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PREVENTING SUMMARY JUDGMENT AGAINST INMATES WHO HAVE BEEN SEXUALLY ASSAULTED BY SHOWING THAT THE RISK WAS OBVIOUS

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One man who was raped in prison asked, "Am I not a human being because I'm a convicted felon? I ask society as a whole. Am I so bad that I deserve such cruel and indescribable pain? That I will live with for the rest of my life?"[1] The Eighth Amendment reaffirms that incarcerated persons remain part of human society and, for that reason, cannot be subjected to "cruel and unusual punishments."[2] The Supreme Court has recognized that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[3] Nevertheless, thousands upon thousands of inmates are sexually assaulted every year.[4]

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1. Greg Burton, *Prison Rapes Covered Up, Inmates Say*, Salt Lake Trib., Nov. 9, 1997, at B1 (quoting a letter from an inmate who was a victim of rape).

2. *See* U.S. Const. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (observing that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man").

3. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

4. This Comment focuses on the rape of male inmates by other inmates in United States prisons. It concentrates on rape, as opposed to other forms of violence, for three reasons. First, sexual assault is uniquely destructive of human dignity, a core concern of the Eighth Amendment and of any civilized society. *See* Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (White, J., dissenting) (describing rape as the "ultimate violation of self" short of homicide) (internal quotation marks omitted) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)). Second, the Eighth Amendment imposes a duty on prison officials to minimize the risk of "serious harm," and rape, as opposed to some physical assaults, is *per se* "serious harm." *See id.*; *see also* Richard D. Vetstein, Note, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 Suffolk U.L. Rev. 863, 865 (1997) (observing that "many inmates face an unintended form of capital punishment, a brutal attack by another prisoner and subsequent infection with a terminal and incurable disease"). Third, the author regards this Comment as an opportunity to shed some light on the "most closely guarded secret activity of American prisons." CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS x (1974).

This Comment deals primarily with attacks on male inmates because women are less likely to be sexually assaulted by other inmates. *See* LEE H. BOWKER, PRISON VICTIMIZATION 49 (1980) (citing studies from the 1960s and 1970s). Furthermore, it does not address the important related problem of guards or other prison officials sexually assaulting inmates. For discussions regarding this problem, see Ashley E. Day, Comment, *Cruel and Unusual*

A significant hurdle for inmates who seek relief from the courts occurs at the pretrial stage, when the defendant-officials often move for summary judgment on the ground that the plaintiff-inmate cannot prove that prison officials actually knew of and disregarded the risk that they would by raped.[5] Courts frequently grant the officials' motions for summary judgment,[6] in spite of conditions at the institution that would make the risk of rape obvious to a reasonable person in the official's position.

This Comment proposes that courts should not grant officials' motions for summary judgment on the ground that the inmate-plaintiff has not shown that the officials knew of the risk, if the plaintiff has shown the existence of conditions at the institution that would make obvious the existence of a substantial risk of sexual assault. This approach would be more faithful to recent Supreme Court law on prison conditions and the established law on summary judgment. More importantly, it would induce prison officials that want to avoid liability for inmate assaults to take the steps necessary to create a reasonably safe prison environment.

Part I of this Comment examines the problem of sexual assault in this nation's prisons and jails, including the institutional conditions that facilitate its occurrence and its effects on inmates. Part II discusses the Supreme Court's holding that plaintiff-inmates must show that defendant-officials acted with "deliberate indifference," and how lower courts have applied and misapplied this holding in deciding whether the plaintiffs have adduced sufficient evidence of the official's "actual knowledge" of the risk to survive a motion for summary judgment. Part III concludes that lower courts should not grant summary judgment to defendant-officials if the plaintiff-inmate has shown

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Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983, 38 SANTA CLARA L. REV. 555 (1998); Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323 (1998).

5. *Cf.* The Jailhouse Lawyer's Manual: How to Bring a Federal Suit Against Abuses in Prison 24 (rev. 1982) (noting that "the prison officials probably will submit a motion for a summary judgment"); JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 174 (1988) (stating that the government usually files a motion to dismiss and/or a motion for summary judgment).

6. *See, e.g.*, Hale v. Tallapoosa County, 50 F.3d 1579, 1584-85 (11th Cir. 1995) (affirming the district court's grant of summary judgment for one defendant and reversing the summary judgment for the other defendant where the two jailors had been accused of deliberate indifference towards the great risk of violence present in their jail); Webb v. Lawrence County, 950 F. Supp. 960, 964-65 (D.S.D. 1996) (granting the official's claim for summary judgment against the plaintiff prisoner), *aff'd*, 144 F.3d 1131 (8th Cir. 1998).

that the risk of assault was obvious and considers ways that an inmate could make this showing.

I. SEXUAL ASSAULT IN PRISONS AND JAILS

A. *The Incidence and Effect of Rape in United States Prisons and Jails*

It is estimated that more than 350,000 men are sexually assaulted every year in our nation's prisons and jails.[7] One prison official ob-

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7. *See* Stephen Donaldson, Prisoner Rape Education Program: Overview for Jail/Prison Administrators and Staff 10 (1993) (Brandon, VT: The Safer Society Press) (estimating that more than 100,000 persons in prison and more than 250,000 persons in jails are sexually victimized every year). It is difficult, however, to gauge the number of rapes that occur in prison because the subject is shrouded in silence. *See* Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 Int'l J. of the Sociology of Law 135, 135-36 (1992) (asserting that conclusive data on the prevalence of sexual assaults in prisons are unavailable because of a lack of research). Inmates themselves are unlikely to report the crime because of the stigma of being raped, see H.M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and their Willingness to Respond to Acts of Rape* 147 (1994), *in* PRISON VIOLENCE IN AMERICA 145-65 (M.C. Braswell et al., 2d ed. 1994) (opining that inmates underreport rape, even to researchers, because of the stigma of being raped and of reporting rape), and because of the risk of retaliation by other inmates, *see* United States v. Bailey, 444 U.S. 394, 426 (1980) (Blackmun, J., dissenting) (recognizing that "[f]iling a complaint may well result in retribution, and appealing to the guards is a capital offense under the prisoners' code of behavior" (citing R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 325-326 (1975) (recounting Oklahoma Crime Commission officials' description of gang rape and conclusion that "[if the kid tells the guards] . . . his life isn't worth a nickel" (alteration in original)); Missouri v. Green, 470 S.W.2d 565, 569 (Mo. 1971) (dissenting opinion)); Jason D. Sanabria, Note & Comment, Farmer v. Brennan: *Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1114 n.9 (1995) (noting that "[t]he retribution often amounts to gruesome attacks with torches, impaling with metal pipes, decapitations, castration, and eviscerations, to name but a few" (citing James G. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 102 n.56 (1987))). Furthermore, prison officials are unlikely to record the crime. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 917 (S.D. Tex. 1999) (noting that "[n]o attempt is made to monitor the total number of reported sexual assaults in . . . [the Texas Department of Correctional Justice], and the result is that differing accounts are extant concerning the total number of sexual assaults throughout the prison units" (citation omitted)); Emily Wilkerson, *Inmate Letters Keep Legislator Fighting: Rapes, Assaults Give Him Cause to Push for Changes*, STATE JOURNAL-REGISTER (SPRINGFIELD, ILL.), Dec. 14, 1996, at 10 [1996 WL 13476326] (reporting that the Illinois Department of Corrections only recently began recording reports of prison rapes separate from reports of other assaults).

Researchers have also largely ignored the subject of prison rape. *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RESEARCH 67, 67 (1996) (noting that the "absence of research is conspicuous in the social sciences and sexology" in light of the hundreds of studies on sexual coercion in community settings and finding that chapters on sexual coercion in ten human sexuality textbooks published in the early 1990s averaged only two paragraphs on inmate victims); Dumond, *supra*, at 136 (finding fewer than a dozen studies on inmate sexual assault in U.S. prisons). Nobody wants to talk about it. *See* J.F. FISHMAN, SEX IN PRISON: REVEALING SEX CONDITIONS IN AMERICAN PRISONS 5 (1934) (observing in 1934 that "[w]e are living in a frank and realistic age,

served that it is "almost standard" for a young inmate to "get raped within the first twenty-four to forty-eight hours."[8] Because male rape is an uncomfortable subject for many people, and because most people have little sympathy for the plight of convicted criminals, few people hear about what happens to these men. This Comment suggests strategies to help prisoners survive motions to dismiss and/or for summary judgment so that they can tell their stories to a jury. But first, it is important to recount a few of their stories here. One victim recounted:

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yet the subject of sex in prison—so provocative, so vital, so timely, . . . is shrouded in dread silence"), *quoted in* Struckman-Johnson et al., *supra*, at 67 (observing that "[t]he silence has largely prevailed throughout the century").

Despite these problems, there have been a few studies of prison rape, and it is possible to get a rough idea of the scope of the problem nationwide. A recent study of the Nebraska prison system found that 22% of male prisoners who responded to a survey reported that they were pressured or forced to have sexual contact. *See* Struckman-Johnson et al., *supra*, at 71. Those who had been targeted have reported an average of nine episodes of pressured or forced sex by an average of four different persons. *See id.* Asked to identify the most severe sexual act that occurred during their "worst case" incident—the incident that was the most harmful or serious—52% of those targeted (or more than 10% of those who responded to the survey) indicated that they had been pressured or forced to engage in acts that included anal sex. *See id.* Eight percent said that the most severe sexual act that they had been pressured or forced to engage in was oral sex. *See id.*

Other studies have found lower percentages of prisoners who had been raped. *See id.* at 68. In a study conducted during the 1960s, one researcher estimated that approximately 3% of men in Philadelphia jails were sexually assaulted every year. *See* A.J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans, in* MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS 107-120 (A.M. Scacco, Jr., ed., 1982). Two-thirds of the reported incidents involved completed rapes. *See id.* In the 1980s, a researcher found that although 28% of 89 inmates interviewed at a New York state prison had been targets of sexual aggression, only one inmate (1.3%) said that he had been raped. *See* D. Lockwood, *Issues in Prison Sexual Violence* 98, *in* PRISON VIOLENCE IN AMERICA 97-102 (M.C. Braswell et al., eds., 2d ed. 1994); D. LOCKWOOD, PRISON SEXUAL VIOLENCE 17-18 (1980). Another pair of researchers estimated that 2% of inmates in federal prisons had someone force or attempt to force them to have sex against their will, with only 0.3% of those sampled reporting a completed rape. *See* Peter L. Nacci & T. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FEDERAL PROBATION 31, 35 (1983). Researchers have suggested that these studies may underestimate the actual incidence of sexual assault in prisons and jails. *See* Eigenberg, *supra*, at 147 (opining that the stigma of being raped and the fear of being labeled a "snitch" causes inmates to underreport sexual assault to researchers); Struckman-Johnson et al., *supra*, at 68 (noting that "[m]ost prior research on sexual coercion in prisons is based upon personal interviews, a method that can easily result in underreporting this sensitive behavior"). In the only other comprehensive survey, *see* Struckman-Johnson et al., *supra*, at 68 (indicating that this is the only other comprehensive survey), 14% of a randomly selected sample of 200 inmates at a medium security prison in California reported, in an anonymous survey, that they had been pressured into having sex against their will. *See* W.S. WOODEN & J. PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 18 (1982).

8. James Gilligan, Violence: Our Deadly Epidemic and Its Causes 174 (1996) (citation omitted).

> All of a sudden a coat was thrown over my face and when I tried to pull it off I was viciously punched in the face for around ten minutes. I fell to the floor and they kicked me all over my body, including my head and my privates. They ripped my pants from me and five or six of them held me down and took turns fucking me.
>
> My insides feel sore and my body hurts, my head hurts, and I feel sick in the stomach. Each time they stopped I tried to call for help, but they put my hands over my mouth so that I couldn't make a sound. While they held me, they burned my leg with a cigarette.[9]

Another inmate described the effects of the harassment and assaults suffered by a fellow prisoner:

> He couldn't take care of himself, you know. He wasn't a con, he wasn't a tough guy. He was just that kind of human being and, like, terrified, and the fucking guys just took advantage of him, you know. . . . I don't know how many fucked him, but like, there were others that were involved that were just harassing him. . . . The kid went to Mattawan, because I remember the day that he wrapped shit in rags and toilet paper and stuffed it under his bed, and, like, before they sent him to Bellevue they had him clean it up—the hacks had him clean it out, and he wound up in the bughouse. He wound up in the bughouse.[10]

Here, an inmate describes how other inmates attacked him and his cellmate, as well as the reaction of the guard who found them afterwards:

> I'm a 28 yr. old black male. . . . I was place in the max. joint and put in a cell with another young kid he was white. . . . About a month after being in the joint i came back to my cell . . . . I walk in my cell and it was full with black guys and my cellie was on his knees sucking them off. I should of got the fuck out of there but i didn't. The next thing I knew I was hit in the face by someone when i turn to run I was grab by the back and they started beatting the crap out of me. Then i was told to strip which i did and they threw me on the bed and someone got on top of me and ram his dick in me i scream from the pain of it what a fucken mistake i ended up getting my face pound in for it. . . . They

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9. Bowker, *supra* note 4, at 4 (quoting Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, Trans-Action 12 (Dec. 1968)).

10. *Id.* at 4 (alteration in original) (quoting A. Astrachan, *Profile/Louisiana*, Corrections Magazine 2 (Sept.-Oct. 1975)).

> kept beatting the crap out of me . . . . Well then someone ram him dick in my mouth and i choke on it but they didn't care. . . . [O]ne by one they either fuck me in the ass or ram there cock down my throat or both. Than one of them decide to piss in my mouth and told me i better drink it or else so i did. . . . I lost count of who was doing what. Then when i thought it was over they started in on my cellie beatting the crap out of him too. . . . Then i pass out and when i came to they was gone. I couldn't mo[v]e but i was on the floor in my cell next to my cellie. He was crying . . . . We just ball up together holding each other. I . . . stay like that til the officer's did count. . . . I told him we need to go to the hospital he said what the fuck you say faggot I told him again and i said we was rape. He started laughing saying yea right. Hell there was blood all over us and the cell but this cop thinks i'm lieing.[11]

These examples are important because the statistics alone cannot convey the horror that victims experience in our nation's prisons.[12] Yet the statistics take on a new and horrible meaning when they are considered in light of these accounts. Three hundred fifty thousand assaults a year mean that nearly one thousand men a day are subjected to the terror and degradation described above. Each victim has his own story.

The effect of rape on prisoners is a profoundly devastating and degrading experience. Six Supreme Court justices have authored or joined opinions that referred to rape as the "ultimate violation of self" short of homicide.[13] Furthermore, the Court of Appeals for the Seventh Circuit acknowledged that "[r]ape constitutes an intrusion upon areas of the victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy."[14] The words of men who have been raped in prison evidence the humiliation felt by the victims. Years after he was raped, one man said:

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11. Stephen Donaldson, *Excerpts from Typical Prisoners' Letters on Rape* (visited Nov. 11, 1999) <http://www.igc.apc.org/spr/docs/prison-letters.html>.

12. *Cf.* Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980) (mem.) (recognizing that "it is impossible for a written opinion to convey . . . the gruesome experiences of youthful first offenders forcibly raped"), *modified*, 650 F.2d 555 (5th Cir. 1981) (per curiam); Bowker, *supra* note 4, at 4 (noting that "[n]o analytic description can ever hope to portray prison rapes with such vividness that readers can understand the true impact of being a victim in a prison sexual assault").

13. Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (White J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (internal quotation marks omitted) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).

14. United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977).

> They took something away from me that I can never replace. I've tried so many nights to forget about it, but the feeling just doesn't go away. Every time I'm with my wife, it comes back what he did to me. I want a close to the story. I want some salvation. But it keeps going on and on.[15]

In addition to the emotional pain, a victim endures the physical agony of the rape itself as well as the beatings that frequently accompany the sexual assault.[16] Worse still, rape can be a death sentence for inmates in the age of AIDS.[17] Even those who are lucky enough to avoid sexual assault live in almost constant fear of it.[18] Ironically, the inmates least harmed by the prevalence of prison rape are likely to be those that society regards as the worst: the most hardened offenders and the rapists themselves.[19]

B. Conditions That Place Inmates at Risk

Courts and commentators have identified the following conditions as placing inmates at risk for being sexually assaulted:

> facility overcrowding; inadequate facility staffing; inadequate supervision of prisoners and staff; inadequate classification system to separate violent prisoners from vulnerable prisoners; inadequate systems for reporting and tracking violent incidents; failure to train staff to respond to and to investigate violent incidents; placement of some prisoners in positions of supervisory authority over others; overreliance on open

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15. Mark Arax & Mark Gladstone, *5 Charged in Corcoran Prison Rape Inquiry: Guards Indicted on Accusations of Allowing Attack on Inmate by a Known Sexual Predator*, L.A. Times, Oct. 9, 1998, at A1 (internal quotation marks omitted) (quoting victim of a prison rape). This prisoner is not alone. A study of the emotional consequences of sexual victimization indicated that the impact on inmates was "extremely negative." *See* Struckman-Johnson et al., *supra* note 7, at 73. The most frequently reported problems experienced by male inmates were distrust, nervousness around people, and depression. *See id.*

16. *Cf.* Vetstein, *supra* note 4, at 870 (recounting an inmate's experience of being tied to his bed, his head banged against the bed's steel bars, and then raped for thirty minutes).

17. *See id.* at 865.

18. *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980) (mem.) (referring to "the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault"), *modified*, 650 F.2d 555 (5th Cir. 1981) (per curiam); *see also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim. L. Rev. 1, 29-31 (1999) (discussing the inmates' continual fear of "sexual victimization").

19. *Cf.* Charles Fried, *Reflections on Crime and Punishment*, 30 Suffolk U. L. Rev. 681, 682 (1997) (discussing "the widespread regime of intimidation by stronger, organized inmates against the weaker or less experienced inmates" (footnote omitted)); Vetstein, *supra* note 4, at 871 (noting that victims of prison rape are usually young with minimal criminal records).

dormitory housing; and failure to control tools or other material that can be used as weapons.[20]

Overcrowding is a pervasive problem in prisons. On December 31, 1998, state prisons were operating at between thirteen percent and twenty-two percent above capacity, and federal prisons were operating at twenty-seven percent above capacity.[21] California, the state with the highest number of people in prison,[22] was operating at more than twice its capacity.[23] Overcrowded "facilities lack the space and the staff to protect vulnerable inmates from predatory ones."[24]

Inadequate supervision increases the risk of rape because it leads to conditions in which guards will be less likely to stop a sexual assault in progress and will be unable to identify offenders without the cooperation of victims who fear retribution. In some institutions, for instance, guards patrol the holding areas at regular intervals.[25] An official at a jail where guards made rounds every hour admitted that this routine was not much of a safeguard, explaining that "[a] lot can happen in an hour."[26]

Housing more than one inmate together obviously increases the risk that sexual assaults will occur by permitting inmates access to each other in close quarters.[27] Although the Supreme Court has held that double-celling is not a per se violation of the Eighth Amendment,[28] it is a condition of confinement that courts should consider in determining whether the risk of rape is obvious. The problems inherent in

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20. Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Colum. Hum. Rts. L. Rev. 273, 278-79 (1995) (citing *Fisher v. Koehler*, 692 F. Supp. 1519, 1561-62 (S.D.N.Y. 1988); JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 21-125 (3d ed. 1995)).

21. *See* Allen J. Beck & Christopher J. Mumola, Bureau of Justice Statistics, Bulletin, Prisoners in 1998, at 1 (1999).

22. *See id.* at 5 (reporting that California had 161,904 persons in its prisons at the end of 1998).

23. *See id.* at 8 (reporting that California was operating at 203% of its capacity at the end of 1998).

24. *See* Amnesty International: U.S.A. Campaign, Rights for All 2 [available at http://www.rightsforall-usa.org/info/report/r04.htm (referring to text proceeding n.8 in report)].

25. *See* J.D. Gallop, *Inmate Rapes Persist Despite Jail's Efforts to Prevent Them*, Florida Today, Apr. 19, 1998, at 1B (describing the procedure at one Florida jail).

26. *Id.*

27. *See All Things Considered* (NPR radio broadcast, Jan. 16, 1997) (citing the spokesman for the Illinois Department of Corrections as saying that single-celling inmates would reduce the risk of rape in prison); Gallop, *supra* note 25, at 1B (citing jail officials as explaining that assaults often occur at night after lockdown when inmates are in their cells and out of view).

28. *See* Rhodes v. Chapman, 452 U.S. 337, 347-48 & n.15 (1981) (noting evidence that double celling did not necessarily increase violence among inmates).

double-celling naturally increase when overcrowding at the institution results in officials packing three, four, or more people in a single cell, when the supervision by guards is inadequate, or when the institution does not take steps to identify and separate inmates who would be likely to sexually assault cellmates from likely victims.

Courts have also recognized the risk to inmates in open dormitories. In *Gates v. Collier*,[29] the district court observed that the penologists who testified on the matter were "in complete accord . . . that open dormitory housing, particularly with bathroom and shower areas beyond the watchful eye of correctional guards, present[s] special danger of serious inmate assaults from other inmates, as well as to staff."[30] This danger naturally increases when accompanied by other conditions such as inadequate supervision, availability of weapons,[31] and overcrowding.

The failure of penal institutions to investigate and prosecute reported rapes also increases the risk to inmates. One court cogently observed that "[t]he lack of such [investigative] procedures created an atmosphere of tolerance of rape which enhanced the risk that incidents could occur."[32] The Eleventh Circuit has recognized that the conditions at a prison can create an atmosphere that facilitates rapes. In *LaMarca v. Turner*,[33] the court concluded that

> the evidence shows a link between the unconstitutional conditions and the plaintiffs' injuries. The record supports the district court's finding "that due to [their] very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI. . . . [These conditions created] the background and climate which . . . preordained homosexual rapes and other inmate assault[s]." The evidence thus permits a finding of a causal link between the objectively intolerable conditions at GCI and the plaintiffs' injuries.[34]

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29. 423 F. Supp. 732 (N.D. Miss. 1976).

30. *Id.* at 741.

31. *See* Smith v. Arkansas Dep't of Correction, 103 F.3d 637 (8th Cir. 1996) (discussing expert opinions that open barracks at a certain prison posed a danger to inmates); Smith v. Norris, 877 F. Supp. 1296, 1311-13 (E.D. Ark. 1995) (discussing the danger posed by permitting prisoners to keep hobby tools in open barracks), *aff'd in part and rev'd in part sub nom.* Smith v. Arkansas Dep't of Correction, 103 F.3d 637 (8th Cir. 1996).

32. LaMarca v. Turner, 995 F.2d 1526, 1533 (11th Cir. 1993).

33. 995 F.2d 1526 (11th Cir. 1993).

34. *Id.* at 1539 (alteration in original) (quoting LaMarca v. Turner, 662 F. Supp. 647, 687 (S.D. Fla. 1987)). "GCI" is the abbreviation for the Glades Correctional Institute, a Florida prison. *See id.* at 1530.

II. JUDICIAL RELIEF AND THE STANDARD OF ACTIONABILITY

A. *The Supreme Court's Explanation of the "Deliberate Indifference" Standard*

It is now settled that the Eighth Amendment places limits on the treatment that a inmate receives and on the conditions of the prison or jail in which he is confined.[35] This amendment places a duty on prison officials to "take reasonable measures to guarantee the safety of the inmates."[36] Specifically, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."[37] The Supreme Court has said that

> [p]rison conditions may be "restrictive and even harsh," but gratuitously allowing the beating or rape of one prisoner by another serves "no legitimate penological objectiv[e]," any more than it squares with "evolving standards of decency." Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society."[38]

Noting that the Eighth Amendment outlaws cruel and unusual "punishments," not cruel and unusual "conditions,"[39] the Court has required that officials know of the risk before liability may be imposed, reasoning that "prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment."[40] Specifically, the Court, beginning with the cases of *Estelle v. Gamble*[41] and *Wilson v. Seiter*,[42] has made clear that a prison official's failure to prevent harm resulting from prison conditions violates the Cruel and Unusual Punishments Clause of the Eighth Amendment only if the prison official showed "deliberate indifference" to the risk.[43]

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35. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks omitted) (citing Helling v. McKinney, 509 U.S. 25, 31 (1993)). Although a pretrial detainee's rights arise from the Due Process Clause rather than the Eighth Amendment, courts often analyze a detainee's claims regarding conditions of confinement under the Eighth Amendment, reasoning that the Due Process Clause gives detainees at least as much protection as the Eighth Amendment gives convicted prisoners. *See* Hale v. Tallapoosa County, 50 F.3d 1579, 1582 n.4 (1995) (citations omitted).

36. *Farmer*, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)).

37. *Id.* at 833 (internal quotation marks omitted) (alteration in original) (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988)).

38. *Id.* at 833-34 (internal quotation marks omitted) (second alteration in original) (internal citations omitted).

39. *See id.* at 837 (internal quotation marks omitted).

40. *Id.* at 844.

41. 429 U.S. 97, 106 (1976).

42. 501 U.S. 294, 297 (1991).

43. *Farmer*, 511 U.S. at 834.

The Supreme Court explained the "deliberate indifference" standard in a failure-to-protect case involving prison rape. In *Farmer v. Brennan*,[44] a transsexual[45] prisoner sued prison officials after they placed her[46] in the general population of a male prison where she was allegedly raped and beaten by another prisoner.[47] Dee Farmer's amended complaint alleged that the officials placed her in the general population despite knowing that the prison was a violent place with a history of inmate assaults and that she, as a transsexual, would be particularly vulnerable to sexual assault by male inmates.[48] Farmer asserted that this was tantamount to a deliberately indifferent failure to protect her safety.[49]

The district court granted summary judgment to the prison officials.[50] The court held that the failure of prison officials to prevent inmate assaults violated the Eighth Amendment only if the officials had "actual knowledge" of a potential danger, and concluded that the officials lacked the requisite knowledge because Farmer had not told them that she was concerned for her safety.[51]

After the Court of Appeals for the Seventh Circuit summarily affirmed the judgment, the Supreme Court granted certiorari[52] to resolve a split among the circuits over whether the "deliberate indifference" standard required that prison officials actually know of the risk, or whether it only required that prison officials should have known of the risk.[53] The Court held that "deliberate indifference"

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44. 511 U.S. 825 (1994).

45. A transsexual is someone who has "'[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." *Id.* at 829 (alteration in original) (quoting American Medical Association, Encyclopedia of Medicine 1006 (1989)).

46. Dee Farmer, who was born anatomically male, wore women's clothing, received silicone breast implants, underwent estrogen therapy and had an unsuccessful "black market" testicle-removal surgery. *Id.* at 829 (internal quotation marks omitted). The parties agreed that Farmer "project[ed] feminine characteristics." *Id.* (internal quotation marks omitted) (citation omitted). The Supreme Court carefully avoided referring to Farmer's gender in its opinion. *See* Rifkin, *supra* note 20, at 273 n.1. Due to her transsexual status and in accordance with her preference, *see id.*, this Comment will refer to her using feminine pronouns.

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

48. *See id.*

49. *See id.*

50. *Id.* at 831.

51. *Id.* at 831-32.

52. Farmer v. Brennan, 11 F.3d 668 (7th Cir. 1992), *cert. granted*, 510 U.S. 811 (1993).

53. *See* 511 U.S. at 832. In particular, the Court noted the clear inconsistencies between the holding in *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), that "deliberate indifference" requires a subjective standard of recklessness, and the holding in *Young v.*

entails actual knowledge of the risk, reasoning that subjecting a prisoner to a risk was only "punishment" within the meaning of the Eighth Amendment if the officials actually knew that they were exposing the prisoner to the risk.[54] After *Farmer*, prison conditions violate the Eighth Amendment if they (1) create a substantial risk of serious harm,[55] (2) a prison official actually knows of the risk,[56] and (3) the official fails to respond reasonably to the risk.[57]

The *Farmer* Court also made clear that a prisoner need not show that the official believed that the complainant would actually be harmed, but only that the official actually knew of a substantial risk of serious harm.[58] The Court warned prison officials that they could not escape liability by showing that although they knew of such a risk, they did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually attacked him.[59] The Court stated that "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."[60] The Court further explained that

> [i]f, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the nights clinging to the bars nearest the guards' station," it would obviously be irrelevant to liability

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Quintan, 960 F.2d 351, 360-61 (3d Cir. 1992), that "deliberate indifference" requires that the prison official have known or should have known of a sufficiently serious danger to an inmate. The *Farmer* Court also framed the issue as whether the level of culpability required by "deliberate indifference" is that of civil law recklessness (objective standard) or criminal law recklessness (subjective standard). *Farmer*, 511 U.S. at 836-37.

54. *Farmer*, 511 U.S. at 837.

55. *See id.* at 834.

56. *See id.* at 837.

57. *See id. Compare* 511 U.S. at 834 (noting that a prison official is liable only if he is deliberately indifferent to the inmate's health or safety), *with id.* at 837-38 (defining "deliberate indifference" as requiring that official actually knew of the risk), *and id.* at 844 (holding that "prison officials who actually knew of a substantial risk to the inmate's health or safety may be found free from liability if they responded reasonably to the risk").

58. *Id.* at 843 (citing *Helling v. McKinney*, 509 U.S. 25, 33 (1993), for proposition that "the Eighth Amendment requires a remedy for exposure of inmates to 'infectious maladies' such as hepatitis and venereal disease 'even though the possible infection might not affect all of those exposed'").

59. *Id.*

60. *Id.*

> that the officials could not guess beforehand precisely who would attack whom.[61]

The Court made it equally clear that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[62] The Court stressed that the obviousness of a risk, though not conclusive, was circumstantial evidence that the prison officials had the requisite knowledge:[63]

> 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 '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."[64]

The Court also emphasized that prison officials cannot escape liability by shutting their eyes to the obvious by "merely refus[ing] to verify underlying facts that he strongly suspect[s] to be true, or declin[ing] to confirm inferences of risk that he strongly suspect[s] to exist."[65]

Despite the Court's adoption of the stricter actual knowledge requirement, *Farmer* actually relaxed the knowledge requirement previously adopted by some circuits. For instance, the Court of Appeals for the Fourth Circuit had adopted a very specific knowledge requirement. In *Ruefly v. Landon*,[66] the Fourth Circuit held that "deliberate indifference" required a showing that prison officials knew of a specific risk to a specific prisoner.[67] The court held that officials were not liable for assigning an inmate to share a cell with an inmate who they

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61. *Id.* at 843-44 (internal quotation marks omitted) (internal citations omitted) (quoting Hutto v. Finney, 437 U.S. 678, 681-82 n.3 (1978)) (citing Helling v. McKinney, 509 U.S. 25, 33 (1993); Massachusetts v. Welansky, 55 N.E.2d 902, 912 (Mass. 1944); West Virginia v. Julius, 408 S.E.2d 1, 10-11 (W. Va. 1991)).

62. *Id.* at 842.

63. *Id.* at 843 n.8.

64. *Id.* at 842-43 (citation omitted).

65. *Id.* at 843 n.8. The Court offered the examples of "when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation" and "when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease." *Id.*

66. 825 F.2d 792 (4th Cir. 1987).

67. *Id.* at 794. *Accord* McGill v. Duckworth, 944 F.3d 344, 349-50 (7th Cir. 1991) (noting that other circuits had held "that failure to tell prison officials about threats is fatal" and holding that "[t]hese decisions are sound and require judgment for the defendants").

knew to be generally violent and dangerous absent a showing that the inmate posed a specific risk to that plaintiff.[68] *Farmer* eased *Ruefly*'s specific-risk requirement by holding that prison officials could not escape liability merely by showing that they did not know that a specific inmate posed a risk to the specific plaintiff.[69]

B. The Standard for Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, "summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"[70] The Supreme Court has explained that trial courts must deny summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[71]

Because a jury can now infer the requisite knowledge "from the very fact that the risk was obvious,"[72] *Farmer* would appear to preclude a court from granting summary judgment to the prison officials where there was evidence that a risk of rape was obvious. Not all courts, however, have seen it this way.

C. The Application of Farmer v. Brennan *by Lower Courts to Motions for Summary Judgment*

1. Farmer *Misapplied.*—Unfortunately, some courts have missed the implication of *Farmer* in the summary judgment context. In *Webb v. Lawrence County*,[73] Douglas Webb brought a § 1983 action against prison officials after he was sexually assaulted numerous times by his cellmate.[74] The Eighth Circuit affirmed the district court's decision, granting summary judgment in favor of the defendant-officials on the ground that the plaintiff-prisoner had failed to establish that officials actually knew of a substantial risk of harm.[75] The court concluded that "[e]ven assuming for purposes of analysis that the risk of sexual assault faced by young, physically slight inmates like Webb was obvious, and thus sufficient to put defendants on notice of its existence,

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68. *Ruefly*, 825 F.2d at 793.

69. Wilson v. Wright, 998 F. Supp. 650, 656-57 (E.D. Va. 1998) (citing Price v. Sasser, 65 F.3d 342, 345 (4th Cir. 1995)).

70. Fed. R. Civ. P. 56.

71. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

72. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

73. 144 F.3d 1131 (8th Cir. 1998).

74. *Id.* at 1134.

75. *Id.* at 1135.

Farmer [*v. Brennan*] specifically rejects the idea that that liability may be found when a risk is so obvious that it should [have been] known."[76]

The district court's unreported decision in *Bolden v. Ramos*[77] reflects a similar misunderstanding of *Farmer*. The inmate alleged that prison guards had violated his constitutional rights by failing to protect him from other inmates.[78] Even though the court acknowledged that *Farmer* had held "that [actual] knowledge may, where appropriate, be inferred from circumstantial evidence, including the obviousness of the risk,"[79] the court granted the defendant's motion for summary judgment, reasoning that "[l]iability does not necessarily follow from an obvious danger; *Farmer* requires that the danger have been known."[80] The court then found that "[t]here is nothing in the record as to [the guard's] knowledge of this risk or his exposing [the inmate] to it," and granted summary judgment on the ground that there was "no genuine dispute as to [the guard's] knowledge of a serious risk to [the inmate's] safety."[81]

In *Estate of Cole v. Fromm*,[82] the Court of Appeals for the Seventh Circuit specifically rejected the plaintiffs' argument that the obviousness of the risk to an inmate's health precluded summary judgment for the psychiatrist and nurses who treated him.[83] Max Cole had been transferred to a psychiatric ward after trying to injure himself and another inmate at the jail.[84] Cole's attending physician classified him as "potentially suicidal," but did not consider him to be at a "high risk" of suicide, the more severe of the two possible classifications.[85] The former is less restrictive than the latter.[86] A few days after he was admitted to the ward, Cole asphyxiated himself with one of the plastic bags that the hospital used to line linen hampers in the restrooms.[87] Cole's mother and estate brought a § 1983 action against the nurses

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76. *Id.* (second and third alteration in original) (internal quotation marks omitted) (quoting Jenson v. Clarke, 73 F.3d 808, 811 (8th Cir. 1996)) (citing *Farmer*, 511 U.S. at 836).

77. No. 93 C 3416, 1996 WL 66135 (N.D. Ill. Feb. 13, 1996).

78. *See id.* at *6.

79. *Id.* at *7 (citing Farmer v. Brennan, 511 U.S. 825 1994)).

80. *Id.* at *8.

81. *Id.*

82. 94 F.3d 254 (7th Cir. 1996).

83. *Id.* at 260-61.

84. *See id.* at 257.

85. *Id.* at 257-58 (internal quotation marks omitted). The hospital had two levels of precautions, one for "potentially suicidal" patients and another for "high risk" patients. *See id.* at 258.

86. *See id.*

87. *See id.* at 258.

and the psychiatrist who had treated him, alleging that they were deliberately indifferent to the danger that he would commit suicide.[88]

In their opposition to the defendants' motion for summary judgment, the plaintiffs relied on the affidavit of their expert doctor, in which he stated that "[t]he danger presented by the plastic bags in the trash can and the laundry hamper . . . was obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a 'potential suicide' patient such as Mr. Cole."[89] The court acknowledged that plastic bags pose a substantial risk to a patient who intended to commit suicide, but then turned to the question of whether the defendants were subjectively aware that Cole intended to commit suicide.[90] It concluded that the plaintiffs' expert's assertion that plastic bags posed an "obvious" risk to "potential suicide" patients did not support an inference that the nurses and doctor who treated Cole were subjectively aware that he had intended to kill himself.[91] The court reasoned that the plaintiffs' expert "simply disagree[d]"[92] with the defendant-psychiatrist, and noted that "[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference."[93] It asserted that a medical professional's error was obvious so as to permit an inference of subjective knowledge of the risk created "only when . . . [his or her] decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment."[94]

The Seventh Circuit's decision in *Cole* should not be read as foreclosing the argument that the obviousness of a risk precludes summary judgment in prison condition cases not involving medical judgments. The court recognized that

> [n]ormally, a jury may infer the subjective (awareness of a substantial risk) from the objective (obviousness of a risk). Cases of medical judgment are different. In *Estelle* [*v. Gam-*

88. *See id.* at 257.

89. *Id.* at 260.

90. *Id.* at 261.

91. *Id.*

92. *Id.*

93. *Id.* (citing White v. Napolean, 897 F.2d 103, 109-10 (3d Cir. 1990)).

94. *Id.* at 262. It is worth noting that the plaintiffs in *Cole* did not actually challenge the attending psychiatrist's diagnosis of Cole as "potentially suicidal," as opposed to "high risk." *Id.* at 261. Presumably, the plaintiffs' case would have survived summary judgment if they had submitted evidence that the defendant's diagnosis of Cole was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Id.* at 262.

> *ble*], the Supreme Court recognized the distinction between a "medical judgment" and deliberate mistreatment.[95]

The Seventh Circuit's opinion can be reconciled with *Farmer* only if it is read to carve out from the implications of that case a narrow exception for medical judgments. Its acknowledgement that "[c]ases of medical judgment are different" certainly supports this reading.[96] So read, *Cole* does not suggest that courts should award summary judgment to defendants in prison assault cases based on lack of actual knowledge in the face of an obvious risk. However, its juxtaposition of medical judgments and deliberate mistreatment is potentially misleading. The Supreme Court in *Farmer* held that "a jury may infer the subjective (awareness of a substantial risk) from the objective (obviousness of a risk)" in the context of a § 1983 claim based on allegations of unconstitutional *conditions* of confinement, not just when the inmate complains of *deliberate* mistreatment.[97]

2. *The Eleventh Circuit's Cases on State of Mind.*—The Eleventh Circuit is headed in the right direction. In the pre-*Farmer* case of *LaMarca v. Turner*,[98] the Eleventh Circuit considered whether there was sufficient evidence of deliberate indifference to sustain a verdict against a prison superintendent for failure to protect inmates from harm.[99] Each of the plaintiffs alleged that he had been violently assaulted.[100] After a bench trial, the court found the following: (1) inmates were housed in dormitories and that the guards' view of many areas of these dormitories was obstructed; (2) the cells for disciplinary and protective custody suffered from substandard conditions, were overcrowded, and did not afford those within protection from their tormentors; (3) officials did little to control contraband or prevent inmates from carrying weapons and using drugs; (4) the staff was corrupt, profiting from contraband and using inmates to punish other prisoners; (5) the staff permitted regular, unsupervised showings of hard-core pornographic movies, during which the screaming and crying of inmates could be heard; and (6) the staff did not investigate or act upon reports of threats or assaults.[101]

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95. *Id.* at 261.
96. *Id.*
97. *See Farmer*, 511 U.S. at 845.
98. 995 F.2d 1526 (11th Cir. 1993).
99. *Id.* at 1535.
100. *See id.* at 1530-33.
101. *See id.* at 1532-33.

The court identified several grounds for concluding that the superintendent knew about these conditions.[102] One ground was material presented by the plaintiffs such as incident reports, internal staff reports, and reports by outside investigators which mentioned the existence of lax security, contraband, staff corruption and inmate assaults.[103] The court also noted that the superintendent gained knowledge of the conditions at the prison through monthly meetings with staff members, attendance at monthly meetings of each department, regular meetings with prisoner organizations, and his practice of wandering through the prison compound.[104] The Eleventh Circuit held that "[t]he plaintiffs' evidence painted a dark picture of life at . . . [the prison]; a picture that would be apparent to any knowledgeable observer, and certainly to an official in . . . [the superintendent's] position."[105] The court noted in a footnote that the superintendent's "supervisory role and the insular character of prison communities provided strong support for the [trial] court's conclusion that . . . [he] must have known of these conditions."[106] The court concluded that the trier of fact could infer from this evidence that the superintendent knew the prison failed to provide inmates with reasonable protection from violence.[107]

The court also recognized the causal link between the conditions and the risk of rape at the prison:

> [t]he evidence shows a link between the unconstitutional conditions and the plaintiffs' injuries. The record supports the district court's finding "that due to [their] very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at [the prison]. . . . [These conditions created] the background and climate which . . . preordained homosexual rapes and other inmate assault[s]." The evidence thus permits a finding of a causal link between the objectively intolerable conditions at GCI and the plaintiffs' injuries.[108]

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102. *Id.* at 1536 (reiterating that the prison official must possess "knowledge both of the infirm condition and of the means to cure that condition, 'so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" (quoting Duckworth v. Franzen, 780 F.2d 645, 673 (7th Cir. 1985))).

103. *See id.*

104. *Id.* at 1536 n.20.

105. *Id.* at 1536.

106. *See id.* 1536 n.21.

107. *See id.* at 1536-37 (quoting LaMarca v. Turner, 662 F. Supp. 647, 687 (S.D. Fla. 1987)).

108. *Id.* at 1539.

The Eleventh Circuit revisited this issue after *Farmer* in *Hale v. Tallapoosa County*.[109] While a pretrial detainee at the Tallapoosa County Jail, Larry Wayne Hale was beaten by two inmates in a crowded holding cell.[110] He sued the jailer, the sheriff, and the county, alleging that they were deliberately indifferent to an excessive risk of inmate-on-inmate violence at the jail.[111] After the district court granted summary judgment to the defendants, Hale appealed.[112]

On appeal, the court considered whether Hale had produced sufficient evidence against the sheriff and the county.[113] After summarizing the Supreme Court's holding in *Farmer*, the court found that there was sufficient evidence to support a finding that the sheriff subjectively knew that a substantial risk of serious harm existed at the jail.[114]

The court pointed to two kinds of evidence as grounds for this conclusion. First, the court noted that the sheriff's deposition testimony revealed that he knew that violence among inmates occurred on a regular basis during the month the attack occurred and other periods of overcrowding and that inmates sometimes required medical treatment as a result.[115] In addition, the court observed, "Hale's expert attested that given the conditions existing in the months preceding . . . [the attack], it was plainly foreseeable to a reasonable law enforcement official that a violent attack was likely to occur."[116] The Eleventh Circuit's recognition that evidence of certain conditions supports an inference of actual knowledge so as to preclude a grant of summary judgment based on that issue is faithful to the Supreme Court's decision in *Farmer* and consistent with the purposes of both summary judgment and the cause of action provided in 42 U.S.C. § 1983.

109. 50 F.3d 1579 (11th Cir. 1995).
110. *See id.* at 1580-81.
111. *See id.* at 1581.
112. *See id.*
113. *Id.* at 1582.
114. *See id.* at 1583.
115. *See id.*
116. *Id.*

III. SUMMARY JUDGMENT ON THE GROUND THAT OFFICIALS LACKED ACTUAL KNOWLEDGE OF RISK IS INAPPROPRIATE WHERE RISK WAS OBVIOUS

A. The Deterrent Purpose of § 1983 Actions

The primary mechanism for seeking judicial relief[117] from prison conditions is 42 U.S.C. § 1983,[118] which codified a cause of action for constitutional violations. In addition to injunctive relief, § 1983 provides that aggrieved individuals may recover compensatory and punitive damages from any person who violates their constitutional rights.[119] A primary purpose of § 1983 is the "deterrence of future egregious conduct."[120] In this manner, the money damages available under § 1983 are similar to punitive damages in tort in that both aim to encourage compliance with the law.

When courts grant summary judgment to prison officials on the ground that the plaintiff-inmates have not proven that the officials had the requisite state of mind, the cases do not make it to trial. As a result, the adequacy of the officials' efforts to protect inmates is never placed at issue in the public forum occasioned by a trial. Worse still, these summary judgments undermine § 1983's potential to encourage officials to take steps to protect prisoners because they made the actionability of § 1983 suits turn on the knowledge of the officials rather than the adequacy of their protective measures. The Supreme Court

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117. Although this Comment focuses mainly on the relief available from the judicial system, it should be noted that legislators have occasionally sought to learn about and have addressed the problem of prison rape. *See, e.g.*, Brenda Rodriguez, *Senate Chairman Calling for Prison AIDS Hearings*, San Antonio Express-News, Sept. 18, 1997, at 1A (available at 1997 WL 13205539); Associated Press, *Voice Against Assault/Measure to Reduce Prison Rapes Passed*, GREENSBORO NEWS & REC., July 2, 1997, at B2D (available at 1997 WL 4590798); *see also* Wilkerson, *supra* note 7, at 10 (describing the efforts of Illinois State Representative Cal Skinner in addressing prison rape).

118. Section 1983 provides:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994 & Supp. 1998).

119. *Id.*

120. Smith v. Wade, 461 U.S. 30, 49 (1983) (citations omitted).

has said in the context of § 1983 and constitutional rights that "the conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance."[121] It seems unlikely that prison officials would be as motivated to protect inmates if they knew that they could avoid liability simply by challenging the inmate's proof that they had actual knowledge of the risk.[122]

B. Summary Judgment and State of Mind

Even before *Farmer* clarified the standard, courts had reason to deny motions for summary judgment based on the issue of the defendant's knowledge. Courts have frequently recognized the need for caution in granting a motion for summary judgment where a party's state of mind is at issue.[123] The Fifth Circuit has observed that

> [t]he court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. . . . In these circumstances the jury should be given an opportunity to ob-

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121. *Id.* at 50.

122. It would be inappropriate to suggest that prison officials, ostrich-like, stick their heads in the sand and try to avoid information about the prevalence of sexual assaults if it were not for evidence that they do exactly that. Prison officials do appear to downplay the prevalence of prison rape. In Illinois, prison officials told state legislators that the prison only confirmed 21 sexual assaults over a three year period in a prison system that housed 41,000 inmates in 25 different prisons. *See* Cornelia Grumman, *Prisons Chief's View of State Inmate HIV Rate Raises Some Doubts*, Chicago Trib., Dec. 5, 1997, at 8; Heather Ryndak, *Prison Cameras Sought, AIDS Measures Opposed*, CHICAGO SUN-TIMES, Dec. 5, 1997, at 48. In Texas, prison documents indicated that there were only six confirmed sexual assaults in 1998, when there were 144,036 people incarcerated in the state's prisons. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 916, 926 (S.D. Tex. 1999). *See generally* Brenda Rodriguez, *Rape Contributes to Spread of AIDS: Sexual Assaults in Prisons Rarely Reported*, SAN ANTONIO EXPRESS-NEWS, Sept. 15, 1997, at 1A (citing studies of sexual assault in prisons). In Utah, corrections officials told a national accreditation team that no prisoner had been raped between 1994 and 1996, even though the department's own records showed that dozens of prisoners reported that they had been sexually assaulted, and one prisoner had actually been convicted in court of forcible sexual abuse for sodomizing another inmate. *See* Burton, *supra* note 1, at B1. Prison officials may downplay incidents of prison rape to avoid liability or to avoid admitting that they cannot control the inmates. *See id.* (citing critics' theories on why prison officials did not report incidents of rape); *see also Ruiz*, 37 F. Supp. 2d at 915 (noting that "[t]he lack of protection for inmates by [the Texas Department of Correctional Justice] . . . evidences a lack of control by prison officials"). Prison officials may also downplay the problem to deflect criticism by legislators. *See* Grumman, *supra*, at 8 (reporting legislator's criticism of prison officials for not doing more to stop prison rape).

123. *See* 10B Charles Alan Wright et al., Federal Practice and Procedure § 2730, at 5 (1998).

> serve the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.[124]

The determination of someone's state of mind usually involves the drawing of inferences "as to which reasonable people might differ."[125] Because drawing such inferences is a function traditionally left to the jury, it often will be inappropriate to resolve the issue of a person's state of mind through summary judgment.[126]

Actions based on alleged violations of constitutional rights are frequently unsuitable for summary judgment because they require an inquiry into the defendant's state of mind.[127] In cases alleging that prison officials violate a plaintiff's Eighth Amendment rights by inflicting cruel and unusual punishment, courts have deemed summary judgment inappropriate because there were questions of fact about the extent of the defendant's knowledge of the conditions of the plaintiff's confinement.[128]

Farmer made clear that summary judgment is inappropriate when the risk of rape is obvious. Although a finding that a risk is obvious is not, by itself, enough to satisfy *Farmer*'s subjective knowledge requirement, it *is* enough to permit the trier of fact to infer that the officials had actual knowledge. If a trier of fact makes this inference, then this factual finding *is* sufficient to satisfy *Farmer*'s subjective knowledge requirement. When a court grants summary judgment for defendant-officials in spite of an obvious risk, it is effectively making a factual finding that the obviousness of the risk, in the given case, does not warrant an inference of actual knowledge. It is simply inappropriate for a court to decide this factual question on summary judgment.

C. Making the Requisite Showing to Survive Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that

> [w]hen a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does

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124. Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970); *see also* Wright, *supra* note 123, at 5 (quoting *Croley*).

125. *See* Wright, *supra* note 123, at 7.

126. *See id.*

127. *See id.* § 2732.2, at 152.

128. *See id.* at 162-63.

> not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[129]

A defendant moving for summary judgment on the knowledge issue would probably attach an affidavit in which he denies having actual knowledge of a substantial risk of serious harm.[130] The defendants are obviously in a very good position here. To survive summary judgment, the plaintiffs must show the existence of evidence from which a reasonable jury could conclude that the defendants actually knew of the risk.[131] This is relatively easy where the inmate has actually told the defendants that other prisoners were threatening him or had attacked him. The inmate can state this fact in the affidavit and that would probably create a genuine issue of material fact that would preclude summary judgment.[132] Many inmates, however, would not have complained to prison officials because of the dangers inherent in doing so.[133]

Prior to *Farmer*, inmates who did not complain probably would have been out of luck. After *Farmer*, however, courts are beginning to realize that prison officials can have actual knowledge of a substantial risk based on their knowledge that conditions at a jail or prison are insufficient to dissuade and to control inmate violence. *Lopez v. LeMaster*[134] is one such case. Genaro Lopez brought a § 1983 action against a sheriff for failing to protect him from other inmates.[135] On October 1, 1997, Lopez was arrested and placed in a general population cell at the Jackson County, Oklahoma, jail.[136] That evening, another inmate struck Lopez with a broom handle, spit on him, and

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129. Fed. R. Civ. P. 56(e).

130. *Cf.* Fed. R. Civ. P. 56(b) (providing that defending party may support motion for summary judgment with affidavits).

131. *See* Fed. R. Civ. P. 56(e) (providing that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). The inmates should also argue that summary judgment is inappropriate because there is really no practical way to prove the defendant's state of mind other than to ask them about their knowledge at trial and permit the fact-finder to evaluate their credibility. *See* FED. R. CIV. P. 56(f) (providing that a court may decline to grant summary judgment if it "appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition").

132. *See* Fed. R. Civ. P. 56(c) (providing that summary judgment may be entered if there is no dispute of material fact).

133. *See supra* note 7 and accompanying text (discussing some of the retaliatory actions that a prisoner risks in reporting an assault by another inmate).

134. 172 F.3d 756 (10th Cir. 1999).

135. *See id.* at 758-59.

136. *See id.* at 758.

threatened to kill him.[137] Lopez notified the jailer on duty, who took him to the jailer's office to prepare a written statement.[138] In the office, Lopez told the jailer that he was afraid to go back into the general population cell because he thought the other inmates would attack him.[139] The jailer did not respond and returned Lopez to the cell.[140] According to Lopez, the jailer was within earshot while the other inmates were plotting their attack.[141] Five minutes after Lopez returned to the cell, two cellmates attacked Lopez, one holding his legs, the other hitting him on the back of his head and neck.[142] They told him they were punishing him for being a "snitch."[143] Five minutes later, the inmates returned with two more cellmates, and the four of them again beat and kicked Lopez.[144] About ten minutes later, the jailer returned and removed Lopez from the cell.[145]

On appeal from the district court's grant of summary judgment for the defendants, the Court of Appeals for the Tenth Circuit observed that Lopez was attributing his injuries to two forms of failure to protect.[146] First, he attributed his injuries to the jailer's placing him back into the cell after the other inmates had threatened him.[147] The court noted that "[t]his claim challenges an episodic act or omission of a jail official, rather than a condition, practice, rule or restriction at the jail."[148] Specifically, Lopez sought to hold Sheriff LeMaster liable for his jailer's actions on the basis of poor training and supervision.[149] Second, Lopez complained of the jailer's failure to rescue him once the assaults began.[150] His theory focused "less on the jailer's conduct than on constitutionally inadequate conditions at the jail which may have prevented the jailer from acting, such as understaffing, lack of monitoring equipment or lack of a means by which inmates could contact guards."[151] The court thereby recognized that a failure to protect action could rest on either (1) "episodic act[s] or omission[s]

137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.* at 758-59.
141. *See id.* at 759.
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *Id.* at 759-60.
147. *See id.* at 760.
148. *See id.* (citing Hare v. City of Corinth, 74 F.3d 633, 645 (5th Cir. 1996)).
149. *See id.*
150. *See id.*
151. *See id.*

of a jail official," or (2) "constitutionally inadequate conditions" at the institution that can prevent guards from stopping detainees from assaulting other inmates.

The knowledge requirement of these two kinds of failure to protect actions will be different. Where an action is based on an episodic act or omission, the inmate will need to show that the official knew that the act or omission would place the inmate at a substantial risk of serious harm. However, where the action is based on conditions, the inmate could support an inference of actual knowledge by showing that (a) the conditions were obvious and (b) any reasonable official would have known that they would cause a substantial risk of serious harm. There could be cases where the conditions at a prison are such that a substantial risk of serious harm would exist but for a safeguard taken by prison officials. Where an episodic act or omission has the effect of removing that safeguard, an inmate may be able to show knowledge of an obvious risk sufficient to prevent summary judgment by showing that (a) the conditions at the jail were obvious, (b) any reasonable official would know that the conditions, absent the safeguard, would place inmates at a substantial risk of serious harm, and (c) the officials knew that the safeguard was being removed.

Where the inmate's theory is that conditions at the institution place inmates at an obvious risk, he should be able to show that "the risk was obvious"[152] by showing (a) that the conditions were obvious and (b) that any reasonable prison official would have known that the conditions created a substantial risk of serious harm. The Eleventh Circuit's opinions in *LaMarca* and *Hale* illustrate how a prisoner can defeat a motion for summary judgment. In *LaMarca*, the inmates adduced sufficient evidence that the superintendent knew about certain conditions by producing internal documents mentioning such conditions, and by showing the extent of the superintendent's supervisory role and interaction with staff and prisoners.[153] The court found that these supported an inference that he knew about the conditions.[154] In *Hale*, one way that the inmate established that the conditions made the risk obvious was by having an expert testify "that given the conditions existing in the months preceding . . . [the attack], it was plainly

152. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

153. LaMarca v. Turner, 995 F.2d 1526, 1536 (11th Cir. 1993); *see also supra* notes 102-107 and accompanying text.

154. *See LaMarca*, 995 F.2d at 1536-37; *see also supra* notes 105-107 and accompanying text.

foreseeable to a reasonable law enforcement official that a violent attack was likely to occur."[155]

The obviousness of the conditions should be relatively easy to demonstrate. Conditions like overcrowding, the use of open barracks, inadequate staff, generally inadequate supervision—conditions that are "longstanding [and] pervasive"[156]—would presumably be obvious to any official with working knowledge of the institution. Nevertheless, the fact that the Eleventh Circuit in *LaMarca* considered whether there was sufficient evidence that the superintendent knew of these conditions suggests that the wiser course is to adduce some circumstantial evidence that the defendants' duties exposed them to information about the conditions. *LaMarca* illustrates several ways to do this. The inmates themselves could testify to the existence of these conditions. Whether the sworn testimony of convicted criminals alone will be enough to convince a jury is another issue, but it is enough to create a genuine issue about the existence of the conditions.

The fact that conditions exist, however, is material only if they obviously place inmates at a substantial risk of serious bodily harm. This element is the more difficult of the two to prove. Although some courts and commentators have recognized that certain conditions create a risk of rape,[157] there is a danger that a court in a particular case will not accept these as evidence because they do not deal with the specific institution involved in that particular case. The wiser course, as illustrated in *Hale*, is to produce an affidavit from a qualified expert who can testify that the conditions would make it obvious to a reasonable law enforcement official that the inmates are at a substantial risk of serious harm.[158]

IV. CONCLUSION

Summary judgment is only appropriate when no reasonable trier of fact could find for the non-moving party. Courts have sometimes granted summary judgment to prison officials in § 1983 "failure to protect" actions on the ground that the plaintiff-inmates could not produce evidence sufficient to permit a trier of fact to conclude that the defendant-officials had actual knowledge of a substantial risk of serious harm. In *Farmer v. Brennan*, however, the Supreme Court rec-

155. Hale v. Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995); *see also supra* note 116 and accompanying text.

156. Farmer v. Brennan, 511 U.S. 825, 842-43 (1994) (citation omitted).

157. *See supra* notes 20-34 and accompanying text.

158. *See supra* note 155 and accompanying text.

ognized that a trier of fact may infer that prison officials knew of such a risk if the risk was obvious. Consequently, if an inmate produces evidence that a substantial risk of rape was obvious at an institution, then a trier of fact could infer that the officials actually knew of the risk and summary judgment for defendant-officials would be inappropriate.