

**WHAT WE DON'T KNOW MIGHT HURT US:
SUBJECTIVE KNOWLEDGE AND THE
EIGHTH AMENDMENT'S DELIBERATE
INDIFFERENCE STANDARD FOR SEXUAL
ABUSE IN PRISONS**

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I'm afraid to go to sleep, to shower or just about anything else. I am afraid that when I am doing these things, I might die at any time. Please, sir, help me.¹

-Rodney Bruntmyer

INTRODUCTION

At age sixteen, Rodney Bruntmyer was sentenced to eight years in prison for setting a dumpster on fire.² He was raped and then removed from, and against his wishes returned to, the general population.³ There he was raped again and repeatedly forced to perform oral sex on other inmates.⁴ At age seventeen, Rodney hung himself in his cell.⁵ His mother recalls that when she talked to the warden regarding transferring her son to a safe place, she was told, "Rodney needs to grow up . . . this happens every day, learn to deal with it. It's no big thing."⁶

Prison rape is a big thing. Conservative estimates place the rate of sexual abuse in prison at thirteen percent at least.⁷ In the

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1. *The Cost of Victimization: Why Our Nation Must Confront Rape—Personal Accounts from Survivors of Prison Sexual Assaults: Hearing Before the Nat'l Rape Elimination Comm.* (June 14, 2005) [hereinafter *Hearing Before the Nat'l Rape Elimination Comm.*] (statement of Linda Bruntmyer), available at http://www.cybercemetery.unt.edu/archive/nprec/20090820160743/http://nprec.us/docs/PersonalAccounts_Bruntmyer.pdf (last visited Feb. 7, 2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. 42 U.S.C. § 15601(2) (2006); see also NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 3 (2009) [hereinafter

past twenty years, the number of inmates who have been sexually assaulted likely exceeds one million.⁸ Juveniles are five times more likely to be sexually assaulted in adult facilities than in juvenile facilities.⁹ Inmates with mental illnesses, who account for seven percent of federal inmates and sixteen percent of state inmates, are more likely to be sexually assaulted.¹⁰ This is not a small segment of society. More than 7.3 million Americans are in the correctional system, which costs taxpayers more than \$68 billion annually.¹¹ At 2001 incarceration rates, it is estimated that one out of every fifteen Americans born in 2001 will spend time in prison.¹² People, however, are rarely incarcerated forever. Each year, more than 600,000 people leave prison.¹³ When they leave, the consequences of their incarceration experience can be devastating. Prisoner infection rates for sexually transmitted diseases are far greater than the general American population¹⁴ and victims of prison rape are more

NPREC REPORT], *available at* http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF (stating that “the most rigorous research produced since [the first study of prison abuse published in 1968]—mainly of sexual abuse among incarcerated men—has yielded prevalence rates in the mid-to-high teens, but none of these are national studies”).

8. § 15601(2).

9. § 15601(4); *see also* NPREC REPORT, *supra* note 7, at 19 (“According to [the Bureau of Justice Statistics], 7.7 percent of all victims in substantiated incidents of violence perpetrated by prisoners in adult facilities in 2005 were under the age of 18.”). Female juveniles are at greater risk than males; according to data collected by the Bureau of Justice Statistics in 2005–2006, “36 percent of all victims in substantiated incidents of sexual violence were female, even though girls represented only 15 percent of youth in residential placement in 2006.” *Id.* at 17.

10. § 15601(3).

11. NPREC REPORT, *supra* note 7, at 2; *see also* Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563, 563 (2004) (stating that more people have been incarcerated than the populations of twenty-eight states and the District of Columbia combined).

12. *See* Schiraldi, *supra* note 11, at 563–64.

13. Michael B. Mushlin, Foreword, *Prison Reform Revisited: The Unfinished Agenda October 16–20, 2003*, 24 PACE L. REV. 395, 398 (2004).

14. These higher infection rates also apply to tuberculosis and hepatitis B and C. § 15601(7). Since sexual activity is not allowed in prisons, condoms are also rarely available, increasing the transmission of sexual diseases. In 2000, six percent of all deaths in federal and state prisons were due to HIV/AIDS and 25,088 inmates were known to be infected with HIV/AIDS. § 15601(7); *see also* NPREC REPORT, *supra* note 7, at 129 (“Michael Blucker tested negative for HIV when he was admitted to the Menard Correctional Center in Illinois in 1993, but approximately a year later, after being raped multiple times by other prisoners, Blucker tested positive.”).

likely to become homeless and require government assistance.¹⁵ As ninety-five percent of prisoners are eventually released,¹⁶ most of these people will re-enter the community, rejoining their husbands, wives, and children, and bringing their newly acquired sexually-transmitted diseases and emotional trauma with them.

Sexual assault in prison takes multiple forms: guards abuse prisoners and prisoners abuse other prisoners. Current research indicates that guard-on-prisoner rape appears to be more prevalent among male guards and female inmates while prisoner-on-prisoner rape appears more prevalent among male inmates.¹⁷ That being said, research in this area is still nascent and society's view of women as sexual predators is limited; thus, the rates of female-on-female inmate sexual abuse may be much higher.¹⁸ Consequently, this Article focuses solely on inmate-on-inmate sexual abuse involving male prisoners. Additionally, this Article only addresses sexual abuse during incarceration and does not touch on the groundswell of related issues in the larger community-corrections landscape, such as the experiences of parolees, nor does it deal with immigration facilities.

The main recourse for an individual who is sexually abused while incarcerated is to file suit against prison officials alleging an Eighth Amendment violation for cruel and unusual punishment.¹⁹ The legal standard for proving an Eighth Amendment failure-to-protect action requires substantial risk of serious harm, determined

15. § 15601(11) ("Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance.").

16. T.J. Parsell, *Unsafe Behind Bars*, N.Y. TIMES, Sept. 18, 2005, at LI17; see also Alan Gustafson, *Oregon Tallies Prison Rapes*, STATESMAN JOURNAL (Salem, OR), May 21, 2004, at 1A.

17. See NPREC REPORT, *supra* note 7, at 62 ("Case law, policy, and common perceptions of sexual abuse in correctional facilities have focused on male officers abusing their authority with female prisoners."). Additionally, civil suits involving sexual abuse of female prisoners at the hands of male guards tend to be more successful than other suits. See Catherine Tsai, *Colo. Judge Sends Message with Prison Rape Penalty*, THE ASSOCIATED PRESS, Aug. 8, 2009, at 1, available at <http://abcnews.go.com/US/wireStory?id=8283908> (last visited Feb. 7, 2010) (describing a case in which a judge awarded a \$1.3 million settlement to a female inmate who was sexually abused by a guard).

18. See NPREC REPORT, *supra* note 7, at 7 ("Research to date has focused on vulnerability to abuse by other prisoners, rather than by staff, and on the risks for men and boys rather than for women and girls.").

19. This is done through either a *Bivens* suit per *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), if the prisoner is in federal prison, or a 42 U.S.C. § 1983 complaint if the prisoner is in a state prison.

using an objective standard; an official's knowledge of the risk of harm to the prisoner, proven by subjective, or actual, knowledge; an official's failure to respond reasonably, determined using an objective reasonable person standard; causation; and injury. The parameters for the deliberate indifference standard were set forth in *Farmer v. Brennan*,²⁰ in which the Court held that the knowledge of risk of harm to the prisoner must be subjective knowledge. Thus, deliberate indifference is more similar to a criminal rather than a civil standard of requisite knowledge.²¹

The two-pronged deliberate indifference standard conflates the questions of whether the victimized prisoner required protection and whether he consented to the act. Because the first prong (the subjective knowledge of the prison official) focuses solely on a mental component, the plaintiff is nearly always forced to rely on circumstantial evidence and inference to prove this element. The complexity of proving knowledge with only circumstantial evidence has rendered the standard, as applied among the courts, discordant.

Subjective knowledge is acutely problematic in this area of the law. For example, if prison guards believe inmates are not entitled to protection or protection is impossible, as appears to have been the case with Rodney Bruntmyer,²² then the deliberate indifference standard cannot be met because subjective knowledge will never be found. Further, courts typically focus their attention on the attributes of the alleged aggressor in order to determine whether subjective knowledge of risk existed.²³ Yet research shows that victim attributes are better indicators of the potential risk of sexual abuse.²⁴ As a result, the examination of circumstantial evidence

20. 511 U.S. 825 (1994). The Court noted that prison officials may avoid liability through proof that they were "unaware even of an obvious risk to inmate health or safety" or if they "responded reasonably to the risk." *Id.* at 844.

21. As the Court stated, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

22. This was evidenced by the prison warden's statement that "this happens every day, learn to deal with it. It's no big thing." *Hearing Before the Nat'l Rape Elimination Comm., supra* note 1.

23. *See, e.g.,* Riccardo v. Rausch, 375 F.3d 521 (7th Cir. 2004); Durrell v. Cook, 71 Fed. Appx. 718 (9th Cir. 2003); Billman v. Indiana Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995); Brown v. Scott, 329 F. Supp. 2d 905 (E.D. Mich. 2004).

24. *See* Christopher Hensley et al., *Examining the Characteristics of Male Sexual Assault Targets in a Southern Maximum-Security Prison*, 20 J. INTERPERSONAL VIOLENCE 667, 672 (2005) [hereinafter Hensley, *Targets in a Southern Maximum-Security Prison*]; NAT'L INST. OF CORRECTION, ANNUAL REPORT TO CONGRESS: PRISON RAPE ELIMINATION ACT (PREA) PUBLIC LAW 108-79, APPENDIX A: RAPE AND COERCIVE SEX

and the inferences drawn therein are often misguided, and few Section 1983 inmate-on-inmate rape cases make it to trial.²⁵ Conse-

IN AMERICAN PRISONS: INTERIM FINDINGS AND INTERPRETATION ON PRELIMINARY RESEARCH 27, 31 (2004); NPREC REPORT, *supra* note 7, at 70–74 (discussing various characteristics linked with vulnerability); *see also* Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. INTERPERSONAL VIOLENCE 595, 599 (2003) [hereinafter Hensley, *Male Oklahoma Correctional Facilities*].

25. The cases reviewed in this article consist of all Section 1983 Eighth Amendment cases decided after *Farmer* in which the plaintiff specifically alleged rape. Of the nine cases reviewed in this article, only one appears to have made it to a jury, and in that case the jury's decision was overturned. Riccardo v. Rausch, No. Civ. 99-372-CJP, 2002 WL 32741124 (S.D. Ill. Mar. 7, 2002), *rev'd*, 375 F.3d 521 (7th Cir. 2004). In 1995, the Sixth Circuit considered the victim's characteristics and determined that the plaintiff's claim withstood summary judgment. Taylor v. Michigan Dep't of Corrs., 69 F.3d 76 (6th Cir. 1995). Also in 1995, the Seventh Circuit overturned a summary judgment finding in favor of the defendants allowing the plaintiff time to locate the names of the officials responsible for his housing when the plaintiff was raped by an HIV positive inmate whom, according to the plaintiff, prison officials knew had a propensity to rape. Billman v. Indiana Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995). In 1996, the Seventh Circuit upheld summary judgment in favor of the defendants in a case where prison records indicated the alleged rapist had committed a previous sexual assault and the victim was supposed to be single-celled because he was an informant. Langston v. Peters, 100 F.3d 1235 (7th Cir. 1996). In 1997, the Seventh Circuit dismissed a plaintiff's case after finding no subjective knowledge for two instances of rape and determining that the third alleged rape was barred from consideration due to an interdisciplinary committee's finding that the act was consensual. Lewis v. Richards, 107 F.3d 549 (7th Cir. 1997).

In 2003, the Ninth Circuit overturned a summary judgment finding in favor of the defendants despite the fact that no sexual assault occurred when a prisoner was housed with another prisoner who had been labeled an "aggressive homosexual" and whose prison file indicated several instances of sexual assault. Durrell v. Cook, 71 Fed. Appx. 718 (9th Cir. 2003). That same year, the Ninth Circuit upheld summary judgment in favor of the defendants when the inmate who was raped expressed fear at being housed with another inmate because he was a homosexual and the alleged rapist was previously caught naked in bed with another prisoner but there was no force allegation. Harvey v. California, 82 Fed. Appx. 544 (9th Cir. 2003).

In 2004, the Sixth Circuit held that a claim withstood summary judgment in favor of the defendants on the basis that subjective knowledge could be found from the rumor that the assailant was a predatory homosexual rapist even though no such classification was in his case file. Post v. Taft, 97 Fed. Appx. 562 (6th Cir. 2004). That same year, the Fifth Circuit refused to examine the district court's finding that a question of fact regarding subjective knowledge existed. Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004). Also that same year, the Seventh Circuit overturned a jury finding on the basis that no reasonable jury could have believed that the defendant was deliberately indifferent because when the defendant questioned two inmates together about whether they had a problem housing together,

quently, the Eighth Amendment avenue of redress is virtually nonexistent.

In order to combat this problem, a better method for parsing the subjective knowledge standard is needed to ensure that courts correctly apply the deliberate indifference standard. Such a method should rely more on research findings that accurately reflect what is known about prison rape so that it will not merely reflect individuals' deep-seated beliefs. The research and mandates articulated by the Prison Rape Elimination Act of 2003 (PREA)²⁶ can assist in this process. PREA called for systematic research of prison rape and asked that the federal government and the states collaborate to eliminate prison rape.²⁷ The circumstantial evidentiary landscape of subjective knowledge, and hence deliberate indifference, can and should be bolstered through the adoption and application of PREA's standards and mandates.

Additionally, in order to find redress that is not hampered by oft-misdirected subjective knowledge determinations, certain plaintiffs should explore other avenues of protection, such as filing a Fifth or Fourteenth Amendment Equal Protection Clause claim instead of an Eighth Amendment claim. Pursuing such a claim drops the subjective knowledge element from the analysis because intent to discriminate can be found through an objective standard, and plaintiffs can thus avoid the quagmire of parsing issues such as consent. If guards protect heterosexual inmates more than homosexual or bisexual inmates, or perhaps female prisoners more than male prisoners, then the Equal Protection Clause may be invoked.

Part I of this Article discusses the *Farmer* standard of deliberate indifference and reviews the opacity of the standard and its lack of unified application among the courts through case law. It also examines potential reasons for why such sporadic application occurs through the review of empirical research and social psychological categorization methods. Part II discusses how to combat such opacity by bolstering the subjective knowledge circumstantial evidence presentation. PREA can be used to ensure that guards' and courts' analysis of circumstantial evidence and subsequent inferences drawn coincide with the true landscape of sexual assault in prisons. Additionally, Part II discusses the possibility of using the Equal Protection Clause as an alternative claim to the Eighth Amendment for certain prisoners.

neither inmate affirmatively indicated he did. *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004).

26. 42 U.S.C. §§ 15601–09 (2006).

27. § 15602.

I.
THE DELIBERATE INDIFFERENCE STANDARD AND
ITS PROBLEMATIC APPLICATION

A. *The Farmer Deliberate Indifference Standard*

Farmer v. Brennan,²⁸ decided in 1994, is one of the most recent Supreme Court cases that dealt with the parameters of the Eighth Amendment. Prior to *Farmer*, the most important case dealing with the standards for determining whether certain prison conditions violated the Eighth Amendment was *Wilson v. Seiter*.²⁹ To fully understand *Farmer*, a brief summary of *Wilson* is necessary. In *Wilson*, an Ohio prisoner alleged an Eighth Amendment violation based on numerous conditions of confinement.³⁰ The Supreme Court's opinion directly addressed whether a prison official's culpable state of mind must be proven in order to establish that prison conditions constituted cruel and unusual punishment.³¹

Justice Scalia, delivering the majority opinion for five of the Justices, stated that some mental component must be attributed to the defendant official before the official's conduct could qualify as punishment and thus be subject to the Eighth Amendment.³² Thus, both an objective and subjective component are required for a finding of cruel and unusual punishment.³³ The objective component, upon which all nine Justices agreed,³⁴ requires that the deprivation suffered by the inmate be "sufficiently serious."³⁵ The subjective component, according to the *Wilson* majority, is one of "wantonness," which "does not have a fixed meaning but must be determined with 'due regard for difference in the kind of conduct against which an Eighth Amendment objection is lodged.'"³⁶ Gen-

28. 511 U.S. 825 (1994).

29. 501 U.S. 294 (1991).

30. *Id.* at 296. Wilson alleged "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Id.*

31. *Id.* Prior to the Supreme Court granting certiorari, the district court granted summary judgment for the defendants and the Court of Appeals for the Sixth Circuit affirmed. *Id.*

32. *Id.* at 302-03.

33. *Id.* at 298-303.

34. *Id.* at 306-11 (White, J., concurring).

35. *Id.* at 298 (majority opinion) (citing *Rhodes v. Chapman*, 454 U.S. 337 (1981)).

36. *Id.* at 302.

erally, the majority equated this to a deliberate indifference standard.³⁷

Justices White, Marshall, Blackmun, and Stevens concurred solely in the *Wilson* judgment.³⁸ These Justices argued that only an objective standard was necessary for Eighth Amendment conditions of confinement claims, that a deliberate indifference intent requirement was inconsistent with precedent, and that the majority's punishment analysis, which requires a subjective intent component for Eighth Amendment claims, was incorrect.³⁹ With the Court's creation of a subjective component for Eighth Amendment claims as a foundation, the *Farmer* court addressed what the subjective component of "deliberate indifference" actually meant.

In *Farmer*, a pre-operative male-to-female transsexual inmate brought a *Bivens* suit⁴⁰ for violation of her Eighth Amendment right

37. *Id.* at 303.

38. *Id.* at 306 (White, J., concurring).

39. *Id.* at 306–10. Justices White, Marshall, Blackmun, and Stevens believed that the search for a subjective deliberate indifference element would lead to serious deprivations of prisoners' Eighth Amendment right to be free from cruel and unusual prison conditions. *Id.* at 310. Justice White stated:

Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue.

In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

Id. They noted that prison officials could simply cite lack of funds as a defense, arguing that they did not intend the conditions; rather they simply did not have enough funds to correct the condition. *Id.* at 311. This, in turn, would negate their subjective intent and hence no Eighth Amendment violation could be proven. *Id.*

40. Prisoners incarcerated in federal facilities can file a civil suit for violation of the Eighth Amendment through a *Bivens* complaint. In *Bivens v. Six Unknown Named Agents*, the Supreme Court created a federal cause of action for damages when a federal official violates a citizen's Fourth Amendment rights. 403 U.S. 388 (1971). The creation of a cause of action allowing one to sue federal officials for violation of one's constitutional rights was extended to include one's Eighth Amendment rights in *Carlson v. Green*, 446 U.S. 14 (1980). In *Carlson*, the Court held that a *Bivens* suit on behalf of a prisoner who died from lack of medical attention to injuries was valid even though the administratrix's allegations could also form a claim under the Federal Tort Claims Act (FTCA). *Id.* at 23–24. Additionally, a *Bivens* suit may be preferable to a FTCA claim because it allows for punitive damages, the option of a jury trial, and it levies damages against the individual official rather than the United States. *Id.* at 22. FTCA suits prohibit punitive damages. *Id.* (citing 28 U.S.C. § 2674). Additionally, plaintiffs cannot opt for a jury in an FTCA suit. *Id.* at 22–23 (citing 28 U.S.C. § 2402). Finally, an FTCA claim is only valid if the state in which the alleged misconduct occurred would permit such a cause of action. *Id.* at 23 (citing 28 U.S.C. § 1346(b)).

to be free from cruel and unusual punishment. Dee Farmer's theory was that prison officials failed to protect her from being beaten and raped by another inmate and that their failure to protect her constituted an Eighth Amendment violation.⁴¹ The district court held that actual knowledge of the danger to inmate Farmer's safety would be required for an Eighth Amendment violation, and because there was no proof that the prison officials had such actual knowledge, the court granted the defendants' motion for summary judgment.⁴² The Seventh Circuit affirmed without an opinion.⁴³

In examining the meaning of "deliberate indifference," the Supreme Court was clear that the term did not mean negligence or specific purpose or intent.⁴⁴ The Court stated that deliberate indifference meant recklessness.⁴⁵ Recklessness, however, has differing civil and criminal meanings.⁴⁶ The civil meaning is an objective standard, which asks whether the risk of harm was known or so obvious that it should have been known;⁴⁷ conversely, the criminal standard is a subjective standard, which asks whether the defendant had actual knowledge of the risk to the prisoner.⁴⁸

Petitioner Farmer argued that the objective standard used in *Canton v. Harris*⁴⁹ should be applied.⁵⁰ The Court, however, held that *Canton's* objective standard did not apply to Eighth Amendment cases based on condition of confinement because in such cases, a specific inquiry into the official's mind is required.⁵¹ Justice Souter, writing for the *Farmer* majority, concluded that the correct standard for deliberate indifference is the criminal standard of sub-

41. *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

42. *Id.* at 831–32.

43. *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992).

44. *Farmer*, 511 U.S. at 835.

45. *Id.* at 836–37.

46. *Id.*

47. *Id.* at 836 (citing RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

48. *Id.* at 837.

49. 489 U.S. 378 (1989).

50. *Farmer*, 511 U.S. at 840. In *Canton*, the Court held that a valid Section 1983 action could be brought against a municipality for failure to train officers. In so holding, the Court applied an objective test for deliberate indifference, stating:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.

Canton, 489 U.S. at 390.

51. *Farmer*, 511 U.S. at 841.

jective knowledge.⁵² As Justice Souter explained, “the official must

52. *Id.* at 837. Both Justice Blackmun and Justice Stevens concurred in the judgment, but stated that, despite their concurrence, they did not think a subjective element should be required for an Eighth Amendment cruel and unusual punishment claim regarding prison conditions. *Id.* at 851–52 (Blackmun, J., concurring). Justice Thomas, also concurring in the judgment, reiterated his *Hudson v. MacMillian*, 503 U.S. 1 (1992), and *Helling v. McKinney*, 509 U.S. 25 (1993), belief that conditions of confinement cannot be considered punishment. *Farmer*, 511 U.S. at 859–62 (Thomas, J., concurring); 503 U.S. at 27 (Thomas, J., dissenting); 509 U.S. at 43 (Thomas, J., dissenting). Thomas expressed his serious doubts regarding the holding of *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), which held that prison conditions are subject to the Eighth Amendment; however, because overturning *Estelle* was not an issue before the Court, based on the *Wilson* precedent that rejected the malicious standard for prison conditions, the Court’s holding that the next highest standard—that of “actual knowledge of the type sufficient to constitute recklessness in the criminal law”—is the best standard available while adhering to stare decisis. *Farmer*, 511 U.S. at 861–62.

Hudson dealt with an excessive force claim and whether injuries (bruises, swelling of the face, and a cracked dental plate) that were deemed minor could constitute serious injury and hence qualify for an Eighth Amendment violation claim. 503 U.S. at 4. The majority held that serious injury is not required for an Eighth Amendment violation. *Id.* at 10. The court held that the appropriate standard with which to judge excessive force claims is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Id.* at 7. Further, the malicious and sadistic determination should turn on “contemporary standards of decency.” *Id.* at 8–9. Justice Thomas, joined by Justice Scalia, dissented, stating, “[A] use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.” *Id.* at 18 (Thomas, J., dissenting). Justice Thomas, without a complete explanation of his reasoning, equated “serious deprivation” (which he stated is always required for an Eighth Amendment violation and has always been required by precedent) with “serious injury.” *Id.* at 22. Thus Justice Thomas admonished the majority, stating that by not requiring a serious injury component, the majority has done away with the serious deprivation that lies at the heart of an Eighth Amendment claim. *Id.* at 22–23.

Helling considered whether the risk of harm from tobacco smoke could form the basis for an Eighth Amendment claim for relief. 509 U.S. at 25, 27–28. The Court held that an unreasonable risk of serious damage to future health could constitute an Eighth Amendment claim, but respondent would need to prove both the objective and subjective elements necessary for an Eighth Amendment claim. *Id.* at 35. Further, in order to prove the objective element, respondent would need to show that he was exposed to unreasonably high levels of tobacco smoke, which in turn would require not only scientific and statistical evidence, but also an assessment of whether such exposure violates contemporary standards of decency and is not simply a risk that “today’s society chooses to tolerate.” *Id.* at 35–36. Justice Thomas, again joined by Justice Scalia, dissented, explaining that he “would draw the line at actual, serious injuries and reject the claim that exposure to the risk of injury can violate the Eighth Amendment.” *Id.* at 42 (Thomas, J., dissenting) (emphasis in original). Justice Thomas also reiterated his long-held belief that punishment only includes what is meted out by a statute, judge, or jury, and by definition

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.*"⁵³

The Court's holding allows a factfinder to consider the obviousness of the risk in determining subjective knowledge, but an extremely obvious risk does not constitute per se subjective knowledge.⁵⁴ On the other hand, an official cannot escape liability by showing that, although he was aware of a general substantial risk to inmate safety, he was not aware of a specific risk to the complainant.⁵⁵ Thus deliberate indifference can be found if a prison official has subjective knowledge of a general risk to the prison population at large. Additionally, the *Farmer* Court held that regardless of the subjective knowledge of the prison officials, if they responded reasonably to the risk, then they could not be held liable, even if a prisoner suffered serious injury.⁵⁶ Finally, the Court stated that a petitioner need not suffer physical injury before bringing suit.⁵⁷ Instead a petitioner may seek injunctive relief to prevent a substantial risk of serious harm from becoming actual harm.⁵⁸

B. The Complexity of the Deliberate Indifference Standard

While the deliberate indifference test itself may seem simple, courts' application of the standard is all over the map because inferences are drawn based on circumstantial evidence, and such inferences are often faulty. To fully understand the complexity of the subjective knowledge prong of deliberate indifference, a brief hypothetical regarding consent may be instructive. Consider a hypothetical rape trial. Imagine the man, John, asserts the affirmative defense that he did not believe that having sex with his wife, Jane,

does not include the actions of prison officials and staff. *Id.* at 38. Therefore, actions by prison officials and staff are not subject to the Eighth Amendment. *Id.* at 40.

53. *Farmer*, 511 U.S. at 837 (emphasis added).

54. *Id.* at 842.

55. *Id.* at 843.

56. *Id.* at 845.

57. *Id.*

58. *Id.* The Court laid out such a case as follows:

[T]o survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.

Id. at 846.

without her consent, constituted rape. In order to find John guilty of rape, the jury could find that John knew having sex with Jane without her consent was wrong or that John should have known that having sex with Jane without her consent was wrong. The former is a subjective standard, meaning that the man had actual knowledge that what he did was illegal. The latter is an objective standard, meaning that a reasonable man should have known that what he did was illegal.

To get closer to the prison rape context, the hypothetical must be taken one step further. Instead of John on trial for having sex with Jane without her consent, imagine that Larry, John and Jane's landlord, was sued for not protecting Jane from John's sexual advances. In order to find against Larry, the jury would have to find that Larry knew that to let John have sex with Jane without her consent was wrong or that Larry should have known that allowing John to have sex with Jane without her consent was wrong. Unlike the previous hypothetical, however, the jury would have to reach two additional findings. First, the jury would have to find that Larry knew that John would try to have sex with Jane without her consent. Without this, Larry would not know that there is any danger from which Jane needed protection. Second, the jury would have to find that Jane did not actually consent to sex with John. If she did consent, then Larry was not responsible for protecting her because John's actions were legal. Thus, in a failure-to-protect case there are essentially two questions: did Larry know that Jane was entitled to protection, and did Jane consent? In an Eighth Amendment failure-to-protect case, these two questions are conflated.

This conflation allows several situations to occur without a functional avenue of recourse. First, a guard may not know the prisoner is entitled to protection. Second, a guard could know he is supposed to protect a prisoner, but the guard may believe that there is no possibility that the prisoner would not consent. This would be similar to Larry's belief that Jane will always consent, such that he never takes action to protect her. Third, a guard could know that he is supposed to protect the prisoner, and the guard may believe there is a possibility that the prisoner would not consent, but if the guard simply does not care or does not want to protect the prisoner, the guard can say that he thought the prisoner consented, and thus there was no danger from which to protect the prisoner in the first place. The idea that guards may use the con-

flated questions to allow inmates to rape one another may seem outlandish; however, research reveals it is not farfetched.⁵⁹

This would be of less consequence if courts did not also participate in the conflation. Unfortunately, that does not appear to be the case. The following review of the post-*Farmer* male inmate-on-inmate Section 1983 Eighth Amendment claims involving rape allegations demonstrates that courts have struggled to clearly and consistently apply the deliberate indifference standard. The cases are examined within the context of the two conflated questions previously discussed.

C. *Conflated Question One: Is the Prisoner Entitled to Protection?*

1. Research indicates some guards do not believe certain inmates are entitled to protection.

Research indicates that some officers do not believe an inmate deserves to be protected because the officer does not see the sexual act as something illegal. A 2000 study by Helen M. Eigenberg sampled all correctional officers in one rural midwestern state.⁶⁰ The study found that 4% of officers did not believe an inmate was raped if he was threatened with bodily harm; 5% of officers did not believe an inmate was raped if he was physically overpowered; 26% of officers did not believe an inmate was raped if the perpetrator threatened to call the victim a snitch if he did not perform sexual acts; 27% of officers did not believe an inmate was raped if he was forced to chose between paying off a debt with sexual acts or by being beaten, and he chose the former; 36% of officers did not believe an inmate was raped if the inmate was a snitch who engaged in sexual acts for protection; and 44% of officers did not believe an inmate was raped if the inmate was a snitch who engaged in sexual acts for protection but then demanded cigarettes afterward.⁶¹ Here, 5% of officers did not think a rape occurred when an inmate was physically overpowered—the most standard definition of rape—and 27% did not believe that coercive sex acts constituted rape even though they are considered rape under PREA and by most states. If these officers do not believe in the legal definitions of rape, they cannot meet the subjective deliberate indifference

59. See discussion *infra* Parts I.C.1. & I.D.1.

60. Helen Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 438 (2000) [hereinafter Eigenberg, *Correctional Officers' Definitions*]. The sample achieved a fifty-three percent response rate and was representative regarding age, race, and gender. *Id.* at 438–39.

61. *Id.* at 442.

standard because they do not think that the objective element ever occurred and thus will never have knowledge of the risk.

The notion that nothing is happening in these situations that would require the officers to protect the inmates is still prevalent, as evidenced by a two-year study conducted by Dr. Mark Fleisher, which was funded by a nearly one million dollar grant from the National Institute of Justice within the U.S. Department of Justice.⁶² Fleisher stated that rape is rare, that inmate sex is consensual, that it is “often engaged in as a way to win protection or privileges,” and that the “[p]rison rape worldview doesn’t interpret sexual pressure as coercion. Rather, sexual pressure ushers, guides, or shepherds the process of sexual awakening.”⁶³ Regardless of Fleisher’s position concerning the prison rape worldview, PREA specifically defines rape to include “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.”⁶⁴ If inmates engage in sexual acts to “win protection,” then the inmates are afraid of something; otherwise they would not need protection. Inmates that exploit that fear for sexual acts are, by PREA’s definition, committing rape.⁶⁵ Imagine the response that would be garnered if, instead of speaking about male prisoners, Fleisher were talking about male-female rape when he said that sexual pressure guides one’s sexual awakening.

Furthermore, Cindy Struckman-Johnson, a psychology professor at the University of South Dakota and a member of the National Prison Rape Elimination Commission, states that Fleisher’s study is not in proper scientific form.⁶⁶ There is no literature review, no raw data, and no full explanation of Fleisher’s research methods or

62. MARK S. FLEISHER & JESSIE L. KRIENERT, *THE CULTURE OF PRISON SEXUAL VIOLENCE* (Nov. 2006) (unpublished report submitted to the U.S. Department of Justice, <http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>); *see also* Dr. Mark Fleisher—Curriculum Vitae, <http://dept.kent.edu/ispv/bios/CV%20PDFs/Fleisher%20CV.pdf>.

63. Kim Curtis, *A Disputed Study Claims Rape is Rare in Prison*, USA TODAY, Jan. 17, 2006, at 1, *available at* http://www.usatoday.com/news/nation/2006-01-17-prison-rape_x.htm (last visited Feb. 12, 2010).

64. 42 U.S.C. § 15609(9)(C) (2006) (emphasis added).

65. These instances of rape without actual physical force outnumber the instances involving the use of force. *See* NPREC REPORT, *supra* note 7, at 42 (detailing a study that found that “[n]onconsensual experiences included sex in return for offers of favors or protection (8.7 percent), sex due to pressure or force other than physical force (8.8 percent), and sex with physical force or the threat of physical force (6.4 percent).”).

66. Curtis, *supra* note 63.

subjects.⁶⁷ The U.S. Justice Department had not yet endorsed or published Fleisher's study,⁶⁸ and although it seems unlikely that it would be published at this point in time, the issue remains.

Also, some guards simply believe that certain prisoners, namely homosexual, bisexual, and transgendered inmates, should not be protected from rape. A 1984 study revealed officers were more willing to protect heterosexual inmates from rape than homosexual inmates.⁶⁹ A 2000 study revealed that 16% of prison officers felt homosexual inmates who are raped get what they deserve.⁷⁰ Seventeen percent of officers felt inmates who dress or talk in a feminine manner deserve to be raped, and 23% of officers believed that inmates who previously engaged in consensual sex acts deserve to be raped.⁷¹ Finally, 24% of officers believed that inmates who took money or cigarettes for prior consensual sexual acts deserve to be raped.⁷² Overall, the officers in the study endorsed condemning attitudes towards homosexuality,⁷³ and these officers were more likely to blame the victim.⁷⁴ When officers have these beliefs, they can simply say that they thought the victim consented, making subjective knowledge, and thus deliberate indifference, virtually impossible to prove. This issue can play out in several ways in courts. First, a guard may believe the prisoner was not entitled to protection or deserved to be raped, and he may simply state that he did not know the prisoner was in danger. Second, and far more prevalent and difficult to parse, guards, and in turn courts, may look at aggressor attributes rather than victim attributes.⁷⁵ By misplacing the focus from victim traits to aggressor traits, inherited biases about victims can remain in play. Based on the case law, this may be part of what is occurring.

Since beliefs are based on knowledge, we need to make sure these individuals have the right knowledge, or at least the knowledge that Congress has chosen to accept through PREA. Humans come to know things through direct knowledge or through inferential knowledge. Prison officials use inferences to set up the entire prison system, and inferential knowledge is the bedrock of subjec-

67. *Id.*

68. *Id.*

69. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 48 *FED. PROBATION* 46, 48 (1984).

70. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 442.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 444.

75. *See* discussion *infra* Parts I.C.1–2.

tive knowledge proven through circumstantial evidence. When people focus on the aggressor's "monster" status, they may be using categories that are readily accessible but have a poor fit,⁷⁶ and this in fact appears to be what is happening.

2. Case law indicates courts focus on aggressor attributes in determining deliberate indifference.

In *Brown v. Scott*,⁷⁷ Gary Brown, citing concern for his safety, requested a transfer away from his cellmate, who was rumored to be a predatory homosexual rapist.⁷⁸ The request was not granted.⁷⁹ Three days later Brown's cellmate raped him.⁸⁰ In July 2003, the magistrate judge, who had an order of reference to conduct all pre-trial proceedings, filed a report recommending that the defendant's motions for dismissal and summary judgment be denied.⁸¹ The defendant filed an objection to the recommendation, after which the district court conducted a *de novo* review of the motions, report, and recommendation.⁸² After the review, the district court

76. Inferential knowledge largely depends on categorization. The categories people use are determined largely by two factors: accessibility and fit. RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 61–62 (1995). Accessibility deals with the people perceiving the situation. *Id.* at 69. It depends on the current task or goal of the person, the natural accessibility of certain groups to a person, and the person's relationship to those being categorized. *Id.* The task at hand, i.e., finding a mate versus finding an employee, can shape the accessibility of categories. Some categories are more accessible to an individual because of her or his personal or social needs, such as who she or he works with or the community in which he or she lives. Certain categories can be more accessible because they are frequently used, such as male and female. Finally, the categorizing of individuals' relationships to the group of people being categorized can influence the accessibility of the group because groups are often founded around in-groups (someone in the same group as the person making the categorization) and out-groups (someone in a different group from the person making the categorization). *See id.* at 70. Certain categories seem to be relied upon because our social and historical landscape makes them readily accessible, such as gender. *See id.* On the other hand, fit depends on the person being categorized. *Id.* at 69. It is an indication of how well the category or subcategory actually fits the categorized person. *Id.* Fit is often derived from stimuli factors, such as what a person looks like or events that prime certain categories. *Id.* at 66–67. For example, an election can bring out categorization based on political party when it would otherwise not be considered a good fit. This foundational principle of categorization, based on accessibility and fit, is the backbone of inferential knowledge.

77. 329 F. Supp. 2d 905 (E.D. Mich. 2004).

78. *Id.* at 907.

79. *Id.*

80. *Id.*

81. *Id.* at 908.

82. *Id.* at 909.

found that a genuine factual dispute existed and that Brown properly stated an Eighth Amendment claim; therefore, the district court denied defendant's motions to dismiss and for summary judgment based on qualified immunity.⁸³ The court stated that the combination of "the rumor that the plaintiff's cell mate was a known homosexual who forced other inmates to have sex with him" and the common knowledge that the cellmate was a member of the Moabites (a group that assaulted vulnerable white inmates) could lead a jury to conclude that a substantial risk of harm to the plaintiff existed and that the defendant disregarded that risk by not transferring Brown.⁸⁴ The court so ruled despite the defendant's testimony that he had reviewed the cellmate's file and it did not contain a predatory homosexual classification.⁸⁵ Even though the court ruled for the plaintiff, it still looked at the aggressor's, and not the victim's, characteristics. Furthermore, while the classification of "predatory" may be a valid indicator of a sexual aggressor, homosexuality is not. As Human Rights Watch stated, "The myth of the 'homosexual predator' is groundless."⁸⁶ It appears that the judge may have used a readily accessible category, sexuality of the aggressor, to determine whether a risk was apparent, even though research does not indicate such a category has a good fit.⁸⁷

In *Billman v. Indiana Department of Corrections*,⁸⁸ inmate Jason Billman was raped by his cellmate, Darrell Crabtree, who was HIV positive.⁸⁹ Billman alleged that prison officials knew from a prior incident that Crabtree had a propensity to rape other inmates and that Crabtree was HIV positive.⁹⁰ Billman could not, however, name any of the prison officials who were responsible for housing him with Crabtree, and the district court dismissed his complaint

83. *Id.* at 914.

84. *Id.* at 912.

85. *Id.* at 907.

86. HUMAN RIGHTS WATCH, REPORT, APR. 2001: NO ESCAPE: MALE RAPE IN U.S. PRISONS 52 (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/report.html>.

87. See REVIEW PANEL ON PRISON RAPE, REPORT ON RAPE IN JAILS IN THE U.S.: BASED ON PUBLIC HEARINGS AND REVIEW OF DOCUMENTARY EVIDENCE BY THE REVIEW PANEL ON PRISON RAPE—FINDINGS AND BEST PRACTICES 9–10 (Dep't of Justice Dec. 29, 2008), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_final-report_081229.pdf.

88. 56 F.3d 785 (7th Cir. 1995).

89. *Id.* at 788.

90. *Id.* Neither Billman's complaint nor the decision state what evidence was given to support the statement that Crabtree had a propensity to rape other inmates.

with prejudice as frivolous.⁹¹ The Seventh Circuit reversed, holding that Billman's complaint was sufficient because, as a prisoner, he had less access to discovering the defendants' names than a plaintiff who was not incarcerated.⁹² In determining whether enough evidence was presented regarding the defendant's deliberate indifference to overturn the lower court's dismissal, Judge Posner stated:

It is no doubt true that if the official who assigns inmates to cells knew that Crabtree had a propensity to rape his cellmates and was HIV-positive, his assigning Billman to the same cell without, at the least, warning Billman and, perhaps, without then giving him a chance to reject the assignment would be deliberate indifference for the consequences of which—the fear and humiliation by the rape and the fear of contracting the AIDS virus (and therefore eventually AIDS) from it—he would be liable to Billman in damages.⁹³

Billman's claim was then reinstated and the lower court was instructed to allow Billman some method of researching the defendants' names.⁹⁴ Again, this case proceeded on the basis of the alleged perpetrator's characteristics. That is not to say this was an entirely incorrect approach. Certainly a "propensity to rape other inmates" should indicate a potential risk. But the court here seemed to place special importance on Billman's HIV status. While this is certainly of great concern, HIV status has not appeared through research to be a salient fit for determining whether one poses a risk as a sexual aggressor.⁹⁵

91. *Id.* at 787.

92. *Id.* at 790.

93. *Id.* at 788–89.

94. *Id.* at 790. It is unclear what happened with the *Billman* case as nothing further was published. Billman may have been unable to locate the defendants' names, the case may have settled, or the district court may have ended up issuing an unpublished decision.

95. Nearly all the research dealing with prison rape examines the victim's characteristics. The Review Panel on Prison Rape (RPPR) appears to have conducted the sole study of aggressor traits. It found perpetrators were likely to be of bigger stature or build; past victims of sexual assault; experienced repeat offenders; having history of acting out or engaging in violence including sexual assault; creditors of victims; desirous of power or control; more verbal or aggressive or extroverted; extremely self-confident; manipulative or knowing of human psychology; serving a longer term sentence; gang affiliated; and mentally challenged. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9–10. The report did not recognize homosexuality or HIV status as likely perpetrator characteristics. *Id.* It is possible that HIV status was not considered among the factors analyzed; however, homosexuality was found to be a salient victim characteristic, so this category was a part of the study and not found to be related to perpetrator characteristics.

In *Langston v. Peters*,⁹⁶ decided the year after *Billman*, inmate Eugene Langston was moved to segregated custody after being in protective custody for four years because he provided information about a murder.⁹⁷ Despite the fact that Langston was supposed to be housed by himself in a single cell, he was moved to a cell with Eric Rayfield, an inmate serving a murder sentence⁹⁸ and who had previously sexually assaulted a cellmate.⁹⁹ This prior sexual assault was recorded in Rayfield's file, but not in the Online Tracking System, which was the only source of information reviewed before placing the two prisoners together.¹⁰⁰ After they were housed together, Rayfield raped Langston.¹⁰¹ The Seventh Circuit upheld summary judgment for the defendant.¹⁰² The court stated that "ignoring internal prison procedures [of housing Langston in a single-cell unit] does not mean that a constitutional violation has occurred."¹⁰³ Further, Langston did not show that "there existed at [the prison] a serious risk of sexual assault, or that he was within a group targeted for such assaults."¹⁰⁴ This case is interesting because although the Seventh Circuit was presented with a set of facts similar to those of *Billman*, it ruled the opposite way. Langston's indicators of potential victimization, his informant status, and the fact that he was previously in protective custody,¹⁰⁵ should have at least been examined. The court, however, dismissed these factors outright. Perhaps the difference was that Rayfield was not HIV positive. Thus, an easily accessible category that indicated a risk of a "monster" did not appear.

In *Durrell v. Cook*,¹⁰⁶ inmate Paul Durrell brought an Eighth Amendment claim for injury caused by being housed for one week,

96. 100 F.3d 1235 (7th Cir. 1996).

97. *Id.* at 1236.

98. *Id.*

99. *Id.* at 1239. It is interesting to note that Langston's move to a cell with Rayfield did not occur until after Langston assaulted a correctional officer. *Id.* at 1236.

100. *Id.* at 1239.

101. *Id.* at 1236.

102. *Id.* at 1241.

103. *Id.* at 1238.

104. *Id.* at 1240.

105. The RPPR found that being in protective custody is a common characteristic of victims of inmate-on-inmate sexual abuse. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 8. Prison rape is often about power and belonging or not belonging to the hierarchy of the prison. Those that snitch are essentially demonstrating their lack of belonging within a prisoner hierarchy, which makes them more likely to be targets for sexual abuse. See HUMAN RIGHTS WATCH, *supra* note 86, at 73.

106. 71 Fed. Appx. 718 (9th Cir. 2003).

against his protests, with an inmate whom Durrell called an “aggressive homosexual.”¹⁰⁷ Durrell did not allege that he was ever actually raped, but did allege that he was injured trying to defend himself from his cellmate.¹⁰⁸ The prison system’s computer record for Durrell’s cellmate revealed that the cellmate had anally raped a sixteen-year-old boy, assaulted other inmates, and threatened to rape another inmate.¹⁰⁹ The Ninth Circuit held that the plaintiff had alleged sufficient facts to remand for a deliberate indifference determination despite the fact that no rape actually occurred.¹¹⁰ The court stated that the information from the computer alone could constitute deliberate indifference.¹¹¹ Thus, the Ninth Circuit overturned the lower court’s grant of summary judgment on the basis of qualified immunity.¹¹² This was found despite the fact that, as the dissent points out, there was no evidence that the named defendants were personally involved in Durrell’s housing assignment.¹¹³ Additionally, the inmate with whom Durrell was housed “had been double-celled with other inmates without incident for years before his assignment with Durrell, and prison officials did not know that he posed a danger to his cellmates,” and the computer record did not denote a recent history of outstanding issues that would have indicated that Durrell should not have been housed with the inmate.¹¹⁴

107. *Id.* at 719.

108. *Id.* (“[Durrell] claims that he was injured defending himself from his cellmate, and sought medical attention for his injury (though this is disputed).”).

109. *Id.*

110. *Id.* at 720.

111. *Id.* at 719.

112. *Id.*

113. *Id.* at 720 (McKeown, J., dissenting).

114. *Id.* The dissent also notes that a year earlier in *Estate of Ford v. Ramirez-Palmer*, the Ninth Circuit held that prison officials who housed Ford—who was killed by his cellmate—with an inmate classified as a “predator” who “had an extensive history of violent behavior toward inmates and staff, including eleven separate assaults, one of which involved stabbing an inmate seventeen times” and had recently been taken off his medication, were entitled to qualified immunity, meaning a reasonable official could have deemed that double-celling was reasonable. *Id.* (citing *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1051 (9th Cir. 2002)). The discrepancy between *Ford* and *Durrell* appears to indicate that the Ninth Circuit drew a distinction between “aggressive homosexuals” (a label given to the inmate by Durrell in his complaint, not the prison system) and “violent predators” (a label given to the inmate by the prison system). Knowledge of the former is enough to meet the deliberate indifference standard, but the latter is not. This is especially interesting considering that the violent predator index appears to be a better indicator, as Ford was actually attacked, while Durrell was never physically harmed.

The *Durrell* case is fascinating in that it allowed an Eighth Amendment claim to go forward in a case in which no assault actually occurred.¹¹⁵ When compared to a case mentioned by the dissent, *Estate of Ford v. Ramirez-Palmer*,¹¹⁶ which the court decided the prior year, the result is more interesting. In *Ford*, the Ninth Circuit held that prison officials who housed Jeffrey Ford, who was killed by his cellmate James Diesso, were entitled to qualified immunity.¹¹⁷ Diesso was classified as a “predator,” had an extensive history of violence towards inmates and staff, including stabbing another inmate who was described as an “effeminate homosexual,” and had recently been taken off his medication.¹¹⁸ In reaching the *Ford* decision, the Ninth Circuit stated, “we cannot say that a reasonable correctional officer would have clearly understood that the risk of serious harm was so high that he should not have authorized the double-celling.”¹¹⁹ Yet in *Durrell* the court stated that if, on remand, deliberate indifference were found, then “no reasonable officer could have believed that defendants’ conduct was lawful, so defendants are not entitled to qualified immunity.”¹²⁰ The discrepancy between *Ford* and *Durrell* indicates that without attention to traits proven through research to be good risk indicators, courts’ decisions on reasonableness are virtually impossible to predict, which only makes guards’ ability to make reasonable decisions more difficult.

In *Riccardo v. Rausch*,¹²¹ the Seventh Circuit overturned a jury verdict awarding Anthony Riccardo \$1.5 million in compensatory damages in an Eighth Amendment failure-to-protect action.¹²² Shortly after entering the Cook County Jail, Riccardo was anally raped by his cellmate.¹²³ Riccardo was later transferred to Centralia Correctional Center, where he told a prison psychologist that he did not feel safe.¹²⁴ After violating prison rules, Riccardo was placed in segregation and then declined to return to the general

115. While *Durrell* claimed that he was injured defending himself from his cellmate and sought medical attention for the injury, this was disputed. *Durrell*, 71 Fed. Appx. at 719.

116. 301 F.3d 1043.

117. *Id.* at 1053.

118. *Id.* at 1046–47.

119. *Id.* at 1051.

120. *Durrell*, 71 Fed. Appx. at 719.

121. 375 F.3d 521 (7th Cir. 2004).

122. *Id.* at 523.

123. *Id.* at 524.

124. *Id.*

population.¹²⁵ At one point, Riccardo informed guards that his cellmate in the segregation unit had stolen some of his property, that he thought the cellmate might belong to the Latin Kings gang, and that the gang may try to kill him.¹²⁶ Because Centralia allowed inmates to veto housing with inmates whom they state are their enemies, the prison had to find Riccardo a new cellmate.¹²⁷ After this was done, however, Riccardo's new cellmate requested a transfer after a few days.¹²⁸ Thereafter, prisoner Juan Garcia offered to help Riccardo retrieve the property his original cellmate allegedly stole.¹²⁹ Riccardo took this as a bad sign and told the day shift guard, Lieutenant Alemond, that he feared he would be in danger if housed with Garcia.¹³⁰ Alemond said he would "take care of it," but did nothing.¹³¹

Lieutenant Rausch came on duty that evening after Alemond left.¹³² Riccardo told Rausch privately that he feared for his life if he were housed with Garcia.¹³³ Rausch replied that there was no other place for the two and that housing could not be refused while both of the prisoners were in segregated housing.¹³⁴ Rausch then brought the two inmates, Garcia and Riccardo, together and asked each if they had a problem sharing a cell with the other.¹³⁵ Riccardo shook his head no and Rausch placed the two inmates in the same cell.¹³⁶ Two evenings later Garcia attempted to anally rape Riccardo and then forced Riccardo to perform oral sex.¹³⁷

Despite the jury verdict that found deliberate indifference on the part of Rausch, the Seventh Circuit found that "no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk."¹³⁸ The majority explained its reasoning:

125. *Riccardo*, 375 F.3d at 524. Segregation at Centralia Correctional Center at that time did not mean single-celled, but rather housed with other prisoners in a separate location from the general population.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 525.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 529 (Williams, J., dissenting). Garcia also forcibly shaved Riccardo's head. *Id.*

138. *Id.* at 526 (majority opinion).

Riccardo argues, and the jury evidently concluded, that Rausch should have believed the first statement, communicated in private, rather than the second, communicated in Garcia's presence. A rational jury could have thought that guards should give priority to statements made in private. . . . Still, what Rausch should have believed is not the right question; we need to know what he *did* believe. No reasonable jury could have found, in light of Riccardo's denial of "a problem" with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm.¹³⁹

The majority opinion stated that data regarding violence within the prison and inmates' tracking records in identifying potential aggressors could have helped,¹⁴⁰ but that "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."¹⁴¹ This data request, as the dissent notes, sets forth a requirement, not supported by Supreme Court precedent, whereby the prisoner must "bolster his own account with a special showing containing material such as statistical evidence of a 'strong correlation between prisoners' professions and actual violence.'"¹⁴²

More interestingly, the Seventh Circuit completely overlooked several key objective indicators. First, inmates who have been raped once, as Riccardo was, are at a greater risk of being raped again.¹⁴³ Second, research shows that aggressor activity is often marked by overt friendly gestures that are made in an effort to trap potential targets.¹⁴⁴ Third, by placing the two prisoners together and asking

139. *Id.* at 527.

140. The court asserted that Riccardo could have made a case by demonstrating "[h]ow many murders (or homosexual assaults) occur in Centralia (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?" *Id.*

141. *Id.* at 528.

142. *Id.* at 533 (Ripple, J., dissenting from denial of rehearing en banc). Note that Riccardo filed a petition for rehearing and rehearing en banc; however, the petition was denied. *Id.* Four of the ten deciding judges dissented to the denial of the rehearing en banc. *Id.*

143. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 6.

144. It is unclear from the decision whether Riccardo told Rausch that one of the reasons he feared Garcia was because Garcia had offered to help him reclaim his property. If Riccardo had told Rausch that, it would be another factor indicating Rausch had subjective knowledge that Riccardo was at risk. See HUMAN RIGHTS WATCH, *supra* note 86, at 60 ("The perpetrator may initially appear to be a friend, even an apparent protector, but will take advantage of his acquaintance with the

if they had a problem with each other, Rausch may have created a risk to Riccardo by alerting Garcia that Riccardo had talked to a guard about the housing situation, which made Riccardo look scared or like a snitch. These are both qualities that increase an inmates' likelihood of being raped.¹⁴⁵

victim to intimidate and coerce him into sexual contact.”). Letters to Human Rights Watch from prisoners, which are included as part of their report, further describe these techniques:

[One technique to force a prisoner into sex is that] one of the bad guys will set up a power play. This is accomplished by him having two or three of his friends stop down on the prisoner of his choice in a strong manner as if to fight or beat up this prisoner. This usually puts the choosen [sic] prisoner in great fear of those type guys [sic]. The prisoner that set up this will be close by when this goes down. His roll is to step in just before the act gets physical. He defends the choosen [sic] prisoner by taking on the would be offenders. This works to gain the respect and trust of the choosen [sic] prisoner. After this encounter the choosen [sic] prisoner is encouraged to hang out with his new friend. This is repeated once or twice more to convice [sic] the choosen [sic] one of the sincere loyalties of the prisoner that set all this up They become very close, the choosen [sic] one feels compelled to show his thanks by giving at first monetary favors to his protector and it progress [sic] to the point where this guy that set up the attacks on him will not accept just the money. He starts to insist on the choosen [sic] one to give him sexual favors The fear of him, the choosen [sic] one, is that if he do [sic] not have this one Protector the rest of the guys will be back after him. After all it is better to have one person that you give sexual favors than it would be to have to be forced to do the act by two or more prisoners at the same time.

What is more prevalent at TCIP . . . is best called “coercion.” I suppose you have an idea what these engagements entail. The victim is usually tricked into owing a favor. Here this is usually drugs, with the perpetrator seeming to be, to the victim, a really swell fellow and all. Soon, however, the victim is asked to repay all those joints or licks of dope—right away. Of course he has no drugs or money, and the only alternative is sexual favors. Once a prisoner is “turned-out,” it’s pretty much a done deal. I guess a good many victims just want to do their time and not risk any trouble, so they submit. . . . The coercion-type abuses continue because of their covert nature. From the way such attacks manifest, it can seem to others, administrators and prisoners, that the victims are just homosexual to begin with. Why else would they allow such a thing to happen, people might ask.

Id. at 67. As Human Rights Watch summarizes, “At some point, the perpetrator insists that the debt be repaid via sexual favors. Again, if the victim hesitates, the perpetrator may make it terrifyingly clear to him that refusal is not an option, but this last step is often unnecessary.” *Id.* at 68; *see also* NPREC REPORT, *supra* note 7, at 70 (describing how “[i]nitial offers of friendship or protection may suddenly become manipulative or morph into demands for ‘payback.’”); REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9 (noting that perpetrators of sexual assault in prisons are more likely to be creditors of the victim).

145. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 7 (noting that victims of sexual assault in prisons are more likely to project feelings of fear).

Furthermore, as the *Riccardo* dissent points out, subjective knowledge is a question of fact to be determined by a jury. As Judge Williams stated in his dissent:

[I]t is clear that Lt. Rausch's credibility and sincerity are integral components to the usefulness of this interaction [Rausch's sit-down with both Riccardo and Rausch]. In essence, the majority accepts Lt. Rausch's assertion that his second discussion with Ricardo in front of Garcia was a sincere investigation of the potential risk to Riccardo. However, the jury found otherwise.¹⁴⁶

As the district court originally held, “[c]redibility had to have been the key to the jury’s analysis, thus the court cannot interject its own credibility determinations.”¹⁴⁷ The original jury (or trial judge) should decide questions of fact as opposed to an appellate court because the jury observed all the testimony and evidence presented and is therefore better suited to evaluate character, honesty, and believability.¹⁴⁸ Yet the Seventh Circuit, in tossing out the jury’s fact-finding results under the guise of subjective knowledge, overturned the factual determination of the district court. Once again, the majority focused solely on the aggressor’s attributes, asking for data “identifying potential aggressors,”¹⁴⁹ even though research demonstrates that it is easier to identify those who are at risk of being assaulted as opposed to those that are at risk of committing an assault.¹⁵⁰

In *Taylor v. Michigan Department of Corrections*,¹⁵¹ decided the year after the *Farmer* decision, inmate Timothy Taylor was raped after he was transferred from a minimum-security prison with single cells to one with dormitory style housing.¹⁵² Taylor was five feet tall, weighed 120 pounds, was mildly retarded, had youthful features, and suffered from a seizure disorder.¹⁵³ The Sixth Circuit overturned the district court’s grant of the defense motion for summary judgment.¹⁵⁴ The Sixth Circuit held that Taylor presented a

146. *Riccardo*, 375 F.3d at 531 (Williams, J., dissenting).

147. *Riccardo v. Rausch*, No. Civ. 99-372-CJP, 2002 WL 32741124, at *9 (S.D. Ill. Mar. 7, 2002).

148. See, e.g., *Sanville v. McCaughtry*, 266 F.3d 724, 737 (7th Cir. 2001) (“Whether a prison official had the requisite knowledge is a question of fact.”) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

149. *Riccardo*, 375 F.3d at 527.

150. HUMAN RIGHTS WATCH, *supra* note 86, at 52.

151. 69 F.3d 76 (6th Cir. 1995).

152. *Id.* at 78.

153. *Id.*

154. *Id.* at 84.

viable claim and that a jury should decide whether the warden knew that conditions posed a substantial risk of harm to prisoners like Taylor, whether he knew there was no procedure in place to protect vulnerable inmates from being transferred to dangerous conditions, and whether despite that knowledge he failed to adopt reasonable policies to protect Taylor.¹⁵⁵ This is the only decision on record that considered the victim's characteristics when determining whether subjective knowledge existed, yet this is what courts should examine because it is a more accurate indication of risk of sexual assault.

There are myriad factors at play in these decisions. But it is fascinating that courts typically look at aggressor attributes, which are a poor fit for inferring risk, while ignoring victim attributes, which are a good fit. It seems possible that this may occur at least in part due to underlying beliefs that the victim is not worthy of protection.

D. *Conflated Question Two: Did the Prisoner Consent?*

1. Research indicates homosexuality is often equated with consent.

Prison rape may be improperly viewed as consensual sex because some guards believe that a homosexual man would never refuse to have sex with another man; thus, a homosexual inmate can never actually be raped. Peter Nacci and Thomas Kane, whose research focuses on sexual conduct in prisons, found that officers equated homosexuality and bisexuality with voluntariness.¹⁵⁶ In a three-month study of the Philadelphia prison system, Alan Davis found that "homosexual liaisons" were often deemed to occur after threats of or actual gang rape and that prison officials simply considered such activities consensual.¹⁵⁷ This set of beliefs allows guards to answer the second conflated question in the negative because the guard believes that homosexuals and bisexuals will always consent;¹⁵⁸ thus there is no illegal act from which the guards need to protect the prisoners.

Indeed, some prison officials may hold notions of masculinity that deny that a "true man" can ever be raped. This notion is best

155. *Id.*

156. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 8 *FED. PROBATION* 46, 48 (1984).

157. A. Davis, *Sexual Assaults in the Philadelphia Prison System*, in *THE SEXUAL SCENE* (John H. Gagnon & William Simon, eds., 1970).

158. See, e.g., Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Back-Drop for "Deliberate Indifference,"* 92 *J. CRIM. LAW & CRIMINOLOGY* 127, 178 (2001).

explained by Dr. Helen Eigenberg, a professor at the University of Tennessee at Chattanooga, who undertook a detailed examination of correctional officers' attitudes and their contribution to the prison rape epidemic.¹⁵⁹ The notion is that "men" cannot actually be raped because "men" are those with power, control, and sexual dominance—people who would die fighting off a rapist rather than become a victim.¹⁶⁰ As Eigenberg writes, "[I]t is essential to portray male rape victims as weak, homosexuals—as effeminate men—*because in our culture the definition of masculinity does not allow for male rape victims.*"¹⁶¹ Eigenberg asserts that when viewing prison rape within the broader context of all rape literature one finds that "traditional definitions about gender role socialization and homosexuality may facilitate victim blaming."¹⁶²

This lack of the ability to recognize "men" as being potential victims of rape leads to the well-documented description of "situational homosexuality."¹⁶³ In the prison rape argot those who are coerced or physically threatened into sexual acts are deemed "situational homosexuals."¹⁶⁴ This allows rape to be considered "consensual homosexual behavior" while "the victims' behavior has been used to explain and legitimize their victimization."¹⁶⁵ This set of beliefs allows a guard to transform a rape into a consensual sex act therefore avoiding liability for failing to protect the inmate by saying that the victim was a consensual participant. Such belief systems can be seen in the following cases.

2. Case law indicates victim sexuality is a disregarded salient risk factor and situational homosexuality can be used to find consent.

In *Harvey v. California*,¹⁶⁶ Paul Harvey was raped by Smith, his cellmate.¹⁶⁷ Previously, Harvey had told Sergeant Parks that he was

159. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60.

160. *Id.* at 437–38.

161. *Id.* at 437 (emphasis in original).

162. *Id.* at 438.

163. *Id.* at 437; *see also* Helen Eigenberg, *Homosexuality in Male Prisons: Demonstrating the Need for a Social Constructionist Approach*, 17 CRIM. JUST. REV. 219 (1992).

164. *See* Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 437 (describing how the literature defines situational homosexuality as "heterosexual men engaging in sex with other men because of the situational nature of their sexual deprivation," thus ignoring the process by which new inmates are coerced into participating in sexual behavior); *see also* HUMAN RIGHTS WATCH, *supra* note 86, at 52 ("Although gay inmates are much more likely than other inmates to be victimized in prison, they are not likely to be perpetrators of sexual abuse.").

165. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 438.

166. 82 Fed. Appx. 544 (9th Cir. 2003).

167. *Id.* at 545.

nervous about being housed with another prisoner because he (Harvey) was a homosexual.¹⁶⁸ Several years earlier, Smith was caught naked in bed with another prisoner; however, the Ninth Circuit rejected this circumstantial evidence as irrelevant in establishing subjective knowledge because there was no allegation of force in that instance.¹⁶⁹ In upholding the district court's grant of summary judgment in favor of the defendants, the Ninth Circuit held that:

Even if Harvey told Parks that he was nervous about being placed in a cell with another prisoner because Harvey was a homosexual, this is not sufficient to show that Parks knew there was a risk from this *particular* prisoner. Nor is it sufficient to show deliberate indifference that the other prisoner, Smith, had been caught naked in bed with another prisoner several years before. Since there was no allegation of force in that case, Parks did not have sufficient reason to know or suspect that there was a risk Smith would rape Harvey. . . . Since Harvey did not allege that Parks knew of the risk, and presented no evidence from which a jury could reasonably infer that Parks in fact knew, Harvey states no Eighth Amendment claim.¹⁷⁰

There are several flaws with the Ninth Circuit's holding. First, the Ninth Circuit misapplied *Farmer* by stating that Harvey had to demonstrate that there was a risk "from this *particular* prisoner."¹⁷¹ In *Farmer*, the Supreme Court specifically stated that an official need only know that there is a substantial risk to inmate safety in general.¹⁷² Second, the Ninth Circuit's dismissal of the prior Smith incident because there was no allegation of force was presumptuous. It illustrates notions of "situational homosexuality" and some guards' beliefs that homosexuals deserve to be raped. Third, Harvey expressed his fear of harm due to his homosexuality, and research indicates that homosexuals may be at a greater risk of sexual

168. *Id.*

169. *Id.*

170. *Id.* (emphasis in original).

171. *Id.*

172. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). As an example the Court states, "If, 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 night clinging to the bars nearest the guards' station,' . . . it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." *Id.* at 843 (quoting *Hutto v. Finney*, 437 U.S. 678, 681-82 & n.3 (1978)).

abuse in prisons than heterosexuals.¹⁷³ Here again the court looked to the features of the aggressor, perhaps precisely because the victim's attributes clash with deep-seated beliefs about homosexuality and consent.

In *Lewis v. Richards*,¹⁷⁴ inmate Tommy Lewis brought an Eighth Amendment failure-to-protect claim.¹⁷⁵ Lewis was sexually assaulted three times.¹⁷⁶ Lewis claimed his first attackers were members of the Gangster Disciples, a gang with significant membership and power within the prison.¹⁷⁷ The Seventh Circuit held there was no evidence that prison officials had specific knowledge of a risk to Lewis before the initial attack.¹⁷⁸ Lewis was then transferred to a different dormitory.¹⁷⁹ In the new dormitory, he was sexually assaulted, choked, and stabbed in the bathroom by two different members of the Gangster Disciples.¹⁸⁰ Lewis told the court that prisoners in the dormitory had called him a "snitch"; the Seventh Circuit, however, found that because Lewis did not tell the prison officials that inmates had called him a snitch, the guards could not have known he was at risk for the second attack and that the prison fulfilled its obligation to Lewis by transferring Lewis after the first attack.¹⁸¹ While the lawsuit regarding the first two incidents was pending, Lewis was placed in the suicide unit and then in the general population of the prison's psychiatric unit, prior to an anticipated move to protective custody.¹⁸² While in the general population of the psychiatric unit, three inmates raped him.¹⁸³ Lewis claimed that those inmates stated that they were raping him for "Schaefer," one of the inmates involved in the second attack.¹⁸⁴ The prison held an internal disciplinary hearing regarding the event during which Lewis was charged and found guilty of engaging in consensual sexual activity and he lost six months good-credit

173. See, e.g., Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 670–71 (describing past research that examined the relationship between victim sexuality and sexual assault in prisons); Hensley, *Male Oklahoma Correctional Facilities*, *supra* note 24, at 597–98 (same); NPREC REPORT, *supra* note 7, at 73–74.

174. 107 F.3d 549 (7th Cir. 1997).

175. *Id.* at 551.

176. *Id.* at 551–52.

177. *Id.* at 551.

178. *Id.* at 553.

179. *Id.* at 551.

180. *Id.* at 551–52.

181. *Id.* at 554.

182. *Id.* at 552.

183. *Id.*

184. *Id.*

time.¹⁸⁵ Lewis did not appeal the disciplinary verdict but did amend his civil suit to include the third alleged rape.¹⁸⁶

The Seventh Circuit held that although there was a material question of fact regarding the defendant's subjective knowledge for the third rape, the results of the prison's internal disciplinary hearing, which occurred while the prison was being sued by Lewis, barred Lewis' third allegation under *Heck v. Humphrey*.¹⁸⁷ The Sev-

185. *Id.* Good-credit time is time earned by inmates if they stay out of trouble. This time can then be deducted from one's original sentence; looked at another way, one is deemed to have served the amount of time one is incarcerated plus one's good-credit time. The practice and exact name for the credit varies from state to state and is provided statutorily. The Federal Bureau of Prisons also awards such credit. 18 U.S.C. § 3624(b).

186. *Lewis*, 107 F.3d at 552.

187. *Id.* at 555 (applying *Heck v. Humphrey*, 512 U.S. 477 (1994)). In *Heck*, a prisoner who was convicted of voluntary manslaughter by an Indiana state court brought a Section 1983 action against the two prosecutors and the police investigator seeking compensatory and punitive damages for "unlawful, unreasonable, and arbitrary investigation," knowing destruction of exculpatory evidence, and use of an "illegal and unlawful voice identification procedure" in court. *Heck*, 512 U.S. at 478-79. *Heck* required the Court to decide whether a Section 1983 claim for damages that calls into question the legality of a conviction or confinement is valid. *Id.* at 483. The Court held that it is not valid because Section 1983 is based on general tort principles and those tort principles would not permit a collateral attack on a criminal decision through a civil suit. *Id.* at 486. Thus, the only way to pursue a Section 1983 claim for actions that lead to a criminal conviction would be to have the criminal conviction invalidated. *Id.* at 486-87.

In deciding *Heck*, the Court briefly reviewed its holdings in *Preiser v. Rodriguez* and *Wolff v. McDonnell*. *Id.* at 481-82 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974)). In *Preiser*, the Court examined the overlap between Section 1983 actions and habeas corpus petitions. *Heck*, 512 U.S. at 480-81. In this case, prisoners brought a Section 1983 action challenging their confinement and seeking release. *Preiser*, 411 U.S. at 476. The Court held that, while such a claim may technically fall under the language of Section 1983, it must instead be brought under a habeas corpus petition. *Id.* at 489. *Heck* was distinguished from *Preiser* because in *Preiser*, respondents sought a speedy release, while in *Heck*, the prisoner sought damages and the Court examined whether a damages claim would be cognizable in a Section 1983 action. *Heck*, 512 U.S. at 481.

In *Wolff*, a prisoner brought a Section 1983 action seeking restoration of good-time credits and damages for the deprivation of his civil rights due to the process by which his credits were taken away. *Wolff*, 418 U.S. at 542-43. The Court noted that *Preiser* precluded the claim for restoration of good time credits; however, the damages claim was actionable because it did not call into question the validity of the denial of the good-time credits (the result) but rather the method of denying the good-time credits (the process). *Id.* at 554-55. As the Court explained in *Heck*, the *Wolff* Court never decided whether a Section 1983 action that called into question the validity of a result was actionable. *Heck*, 512 U.S. at 482. Thus, the Court undertook to decide that issue in *Heck*. The *Heck* Court also clarified that *Wolff* did

enth Circuit, in applying *Heck*, held that if the court awarded damages to Lewis it would call into question the result of the prison's inner disciplinary finding that Lewis engaged in prohibited consensual sex.¹⁸⁸ Thus, the court held that unless the disciplinary hearing was invalidated, Lewis had no claim for the third attack even though the court noted that there were disputed issues of material fact.¹⁸⁹ Additionally, regarding the first two allegations of rape, the Seventh Circuit held that because the plaintiff did not present "evidence of the number or frequency of incidents of inmate-on-inmate violence at [the prison where the assault occurred]," the case could not survive the summary judgment stage.¹⁹⁰

The Seventh Circuit's reasoning is flawed. *Heck* dealt with whether a prisoner had a valid Section 1983 action if the action brought into question the underlying validity of a criminal conviction or the confinement resulting from that criminal conviction.¹⁹¹ Internal prison disciplinary findings are not tantamount to a criminal conviction.¹⁹² Lewis's claim did not call into question his basic conviction or his confinement in prison. The issue addressed in the disciplinary hearing was whether the defendant at the hearing was raped, which turned on the question of whether Lewis consented. If an internal disciplinary committee can decide this issue and then block an Eighth Amendment Section 1983 decision through *Heck*, then every prison is incentivized to have a disciplinary committee review every instance of sexual contact and deem it consensual. The Seventh Circuit's decision in *Lewis* thus creates a situation in which the prison system is not only the defendant, but also the judge and the jury. The additional fact that the disciplinary hearing regarding the third incident occurred while Lewis's civil suit for the first two Eighth Amendment failure-to-protect claims was pending casts further doubt on the logic of the Seventh Circuit's holding. There may have been additional factors at work in *Lewis*, which are not contained within the appellate record, but the case is illustrative of a "situational homosexuality" determination being used to block the case from moving forward.

not mean that a prisoner could recover damages "measured by the action loss of good time," but rather damages that measured the "deprivation of civil rights" through the use of improper procedures. *Id.*

188. *Lewis*, 107 F.3d at 555.

189. *Id.*

190. *Id.*

191. *Heck*, 512 U.S. at 483.

192. *See, e.g.*, *Walpole v. Hill*, 472 U.S. 445, 456 (1985) (citing *Wolff*, 418 U.S. at 556); *Wolff*, 418 U.S. at 556.

In *Johnson v. Johnson*,¹⁹³ Roderick Johnson, a black homosexual prisoner, brought an Eighth Amendment and two equal protection claims¹⁹⁴ after being sexually assaulted over an eighteen-month period.¹⁹⁵ Johnson was transferred to the Allred Unit, where he was placed in the general population despite the fact that prison officials knew he was a “homosexual, and possessed an effeminate manner,”¹⁹⁶ and was previously housed in safekeeping, which is reserved for vulnerable inmates.¹⁹⁷ Upon his transfer, Johnson stated that the Unit Classification Committee (UCC) told him that they “don’t protect punks on this farm.”¹⁹⁸ Johnson was raped almost immediately after entering the general population and began an eighteen-month stint during which he was claimed as various prisoners’ sexual servant.¹⁹⁹ He informed numerous officials of his rapes, requested medical attention, sought help from guards, filed multiple “life-endangerment” forms, and wrote letters to prison officials.²⁰⁰ Johnson’s requests were repeatedly rebuffed or investigated without interviewing any of the inmates mentioned in the complaints, such that no corroboration for his complaints was found.²⁰¹ He did, however, meet with the UCC seven times to request a transfer.²⁰² Each time the UCC refused to transfer him; according to Johnson, they told him to fight off the other inmates or submit and insinuated that because he was a homosexual, he probably enjoyed the sexual assaults.²⁰³ Johnson was finally transferred and placed in safekeeping housing after he contacted the ACLU.²⁰⁴

Johnson’s original complaint stated three causes of action: an Eighth Amendment violation based on the officials’ failure to protect him; an equal protection claim that the defendants denied him protection because he was black; and an additional equal protection claim that the defendants denied him protection because he was a homosexual.²⁰⁵ The defendants responded with a denial of

193. 385 F.3d 503 (5th Cir. 2004).

194. *Id.* at 514.

195. *Id.* at 512–13.

196. *Id.* at 512.

197. *Id.*

198. *Id.*

199. *Id.* at 512–13.

200. *Id.* at 513.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 514.

almost all the charges.²⁰⁶ Three defendants then moved for judgment on the pleadings for the two equal protection claims, and this motion was granted by the court without opposition from the plaintiff.²⁰⁷ In November 2002, all the defendants filed a motion to dismiss all causes of action for failure to exhaust administrative remedies²⁰⁸ as required by the Prison Litigation Reform Act.

Under the Prison Litigation Reform Act (PLRA), a prisoner must exhaust all administrative remedies before filing a Section 1983 suit.²⁰⁹ Additionally, the PLRA limits recovery stating that “[n]o 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.”²¹⁰ The majority of circuits take the position that this limitation is only for compensatory damages, and thus nominal or punitive damages and injunctive and declaratory relief are excluded.²¹¹ What level of sexual abuse constitutes physical injury is unclear.²¹² Furthermore, the PLRA states that if a prisoner has three cases dismissed as malicious, frivolous, or for failure to state a claim while he is incarcerated or detained, he may not proceed in another action *in forma pauperis* unless he is in imminent danger of serious physical

206. *Id.*

207. *Id.*

208. *Id.*

209. 42 U.S.C. § 1997e (2006).

210. § 1997e(e).

211. *See, e.g.*, JOHN BOSTON, THE LEGAL AID SOCIETY, PRISONERS' RIGHTS PROJECT, THE PRISON LITIGATION REFORM ACT 99–100 (Sep. 2004), *available at* www.wnylc.net/pb/docs/plra2cir04.pdf. Regarding nominal and punitive damages, *see* Searles v. Van Bebber, 251 F.3d 869, 881 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 252–53 (3d Cir. 2000); *but see* Davis v. Dist. of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998). Regarding the availability of injunctive and declaratory relief, *see* Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Perkins v. Kansas Dep't of Corrs., 165 F.3d 803, 807 (10th Cir. 1999); Davis v. Dist. of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

212. For example, the Second Circuit held this means the injury must be more than de minimis and stated that the sexual assaults alleged in the case qualified as a physical injury “as a matter of common sense.” *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *see also* *Kemner v. Hemphill*, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (“[W]here only fear and intimidation are used, it might appear that no physical force is present. But that is error.”); *Nunn v. Michigan Dep't of Corr.*, No. 96-CV-71416, 1997 WL 33559323, at *4 (E.D. Mich. 1997). However, the Western District of Virginia dismissed a prisoner's complaint regarding female staff that routinely viewed him in the nude for lack of physical injury. *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 566 (W.D. Va. 2000).

injury.²¹³ However it is still unclear whether all forms of sexual assault would qualify as physical injuries. If they did not, a prisoner's valid suit could be dismissed because he had three prior cases dismissed for failure to state a claim.²¹⁴ Additionally, the Supreme Court held in 2001 that administrative exhaustion is required even if it cannot provide the relief requested, such as money damages.²¹⁵ Furthermore, even if the grievance procedure is faulty or illegal, the prisoner must follow it.²¹⁶ Thus, the defendants in *Johnson* as-

213. 28 U.S.C. § 1915(g) (2006). Several circuits have held that "imminent danger of serious physical injury" includes risk of future injury. See *McAlphin v. Toney*, 281 F.3d 709, 711 (8th Cir. 2002); *Gibbs v. Cross*, 160 F.3d 962, 965-66 (3d Cir. 1998). Further, an ongoing risk of assault from another prisoner qualifies for the imminent danger exception. *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998).

214. See, e.g., *Brown v. City of Philadelphia*, No. 08-2419, 2009 U.S. App. LEXIS 10790, at *1 (3d Cir. May 21, 2009); *Jackson v. Johnson*, 475 F.3d 261, 265, 267 (5th Cir. 2007); *Bozeman v. Johnson*, No. 2:07-CV-290, 2007 U.S. Dist. LEXIS 26590, *1 (M.D. Ala. Apr. 10, 2007).

215. *Booth v. Churner*, 532 U.S. 731, 733-34 (2001); see also *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Prior to the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), there was a circuit split regarding total versus mixed claim exhaustion. The Second Circuit held that if dismissal for failure to exhaust administrative procedures is proper for one claim, but exhaustion was fulfilled for another claim, then both claims need not be dismissed, only the claim for which exhaustion was not fulfilled. *Ortiz v. McBride*, 380 F.3d 649, 663 (2d Cir. 2004). However, the Sixth, Eighth, and Tenth Circuits have all required total exhaustion and dismissed cases demonstrating only mixed exhaustion. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10th Cir. 2004); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). In *Jones*, the Supreme Court held that within one action unexhausted claims may be dismissed, but exhausted claims may proceed. 549 U.S. at 218-22. Fulfilling exhaustion is not a swift process. Several circuits have held that exhaustion requires pursuing one's grievances through the highest level of administrative review. *Post v. Taft*, 97 Fed. Appx. 562, 563 (6th Cir. 2004); *Smith v. Sundquist*, 33 Fed. Appx. 798, 799 (6th Cir. 2002); *Lyons-Bey v. Curtis*, 30 Fed. Appx. 376, 378 (6th Cir. 2002); *Dixon v. Page*, 291 F.3d 485, 489-91 (7th Cir. 2002). This includes waiting for a response from the highest administrative level before filing in court. *Tolbert v. McGrath*, No. C 02-5465, 2002 WL 31898207, at *1 (N.D. Cal. Dec. 27, 2002); see also *Williams v. Cooney*, No. 01 CV 4623, 2004 WL 434600, at *3 (S.D.N.Y. Mar. 8, 2004). Additionally, the prisoner must wait for the response even if it is untimely. See, e.g., *Daniels v. California Dep't of Corrs.*, No. C 02-2088CRB(PR), 2003 WL 21767466, at *2 (N.D. Cal. Jul. 29, 2003). However, the district court of Delaware did hold that the exhaustion requirement was met when prison authorities failed to respond to a prisoner's complaint for four years because the court assumed that such a delay exceeded the amount of time allowed for prison authorities to respond under the grievance procedure. *Woulard v. Food Serv.*, 294 F. Supp. 2d 596, 602 (D. Del. 2003).

216. See, e.g., *Ferrington v. Louisiana Dep't of Corrs.*, 315 F.3d 529, 531 (5th Cir. 2002) (requiring prisoner to follow the institution's grievance procedure even

serted that the plaintiff's claims were barred because he failed to fully exhaust all his administrative remedies prior to filing his complaint with the district court.²¹⁷

Also in November 2002, the remaining defendants facing equal protection claims filed a motion for judgment on the pleadings, asserting qualified immunity.²¹⁸ While these motions were pending, the defendants filed a motion for summary judgment on the Eighth Amendment claim.²¹⁹ The district court denied the January 2003 motion for summary judgment and also rejected defendants' failure-to-exhaust claims and qualified immunity assertions, finding that there was a question of fact regarding the subjective knowledge of various prison officials.²²⁰ Afterward, the defendants requested a ruling on their prior motion for judgment on the pleadings.²²¹ The district court denied that motion,²²² and denied as moot the failure-to-exhaust and qualified immunity claims asserted in defendants' various November 2002 motions.²²³ The defendants then filed two notices of appeal, one appealing the order denying summary judgment and one appealing the order denying the motion for judgment on the pleadings.²²⁴ The district court certified and the Fifth Circuit granted leave to rule on the interlocutory appeals regarding the denials of qualified immunity and failure-to-exhaust administrative remedies.²²⁵

The Fifth Circuit stated that it lacked interlocutory discretion and thus could not review the district court's finding that a question of fact existed regarding defendant's subjective knowledge.²²⁶ The court could and did, however, review the evidence presented to determine if the defendant was entitled to summary judgment on qualified immunity grounds.²²⁷ The Fifth Circuit found that the non-UCC defendants (various prison officials) were entitled to

though the Louisiana Supreme Court had held that the procedure was unconstitutional).

217. *Johnson v. Johnson*, 385 F.3d 503, 514 (5th Cir. 2004).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 515.

224. *Id.*

225. *Id.*

226. *Id.* at 523–24.

227. *Id.* at 524. Qualified immunity is granted to officials when their actions do not violate “clearly established law.” Clearly established law is determined through an objective analysis, i.e., was one's behavior objectively unreasonable at the time behavior was committed? Qualified immunity can be granted to officials

qualified immunity because they responded reasonably by referring Johnson's complaints for further investigation.²²⁸ The court held that the UCC defendants, however, were not entitled to qualified immunity because Johnson's allegations that they responded with statements like "fuck or fight" and insinuated that Johnson enjoyed being raped could be viewed by a jury as an unreasonable method of discharging their duty to protect prisoners.²²⁹

The Eighth Amendment is supposed to reflect "contemporary standards of decency."²³⁰ Perhaps our contemporary standards of decency parallel those of the officers who believe homosexual prisoners deserve to be raped. If that is the case, it would not matter if the officers protected their actions by saying they thought the victim consented. But if this is not the case, then the standards for analyzing and proving an Eighth Amendment violation should be changed to reflect this. At the heart of the issue is consent.²³¹ Individual views of what constitutes consent vary from person to person. The United States' jury system creates a method of aggregating the different opinions in order to create societal standards. By allowing the consent question to be answered by society at large, we draw boundaries between acceptable and unacceptable conduct. Unfortunately, this societal interpretation of consent is lost in the prison context. Instead of being a part of society, prisons and prisoners have become the "other," and an extremely small number of peo-

who commit illegal acts if, at the time of commission, those acts did not clearly violate established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

228. *Johnson*, 385 F.3d at 526.

229. *Id.* at 527. Regarding Johnson's Equal Protection claims, the Fifth Circuit dismissed the racial claim for failure to exhaust administrative remedies, as required by the PLRA. *Id.* at 523. However, Johnson's sexual orientation-based Equal Protection claim withstood summary judgment. *Id.* Further, the Fifth Circuit rejected defendants' argument that Johnson failed to provide any examples of non-homosexual prisoners that were treated better in a similar situation, stating, "It is unclear how a prisoner is supposed to possess identifying information regarding other inmates' treatment at the complaint stage." *Id.* at 531. This stands in contrast to the Seventh Circuit's requests for data regarding other instances of rape and violence in the prison for an Eighth Amendment claim to withstand summary judgment. *Riccardo v. Rausch*, 375 F.3d 521, 527 (7th Cir. 2004).

230. *Hudson v. MacMillian*, 503 U.S. 1, 7-8 (1991) (stating that in an Eighth Amendment excessive force case, the way to judge excessive force claims is to examine whether the force was applied in "a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm" and that "contemporary standards of decency" should be used to determine whether the action in question was malicious and sadistic).

231. Of course there are instances in which an individual's consent is irrelevant because he or she is deemed incapable of giving free consent, but those situations are not the subject matter of this Article.

ple control the boundaries of acceptable conduct for inmates, guards, and prison officials. When it comes to sex in prisons this non-representative sample of prison officials and judges have become the decision-makers on consent, and therefore the only creators of the proper normative behavior for prisons and prisoners. This must change because prisons and prisoners are a part of society as a whole, and society as a whole should be responsible for determining normative consequences.

II.

COMBATING THE CONFLATION WITH HELP FROM THE PRISON RAPE ELIMINATION ACT AND EQUAL PROTECTION

A. *PREA and The National Prison Rape Elimination Commission*

The Prison Rape Elimination Act of 2003 (PREA) authorized the Bureau of Justice Statistics (BJS) to gather statistics on prison rape.²³² The Review Panel on Prison Rape (RPPR) then reviewed such statistics and held public hearings to aid the BJS in identifying common characteristics of rape victims and perpetrators, as well as discerning the correctional facilities with the highest and lowest incidences of prison rape.²³³ On December 29, 2008, the RPPR released its *Report on Rape in Jails in the U.S.*, which described certain findings regarding common characteristics of victims and aggressors, and a list of best practices based on the RPPR's review of the BJS data and the public hearings.²³⁴ These best practices fall into the following categories: training of staff and inmates; classification of inmates; surveillance; reporting; investigation; prosecution; and relevant policies and practices.²³⁵ The National Prison Rape Elimination Commission (NPREC) examined the RPPR's report and conducted numerous hearings across the nation with various individuals and entities involved with the issue.²³⁶ The NPREC then

232. 42 U.S.C. § 15603 (2006).

233. § 15603(b)(3)(A).

234. REVIEW PANEL ON PRISON RAPE, *supra* note 87. The jails selected to participate in the hearings were not necessarily the three with the highest and lowest incidences of sexual victimization because the BJS's victimization rates were based on a sample of inmates from 282 jail facilities as opposed to a complete enumeration, which makes its findings subject to sampling error. *Id.* at 3–6. The Review Panel on Prison Rape made the final selection of the facilities based on the data in the tables within the BJS' survey that contained the tabulated results of the surveys by facility and state. *Id.*

235. *Id.* at 19–28.

236. NPREC REPORT, *supra* note 7.

proposed national standards in June 2009.²³⁷ The Attorney General of the United States must publish a final rule adopting national standards no later than one year after receiving the official NPREC report.²³⁸ The NPREC published nine findings and a multitude of best policies and practices.²³⁹

It is vital that the NPREC standards regarding data collection,²⁴⁰ data storage, publication and destruction,²⁴¹ data review

237. *Id.* The Report acknowledges the tension in the Commission's mandates, stating, "Congress conferred upon the Commission an enormous responsibility: developing national standards that will lead to the prevention, detection, and punishment of prison rape. Yet Congress also and appropriately required us to seriously consider the restrictions of cost, differences among systems and facilities, and existing political structures." *Id.* at v.

238. 42 U.S.C. § 15607(a)(1). It should be noted that pursuant to § 15606(e)(3), the standards proposed by the National Prison Rape Elimination Commission cannot "impose substantial additional costs compared to the costs presently expended by Federal, State, or local prison authorities."

239. NPREC REPORT, *supra* note 7. The nine findings are as follows: "(1) Protecting prisoners from sexual abuse remains a challenge in correctional facilities across the country. Too often, in what should be secure environments, men, women, and children are raped or abused by other incarcerated individuals and corrections staff." *Id.* at 3. "(2) Sexual abuse is not an inevitable feature of incarceration. Leadership matters because corrections administrators can create a culture within facilities that promotes safety instead of one that tolerates abuse." *Id.* at 5. "(3) Certain individuals are more at risk of sexual abuse than others. Corrections administrators must routinely do more to identify those who are vulnerable and protect them in ways that do not leave them isolated and without access to rehabilitative programming." *Id.* at 7. "(4) Few correctional facilities are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it. Dramatic reductions in sexual abuse depend on both." *Id.* at 9. "(5) Many victims cannot safely and easily report sexual abuse, and those who speak out often do so to no avail. Reporting procedures must be improved to instill confidence and protect individuals from retaliation without relying on isolation. Investigations must be thorough and competent. Perpetrators must be held accountable through administrative sanctions and criminal prosecution." *Id.* at 11. "(6) Victims are unlikely to receive the treatment and support known to minimize the trauma of abuse. Correctional facilities need to ensure immediate and ongoing access to medical and mental health care and supportive services." *Id.* at 14. "(7) Juveniles in confinement are much more likely than incarcerated adults to be sexually abused, and they are particularly at risk when confined with adults. To be effective, sexual abuse prevention, investigation, and treatment must be tailored to the developmental capacities and needs of youth." *Id.* at 16. "(8) Individuals under correctional supervision in the community, who outnumber prisoners by more than two to one, are at risk of sexual abuse. The nature and consequences of the abuse are no less severe, and it jeopardizes the likelihood of their successful reentry." *Id.* at 19. "(9) A large and growing number of detained immigrants are at risk of sexual abuse. Their heightened vulnerability and unusual circumstances require special interventions." *Id.* at 21.

240. The proposed standard reads:

for corrective action,²⁴² and audits of standards²⁴³ be adopted by

The agency collects accurate, uniform data for every reported incident of sexual abuse using a standardized instrument and set of definitions. The agency aggregates the incident-based sexual abuse data at least annually. The incident-based data collected includes, at a minimum, the data necessary to answer all questions from the most recent version of the BJS Survey on Sexual Violence. Data are obtained from multiple sources, including reports, investigation files, and sexual abuse incident reviews. The agency also obtains incident-based and aggregated data from every facility with which it contracts for the confinement of its inmates.

Id. at 85.

241. The proposed standard reads:

The agency ensures that the collected sexual abuse data are properly stored, securely retained, and protected. The agency makes all aggregated sexual abuse data, from facilities under its direct control and those with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means. Before making aggregated sexual abuse data publicly available, the agency removes all personal identifiers from the data. The agency maintains sexual abuse data for at least 10 years after the date of its initial collection unless Federal, State, or local law allows for the disposal of official information in less than 10 years.

Id. at 86.

242. The proposed standard reads:

The agency reviews, analyzes, and uses all sexual abuse data, including incident-based and aggregated data, to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training. Using these data, the agency identifies problem areas, including any racial dynamics underpinning patterns of sexual abuse, takes corrective action on an ongoing basis, and, at least annually, prepares a report of its findings and corrective actions for each facility as well as the agency as a whole. The annual report also includes a comparison of the current year's data and corrective actions with those from prior years and provides an assessment of the agency's progress in addressing sexual abuse. The agency's report is approved by the agency head, submitted to the appropriate legislative body, and made readily available to the public through its Web site or, if it does not have one, through other means. The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but it must indicate the nature of the material redacted.

Id. at 87.

243. The proposed standard reads:

The public agency ensures that all of its facilities, including contract facilities, are audited to measure compliance with the PREA standards. Audits must be conducted at least every three years by independent and qualified auditors. The public or contracted agency allows the auditor to enter and tour facilities, review documents, and interview staff and inmates, as deemed appropriate by the auditor, to conduct proper audits. The public agency ensures that the report of the auditor's findings and the public or contracted agency's plan for corrective action (DC-3) are published on the appropriate agency's Web site if it has one or are otherwise made readily available to the public.

the Attorney General as part of the promulgated standards because they are vital for plaintiffs who seek to prove deliberate indifference.²⁴⁴ Besides greater collection, retention, and analysis of data, the NPREC's findings and recommended standards regarding staff training and prisoner classification are most helpful in increasing a plaintiff's opportunity to prove subjective knowledge.

1. Staff Training: Ensuring Conflated Question One Regarding Entitlement to Protection is Answered Correctly

Before subjective knowledge can ever be proven, one must ensure that all correctional employees understand that each and every prisoner is entitled to serve his or her time free of sexual abuse. Further, all correctional employees must understand that PREA's definition of rape is the law, and thus even if there is no evidence of physical force, an inmate who participates in a sex act due to fear was in fact raped.²⁴⁵ Prisons need to mandate training for all employees and volunteers, and each needs to acknowledge in writing that such individual has participated in and understood the training.²⁴⁶ This helps to parse the first conflated question (whether the prisoner was entitled to protection) by ensuring that a clear written record exists establishing that each prison official knew that each prisoner is entitled to protection. These trainings must cover the definitions of sexual assault under PREA, that sexual abuse in prison at any level and between any parties is not allowed, the latest research in victim and aggressor identification, and best practices for prison management. The content of these trainings must be written and maintained by each facility. Additionally, prison employees need to record all allegations of abuses, substantiated or not, and all allegations need to be maintained in both the accuser's and the accused's files. Currently some facilities only maintain records of incidents for which officials substantiated the allega-

Id. at 88.

244. Courts have specifically requested the use of this data in order to prove deliberate indifference. *See, e.g.,* Riccardo v. Rausch, 375 F.3d 521, 527 (7th Cir. 2004) (stating that Riccardo "might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence" by relying on data such as murder and assault rates or the number of violent events that were preceded by requests for protection).

245. 42 U.S.C. § 15609(9)(C).

246. *See* NPREC REPORT, *supra* note 7, at 6 ("Only through training can staff understand the dynamics of sexual abuse in a correctional environment, be well informed about the agency's policies, and acquire the knowledge and skills necessary to protect prisoners from abuse and respond appropriately when abuse does occur.").

tions.²⁴⁷ When proving deliberate indifference the fact that there were prior accusations of sexual abuse regarding a prisoner involved in another alleged assault, be it the alleged attacker or the alleged victim, regardless of whether they were substantiated, has circumstantial value for proving the officials' knowledge of risk, and it is critical that such records are maintained.

Some of the NPREC's standards require an examination of how well corrections employees work in a sexual assault zero-tolerance environment and require that those results be factored into hiring and promotion decisions.²⁴⁸ Psychological tests can and should be administered to help determine which employees are better suited to facilitate the elimination of prison rape.²⁴⁹ A record of the test administered, the date of administration, and the results should be placed in each employee's file. Plaintiffs could then use such test results in order to help bolster proof of deliberate indifference. While certainly not conclusive, these tests could shed light on how prison employees view the conflated questions.

Finally, society needs to come at this from new perspectives. One of NPREC's recommendations is for all facilities to "take a simple step to protect youth from sexual abuse: encourage all residents during intake to tell staff if they fear being abused."²⁵⁰ A National Institute of Corrections study finds that inmates' views on their own vulnerability are essential in properly screening and protecting inmates.²⁵¹ Yet when particular victim's views were known, as in *Harvey* and to a certain extent in *Riccardo*, it was disregarded by the courts. Thus, courts should be included in the training. Judges are busy people, and they may not know about or fully understand the scope and mandates of PREA. For prison sexual abuse to be eliminated, however, judges need to fully comprehend and appreciate the congressional mandate set forth in PREA. Furthermore, they need to familiarize themselves with prisoner sexual abuse at-risk categories. They need to draw inferences from categories with a good fit, as opposed to simply categories that are readily accessible. In the absence of specialist judges, it is the plaintiff's responsibility to

247. *Id.* at 41.

248. *Id.* at 56.

249. *See id.* Emotional stability, especially in connection with anger and impulse control, along with dependability, rationality, and maturity, are all factors that indicate that a correctional officer will be more successful at maintaining a zero-tolerance atmosphere. *Id.*

250. *Id.* at 149.

251. *Id.* at 76.

educate the presiding judge about PREA and the research regarding at-risk categories.

2. Prisoner Classification: Building a Stronger Case for Correctly Answering Conflated Question Two Regarding Consent

A 2000 study of a maximum-security prison in the South examined prison sexual assault targets and their sexual orientations prior to and during incarceration.²⁵² Chi-square tests²⁵³ measuring differences between characteristics of an entire sample population versus a target population (in this case inmates that had been sexually threatened) found that the only significant differences between the sample group and the target group were sexual orientation prior to incarceration and sexual orientation during incarceration.²⁵⁴ Thus, homosexuals and bisexuals were overrepresented as victims, which indicates they are much more likely targets for sexual victimization in prison.

252. Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 672.

253. In chi-square tests, one is determining the chi square value, which is stated as χ^2 . This value allows one to test hypotheses about the distribution of observations into categories. One starts with a baseline assumption that the observed frequencies are the same (except for chance variation) as the expected frequencies. If the frequencies one actually observes are different from the expected frequencies, then the value of χ^2 increases from the baseline of 0. It is also necessary to determine the degrees of freedom, which is stated as *df*. This value tells one the statistical significance of χ^2 by testing it against a table of chi-square distributions, according to the number of degrees of freedom (*df*) from one's sample, which is the number of categories minus 1. Finally, one needs to know the significance of the figure, which is stated as *p*. This value is essentially a way of determining whether the χ^2 value one found is probable or not on its own regardless of the test one ran. The lower the *p*-value, the less likely that one's result would have naturally occurred, and thus the more statistically significant the outcome. If a *p*-value is less than 0.05 (corresponding to a five percent chance of naturally occurring regardless of one's tested hypothesis), it is usually deemed statistically significant, although *p*-values of closer to 0.01 (corresponding to a one percent chance of naturally occurring regardless of one's tested hypothesis) are more desirable. For a discussion of chi square tests, see R.L. Plackett, *Karl Pearson and the Chi-Squared Test*, 51 INT'L STAT. REV. 59, 61-64 (1983).

254. Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 674. Prior to incarceration, 15.5% of the sample described their sexual orientation as bisexual, and 5.6% of the sample described their sexual orientation as homosexual. Of the targets, however, 38.5% described themselves as bisexual prior to incarceration, and 11.5% described themselves as homosexual prior to incarceration ($\chi^2 = 16.17$, *p* .01, *df* = 2). *Id.* at 675. Regarding sexual orientation during incarceration, 5% of the sample identified as homosexual, and 26% of the sample identified as bisexual. *Id.* Of the targets, 11.8% identified as homosexual, and 46.2% identified as bisexual ($\chi^2 = 11.04$, *p* .01, *df* = 2). *Id.*

A 2003 study in three Oklahoma correctional facilities found similar overrepresentation of homosexuals and bisexuals as victims of sexual threats.²⁵⁵ Overall, the study identified young, white, bisexual, and homosexual males as more likely targets of victimization.²⁵⁶ This is confirmed by research conducted on behalf of the National Institute of Corrections, which revealed the most likely male prison rape targets are, “young, white, small, and feminine physical features [sic] and body movements; he has no prison experience; and he has no friends or companions or social support.”²⁵⁷ The RPPR, NPREC, and Human Rights Watch found similar victim characteristics.²⁵⁸ Given this research, judges are making a mistake when, as in *Harvey*,²⁵⁹ they fail to take into account the victim’s characteristics as a factor that could create subjective knowledge of risk in a guard’s mind.

By using victimology to classify and house prisoners more effectively, prisons can decrease the rate of sexual abuse within the facility without adding much cost. Additionally, by mandating classification for each prisoner, the results of which should be written down and remain part of each inmate’s permanent file, a record of subjective knowledge is begun. That record, along with the aforementioned training, can combine to show subjective knowl-

255. Hensley, *Male Oklahoma Correctional Facilities*, *supra* note 24, at 602. Of the sample, 8% identified as homosexual; whereas of the victims, 16% identified as homosexual. *Id.* Also, 13.2% of the sample identified as bisexual and 42% of the victims identified as bisexual. *Id.*

256. *Id.*

257. NAT’L INST. OF CORRECTION, *supra* note 24, at 27.

258. The RPPR found that the common characteristics of victims of inmate-on-inmate sexual victimization were: a young or youthful appearance, smaller stature and build, physical disability, past victim of sexual assault, first time in jail or new to the facility, homosexual or transgender, mentally ill or learning disabled or lower IQ, low self-confidence or projection of feelings of fear, non-aggressive, lack of gang affiliation, a criminal history of prostitution or sex offenses or less serious crimes, reputation among the staff as untruthful, access to or lack of access to money, promiscuous or provocative behavior, in protective custody, and male inmates with feminine mannerisms or features. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 6–8. The NPREC identified the following categories as more at risk: young, small, and naïve; previously traumatized; disabled and at risk; and gender non-conforming, which includes non-heterosexual, transgender, and intersex inmates. NPREC REPORT, *supra* note 7, at 70–74. Human Rights Watch identified the following victim characteristics: “young, small in size, physically weak, white, 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.” HUMAN RIGHTS WATCH, *supra* note 86, at 52.

259. *Harvey v. California*, 82 Fed. Appx. 544 (9th Cir. 2003).

edge and hence deliberate indifference in a far clearer and more consistent manner than is currently being applied by the courts. As the NPREC wrote:

Through training, investigators can learn the characteristics of an objective investigative process and outcome and how to recognize and reject stereotypes that hinder objectivity. They may learn, for example, not to assume that a sexual encounter is consensual simply because there are no discernable physical injuries or because the alleged victim or perpetrator is homosexual. Although training cannot overcome deeply rooted prejudices, when it is accompanied by good supervision, investigators are more likely to remain objective as they weigh the evidence and formulate their findings.²⁶⁰

Per the NPREC's recommendations, "[e]vidence-based screening must become routine nationwide, replacing the subjective assessments that many facilities still rely on and filling a vacuum in facilities where no targeted risk assessments are conducted," and "[t]o be effective, the results of these screenings must drive decisions about housing and programming."²⁶¹

The Federal Bureau of Prisons and the California Department of Corrections and Rehabilitation already use written instruments to screen incoming prisoners for sexual abuse risk.²⁶² Prisoners need to be classified, not only when entering the facility but, as the NPREC standards recommend, "within 6 months of the initial screening and every year thereafter in prisons, and within 60 days of the initial screening and every 90 days thereafter in jails."²⁶³ Additionally, per the National Institute of Corrections' recommendations, correction agencies should review their classification and screening procedures once a year with a formal evaluation done every three years.²⁶⁴

Courts need to be educated about what traits are a good fit so that they examine the proper information when determining whether subjective knowledge of sexual assault risk existed. Although the research on perpetrator characteristics is less robust,

260. NPREC REPORT, *supra* note 7, at 113; *see also* NAT'L INST. OF CORR., REPORT TO THE CONGRESS OF THE U.S. ON THE ACTIVITIES OF THE DEP'T OF JUSTICE IN RELATION TO THE PRISON RAPE ELIMINATION ACT (Public Law 108-79) 6 (Jul. 2006), available at <http://nicic.org/Downloads/PDF/Library/02212.pdf>.

261. NPREC REPORT, *supra* note 7, at 8.

262. *Id.* at 76. The NPREC recognized that "[c]ourts have commented specifically on the obligation of correctional agencies to gather and use screening information to protect prisoners from abuse." *Id.* at 8.

263. *Id.* at 77.

264. *Id.*

prisoners should also be screened for any such known attributes, and such screening and its results should be recorded in an inmate's permanent record file, especially since courts are already focused on these characteristics. The RPPR found that perpetrators of inmate-on-inmate sexual victimization were likely to be of bigger stature or build; past victims of sexual assault; experienced repeat offenders; having a history of acting out or engaging in violence including sexual assault; creditors of victims; desirous of power or control; more verbal, aggressive, or extroverted; extremely self-confident; manipulative or knowing of human psychology; serving a longer term sentence; gang affiliated; and mentally challenged.²⁶⁵ Aggressor characteristics such as homosexuality and HIV status were not found to be common perpetrator characteristics,²⁶⁶ despite the aforementioned examinations of these attributes in *Brown, Billman, and Durrell*.

The RPPR's findings are not surprising given that research on rape indicates the majority of rapes are based on power dynamics,²⁶⁷ and in prisons inmates are essentially stripped of all power.

265. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9–10.

266. *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 86, at 52 (noting that perpetrators normally view themselves as heterosexual).

267. One clinical study reveals rape is “a pseudosexual act, complex and multidetermined, but addressing issues of hostility (anger) and control (power) more than passion (sexuality).” A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 2 (1979). Sexual access to another can be gained by consent, pressure, or force. *Id.* Rape researchers have identified three basic rape patterns: “(1) the *anger rape*, in which sexuality becomes a hostile act; (2) the *power rape*, in which sexuality becomes an expression of conquest; and (3) the *sadistic rape*, in which anger and power become eroticized.” *Id.* at 13 (italization in original); see also A. Nicholas Groth, Ann Burgess, & Lynda Holmstrom, *Rape: Power, Anger, and Sexuality*, 143 AM. J. PSYCHIATRY 1239, 1240–42 (1977). In anger rape, the rapist feels wronged, hurt, or mistreated, and the rape discharges the individual's feelings of frustration, anger, and resentment. A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 16 (1979). In power rape, the rapist is attempting to confirm his competence and validate his masculinity. *Id.* at 31. As Groth explains, “Sexuality becomes a means of compensating for underlying feelings of inadequacy and serves to express issues of mastery, strength, control, authority, identity, and capability.” *Id.* at 25. Sadistic rape involves the eroticization of aggression and often involves elements of ritual or torture. *Id.* at 44. Researchers examining convicted rapists estimated that fifty-five percent of the rapes presented to them were power rapes, forty percent were anger rapes, and five percent were sadistic rapes. *Id.* at 58. The researchers estimated that power rapes outnumber anger rapes by significantly more than the fifteen percent found in their study because their data sample consisted only of convicted rapists, and it is easier to convict for anger rape because a greater showing of hostility during the act makes it easier to prove lack of consent. *Id.* In prisons, many of the traditional signifiers of power, such as independence, autonomy, authority, and sexual access to wo-

Prisons should also look into incorporating tests developed by psychologists that deal with power issues into their screening and categorization processes. The Macho Personality Constellation measures callused sexual attitudes toward women, a conception of violence as manly, and a view of danger as exciting.²⁶⁸ The Aggressive Sexual Behavior Inventory measures sexual force, drugs and alcohol, verbal manipulation, angry rejection, anger expression, and threat in men.²⁶⁹ Research revealed a correlation between the Macho Personality Constellation and the Aggressive Sexual Behavior Inventory.²⁷⁰ This supports research by others indicating that males with many “masculine” characteristics and few “feminine” characteristics, and males with few of either characteristics are more inclined to rape.²⁷¹ While these tests are not conclusive, they could certainly be one more layer in creating categories with better fit for the courts to examine when deciding whether subjective knowledge can be found in Eighth Amendment failure-to-protect claims.

men, are eliminated. Teresa Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291, 300 (2000). As a result, alternative hierarchies are created to signify masculinity and power. *Id.* at 301–02. These hierarchies tend to center on sexual dominance and subordination. *Id.* at 301. “Men” have the most power; “queens,” below men, are generally one to two percent of the population and are distinguished by their willingness to be submissive sexual partners; and “punks” are prisoners who have been forced into sexual submission. *Id.* at 302–03.

268. Donald L. Mosher & Mark Sirkin, *Measuring a Macho Personality Constellation*, 18 J. RES. PERSONALITY 150, 151 (1984).

269. Donald Mosher & Ronald Anderson, *Macho Personality, Sexual Aggression and Reactions*, 20 J. RES. PERSONALITY 77, 83–84 (1986).

270. F. STEPHAN MAYER & KAREN SUTTON, PERSONALITY: AN INTEGRATIVE APPROACH 498 (1996).

271. Researchers in the area of sex and gender have argued for the following gender classifications: male-typed, female-typed, androgynous, undifferentiated, and cross-sex typed. Janet T. Spence, Robert Helmreich, & Joy Stapp, *The Personal Attributes Questionnaire: A Measure of Sex-Role Stereotypes and Masculinity-Femininity*, Abstract, 4 JSAS CATALOG OF SELECTED DOCUMENTS IN PSYCHOL. 43 (1974). A man with many masculine characteristics and few feminine characteristics is considered male-typed. *Id.* A female with many feminine characteristics and few masculine characteristics is considered female-typed. *Id.* A female or male with many masculine and feminine characteristics is considered androgynous. *Id.* A female or male with few masculine or feminine characteristics is considered undifferentiated. *Id.* Finally, males with many feminine characteristics and few masculine characteristics, and females with many masculine characteristics and few feminine characteristics are considered cross-sex typed. *Id.* Individuals who are strongly male-typed or undifferentiated tend to be more inclined to sexual aggressiveness and rape. MAYER & SUTTON, *supra* note 270, at 540.

3. Amending the Prison Litigation Reform Act to Enhance the Ability to Prosecute Prison Rape Cases

As previously stated, under the PLRA, prisoners must exhaust all administrative remedies before filing a Section 1983 suit, and no action can be brought without a “prior showing of physical injury.”²⁷² In order to ensure prisoners report their rapes, the PLRA should be explicitly amended to state that “physical injury” includes any rape as defined by PREA. Without this amendment, oral sodomy and sexual fondling, both of which are defined as rape by PREA, could be deemed non-actionable under the PLRA because they do not create “physical injury.” For that matter, some acts of carnal knowledge and sexual assault with an object could be deemed to leave no physical injuries if they are achieved through the exploitation of fear or threat of physical violence.

It is also important to make such an amendment because the PLRA states that if a prisoner has three cases dismissed as malicious, frivolous, or for failure to state a claim while he is incarcerated or detained, he may not proceed in another action *in forma pauperis* unless he is in imminent danger of serious physical injury.²⁷³ While several circuits have held that “imminent danger of serious physical injury” includes risk of future injury,²⁷⁴ and an ongoing risk of assault from another prisoner has been ruled to qualify for the imminent danger exception by the Eighth Circuit,²⁷⁵ it is unclear whether all forms of rape under PREA would qualify as physical injuries. If they did not, a prisoner’s valid suit could be dismissed because he had three prior cases dismissed for failure to state a claim.

In addition to specifying that “physical injury” includes rape, the PLRA should be amended to include an expedited process for PREA-defined rape claims. The PLRA was designed to eliminate frivolous prisoner lawsuits, but with its broad sweep, it took with it serious instances of fundamental violations. The Supreme Court held in 2001 that administrative exhaustion is required even if it cannot provide the relief requested, such as money damages.²⁷⁶ In 2002, the Supreme Court held that exhaustion is required for all prisoner suits, regardless of whether they are for general circum-

272. 42 U.S.C. § 1997e(a), (e) (2006).

273. 28 U.S.C. § 1915(g) (2006).

274. *See* McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002); Gibbs v. Cross, 160 F.3d 962, 965–66 (3d Cir. 1998).

275. Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998).

276. Booth v. Churner, 532 U.S. 731, 733–34 (2001).

stances, particular episodes, excessive force or other Eighth Amendment violations.²⁷⁷

While requiring prisoners to follow some set of administrative procedures prior to filing suit in court is valuable, it is important to understand these procedures and their implications. Typically, all grievances must be timely filed.²⁷⁸ If they are not, and the prison does not make an exception and allow the prisoner to file despite the lack of timeliness, the prisoner can be seen as not fulfilling administrative exhaustion, and his or her case could be dismissed if the defendant raises the affirmative defense of failure-to-exhaust.²⁷⁹ In the federal system, there is a four-step grievance procedure.²⁸⁰ Within twenty days of the event triggering the complaint, an inmate must attempt an informal resolution and then, if dissatisfied with the result, file a written “request for administrative remedy” using a designated form.²⁸¹ While extensions may be granted for reasons of valid delay, doing so is not required.²⁸² Further, while being hospitalized for injuries would likely qualify, it is unclear whether internal physical injuries not seen by staff or psychological trauma would be considered valid reasons for delay. Instances of rape should be reported as soon as possible in order to allow evidence to be gathered prior to it being destroyed. However, given the physical and emotional trauma of rape, requiring a victim to attempt an informal resolution within twenty days of the attack may not be feasible. Further, it is unclear what sort of “informal resolution” would be appropriate for a rape victim.

To ensure prison rape victims have a clear path to resolve their abuse, the PLRA should be amended to either eliminate the exhaustion requirement for prison sexual abuse victims or set a separate, more direct exhaustion path that takes into account victims’

277. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). In 2007, in *Jones v. Bock*, 549 U.S. 199 (2007), the Court resolved a circuit split regarding total versus mixed claim exhaustion—that is, whether an entire action could be dismissed if one claim within the action did not meet the exhaustion procedures—holding that, within one action, claims that had fulfilled the exhaustion requirements should proceed and claims that had not fulfilled the exhaustion requirements could be dismissed. *Id.* at 218–22. To clarify, the Court also held that failure to exhaust constitutes an affirmative defense under the PLRA and is not part of the pleading requirements for prisoners. *Id.* at 912.

278. *See, e.g., Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999).

279. *See Pozo*, 286 F.3d at 1025; *Harper*, 179 F.3d at 1312.

280. 28 C.F.R. §§ 542.13–.15 (2006); *see also Yousef v. Reno*, 245 F.3d 1214, 1220 (10th Cir. 2001).

281. 28 C.F.R. §§ 542.13–.14 (2006).

282. § 542.14(b).

needs. By amending only the exhaustion requirement, but not the three-strikes requirement, it is unlikely that prisoners would file frivolous suits regarding these matters. Admitting that one was raped makes one appear weak and vulnerable, and a prisoner does not want to be perceived as such; therefore, it is unlikely that prisoners will begin to file fabricated or frivolous suits if such an amendment was passed. Thus, the original intention of the PLRA, the reduction of frivolous lawsuits, would be maintained, while prisoners' constitutional rights would be well-protected. Additionally, PREA's mandate to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States"²⁸³ and "protect the Eighth Amendment rights of Federal, State and local prisoners"²⁸⁴ would be closer to fulfillment.

The NPREC urged that both these amendments to the PLRA be made, recommending that:

Congress amend two aspects of the PLRA for victims of sexual abuse: the requirement that prisoners exhaust all internal administrative remedies before their claims can proceed in court and the requirement to prove physical injury to receive compensatory damages, which fails to take into account the very real emotional and psychological injuries that often follow sexual assault.²⁸⁵

The NPREC also called for correctional agencies to "deem that victims of sexual abuse have exhausted their administrative remedies within 90 days after the abuse is reported—or within 48 hours in emergency situations—regardless of who reports the incident and when it allegedly occurred."²⁸⁶ Congress should heed these recommendations. Without such changes, it is unlikely that prisoners will attempt to run the gauntlet of reporting their abuse, which is vital to prosecuting and ending it. The best deterrent to prison rape is to ensure that each incident is fully investigated and if appropriate, prosecuted to its fullest extent. Only then will we likely see an actual decrease in prison rape.

B. Equal Protection as an Alternative to the Eighth Amendment For Certain Prisoners

The almost complete dearth of Eighth Amendment failure-to-protect from male inmate-on-inmate rape cases that survive sum-

283. 42 U.S.C. § 15602(1) (2006).

284. § 15602(7).

285. NPREC REPORT, *supra* note 7, at 10.

286. *Id.*

mary judgment, coupled with the myriad summary judgment decisions ignoring research findings, indicates that before we allow Justice White's warnings about allowing serious deprivations of constitutional rights to "go unredressed due to an unnecessary and meaningless search for 'deliberate indifference'"²⁸⁷ to ring true, we should look for alternative avenues of redress while using PREA to bolster plaintiffs' ability to prove deliberate indifference in Eighth Amendment cases. Indeed, as previously mentioned, ensuring prison rapists are prosecuted to the fullest extent possible is probably one of the most effective ways to reduce prison rape. Even if the alleged rapist is already serving a long sentence, it clearly establishes the individual as a risk to the general population. This would help in proving subjective knowledge if another incident arose, and it should result in a curtailing of the limited freedoms of such prisoner. Yet, such rapes are rarely prosecuted.

Sexual contact in prisons is an extremely murky issue. There are clear consent issues to deal with and difficult hurdles to prosecution. But that does not mean investigation and prosecution should be ignored. As discussed, some research indicates that homosexual inmates are at a much higher risk for sexual abuse than heterosexual inmates.²⁸⁸ If guards protect heterosexual inmates more than homosexual or bisexual inmates, or ignore homosexual and bisexual grievances while attending to heterosexual grievances, then the Equal Protection Clause may be invoked. Alternatively, if there are gender differences between protection levels and grievance procedures, then an equal protection claim may be a more beneficial avenue of redress. By pursuing an equal protection claim the quagmire of subjective knowledge may be avoided because the issue of consent is separated from the analysis. While some level of intent must be proven for a Fifth or Fourteenth Amendment Section 1983 action, just as it must be proven for an Eighth Amendment Section 1983 action, the standards are different; intent to discriminate is subject to an objective standard.²⁸⁹ Thus, circumstantial evidence that is often rejected in Eighth

287. *Wilson v. Seiter*, 501 U.S. 294, 311 (White, J., concurring).

288. See NPREC REPORT, *supra* note 7, at 7–8 (citing a study of medium-security men's facilities in California that found the rate of abuse among heterosexual prisoners was 9%, while the rate among gay prisoners was 41%).

289. See *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997) (stating "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" (emphasis added.)); see also *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) ("In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be 'plainly obvious.'") (citing *Bd. of the*

Amendment cases, such as departures from established practices,²⁹⁰ could be used to prove discrimination under equal protection.

While the equal protection standard for sexual orientation is rational review, it seems unlikely that a court would find subjecting non-heterosexual inmates to prison rape while protecting heterosexual inmates is rational. In *Nabozny v. Podlesny*,²⁹¹ the Seventh Circuit upheld a student's equal protection argument based on gender and sexual orientation for disparate treatment he received while being bullied at school for being homosexual.²⁹² The Seventh Circuit also held the defendants were not entitled to qualified immunity.²⁹³ In so holding, the court stated, "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation"²⁹⁴ While the abuse alleged by Nabozny was extreme and lasted several years, the court's willingness to find a valid equal protection argument without relying on *Romer v. Evans*,²⁹⁵ which was decided after oral arguments in *Nabozny*, indicates the potential strength of equal protection for certain prisoners as an alternative to Eighth Amendment claims. Additionally, in *Stemler v. City of Florence*,²⁹⁶ the Sixth Circuit held that Stemler had a valid claim for an equal protection violation if she could prove that Kentucky officers, even if they had probable cause, arrested her simply because they thought she was a lesbian.²⁹⁷

Under *Turner v. Safley*,²⁹⁸ courts typically apply a deferential standard of review for prisoner classifications that infringe on a prisoner's fundamental rights. The *Turner* standard asks whether the classification that burdens prisoners' rights is "reasonably re-

County Comm'rs, 520 U.S. 397 (1997)). A standard invoking "obviousness" connotes an objective as opposed to subjective standard.

290. See, e.g., *Langston v. Peters*, 100 F.3d 1235 (7th Cir. 1996).

291. 92 F.3d 446 (7th Cir. 1996).

292. *Id.* at 460-61.

293. *Id.* at 458.

294. *Id.*

295. 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution that prevented protected status under the law for homosexuals violated the equal protection clause because it was not rationally related to a legitimate state interest).

296. 126 F.3d 856 (6th Cir. 1997).

297. *Id.* at 872. Stemler failed to show this in subsequent state court proceedings, however. See *Stemler v. City of Florence*, 350 F.3d 578, 590 (6th Cir. 2003) (noting on subsequent appeal that the issue of Stemler's equal protection claim was resolved in state court, which found "the officers had no improper motive" in arresting Stemler).

298. 482 U.S. 78 (1987).

lated to legitimate penological interests”²⁹⁹ and examines four factors: whether the regulation has a valid and rational connection to a legitimate government interest; whether there are alternative means available for the inmate to exercise the right that is burdened; the impact that allowing the right to be unburdened would have on prison officials and resources; and whether there are ready alternatives to the regulation.³⁰⁰ It is unclear how refusing, through policy or practice, to fully investigate and prosecute rape allegations in prison to the extent they would be investigated and prosecuted outside of prison could be legitimately related to penological interests. The *Farmer* Court, in fact, specifically stated that “gratuitously allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objectiv[e],’”³⁰¹ yet “[d]espite the fact that most incidents of sexual abuse constitute a crime in all 50 States and under Federal law, very few perpetrators of sexual abuse in correctional settings are prosecuted.”³⁰² Only a fraction of cases are referred to prosecutors, and the NPREC repeatedly heard testimony that prosecutors decline most of these cases.³⁰³

If Eighth Amendment protection claims cannot succeed because of the subjective knowledge barriers, inmates should still be allowed the relief of seeing their rapists punished for breaking the law. Indeed, society should demand it. If the NPREC recommended national standards that included a prohibition on differential treatment based on sexual orientation (actual and perceived), prisoners would find themselves with greater and necessary protections.

Furthermore, the *Turner* standard does not apply to all limitations of prisoners’ constitutional rights. In *Johnson v. California*,³⁰⁴ the Supreme Court stated that it had “applied *Turner’s* reasonable-relationship test *only* to rights that are ‘inconsistent with proper incarceration.’”³⁰⁵ Under cases such as *Bounds v. Smith*,³⁰⁶ prisoners

299. *Id.* at 89.

300. *Id.* at 89–91.

301. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517 (1984) (Stevens, J., concurring in part and dissenting in part)).

302. NPREC REPORT, *supra* note 7, at 119.

303. *Id.*

304. 543 U.S. 499 (2005).

305. *Id.* at 510 (emphasis in original). The Court then applied the strict scrutiny standard to an unwritten California prison policy of racially segregating prisoners for sixty days upon entry into the prison system or transfer to a different prison. *Id.* at 515.

306. 430 U.S. 817 (1977).

have a fundamental right of access to courts,³⁰⁷ and by refusing to gather evidence, such as failing to administer a rape kit immediately after a prisoner alleges he was raped, the prison is denying the prisoner the ability to prove his case and may thereby be denying the prisoner's fundamental right of access to the courts. Furthermore, allowing a disciplinary committee finding to block an alleged rape prosecution and an Eighth Amendment violation claim as was done in *Lewis* could be seen as violating the rights set forth in *Bounds*.

Regarding the right to police protection, which arguably includes the full investigation of crimes, it has been established that if police protection exists, a state cannot discriminate in providing such protection.³⁰⁸ Additionally, decisions to prosecute based on arbitrary classifications or standards such as race or religion are actionable under the Equal Protection Clause.³⁰⁹ To succeed on such a claim, the plaintiff would need to show that he was treated differently in comparison with others who were similarly situated.³¹⁰ The determination of such comparison class should be carefully decided. If a prisoner compares himself to a non-incarcerated person the distinction might be too great, and a finding of similarity might not be found. It may be easier for prisoners to make comparisons to other prisoners. Currently, the cases receiving the most attention, investigation, and prosecution are allegations of rape of female prisoners by male guards.³¹¹ Thus, using this group as the comparison point might be the easiest for male prisoners.

307. *See id.* at 818–19.

308. *E.g.*, *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000); *Hayden v. Grayson*, 134 F.3d 449, 452 (1st Cir. 1998); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988).

309. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (claim based on selective prosecution based on race); *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (quoting *Armstrong*, 517 U.S. at 464).

310. *See, e.g.*, *Kosta v. Connolly*, 709 F. Supp. 592, 595–96 (E.D. Pa. 1989).

311. *Compare* HUMAN RIGHTS WATCH REPORT, DEC. 1996: ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, available at <http://hrw.org/reports/1996/Us1.htm>, with HUMAN RIGHTS WATCH, *supra* note 86; *see also* Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004); Jeff Eckhoff, *3 Iowa Inmates Share \$160,000 to Settle Suits: The Sex Abuse Charges Against a Guard Push Officials to Do More to Protect Prisoners*, DES MOINES REGISTER, Jan. 9, 2006, at 1A; Alan Johnson, *Efforts Under Way to End Illegal Sex, Prisons Chief Says*, THE COLUMBUS DISPATCH, Mar. 18, 2004, at B3 (commenting on efforts to curtain illegal sex with inmates at the Ohio Reformatory for Women); Jeff Seidel & Dawson Bell, *\$100 Million Ends Prisoner Sex-Abuse Suit: Women Started Their Legal Fight in 1996*, DETROIT FREE PRESS, Jul. 16, 2009, at A1; Maggie Shepard, *Prison Guard Charged in Rapes—Four Female Inmates Have Accused Officer*, ALBUQUERQUE TRIB., Oct. 10, 2007, at A1; Michelle Van Natta,

Undoubtedly, establishing an equal protection claim would be an uphill battle because in such cases, a plaintiff must prove that there was some sort of discriminatory intent.³¹² Written policies regarding investigating and prosecuting sexual assault cases are unlikely to be facially discriminatory. Thus, in the absence of facial discrimination, discriminatory intent would have to be shown.³¹³ For prosecutorial equal protection claims, a discriminatory purpose that resulted in a discriminatory effect must be shown.³¹⁴ Since disparate impact is not conclusive evidence of discriminatory intent,³¹⁵ the level of records, data, and statements that would need to be gathered in order to establish discriminatory intent would be great. After all, the defendants could easily argue that prison sexual assault cases are not investigated or prosecuted due to few reports of attack, destruction of evidence prior to reports of the abuse, lack of witnesses, and unreliable witnesses. Further, they may argue that tax dollars are better spent on cases with a greater probability of a victorious outcome. However, given the Eighth Amendment cases reviewed, this level of evidence required would not be any greater than what is necessary to establish deliberate indifference.

Legal services organizations, prisoner rights organizations, and other bodies that provide legal advice to prisoners and create informational materials for prisoners filing their own lawsuits should consider investigating equal protection as an avenue of redress. Further, prisoners should be informed of the possibility of using equal protection in prison rape situations so that prisoners can look for and gather the type of evidence that would be required to prove

Rape Crisis in Womens Prison: Sexual Violence in Illinois Prisons and the (Lack of) Systematic Response by Illinois Sexual Assault Crisis Intervention Organizations, 4 AREA CHICAGO (AREA Chicago, Chicago, IL), Apr. 6, 2007, available at <http://www.area-chicago.org/p/issues/issue-4/rape-crisis-womens-prison/>; Lee Williams & Esteban Parra, *Ex-Guard: Prison Sex Hushed Up: Inmates Not in Position to Say No to Correctional Officers, Advocates Say*, THE NEWS J. (Wilmington, Del.), Dec. 11, 2005, at 1A; *The Montel Williams Show: Women Raped in Prison* (Jan. 17, 2006). Perhaps part of the reason female prisoner rape cases are investigated and prosecuted more often is because the pregnancies that can result from these crimes serve as proof of the sexual act. With male prisoner rape, locating such physical evidence of the attack is much more difficult. Society as a whole may also still feel more comfortable recognizing women as rape victims as opposed to men.

312. *E.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 248 (1976).

313. *Semple v. City of Moundsville*, 963 F. Supp. 1416, 1433 (N.D. W. Va. 1997).

314. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003).

315. *Arlington Heights*, 429 U.S. at 264–65.

such a claim. As of now, most prisoner self-help litigation manuals only discuss the filing of Eighth Amendment claims, yet, as demonstrated, those claims are rarely successful.³¹⁶

CONCLUSION

The issues surrounding prison rape are vast and varied. To take hold of the problem, society needs to look at all its layers. The *Farmer* standard is one layer. Correctional employees' underlying beliefs about prisoners, sexuality, and sexual abuse is another. The ways in which deep-seated beliefs may conflate with facts in courts' subjective knowledge determinations is another layer. Creating research to better educate society to understand the factors behind prison rape and the true risks to various prisoners is yet another layer. Discovering the confidence and creativity to find new avenues of addressing that landscape, such as the use of the Equal Protection Clause, is still another layer. All of these layers must be examined to achieve PREA's mandate of eliminating prison rape.

Certainly, the protection of constitutional rights and human dignity is a convoluted path. But as Winston Churchill's words echo, "[T]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."³¹⁷ Now is the time to answer Rodney Bruntmyer's entreaty, "[p]lease, sir, help me."³¹⁸ This Article is cer-

316. For examples of prisoner self-help manuals, see CENTER FOR CONSTITUTIONAL RIGHTS & THE NATIONAL LAWYERS GUILD, *THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON*, available at <http://www.jailhouselaw.org/CCRNLGJHL.pdf>; COL. HUM. RTS. L. REV., *A Jailhouse Lawyer's Manual* (8th ed. 2009), available at <http://www3.law.columbia.edu/hrlr/ejlm.php>; HEATHER MACKAY & THE PRISON LAW OFFICE, *THE CALIFORNIA STATE PRISONER'S HANDBOOK: A COMPREHENSIVE PRACTICE GUIDE TO PRISON & PAROLE LAW* (4th ed. 2008); JOHN W. PALMER & STEPHEN E. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* (7th ed. 2004); ROBERT TOONE & THE SOUTHERN POVERTY LAW CTR., *PROTECTING YOUR HEALTH & SAFETY: PRISONER'S RIGHTS* 54–70 (2002). See generally Just Detention International, *Online Resources*, www.justdetention.com. Interestingly, in the current edition of *Constitutional Rights of Prisoners* (the first edition was in 1973), there are only a few pages within the nearly 800-page book that deal with Eighth Amendment claims for sexual abuse. Further, *The Jailhouse Lawyer's Handbook* does not even cover filing an Eighth Amendment claim for failure-to-protect from sexual assault, much less touch on potential alternative constitutional actions.

317. Winston Churchill, Home Secretary, House of Commons Speech (Jul. 20, 2010), available at <http://hansard.millbanksystems.com/commons/1910/jul/20/class-iii>.

318. *Hearing Before the Nat'l Rape Elimination Comm.*, *supra* note 1.

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tainly not a solution to prison rape. But hopefully, it can be a part of such a solution.