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# FORECASTING SEXUAL ABUSE IN PRISON: THE PRISON SUBCULTURE OF MASCULINITY AS A BACKDROP FOR “DELIBERATE INDIFFERENCE”

CHRISTOPHER D. MAN\* & JOHN P. CRONAN\*\*

## INTRODUCTION

On August 9, 1973, Stephen Donaldson, a Quaker peace activist, was arrested for trespassing after participating in a pray-in at the White House.<sup>1</sup> Upon refusing to post a ten-dollar bond on moral grounds, Donaldson was sent to a Washington, D.C. jail.<sup>2</sup> In the days that followed, Donaldson experienced a terror that is far too common for tens of thousands of inmates in American correctional institutions.<sup>3</sup> In the course of Donaldson's two nights behind bars, he was gang-raped approximately sixty times by numerous inmates.<sup>4</sup> Upon his release, Donaldson did what few others have the strength and courage to do: he spoke out. Donaldson was among the first survivors of jailhouse rape to come forward publicly to describe his abuse, launching

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<sup>1</sup> See Gary Marx, *Lonely Missionary Stephen Donaldson Wants To Stop the Sexual Abuse of Inmates by Inmates*, CHICAGO TRIB., June 23, 1995, at 1.

<sup>2</sup> See *id.*

<sup>3</sup> See *infra* notes 9-11 and accompanying text. Experts in the field of prisoner sexual assault estimate that over 60,000 prisoners are subjected to involuntary sex every day. Stephen Donaldson, *Can We Put an End to Inmate Rape?*, U.S.A. TODAY MAG., May 1995.

<sup>4</sup> See Fred Bruning, *A Former Inmate Speaks Out About Rape in U.S. Prison System*, SEATTLE TIMES, Apr. 23, 1995, at A16.

a personal crusade to save other inmates from sexual victimization.<sup>5</sup> Donaldson later became President of Stop Prisoner Rape, a nonprofit organization that advocates for the protection of inmates from sexual assault and offers support to victims.<sup>6</sup> Sadly, Stephen Donaldson was unable to witness the fruits of his heroism because, on July 18, 1996, at the age of forty-nine, he passed away from infections complicated by AIDS after he contracted HIV through prisoner rape.<sup>7</sup>

In prisons across the country, many inmates face similar horrors every day. Sexual abuse in prison is one of America's oldest, darkest, and yet most open, secrets.<sup>8</sup> One former inmate recounted, "It is the rare convict who will never engage in homosexual acts."<sup>9</sup> In the vast majority of cases, mutual attraction or affection does not drive prison sexual relationships; rather,

<sup>5</sup> See Jason Mallory, *Sexual Assault in Prison: The Numbers Are Far From Funny*, 9 THE TOUCHSTONE (1995), available at <http://www.rtis.com/reg/bcs/pol/touchstone/november99/assault.html> (last visited Sept. 17, 2001).

<sup>6</sup> See Bruning, *supra* note 4, at A16. Stop Prisoner Rape maintains a website that provides additional information about prisoner rape, identifies resources that are available to victims of prisoner rape and suggests ways in which prisons could be reformed to reduce the incidence of prisoner rape. See <http://www.spr.org>. The current President of Stop Prisoner Rape, Thomas Cahill, experienced horrors similar to Donaldson. While jailed for civil disobedience in Texas in 1968, Cahill was gang raped continuously for twenty-four hours. See <http://www.spr.org>.

<sup>7</sup> Stephen Donaldson, 49—*Led Reform Movement Against Jailhouse Rape*, Stop Prisoner Rape, July 19, 1996, available at <http://www.spr.org> (last visited Apr. 5, 2002). Many victims of prisoner rape, like Donaldson, pay the ultimate price by contracting HIV from their assailants. See Tamar Lewin, *Little Sympathy or Remedy for Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, at 19. The Department of Justice's most recent statistics indicate that the overall rate of confirmed AIDS cases among our nation's prisoners is 0.60%, which is five times higher than the rate among the general United States population. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS: HIV IN PRISONS AND JAILS (1999), available at <http://www.ojp.usdoj.gov/bjs/abstract/hivpj99.htm> (last visited Sept. 10, 2001); see also *AIDS in Prisons*, N.Y. TIMES, May 21, 2001, at A16 (finding that "[f]orcible sex" is "widespread" in prisons, and "[t]he AIDS rate is seven times higher in state and federal prisons than in the population as a whole").

<sup>8</sup> Sexual abuse in prisons is far from a recent phenomenon. The first influential study of prison subcultures, published by Joseph Fishman in 1934, estimated that between thirty percent and forty percent of all prisoners engage in non-consensual homosexual activity. Moreover, Fishman identified the factors that drive prisoner rape, such as the specific roles of the aggressors and the victims and the process of "turning out" inmates. JOSEPH FULLING FISHMAN, *SEX IN PRISON: REVEALING SEX CONDITIONS IN AMERICAN PRISONS* (1934). These dynamics of sexual abuse continue to pervade modern correctional institutions. See *infra* Part III.A.

<sup>9</sup> LOU TOROK, *STRAIGHT TALK FROM PRISON: A CONVICT REFLECTS ON YOUTH, CRIME AND SOCIETY* 40 (1974).

most sexual acts in prison are the coerced products of dominance, intimidation, and terror.<sup>10</sup> Although the precise extent of prisoner-on-prisoner rape and sexual assault remains unknown, it is hard to dispute that rape occurs at an alarming and unacceptable rate in our prisons. The highest estimates of prisoner sexual assault are simply staggering.<sup>11</sup> Even the most conservative estimates leave little doubt that sexual abuse is rampant.<sup>12</sup> Simply put, the threat of sexual abuse is a reality of prison life.<sup>13</sup>

Although sexual abuse exists as an actual pain of imprisonment for many inmates, a state could not constitutionally sanction such acts as punishment.<sup>14</sup> Yet, most prisons have steadfastly ignored the many possible reforms that could combat prisoner rape. Rudimentary humanity compels our society to do something. Successful litigation against prisons that fail to take adequate preventive measures may be the most effective way to stimulate reform.

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<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See, e.g., SUE LEES, *RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION AND THE LAW* 96 (1997) (discussing study by Stop Prisoner Rape that estimates the number of rapes in U.S. prisons is in excess of 60,000 taking place every day); Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. OF THE SOCIOLOGY OF L. 135 (1992) (citing Stephen Donaldson, Dissertation, *Rape of Males: A Preliminary Look at the Scope of the Problem* (1984) (estimating that 18 adult males in state and local facilities are raped every minute)). Donaldson estimated that 300,000 inmates in juvenile centers, adult jails, and prisons nationwide are victims of sexual assault each year. See Marx, *supra* note 1, at 1.

<sup>12</sup> See generally DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE* (1980) (studying a New York state prison and finding that although twenty-eight percent of respondents had been the target of sexual aggression, only 1.3% were raped); see also Martin L. Haines, *Prison Rape Highlights the Need for Better Prison Administration*, 154 N.J. L.J., Dec. 14, 1998, at 23 ("Estimates of the number of rapes occurring in prisons, countrywide, run as high as 7,000 per day, a figure said to be conservative . . . . Gang rape is common."); Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. OF SEX RES. 67, 68 (1996) ("[E]ven the most conservative estimates of prisoner sexual assault rates translate into a high number of victims among inmate populations nationwide."); Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. TIMES Dec. 29, 1993, at A11 [hereinafter Donaldson, *The Rape Crisis Behind Bars*] ("[A] conservative estimate, based on extrapolations of two decades of surveys, is that more than 290,000 males are sexually assaulted behind bars every year.")

<sup>13</sup> Christine A. Saum et al., *Sex in Prison: Exploring Myths and Realities*, 75 PRISON J. 414, 413 (1995) ("Several investigations of these allegations have revealed that sex in prison, although prohibited, is a reality.") (citing D.M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541 (1992)).

<sup>14</sup> See U.S. CONST. amend. VIII; LEE H. BOWKER, *PRISON SUBCULTURES* 116 (1977).

In this Article, we offer guidance for inmates seeking to litigate against prison officials who condone and fail to prevent this sexual victimization. We endeavor for the practical, rather than solely theoretical, side of this issue, as we aim to sketch a litigation strategy for inmates victimized by sexual assault. In the pages that follow, we set forth the prevailing legal standard for bringing such claims, and articulate how commonplace prison circumstances tie into that standard. Under current jurisprudence, an inmate must show that prison officials knew that the victim was at risk to be raped and acted with deliberate indifference to that threat. In recent years, such lawsuits have been increasingly successful and, if prudently constructed, more should succeed in the future. The ultimate goal of these lawsuits is to induce prisons to adopt reforms that protect the rights of all inmates and diminish, if not eradicate, the horror of prisoner rape.

Our Article is focused on coerced sex between male inmates. We acknowledge that men are not the sole victims of prisoner sexual assault. Female inmates also face horrifying sexual abuse, often from the very individuals charged with ensuring their safety, prison guards.<sup>15</sup> Our focus on male inmates does not mean to trivialize the plights of female inmates. Quite the contrary, the rampant sexual abuse in female correctional institutions is a horrendous problem that must be addressed.

The reason for our limited scope is simple. Our analysis of prisoner rape relies on the unique dynamics of the subculture that pervades many male penal institutions. This subculture, which relies on an aggressive conception of masculinity, places the quest for power and dominance at the forefront.<sup>16</sup> Behind prison walls, male inmates are stripped of most traditional means of asserting their masculinity and, consequently, turn to intimidation and aggression. To be sure, this mindset often is

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<sup>15</sup> For discussions of rape of female inmates, see HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), available at <http://www.hrw.org/summaries/s.us96d.html> (last visited Sept. 17, 2001) (finding sexual abuse and privacy violations by male guards against female inmates at eleven state prisons); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 202-08, 218-223 (1999) (reviewing studies on female inmate rape and proposing reforms); and Struckman-Johnson et al., *supra* note 12, at 71 (finding that seven percent of female inmates reported an incident of sexual coercion).

<sup>16</sup> See *infra* Part II.B.

responsible for men raping women, but outside the confines of an all-male prison population it rarely results in men raping other men. In a prison society where each of its members is male, many inmates seek to reestablish their sense of dominance by using rape as a means of forcing other men to assume a submissive role that is perceived as feminine within that society. By better understanding this dynamic of all-male prison populations, it becomes much easier to identify would be rapists and to profile their most likely victims.

Comprehension of the dynamics of this unique male prison subculture is critical for any constitutional analysis of prison rape claims. In the seminal case, *Farmer v. Brennan*,<sup>17</sup> the Supreme Court established “deliberate indifference” as the appropriate legal standard for Eighth Amendment claims against prison officials in prisoner rape litigation. The subculture of aggressive masculinity, which is openly known by inmates and prison officials alike, is a paramount factor for assessing whether prison officials acted with “deliberate indifference.” More importantly, sexually victimized inmates can rely on this widely acknowledged subculture to litigate successful claims against prisons and prison officials.

We begin, in Part I, by presenting the *Farmer* standard of “deliberate indifference.” After showing how courts have interpreted this standard, we proceed to examine the prison subculture, a subculture that lends to a fairly straightforward application of the *Farmer* standard. In Part II, we discuss the psychological dynamics of rape, and more specifically prisoner rape. We explain the prison subculture of aggressive masculinity, and demonstrate what institutional factors grounded in this subculture promote prisoner rape. This subculture elucidates our understanding of which inmates will commit sexual abuse and which inmates will be victimized.

In Part III, we move to a more concrete analysis of prisoner rape. Here, we discuss the specific characteristics that can be used to predict the sexual roles an inmate is likely to assume, or be forced to assume. By and large, sexual assault in prisons is predictable. Certain obvious and easily identifiable personal characteristics determine whether an inmate will become a “man,” the sexual predator, or be “turned out” as a “punk,” the

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<sup>17</sup> 511 U.S. 825, 828 (1994).

victim of sexual assault. We show the relevance of forecasting prisoner rape in Part IV. Prison officials, who are intimately familiar with the prison subculture, are well aware of these indicators of victimization. Immediately upon incarceration, an official often knows whether an inmate is likely to be an aggressor or a victim. This knowledge should compel action, for failure to take measures to protect endangered inmates constitutes "deliberate indifference" to a clear danger. Prison officials who fail to take adequate preventive measures at this stage should be liable under *Farmer*.

### I. THE APPLICABLE LEGAL STANDARD: "DELIBERATE INDIFFERENCE"

Since the Supreme Court decided *Farmer v. Brennan* in 1994, the applicable legal standard for Eighth Amendment<sup>18</sup> claims in prisoner rape cases has been clear and generally favorable to prisoner rape victims.<sup>19</sup> To establish an Eighth Amendment vio-

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<sup>18</sup> The Eighth Amendment, which prohibits the infliction of punishments that are cruel and unusual, governs prisoner rape cases where the victim has been convicted. Where the victim is a pre-trial detainee, the Eighth Amendment has been held inapplicable because a detainee cannot be punished in any manner at all. Instead, pre-trial detainees bringing prisoner rape claims invoke the Due Process Clause of either the Fifth or Fourteenth Amendments. See, e.g., *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996) (describing the different constitutional provisions applicable to prisoners and pre-trial detainees). The Supreme Court has held that a pre-trial detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983), but it repeatedly has left open the question of whether pre-trial detainees are entitled to greater rights, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989); *City of Revere*, 463 U.S. at 244. The Courts of Appeals generally have applied the same constitutional standard to convicted inmates and pre-trial detainees. See, e.g., *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000) ("[T]here is little practical difference between the two standards."); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (holding that "the applicable standard is the same"); *Hare*, 74 F.3d at 643 (pre-trial detainee complaining of episodic acts or omissions is subject to the *Farmer* standard, but where challenging general conditions, prison rules or practices is subject to a "functionally equivalent" test established by *Bell v. Wolfish*, 441 U.S. 520 (1979), of whether the condition is rationally related to a legitimate governmental purpose). But see *Hare*, 74 F.3d at 653 (Dennis, J., concurring) (arguing that the *Bell* standard should apply to all claims by pre-trial detainees and that the *Bell* standard is satisfied by a showing of something less than deliberate indifference, possibly negligence or gross negligence).

<sup>19</sup> Constitutional claims against federal prison officials are brought pursuant to *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971), and constitutional claims against state prison officials are brought pursuant to 42 U.S.C. § 1983. Several states have hired private prisons to house inmates. The courts consistently have held that prisons and their officers can be sued under § 1983. See, e.g., *Skelton v. Pri-Cor*,

lation, the rape victim must satisfy a two-part test. First, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."<sup>20</sup> Second, the inmate must demonstrate that the responsible prison officials acted with "deliberate indifference" towards his health or safety in allowing those conditions to exist.<sup>21</sup> The first part of the test never posed much of a legal obstacle in prisoner rape cases because rape plainly is a serious harm.<sup>22</sup> The more difficult legal hurdle, at least before *Farmer*, was determining what was required by the "deliberate indifference" standard.<sup>23</sup> The *Farmer*

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Inc., 963 F.2d 100, 102 (6th Cir. 1991); *Gwynn v. Transcor Am., Inc.*, 26 F. Supp.2d 1256, 1266 (D. Colo. 1998) (finding that private officials who raped a female inmate they were hired to transport could be sued under § 1983). In addition to civil rights claims that can be filed against prison officials whose actions or omissions allowed the rapes to occur, civil rights claims can be brought against the officer's superiors in some instances for their failure to train or supervise the officers, or to implement an appropriate policy for classifying and segregating inmates. See, e.g., *City of Canton*, 489 U.S. at 380 (recognizing that the failure to train police can form the basis of liability under § 1983); *Weiss v. Cooley*, 230 F.3d 1027, 1033 (7th Cir. 2000) (addressing claim for failure to classify and segregate); *Trammell v. Davis*, No. 99-2779, 2000 WL 227962, at \*1 (9th Cir. Feb. 28, 2000) (rejecting qualified immunity of senior prison officials who knew of improper sexual contacts between guards and prisoners but "made no changes in policies and practices in response"); *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998) (claim against warden for failure to supervise dangerous guard). In some cases, superiors can be held responsible for the failure to correct unwritten policies of not disciplining rapists or assisting victims, even if the formal written policies state otherwise. See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) ("Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced."); *Ware v. Jackson Cty.*, 150 F.3d 873, 882 (8th Cir. 1998); *Roland v. Johnson*, 856 F.2d 764, 770 (6th Cir. 1988). Prisoner rape victims often cannot identify responsible prison officials without conducting discovery first, so courts typically allow discovery to take place before all of the responsible officials are named. As the Seventh Circuit explained, "we do not think that the children's game of pin the tail on the donkey is a proper model for constitutional tort law." *Billman v. Indiana Dep't of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995) (Posner, C.J.). The failure of an inmate to name all responsible prison officials is not a ground for dismissing the complaint "[i]f a prisoner makes allegations that if true indicate a significant likelihood that someone employed by the prison system has inflicted cruel and unusual punishment on him, and if the circumstances are such as to make it infeasible for the prisoner to identify that someone before filing his complaint . . . ." *Id.*

<sup>20</sup> *Farmer*, 511 U.S. at 834.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1196-98 (9th Cir. 2000) (noting that rape or sexual assault easily satisfies the first prong); *Spruce v. Sargent*, 149 F.3d 783, 785 (8th Cir. 1998) (same).

<sup>23</sup> State and federal officials are entitled to qualified immunity where they are accused of violating constitutional rights that were not clearly established at the time those rights were violated. Since *Farmer* clarified the applicable legal standard, courts have made it clear that prison officials will have a difficult time arguing that their ob-



decision clarified that the "deliberate indifference" standard does not place an insurmountable burden on prisoner rape victims.<sup>24</sup>

Although the Supreme Court rejected an objective test for determining deliberate indifference that was advocated by the prisoner in *Farmer*, the Court emphasized that the subjective test that it adopted would not leave prison officials "free to ignore obvious dangers to inmates."<sup>25</sup> The Supreme Court defined deliberate indifference by holding that liability requires a showing that the prison official "knows of and disregards an excessive

ligation to prevent prisoner rape was not clearly established. *See, e.g.*, *Wilson v. Wright*, 998 F.Supp. 650, 657 (E.D. Va. 1998) (holding that *Farmer* clearly established the legal obligations of prison officials regarding the prevention of rape for qualified immunity purposes); *see also* *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977) (noting that a particular prison policy that previously had not been found unconstitutional in promoting rape is not decisive if the policy appears unconstitutional under settled practice; "a prison official may not take solace in ostrichism"). The Supreme Court also recently held that officials employed by private prisons are not entitled to any form of immunity. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) ("[W]e must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case.").

<sup>24</sup> The actual damages that have been recovered in prisoner rape cases have varied widely, but the size of the awards appears to be increasing. In a rather appalling pre-*Farmer* opinion, a sharply divided Eighth Circuit sitting *en banc* upheld a jury verdict awarding four inmates nominal damages of one dollar for being repeatedly raped and terrorized. *Butler v. Dowd*, 979 F.2d 661, 664 (8th Cir. 1992). The dissent's rather forceful observation that the rapes were "so horrendous that no reasonable person could have found that the plaintiffs' suffering was *de minimis*," *id.* at 685 (M. Arnold, J., dissenting); *see id.* at 683 (Bright, J., dissenting) (arguing that the "award is so inadequate as to constitute a plain injustice"), is so obviously correct that we find it difficult to believe that another jury would award damages that are so low or that such a verdict would again be upheld. More recent judgments have been far more substantial. *See, e.g.*, *Mathie v. Fries*, 935 F. Supp. 1284, 1306 (E.D.N.Y. 1996) (awarding \$250,000 compensatory damages and \$500,000 punitive damages), *modified on appeal*, 121 F.3d 808, 818 (2d Cir. 1997) (affirming \$250,000 compensatory damages award, but reducing punitive damages award to \$200,000); Susan Schramm, *Jury Awards \$201,501 to Prisoner*, THE INDIANAPOLIS STAR, Apr. 12, 1997 at A01 (noting jury award to prisoner rape victim of compensatory damages of \$55,501 and punitive damages of \$146,000); *see also* *Billman v. Indiana Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995) ("But the fear caused by the rape itself, and the additional fear of contracting HIV until that fear was finally dispelled, would be normal items of damages, certainly in a case such as this of actual rather than merely feared exposure."). In addition to damages, successful civil rights plaintiffs can recover their attorneys' fees under § 1983. *See* 42 U.S.C. § 1988 (1994) (recovery of attorneys' fees for § 1983 actions). Although an argument can be made that attorneys' fees should be recovered under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994), by plaintiffs who successfully bring a *Bivens* claim, that argument has been rejected by the Ninth Circuit. *Kreines v. United States*, 33 F.3d 1105, 1107 (9th Cir. 1994).

<sup>25</sup> *Farmer*, 511 U.S. at 842.

risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>26</sup> The Supreme Court emphasized that a prisoner “need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”<sup>27</sup>

Moreover, the Supreme Court clarified that the prison official need only know that there is a serious risk to an inmate’s health or safety, even though the official may not be aware of the precise threat.<sup>28</sup> If the prison is aware that such a risk exists, “it is irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.”<sup>29</sup> The Supreme Court added that because the constitutional violation is complete upon being placed in an unsafe condition, the prisoner can seek judicial relief before any physical injury actually is inflicted.<sup>30</sup>

Although this subjective standard is in theory more difficult to satisfy than an objective standard, as a practical matter it should not and has not prevented prisoner rape claims from being presented to juries.<sup>31</sup> The Supreme Court clarified that:

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<sup>26</sup> *Id.* at 837.

<sup>27</sup> *Id.* at 842.

<sup>28</sup> *Id.* at 843.

<sup>29</sup> *Id.* at 844. The Supreme Court noted that the District Court’s opinion could be read as requiring “advance notification of a substantial risk of assault posed by a particular fellow prisoner” and clarified that the Eighth Amendment “imposes no such requirement.” *Id.* at 849 n.10. See *Harper v. Sheppard*, No. 99-15360, 2000 WL 158513, at \*2 (9th Cir. Feb. 14, 2000) (“Defendants’ argument that they were under no duty to protect [the inmate] because he was unable to identify a special inmate as a source of threat is without merit.”); *Giroux v. Somerset County*, 178 F.3d 28, 33 (1st Cir. 1999) (holding that liability can attach where prison officer knows of a risk even if he does not know who the predator would be); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 817 (6th Cir. 1996) (holding that *Farmer* overruled prior circuit precedent by holding that prison officials did not need to know of a threat to a particular individual); *Price v. Sasser*, 65 F.3d 342, 347 (4th Cir. 1995) (same).

<sup>30</sup> *Farmer*, 511 U.S. at 845. Moreover, the transfer of an inmate to a new prison does not moot claims seeking injunctive relief to reform the institution where the rape or threatened rape occurred. *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980).

<sup>31</sup> James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 40 (1999) (“[P]rison officials’ actual knowledge of sexual harassment can be readily inferred via the *Farmer* standards.”).

[W]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.<sup>32</sup>

To illustrate this point, the Court explained that knowledge of a substantial risk of inmate assaults could be inferred from the fact that such a risk was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past” and the circumstantial evidence suggests that the prison officer must have known of that risk.<sup>33</sup>

Although a “prison official may show that the obvious escaped him” under this standard, the Supreme Court explained that “he would not escape liability if the evidence showed that he . . . strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.”<sup>34</sup> For example, a prison official who is alerted to the fact that one inmate was preparing to attack another could be held accountable for the failure to investigate and confirm that threat.<sup>35</sup>

In applying the standard that it had formulated, the Supreme Court remanded Farmer’s case that previously had been dismissed by the District Court.<sup>36</sup> The lower court inappropriately had assumed that Farmer could not prove that prison officials were aware of the risk because Farmer had not given them any advance warning.<sup>37</sup> The Supreme Court explained that no

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<sup>32</sup> *Farmer*, 511 U.S. at 842. See *Trice v. O’Sullivan*, No. 94 C 2544, 1999 WL 35347, at \*7 (N.D. Ill. Jan. 13, 1999) (holding that the typical disputes as to whether an inmate informed prison officials of a risk or did not was a jury issue).

<sup>33</sup> *Farmer*, 511 U.S. at 842-43.

<sup>34</sup> *Id.* at 843 n.8; see *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995) (explaining that prison officials claiming ignorance have a difficult burden because they must show not only that they were unaware of the risk but that they did not even suspect that such a risk could exist).

<sup>35</sup> *Farmer*, 511 U.S. at 843 n.8.

<sup>36</sup> *Id.* at 848.

<sup>37</sup> *Id.* Requiring that inmates warn prison officials that they are at risk of being raped, when prison officials already are aware of that risk, would not only be unnecessary, it also would likely increase the prevalence of rape in the prisons. Indeed, prison officials may appreciate the risk that a new inmate may be raped by his fellow inmates far better than the new inmate does. Such inmates depend almost entirely upon prison officials to protect their safety. Even where inmates are aware that they are at risk, they often know that “ratting” out their tormentors may bring about reprisals from the entire prison population. Where inmates can expect that prison officials will not take effective measures to protect their safety, an inmate’s refusal to risk

advance warning from Farmer was required because knowledge could be established through "any relevant evidence."<sup>38</sup> Applying the victim profile, which is described in more detail in Section III, the Court explained that adequate evidence did exist for a jury to infer deliberate indifference.<sup>39</sup> Dee Farmer was a twenty-one year old transsexual who had breast implants, had taken female hormones, and had a youthful and feminine appearance when she was placed in the general male population at a high-security prison.<sup>40</sup> Farmer also was a non-violent offender.<sup>41</sup> The Supreme Court appropriately recognized that a jury could infer from those facts that prison officials must have known that Farmer was at risk.<sup>42</sup>

After *Farmer*, prison officials have continued to assert the ignorance defense, but it seldom has been effective in preventing prisoner rape cases from being presented to a jury. The problem for prison officials is that their past failures to protect the constitutional rights of inmates has made many of this country's judges virtual experts in applying the prisoner rape victim profile. Although persons who are unfamiliar with prison dynamics may find the stories of prisoner rape so foreign and bizarre that they may conclude, or at least want to believe, that such events must be unpredictable fluke occurrences, judges know better and routinely allow prisoners the opportunity to present their case to the jury. Of course, judges also know that prison officials are well aware of prison dynamics and the accuracy of the prisoner rape profile.<sup>43</sup>

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being labeled a "snitch" by reporting the threat is understandable. *See* Robertson, *supra* note 31, at 39 (describing inmates as having a Hobson's choice of becoming a snitch or foregoing intervention by prison officials).

<sup>38</sup> *Farmer*, 511 U.S. at 848.

<sup>39</sup> *Id.* at 848-49.

<sup>40</sup> *Id.* at 829-30.

<sup>41</sup> *Id.* at 848.

<sup>42</sup> *Id.* at 848-49.

<sup>43</sup> *See* Weiss v. Cooley, 230 F.3d 1027, 1032 (7th Cir. 2000) ("Sometimes the heightened risk of which the guards were aware comes about because of their knowledge of the victim's characteristics, not the assailant's."); Woods v. Lecureux, 110 F.3d 1215, 1225 (6th Cir. 1997) (noting testimony by prison official that changes in the make-up of prisoners within a unit increases the risk of prisoner on prisoner violence); Redman v. County of San Diego, 942 F.2d 1435, 1448 (9th Cir. 1991) (en banc) (noting testimony by prison official that new inmates are the most likely victims of sexual assault and should be housed with one another or the old and feeble to minimize that risk); Roland v. Johnson, 856 F.2d 764, 770 (6th Cir. 1988) (holding that a jury could find prison officials liable because the inmate's mother warned them of threats

In fact, judges are so well acquainted with the reality of prisoner rape that they often anticipate that the constitutional rights of those whom they sentence will be violated in prison. As the Eleventh Circuit appropriately recognized, in the prison environment, “[h]omosexual rape is commonplace.”<sup>44</sup> Entire prison systems have been held unconstitutional where prisoner rape is rampant.<sup>45</sup> Therefore, courts will use the prisoner rape victim profile in making downward departures from the sentencing guidelines where they find that a defendant is particularly vulnerable to rape.<sup>46</sup>

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against her son and showed them a picture of him that revealed that “he fit the known profile of prison rape victims”); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980) (“Typically, the attacks [homosexual rapes] are upon younger prisoners, and a young, white, slightly built man is at the greatest risk of all.”); *id.* at 161 (To obtain injunctive relief from the threat of prisoner rape, “[i]t is not necessary to show that all prisoners suffer a pervasive risk of harm. It is enough to show that an identifiable group of prisoners do, if the complainant is a member of that group. It is irrelevant that larger, older men need experience no such fear, when younger and smaller men are frequently victimized and each such person has a reasonable basis for fearing that he will become a victim or will be victimized again.”); *Gates v. Collier*, 501 F.2d 1291, 1309-10 (5th Cir. 1974) (upholding injunctive relief requiring that prisoners be segregated by the severity of their offenses); *United States v. Ruff*, 998 F. Supp. 1351, 1355 n. 14 (M.D. Ala. 1998) (“Correctional administrators have long recognized that prisoners likely to be victimized are overwhelmingly young first offenders of slight build with passive, soft-spoken personalities.” (quoting Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 278 (1995))); Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers, Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 47 tbl.3 (1989) (noting that eighty-six percent of Texas correctional officers surveyed “disagreed” or “strongly disagreed” with the suggestion that prisoner rape is rare).

<sup>44</sup> *Harris v. Thigpen*, 941 F.2d 1495, 1520 n.36 (11th Cir. 1991).

<sup>45</sup> *See, e.g., Alberti v. Klevenhagen*, 790 F.2d 1220, 1226 (5th Cir. 1986) (“We conclude, as a matter of law, that the level of violence and sexual assault found to be existing in the Harris County jails constitutes a violation of the Eighth Amendment.”).

<sup>46</sup> *See, e.g., United States v. Gonzales*, 945 F.2d 525, 526 (2d Cir. 1991) (upholding departure because defendant was “unusually vulnerable” as he was “extremely small and feminine looking, and that, although he was nineteen, he had the appearance of a fourteen year old boy”); *United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (upholding downward departure because the defendant was a “delicate looking young man with a certain sweetness about him”); *United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992); *United States v. K*, 160 F. Supp. 2d 421, 423 (E.D.N.Y. 2001) (“Sentencing can be deferred to allow this young, nonviolent offender—whose physical and mental fragility renders him particularly susceptible to abuse in prison—further time to demonstrate rehabilitation under the strict control of Pretrial Services.”); *United States v. Blarek*, 7 F. Supp. 2d 192, 211 (E.D.N.Y. 1998) (“Because these defendants will be especially vulnerable to abuse in prison given their sexual orientation as well as their demeanor and build, downward departure is warranted.”); *United States v. Ruff*, 998 F. Supp. 1351, 1359 (M.D. Ala. 1998) (upholding downward departure because defendant’s cumulative status as a gay man, an effeminate man and a survivor of sexual abuse “substantially increase his risk for sexual assault in

Although every rape is different, courts have held that a jury can infer deliberate indifference based upon any of a multitude of factors that are typically present. In most cases, common-sense alone serves as an adequate guide. For example, *Wilson v. Wright*<sup>47</sup> provides a stark, but all too common, example of a prison official's deliberate indifference to the safety of its inmates.<sup>48</sup> The prison housed a 6'1", 290 pound Black man who was serving a lengthy sentence for abducting and raping a twelve-year-old White boy.<sup>49</sup> The inmate was classified as a high-risk prisoner, had a history of violence and disciplinary problems within the prison, and his prison file indicated that he had sexually assaulted a fellow inmate in a county jail.<sup>50</sup> A new inmate was transferred to the prison upon turning nineteen.<sup>51</sup> He was a 5'8", White, non-violent offender, who weighed 136 pounds—roughly one-third the weight of the man with whom he would share a cell.<sup>52</sup> The new inmate also had a deformity of his spine that caused his buttocks to protrude and invited abusive and often sexually-oriented remarks by fellow inmates.<sup>53</sup> A report by a prison psychologist noted that the inmate was afraid that he was at risk of being sexually assaulted and the psychologist added that “[d]ue to his impulsivity, immaturity, and small

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prison—a penalty that not only violates the Sentencing Guidelines for uniformity in sentencing, but, depending on the magnitude of indifference of prison officials to his risk for assault, could also violate the Eighth Amendment”); *see also* *Koon v. United States*, 518 U.S. 81, 111-12 (1996) (upholding departure based on “susceptibility to abuse in prison”).

<sup>47</sup> 998 F. Supp. 650 (E.D. Va. 1998).

<sup>48</sup> *Id.* at 652. The Ninth Circuit heard a very similar case in *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc). In that case an eighteen-year-old pre-trial detainee with no prior criminal record was placed in a “young and tender” unit upon arrival at a detention facility. He was 5'6” and weighed 130 pounds. A week later, he was transferred into the general population. He was placed in a cell with a man whose status file described him as an “aggressive homosexual,” who had been moved from a homosexual module because he was coercing other inmates for sex and he had been convicted of a sexual offense. That man was twenty-seven-years-old, was 5'11, and weighed 165 pounds. The eighteen-year-old pre-trial detainee was raped the first night that this man was placed in his cell. *Id.* at 1438; *see also* *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980) (young, slightly built inmate, who prison officials knew was at risk of sexual assault, was placed in a cell and raped by a large man with a “history of violent, aggressive, sexual assaults”).

<sup>49</sup> *Wilson*, 998 F. Supp. 650, 652 (E.D. Va. 1998).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

stature he may well be victimized as he fears.”<sup>54</sup> Despite the extreme lack of parity between these two prisoners, they were forced to share a cell together.<sup>55</sup> Not surprisingly, the new inmate was raped his first night in the cell.<sup>56</sup> The court had no difficulty finding that a jury could conclude that the prison official who made the cell assignment would have seen these facts in the inmates’ files and could be found deliberately indifferent in placing them in a cell together.<sup>57</sup>

Although many of the courts’ conclusions regarding what can be considered evidence of deliberate indifference is obvious, they are worth repeating because the same pattern of cases is constantly repeating itself.<sup>58</sup> Courts have found that deliberate indifference can be inferred from the following circumstances: guards raping or sexually harassing inmates;<sup>59</sup> guards sexually assaulting inmates to coerce them into signing statements exonerating them from wrong-doing;<sup>60</sup> prison officials setting inmates up to be raped or attacked by other prisoners as

<sup>54</sup> *Id.* (quoting the psychologist’s report).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 654-56.

<sup>58</sup> See, e.g., David M. Siegel, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1545 (1992) (“Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims.”); Kevin N. Williams, *The Violent and Victimized in Male Prison*, 16 J. OF OFFENDER REHABILITATION, 1, 6, 22 (1991) (noting that studies show that victims of sexual assault in male prisons “tend to be [small, young, and middle class . . . lack mental toughness and are not ‘streetwise’ . . . appear to be less involved in criminal culture before incarceration and to have less institutional experience”); PETER L. NACE & THOMAS R. KANE, INMATE SEXUAL AGGRESSION: SOME EVOLVING PROPOSITIONS, EMPIRICAL FINDINGS, AND MITIGATING COUNTER-FORCES 9 (1984) (“[T]he target is singled out by assailants quickly as one who (1) is generally weak and exploitable and (2) ‘appropriately’ feminine.”).

<sup>59</sup> See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (affirming denial of a guard’s motion for summary judgment because “[i]n the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise”); *id.* (“Where guards themselves are responsible for the rape and sexual assault of inmates, qualified immunity offers no shield.”); *Ware v. Jackson County*, 150 F.3d 873, 881 (8th Cir. 1998) (upholding liability of supervisors for the failure to discipline guards who sexually assaulted and raped female inmates); *Mathie v. Fries*, 935 F. Supp. 1284, 1300 (E.D.N.Y. 1996) (rape of inmate); *Thomas v. Dist. of Columbia*, 887 F. Supp. 1, 4-5 (D. D.C. 1995) (alleging that prison officer forcibly touched prisoner’s penis and threatened to label the inmate a homosexual and a “snitch” if he did not have sex with him).

<sup>60</sup> *Wilkins v. Moore*, 40 F.3d 954, 956, 958 (8th Cir. 1994).

a form of discipline;<sup>61</sup> knowingly placing an inmate in a cell with an HIV positive inmate who has a history of rape;<sup>62</sup> housing inmates with aggressive homosexuals that have a history of coercing their cellmates for sex;<sup>63</sup> the failure to consider the rape victim profile in making cell assignments;<sup>64</sup> guards watching a rape in progress and not doing anything to stop it;<sup>65</sup> failure to transfer known or likely sexual predators to areas where they could be controlled;<sup>66</sup> officials knowing that one inmate had at-

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<sup>61</sup> *LaMarca v. Turner*, 995 F.2d 1526, 1532 (11th Cir. 1993); *McGill v. Duckworth*, 944 F.2d 344, 347 (7th Cir. 1991) ("If prison officials put McGill into the IDU so that a bigger inmate would have a better chance to rape him, then it is as if the officials inflicted that pain and humiliation themselves."); *Kelly v. Nunn*, No. 3:93-CV263RP, 1994 WL 586948, at \*6 (N.D. Ind. 1994); *Rutledge v. Springborn*, 836 F. Supp. 531, 538 (N.D. Ill. 1993); see also CARL WEISS & DAVID J. FRIAR, *TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT* x (1974) ("Prisoners are convinced that prisoner rape is an integral part of the prison punishment system.")

<sup>62</sup> *Billman v. Indiana Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995); *Glick v. Henderson*, 855 F.2d 536, 541 (8th Cir. 1988) (McMillian, J., concurring) (speculating that an Eighth Amendment violation could be shown by a housing policy that exposes the plaintiff "to an unreasonable danger of sexual assault by an AIDS carrier or victim").

<sup>63</sup> *Redman v. County of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1991) (en banc); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980); *Kish v. County of Milwaukee*, 48 F.R.D. 102, 103 (E.D. Wis. 1969).

<sup>64</sup> See, e.g., *Withers*, 615 F.2d at 162 ("In assigning a person such as Withers, whose age and physical characteristics put him in the high risk group for victimization by sexual assault, the absence of any procedure or guidelines to assist the assigning official was probably much more than simple negligence."); *id.* at 162 ("[T]he assignment of those two to the same cell created great risk of harm to Withers. This should have been obvious to one who looked at their individual characteristics with any concern for the protection and the safety of Withers."); *Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974) (faulting the Mississippi's penal system because "inmates are not classified according to the severity of their offense, resulting in the intermingling of inmates convicted of aggravated violent offenders with those who are first offenders convicted of nonviolent crimes"); *Pugh v. Locke*, 406 F. Supp. 318, 324 (M.D. Ala. 1976) ("Violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft and assault are everyday occurrences . . ."); *Holt v. Sarver*, 309 F. Supp. 362, 377 (E.D. Ark. 1970) (criticizing Arkansas prisons for housing all inmates in barracks together where the younger inmates are raped or "cling to the bars all night"), *aff'd*, 442 F.2d 304, 307 (8th Cir. 1971) (upholding constitutional violations because "[p]risoners are frequently attacked and raped in the dormitories and injuries and deaths have resulted.").

<sup>65</sup> *Billman*, 56 F.3d at 790; see also *LaMarca*, 995 F.2d at 1533 (faulting prison officials for allowing hard-core pornographic movies to be shown in unsupervised areas and for ignoring the screams and cries of inmates while the movies were shown).



tacked the same inmate before and failing to protect the victim from further attacks;<sup>67</sup> officials knowing that threats of rape were made against an inmate and failing to provide protection;<sup>68</sup> victim's appearance, traits, or mannerisms fits the profile for prisoner rape victims;<sup>69</sup> where prison officials previously had acknowledged an inmate's vulnerability and failed to protect him;<sup>70</sup> where formal requests to be removed from a cell because the inmate is being raped are denied;<sup>71</sup> refusing requests to be placed in solitary confinement where there is a genuine risk to safety;<sup>72</sup> where the prison official calls the inmate a "faggot" in rejecting his pleas for help;<sup>73</sup> dismissing a substantial threat of rape on the theory that heterosexual men can protect themselves;<sup>74</sup> identifying a prisoner as HIV positive, if knowing that the label would make the inmate a target for violence;<sup>75</sup> guards

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<sup>66</sup> *LaMarca*, 995 F.2d at 1538; *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) ("When prison officials have failed to control or separate prisoners who endanger the physical safety of other prisoners and the level of violence becomes so high . . . it constitutes cruel and unusual punishment . . .").

<sup>67</sup> *Richardson v. Penfold*, 839 F.2d 392, 396 (7th Cir. 1988); *Holland v. DeBruyn*, No. 3:95-CV-525RM, 1997 WL 284813, at \*8 (N.D. Ind. Mar. 6, 1997).

<sup>68</sup> *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992); *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991); *Roland v. Johnson*, 856 F.2d 764, 770 (6th Cir. 1988) (warning came from victim's mother); *Richardson*, 839 F.2d at 396; *Holland*, 1997 WL 284813, at \*8; *see also* *Smith v. Brenoettsy*, 158 F.3d 908, 913 (5th Cir. 1998) (multiple letters to Warden warning of prisoner's risk of harm by a guard).

<sup>69</sup> *Young*, 960 F.2d at 362; *Roland*, 856 F.2d at 770; *see also* *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997) (explaining that deliberate indifference can be inferred "where prison officials fail to protect an inmate who belongs to an identifiable group of prisoners for whom the risk of assault is a serious problem of substantial dimensions, including prisoners targeted by gangs").

<sup>70</sup> *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) (initial placement in a "young and tender" unit).

<sup>71</sup> *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1988).

<sup>72</sup> *Moore v. Goord*, No. 00-0004, 2001 WL 289894, at \*1 (2d Cir. Mar 23, 2001); *Hamilton v. Leavy*, 117 F.3d 742, 747 (3d Cir. 1997); *Anderson v. Romero*, 72 F.3d 518, 526 (7th Cir. 1995).

<sup>73</sup> *Anderson*, 72 F.3d at 521.

<sup>74</sup> *Redman*, 942 F.2d at 1444; *Roland*, 856 F.2d at 770.

<sup>75</sup> *Onishea v. Hopper*, 171 F.3d 1289, 1294 (11th Cir. 1999) (noting prison's argument that disclosure of HIV positive status may subject an inmate to violence); *Anderson*, 72 F.3d at 523; *Harris v. Thigpen*, 941 F.2d 1495, 1518 n.33 (11th Cir. 1991) (noting prison's evidence that disclosure of HIV positive status makes inmates targets for violence and death by those who are afraid of infection, and targets for rape by other inmates).

branding a prisoner a “snitch”;<sup>76</sup> failure to control inmate movement;<sup>77</sup> failure of guards to patrol dormitories, particularly at night;<sup>78</sup> allowing a prevalence of weapons;<sup>79</sup> allowing inmates to obstruct vision into their cells by hanging sheets;<sup>80</sup> and possibly even where a prison has failed to take adequate steps to stop the spread of AIDS by segregating HIV positive prisoners.<sup>81</sup>

In addition, courts recognize that prisons actually foster rape through policies that fail to punish rapists or fail to assist rape victims. In holding the entire penal system of the State of Texas unconstitutional, Judge Justice explained:

[T]he combination of inmates who are routinely subjected to violence, extortion, and rape, of officers who are aware of inmate-on-inmate victimization but fail to respond to the victims, of high barriers preventing inmates from seeking safekeeping or protective custody, and of a system that fails to accurately report, among other data, instances of requests for safekeeping and sexual assaults, and, as well, the obviousness of the risk to prison officials, when all are considered together, have the mutually enforcing effect of rendering prison conditions cruel and unusual by denying inmates safety from their fellow inmates.<sup>82</sup>

Likewise, in finding a Florida prison unconstitutional, the Eleventh Circuit explained that “the procedures for investigating rapes, to the extent such procedures existed, were not followed; some of the reported incidents were not investigated at all. The lack of such procedures created an atmosphere of tol-

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<sup>76</sup> *Hamilton*, 117 F.3d at 747; *Northington v. Jackson*, 973 F.2d 1518, 1525 (10th Cir. 1992); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989); *Thomas v. Dist. of Columbia*, 887 F. Supp. 1, 4 (D. D.C. 1995).

<sup>77</sup> *LaMarca v. Turner*, 995 F.2d 1526, 1538 (11th Cir. 1993).

<sup>78</sup> *LaMarca*, 995 F.2d at 1538; *Alberti v. Klevenhagen*, 790 F.2d 1220, 1228 (5th Cir. 1986) (noting that “fights and sexual abuse occurred for hours or even days without effective staff intervention”); *id.* at 1224 (finding that rampant rape resulted from “inadequate staffing, inadequate supervisory techniques, poor sightlines, and an unreliable communication system”); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974); *Pugh v. Locke*, 406 F. Supp. 318, 324 (M.D. Ala. 1976) (“Guards rarely enter the cell blocks and dormitories, especially at night when their presence is most needed.”).

<sup>79</sup> *LaMarca*, 995 F.2d at 1538.

<sup>80</sup> *Id.* at 1538.

<sup>81</sup> *Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989); *Glick v. Henderson*, 855 F.2d 536, 541 (8th Cir. 1988); *Harris v. Thigpen*, 727 F. Supp. 1564, 1583 (M.D. Ala. 1990); *Lareau v. Manson*, 507 F. Supp. 1177, 1195 n.22 (D. Conn. 1980), *modified on other grounds*, 651 F.2d 96 (2d Cir. 1981).

<sup>82</sup> *Ruiz v. Johnson*, 37 F. Supp.2d 855, 929 (S.D. Tex. 1999), *rev'd and remanded sub nom.* *Ruiz v. United States*, 243 F.3d 9421 (5th Cir. 2001).

erance of rape which enhanced the risk that incidents would occur.”<sup>83</sup>

Courts have held that “prison officials should, at a minimum, investigate each allegation of violence or threat of violence”<sup>84</sup> and prison officials cannot dismiss an inmate’s allegations as improbable when the facility has had a significant history of inmate on inmate violence.<sup>85</sup> Similarly, the failure of prisons “to compile and report data on such assaults evidences disregard by prison officials for a crime that rips at the dignity and humanity of its victims.”<sup>86</sup> Nevertheless, prison officials often fail to conduct adequate investigations.

In far too many cases, prison officials respond with deliberate indifference to the pleas of rape victims or those who have been threatened with rape.<sup>87</sup> Courts have held that a jury can find prison officials deliberately indifferent if after being informed of a rape they do the following: advise that it is an inmate’s own responsibility to prevent rape by fighting;<sup>88</sup> adopt a policy that no rape really occurred if the inmate did not fight back after being threatened with physical harm;<sup>89</sup> tell an inmate that he would have to solve his own problems and that prison officials do not want to be bothered by “cry babies;”<sup>90</sup> advise a prisoner to consent to sexual demands for his own safety;<sup>91</sup> tell a retarded inmate to go back to his cell and to stop being a whore after reporting that he was forced to pay for protection by hav-

<sup>83</sup> *LaMarca*, 995 F.2d at 1533.

<sup>84</sup> *Young v. Quinlan*, 960 F.2d 351, 363 n.23 (3d Cir. 1992); see *Riley v. Jeffes*, 777 F.2d 143, 146-48 (3d Cir. 1985).

<sup>85</sup> *Young*, 960 F.2d at 354.

<sup>86</sup> *Ruiz*, 37 F. Supp.2d at 928; see also *Roland v. Johnson*, 856 F.2d 764, 770 (6th Cir. 1988).

<sup>87</sup> See, e.g., *Ruiz*, 37 F. Supp.2d at 928 (“[P]rison officials deliberately resist providing reasonable safety to inmates. The result is that individual prisoners who seek protection from their attackers are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system.”).

<sup>88</sup> *LaMarca*, 995 F.2d at 1533 (ignoring inmate request for help and advising him that “inmates deal with their problems ‘like men,’ that is, use physical force against the aggressive inmate”); *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1988); *Ruiz*, 37 F. Supp.2d at 925-26 n.115; see also WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 2* (1982) (noting that a rape victim who did not fight his attacker was told by a prison official that “I do not feel sorry for you. You’re getting what you deserve.”).

<sup>89</sup> *Ruiz*, 37 F. Supp.2d at 926.

<sup>90</sup> *Young*, 960 F.2d at 354.

<sup>91</sup> *Ruiz*, 37 F. Supp.2d at 918 n.108.

ing sex;<sup>92</sup> joke that “here’s another one [] the booty bandit got” or laugh at an inmate for being sold for cigarettes.<sup>93</sup>

Moreover, when investigations do take place they are often inadequate. Homosexual or bisexual inmates often report that prison officials refuse to investigate their claims seriously because the officials presume that any sex that these inmates engage in is consensual.<sup>94</sup> In addition, courts have noted that at some prisons “there appears to be a strong presumption on the part of prison officials that, in the absence of outward physical harm to assaulted inmates, such as cuts, abrasions, and bruises, no sexual assault occurred.”<sup>95</sup> Prisoners often inform Stop Prisoner Rape that they have difficulty persuading officers to investigate or to investigate thoroughly, particularly when there are no signs of a brutal fight.<sup>96</sup> Many prisoners perceive that prison officials refuse to confirm their rapes because they do not want to take a more active role in protecting them.<sup>97</sup> Prisoners are often told that it is essentially their fault if they failed to fight—even if there are multiple attackers or the attackers are armed—and that they will have to deal with the problem on their own by fighting or agreeing to be a “punk.”<sup>98</sup> Inmates see the refusal to investigate thoroughly, or to conclude formally that a rape occurred, as the prison officials confirming what their attackers frequently tell them in crass and simple terms: they have two options—“fuck or fight.”<sup>99</sup>

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See also PETER L. NACCI & THOMAS R. KANE, SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS 16 (1982) (reporting that an empirical study of 500 federal correctional officers found that they assume that sex acts involving homosexual or bisexual inmates are consensual). The fact that an inmate has engaged in consensual homosexual sex either inside or outside prison is not relevant to whether he was raped while in prison and such evidence is properly excluded. *Blackmon v. Buckner*, 932 F. Supp. 1126, 1128 (S.D. Ind. 1996).

<sup>95</sup> *Ruiz*, 37 F. Supp.2d at 918.

<sup>96</sup> See Dan Harris, *Nowhere to Hide: Prison Rape Called Common, but Inmates' Complaints Often Ignored*, ABC News.com, April 16, 2001, available at [http://more.abcnews.go.com/sections/WNT/WorldNewsTonight/WNT010416\\_Prisonrape1\\_feature.html](http://more.abcnews.go.com/sections/WNT/WorldNewsTonight/WNT010416_Prisonrape1_feature.html) (last visited Apr. 3, 2002).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* It should, of course, be recognized that “[t]his volatile combination of circumstances, coupled with the fact that the environment is geographically restricted and avoidance is difficult makes the case of sex pressuring mortally dangerous.” See NACCI & KANE, *supra* note 58, at 9.

<sup>99</sup> This is a catchy phrase among inmates. See Robertson, *supra* note 31, at 33.

At many prisons, rape victims are discouraged from seeking protective custody or administrative segregation because it is not protective and often forces the inmates to live in worse conditions. In many prisons, inmates who are segregated for protection are placed in the same quarters and subject to the same conditions as inmates who are segregated as disciplinary punishment.<sup>100</sup> Numerous inmates have reported being raped while in protective custody,<sup>101</sup> and that their rapists have threatened them while they were in protective custody.<sup>102</sup>

Protective custody and administrative segregation often requires inmates to live under deplorable conditions.<sup>103</sup> For example, a federal court recently held that “the administrative segregation units of the Texas prison system deprive inmates of the minimal necessities of civilized life.”<sup>104</sup> The court explained that inmates are “virtually void of property, personal contact, and mental stimulus” and that this situation resulted in “profound and obvious psychological pain and suffering” that pushed inmates into insanity.<sup>105</sup> The experts who investigated administrative segregation in Texas “revealed a world in which smeared feces, self-mutilation, and incessant babbling and shrieking are almost everyday occurrences.”<sup>106</sup>

In addition, prison officials often are deliberately indifferent to the rights of prisoner rape victims by failing to discipline

<sup>100</sup> See, e.g., *Little v. Walker*, 552 F.2d 193, 195 (7th Cir. 1977).

<sup>101</sup> See, e.g., *Richey v. United States*, No. 93-1375, 1994 WL 44,838, at \*1 (10th Cir. Feb. 16, 1994) (inmate claiming that he was raped and infected with HIV while in protective custody); *LaMarca v. Turner*, 995 F.2d 1526, 1533 (11th Cir. 1993) (inmate claiming that he was “repeatedly attacked” while in protective custody); *Little*, 552 F.2d at 195 (noting inmate allegations that gang members served food to inmates in protective custody in their cells and would refuse to feed inmates that did not grant them sexual favors through the cell bars); *id.* (noting allegations that gang rapes occurred in protective custody); *Ruiz*, 37 F. Supp.2d at 928 (S.D. Tex. 1999) (explaining that inmates “are faced with a custody that is not truly protective, and places them frequently in the same danger they have sought to avoid”); *Patterson v. Walrath*, No. CIV.A.94-2451 1994 WL 328353, at \*1 (E.D. Pa. June 11, 1994) (inmate was raped in the showers while in protective custody).

<sup>102</sup> See, e.g., *Butler v. Dowd*, 979 F.2d 661, 665-67 (8th Cir. 1992) (describing claims by four inmates that they had been forced to leave administrative segregation or protective custody because they had been threatened by their attackers).

<sup>103</sup> See, e.g., *id.* (describing testimony that many prisoners soon request to be returned to the general population because the conditions are so bad in administrative segregation).

<sup>104</sup> *Ruiz*, 37 F. Supp. 2d at 907.

<sup>105</sup> *Id.* at 907.

<sup>106</sup> *Id.* at 908.

prison rapists appropriately. Courts have noted that the lack of disciplinary action at some prisons creates the impression that there are “no serious ramifications for those inmates committing sexual assault against other inmates.”<sup>107</sup> Very rarely are prison rapists criminally prosecuted for their crimes.<sup>108</sup> More typically, prison rapists are placed in some form of disciplinary segregation for what may be a few weeks, but are often returned to the same area within the prison where the victim was housed.<sup>109</sup> Inmates explain that they live in constant fear of reprisal from their attacker’s friends during segregation and that they are especially afraid of what their attacker will do to them once he gets out.<sup>110</sup>

Prison officials also may violate the constitutional rights of inmates by failing to give them appropriate medical assistance after the rape, including rape counseling.<sup>111</sup> By denying rape victims medical attention and counseling, failing to collect evidence of rape, and failing to provide rape kits, prison officials cast considerable doubt on whether they take the problem of prisoner rape seriously.

## II. SOCIOLOGICAL ANALYSIS OF PRISONER SEXUAL ASSAULT

To assess the *Farmer* standard of “deliberate indifference,” courts must first understand the backdrop of the subculture that drives prison life. Simply put, in this Part we ponder, “Why do prisoner rapes occur?” To grasp the reality of sexual assault in prisons, it is critical to understand prison subculture as it relates to sexual behavior.<sup>112</sup> This subculture, which places a premium on masculinity and power, explains why certain prisoners rape and others are victimized by sexual assault.

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<sup>107</sup> *Id.* at 919.

<sup>108</sup> See, e.g., Lisa Sandberg, *Sexual Assaults in Texas Prisons Seldom Prosecuted*, SAN ANTONIO EXPRESS-NEWS, May 24, 2001, at 1B.

<sup>109</sup> See *infra* note 328 and accompanying text.

<sup>110</sup> See *infra* notes 328-30 and accompanying text.

<sup>111</sup> *LaMarca v. Turner*, 995 F.2d 1526, 1534 (11th Cir. 1993) (“[T]he district court found that failure to make adequate psychological counseling available to rape victims constituted cruel and unusual punishment because it constituted deliberate indifference to a serious medical need.”).

<sup>112</sup> See WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 3* (1982) (“To understand the dynamics of . . . sexual victimization one needs to be aware of prison subculture and its code of conduct specifically as it relates to sexual behavior in prison.”).

## A. THE PSYCHOLOGY OF RAPE

The notion of masculinity is central to understanding rape. One's sense of masculinity is socially constructed and develops in relation to constructions of femininity.<sup>113</sup> The commission of a rape depends, in large part, on how the rapist sees himself as a man, and how that perception is socially reinforced.<sup>114</sup> The rapist's sense of manhood is established through the dual process of distancing himself from his conception of femininity and maintaining the hierarchy and social superiority that he equates with masculinity by devaluing the opposite sex.<sup>115</sup>

Under this feminist theory, violence against women, both sexual and nonsexual, is first and foremost an expression of male domination and social control.<sup>116</sup> Rape and the fear of rape enable men to assert power over women and maintain the existing system of gender stratification.<sup>117</sup> This psychology explains why rape is more prevalent in societies where women are regarded as inferior and as the sexual possessions of men.<sup>118</sup> At the same time, because rape also signifies the act of putting women "back in their place," rapists are often men who feel threatened by the fear that women or a particular woman may achieve equality or superiority over them.<sup>119</sup> In short, misogynist gender roles encourage rape for men who embrace these norms. Rape becomes a perverse extension of normative male behavior, and results from a perceived need to preserve tradi-

<sup>113</sup> LEES, *supra* note 11, at 105.

<sup>114</sup> *Id.*

<sup>115</sup> M. Adeleine Arnot, *How Shall We Educate Our Sons?*, in CO-EDUCATION RECONSIDERED (Rosemary Deem ed. 1984).

<sup>116</sup> See LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 61 (1989); Diana Scully & Joseph Marolla, "Riding the Bull at Gilley's": Convicted Rapists Describe the Rewards of Rape, in RAPE & SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 60 (Patricia Searles & Ronald J. Berger eds., 1995).

<sup>117</sup> BARON & STRAUS, *supra* note 116, at 61 (citing Connie Stark Adamec & Robert E. Adamec, *Aggression by Men Against Women: Adaptation or Aberration*, 5 INT'L J. OF WOMEN'S STUDIES 1 (1981); KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975); Stephanie Riger & Margaret T. Gordon, *The Fear of Rape: A Study in Social Control*, 37 J. OF SOCIAL ISSUES 71 (1981); DIANE E. H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1975); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. OF SOCIAL ISSUES 5 (1983)).

<sup>118</sup> *Id.* (citing LOREENE M.G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977)).

<sup>119</sup> *Id.* (citing RUSSELL, *supra* note 117).

tional male roles.<sup>120</sup> The norms associated with masculinity, such as dominance and aggression, often lead to the sexual exploitation of women.<sup>121</sup>

Females are not the sole targets of men seeking to assert their masculinity. Less aggressive and weaker men often find themselves victimized by dominant males, as evinced by the paradigm of a schoolyard bully who targets another boy that is perceived to be less "macho."<sup>122</sup> Similarly, males seeking domination often devalue weaker males with insults that imply some form of fragility or lack of toughness, such as "wimp," or names that tend to associate weakness with femininity or homosexuality, such as "pussy," "girl," "fag," and "queer."<sup>123</sup> Thus, the exertion of physical power over men resembles rape of females in that it reinforces the attacker's sense of masculinity by making him feel powerful.<sup>124</sup> In fact, many rapists view the act of raping another man as an even more forceful demonstration of masculinity than the rape of a woman because it is perceived as conquering a more powerful opponent and as stripping that victim of his very manhood.<sup>125</sup>

#### B. THE PRISON SUBCULTURE OF MASCULINITY AND AGGRESSION

It is often incorrectly assumed that male-on-male prisoner rape is perpetrated exclusively by homosexuals. This perception is a groundless myth.<sup>126</sup> Rather, sexual predators in prison ordinarily are heterosexual, but engage in what most people would characterize as homosexual acts to achieve power in a manner that, in many ways, reflects the most abhorrent side of gender relations.<sup>127</sup>

The misogynist subculture within prison naturally lends itself to sexual assault. The prison population is disproportion-

<sup>120</sup> Scully & Marolla, *supra* note 116, at 60.

<sup>121</sup> BARON & STRAUS, *supra* note 116, at 61.

<sup>122</sup> LEES, *supra* note 11, at 105-06.

<sup>123</sup> *Id.* at 106 (citing DONNA EDER ET AL., SCHOOL TALK: GENDER AND ADOLESCENT CULTURE (1995)).

<sup>124</sup> LEES, *supra* note 11, at 105.

<sup>125</sup> *Id.* at 106.

<sup>126</sup> See, e.g., HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISON Ch. IV (2001), available at <http://www.hrw.org/reports/2001/prison/report.html> (last visited Apr. 3, 2002) [hereinafter HUMAN RIGHTS WATCH].

<sup>127</sup> See WOODEN & PARKER, *supra* note 112, at 224 (observing that heterosexual and bisexual inmates are more likely to commit sexual assault than homosexual inmates).



ately comprised of uneducated men of below-average intelligence who lacked meaningful and financially rewarding employment before their imprisonment.<sup>128</sup> They are more likely to accept the traditional, misogynist notions of gender roles that require men to exert dominance and power over women.<sup>129</sup> Moreover, these individuals are often incapable of achieving the male power that those traditional gender roles dictate through nonviolent and constructive means, like employment. Because these men rely on a perverse understanding of gender roles to determine their sense of self-worth, they often exert their one area of superiority—physical strength—to establish power. On the outside, men who think this way typically reinforce their understanding of gender roles by attempting to subjugate women, often through physical and verbal abuse.

For men who adhere to these views, prison life aggravates their impulse to pursue sexual aggression and dominance. Whatever sense of power a prisoner once had on the outside essentially is stripped upon entry into the controlled environment of prison.<sup>130</sup> Added to this sense of disempowerment is the absence of women, which prevents inmates from satisfying their sexual needs with women and eliminates the category of people that they look to in establishing their sense of power and superiority.

While incarcerated, these inmates lack any option but to turn to male inmates as an object for their dominance and aggression.<sup>131</sup> Prison rapists rewrite their previous conception of homosexual behavior into an acceptable masculine role, which is highly physical and powerful, and transform their male vic-

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<sup>128</sup> Forty-one percent of state prison inmates and forty-six percent of persons in jail do not have a high school diploma or its equivalent. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDER STATISTICS, *available at* <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Apr. 3, 2002). In fact, estimates place the percentage of seriously mentally ill inmates at between six percent and fifteen percent. Editorial, *Jails and Prisons: America's New Mental Hospitals*, AM. J. OF PUB. HEALTH, Dec. 1995, at 1612.

<sup>129</sup> See *supra* Part II.A.

<sup>130</sup> See generally ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961) (discussing the characteristics of "total institutions").

<sup>131</sup> See Stephen Donaldson, *Rape of Males*, in *ENCYCLOPEDIA OF HOMOSEXUALITY* (Wayne R. Dynes ed., 1990) [hereinafter Donaldson, *Rape of Males*].

tims into surrogates for women.<sup>132</sup> The “men” in prison seek the appearance of control over themselves and exert control over others. With their former modes of expressing masculinity unavailable, inmates resort to rape to signify power.<sup>133</sup> As a result, rape becomes the most extreme form of inmate victimization and the threat of rape lurks as the supreme power that may be held over another inmate.<sup>134</sup> Sexual victimization demonstrates the aggressor’s superior strength and knowledge, while pinpointing the victim as weaker and less knowledgeable.<sup>135</sup> In addition to rape, aggressors force victims to assume “female” roles, such as cleaning and doing laundry. The “men” often coerce their victims to engage in even more extreme “female” acts, including requiring victims to remove their body hair, grow their hair long, wear make-up, and dress like women.<sup>136</sup>

Inmates do not view sex with another male as homosexual per se. Rather, inmates perceive the insertive sexual partner as heterosexual because he is demonstrating his power and masculinity. In contrast, the receptive sexual partner is perceived as homosexual because, in their eyes, he is assuming the role of a woman.<sup>137</sup> This perception of sexual assault is so profound that many rapists do not appreciate the fact that they are engaging in activity that normally would be labeled “homosexual.”<sup>138</sup>

Alan J. Davis, a former Chief Assistant District Attorney for Philadelphia charged with investigating sexual assault in Philadelphia prisons, agreed with this curious perception of male rape. Davis concluded that the motivating factor behind pris-

<sup>132</sup> See Dumond, *supra* note 11, at 140 (citing K. Richmond, *Fear of Homosexuality and Modes of Rationalization in Male Prisons*, 14 AUSTRALIAN & NEW ZEALAND J. OF SOCIOLOGY 51 (1978)).

<sup>133</sup> Roger N. Lancaster, *Subject Honor and Object Shame: The Construction of Male Homosexuality and Stigma in Nicaragua*, in ETHNOGRAPHIC STUDIES OF HOMOSEXUALITY 294 (Wayne R. Dynes & Stephen Donaldson Jr. eds., 1992).

<sup>134</sup> HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 143 (1977).

<sup>135</sup> *Id.* at 144.

<sup>136</sup> See Donald Tucker, *A Punk’s Story: A View from the Inside*, available at <http://www.spr.org> (last visited Apr. 3, 2002) (“[Punks] are . . . substitutes for females and are expected to remain in the passive role sexually as well as perform such “wifely” tasks as housekeeping, laundry and ironing for their men.”).

<sup>137</sup> See ANTHONY M. SCACCO, JR., *RAPE IN PRISONS* 87 (1975) (concluding that “in the attacker’s mind [prisoner rape] reduces the victim to the political role of a female”); see also HUMAN RIGHTS WATCH, *supra* note 126, Ch. V (describing prisoner rape as a crime of violence and power).

<sup>138</sup> See BROWNMILLER, *supra* note 117, at 285.

oner rape is not sexual satisfaction, but rather anger and aggression.<sup>139</sup> Davis discovered that “the typical sexual aggressor does not consider himself to be a homosexual, or even to have engaged in homosexual acts.”<sup>140</sup> This self-perception stems from the view of sexual relationships in prisons that “defines as male whichever partner is aggressive and as homosexual whichever partner is passive.”<sup>141</sup> Rather than a quest for sexual release, Davis concluded that a primary goal of the sexual aggressor is clearly “the conquest and degradation of his victim.”<sup>142</sup> Davis noted that aggressors commonly used such aggressive language as, “Fight or F\*\*\*,” “We’re going to take your manhood,” “You’ll have to give up some face,” and “We’re gonna make a girl out of you.”<sup>143</sup>

Outside prison walls, legal, moral, and humanistic interests often successfully restrict even the most aggressive males from carrying out this quest for male domination. In prison, however, traditional moral and humanistic concerns have little relevance;<sup>144</sup> status and power are based on domination and gratification.<sup>145</sup> The result, according to Wooden and Parker, is “an emphasis on violence and exploitation and a de-emphasis on mutual caring and reciprocal fulfillment.”<sup>146</sup> In this system, eroticism is associated with aggression, and “the degree of satisfaction derived from the sex act is often in direct proportion to

<sup>139</sup> Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, in *MALE RAPE* 116-17 (Anthony M. Scacco ed., 1982).

<sup>140</sup> *Id.* at 116.

<sup>141</sup> *Id.* A rapist who assumes the “heterosexual” male role of the aggressor is not considered homosexual by his peers. As long the inmate maintains the dominant sexual role, either by performing anal penetration or by receiving oral stimulation, he avoids social sanctions for what would otherwise and elsewhere be perceived as a homosexual act. WOODEN & PARKER, *supra* note 112, at 15. As an inmate told Human Rights Watch,

The theory is that you are not gay or bisexual as long as YOU yourself do not allow another man to stick his penis into your mouth or anal passage. If you do the sticking, you can still consider yourself to be a macho man/heterosexual, according to their theory. This is a pretty universal/widespread theory.

HUMAN RIGHTS WATCH, *supra* note 126, ch. IV (quoting an Illinois prisoner).

<sup>142</sup> Davis, *supra* note 139, at 116-17.

<sup>143</sup> *Id.* at 117.

<sup>144</sup> WOODEN & PARKER, *supra* note 112, at 14.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

the degree of force and humiliation to which the partner is subjected."<sup>147</sup>

This quest for domination often explains why certain inmates are raped.<sup>148</sup> Studies suggest that prisoner rape mirrors rape of women in that targets are chosen by the rapist's perception of the weakness and inability of the victim to defend himself.<sup>149</sup> In the prison context, weaker inmates quickly are identified and converted into sex slaves to be acquired by more powerful men.<sup>150</sup> A man's claim to his manhood is of the utmost value within prison walls. At the same time, masculinity is a tenuous concept that always stands the risk of being lost to another more powerful or aggressive man.<sup>151</sup> Not surprisingly, men are expected to fight for their manhood in prison.<sup>152</sup>

Just as successful rape and possession of a sexual receptive validate an inmate's manhood and protect the "man" from attempts to deprive him of his masculinity,<sup>153</sup> a single instance of penetration could strip an inmate of his masculinity for life.<sup>154</sup> Once lost, the rape victim becomes an immediate target for other potential rapists. The fact that someone has succeeded in raping the victim fuels the hopes of others that they will succeed as well. Others may perceive less harm in raping the man again because his masculinity was, in their eyes, already taken by someone else or they may believe that they are just as entitled to have him as the previous attacker.

Donna Brorby, an attorney who has represented a class of Texas prisoners in a major prison conditions case and spent hundreds of days in Texas prisons viewing facilities and interviewing prisoners and staff, explains that a prisoner typically

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<sup>147</sup> *Id.*

<sup>148</sup> See A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. OF PSYCHIATRY 806, 808 (1980).

<sup>149</sup> See Nobuhle R. Chonco, *Sexual Assault Among Male Inmates: A Descriptive Study*, 69:1 PRISON J. 72, 73 (1989).

<sup>150</sup> See Donaldson, *Rape of Males*, *supra* note 131.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

<sup>154</sup> See Stephen Donaldson, *Prison, Jails, and Reformatories*, in ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 131 [hereinafter Donaldson, *Prison, Jails, and Reformatories*].

would be assaulted on his first day in prison.<sup>155</sup> Brorby found that this initial attack often occurs as early as the inmate's first trip to his housing cell, and other inmates would observe the attack and evaluate the inmate based on how he responded.<sup>156</sup> Factors such as whether the inmate fought back, how well he fought, and whether he fought until he was unconscious likely determine whether the inmate will experience future assaults.<sup>157</sup> Brorby explained that victimizers want inmates who fold easily and will accept victimization.<sup>158</sup>

The initial rape commonly serves as the first step in what prisoners refer to as "turning out" the victim, which frequently resembles a form of slavery and forced prostitution.<sup>159</sup> Often, a gang or an attacker assumes control over the victim through overt force. At other times, a man or group of men will act like a support system and engage in various charades to mislead their intended victim into believing that they are friends.<sup>160</sup> This often serves to entice the victim into moving into their quarters where he more easily can be controlled. It also is used as an effective means to break the victim's spirit by reinforcing his feelings of powerlessness when they ultimately rape him. After the rape, the rapist or rapists establish that they can do whatever they want with the victim and that he is powerless to prevent them from having their way. Once the victim accepts this situation, he is easier for his attackers to manage and the victim is often forced to prostitute himself for their benefit, do whatever chores he is ordered to perform, and give them all of his property.

Alternatively, sometimes when a "man" takes another inmate as his, he will protect that individual—not out of a sense of charity or camaraderie, but because it would be an affront to his manhood to have someone else mess with what is his. Some

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<sup>155</sup> Donna Brorby, Remarks at the "Not Part of the Penalty": Ending Prisoner Rape Conference (Oct. 19, 2001).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See Lewin, *supra* note 7 (observing that prisoner rape can escalate into repeated assaults and even slavery, in which inmates are sold or rented to other inmates for sex).

<sup>160</sup> See, e.g., A.P.'s letter in *Excerpts From Typical Prisoners' Letters on Rape*, available at <http://www.spr.org> (last visited Apr. 5, 2002) (describing being befriended by his eventual rapist).

even advocate that potential victims pursue this form of “protective pairing” because it is safer than being raped and being forced to prostitute one’s self to what could be countless other men.<sup>161</sup> In fact, some prisons even have held wedding ceremonies for inmates.<sup>162</sup>

These dynamics of prisoner rape yield a rigid class system defined by sexual roles.<sup>163</sup> A clear hierarchy, or “pecking order,” determines the role to be played by each inmate.<sup>164</sup> On the masculine side the most prominent prisoners are “men,” also sometimes called the “pitchers” or the “wolves.”<sup>165</sup> The “man” takes the masculine role in sexual victimization by acting as the violent aggressor in a rape.<sup>166</sup> This coercion is essential for the inmate to maintain his masculine, heterosexual identity because consensual homosexual activity might raise questions about one’s masculinity.<sup>167</sup> These individuals, who clearly “rule the roost” and dictate the values and norms for the entire prison population, include convicted gang leaders, gang members, and organizers of aggressive activities such as the smuggling of contraband, protection rackets, and prostitution rings.<sup>168</sup>

On the “feminine” side are the “Fag,” the “Queen,” the “Kid,” and the “Punk.” The number of inmates who assume feminine roles tends to be very high, given the unrelenting demand of “men” for sexual recipients.<sup>169</sup> The “Fag” is a natural homosexual. The “Queen” is a homosexual or transsexual male who tends to adopt stereotypical effeminate mannerisms and plays a submissive role. The “Kid” is a sex slave who often submits by providing sexual favors and is rewarded with protection. The homosexual “queens” and the heterosexual “kids” are sub-

<sup>161</sup> See, e.g., *Contract Between a Punk and His “Man,”* available at <http://www.spr.org> (last visited Apr. 5, 2002).

<sup>162</sup> TOROK, *supra* note 9, at 42.

<sup>163</sup> See Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154.

<sup>164</sup> See Dumond, *supra* note 11, at 138.

<sup>165</sup> Other terms for this role include “Studs” and “Jockers.” See WOODEN & PARKER, *supra* note 112, at 3; Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154.

<sup>166</sup> See *id.*

<sup>167</sup> See Richard S. Jones & Thomas J. Schmid, *Inmates’ Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 53 (1989).

<sup>168</sup> See Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154. The “Daddy” also achieves sexual dominance, but does not employ physical coercion. He courts, befriends, or patronizes weaker and inexperienced inmates into sexual gratification. See Dumond, *supra* note 11, at 138.

<sup>169</sup> Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154.

jected to the norms, values, and roles determined by the more masculine inmates.<sup>170</sup> They sometimes are denied the right to establish their own identities and roles, and are considered “fair game” by other convicts.<sup>171</sup> These vulnerable inmates often are forced to conform to the roles required of them by the prison code.<sup>172</sup> In many ways, their submission to sexual acts can be seen as choosing the path of least resistance and attempting to make the best of a forced situation.<sup>173</sup>

At the bottom of the social hierarchy is the “punk.” The “punk” is usually a heterosexual male who submits to sexual acts, after initial resistance and eventual force. These inmates are turned into “punks” after rape (often gang rape), convincing threat of rape, or intimidation.<sup>174</sup> Once a prospective “punk” is raped, other inmates promptly brand him a continual target for future sexual attack.<sup>175</sup> The success of the initial rape causes the victim to be perceived weak and vulnerable by other inmates, who, in turn, take full advantage of this perceived weakness.<sup>176</sup> “Punks” are relegated to the lowest class of inmates and are victims of the most violent and heinous sexual assaults. Typically, one inmate “owns” a particular “punk,” rendering the “punk” the equivalent of a sexual slave.<sup>177</sup> The “punks” are forced to satisfy their “owner’s” sexual appetites whenever he demands, are sometimes forced to assume a female name, and may be responsible for washing the owner’s clothes, massaging his back, cooking his food, cleaning his cell, and various other chores.<sup>178</sup> Moreover, these “punks” are often “rented” by their “owners” to other inmates. Human Rights Watch reported that the “man” commonly sells oral or anal sex from his “punk” in exchange for money or other prison perks, like cigarettes.<sup>179</sup> Stephen Donaldson related his observations of the “punks”:

<sup>170</sup> WOODEN & PARKER, *supra* note 112, at 17.

<sup>171</sup> *Id.* at 17-18.

<sup>172</sup> *Id.* at 18.

<sup>173</sup> *Id.*

<sup>174</sup> Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154.

<sup>175</sup> Donaldson, *The Rape Crisis Behind Bars*, *supra* note 12, at A11.

<sup>176</sup> WOODEN & PARKER, *supra* note 112, at 18.

<sup>177</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. I.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Human Rights Watch reported that punks “are frequently ‘rented out’ for sex, sold, or even auctioned off to other inmates, replicating the financial aspects of traditional slavery.” *Id.*

I soon learned that victims of prison rape were, like me, usually the youngest, the smallest, the nonviolent, the first-timers and those charged with less serious crimes. If a prisoner is not middle-class, not "street-wise," not affiliated with a gang, not part of the racial or ethnic group that dominates his institution or held in a big city jail, he is likely to be a target.<sup>180</sup>

A new arrival in prison who projects the image of being young, attractive, or homosexual is likely to be approached within a short period of time by many inmates who possess the intention to turn the inmate into a "punk."<sup>181</sup> In addition, future "punks" often are subjected to violence prior to arriving in prison, as they frequently face sexual aggression in county jails<sup>182</sup> and even physical harm on the van ride to the prison.<sup>183</sup>

### III. PREDICTING PRISON SEXUAL ROLES

The specific roles that exist within this paradigm of masculinity and aggression are not randomly assigned. In many ways, the prison subculture resembles a scripted play, in which inmates play certain sexual roles. Inmates exuding certain characteristics are more vulnerable to aggression, making them more likely to be turned into "punks." At the same time, other inmates possess characteristics that reveal they are likely to become "men" and assume the role of the sexual aggressor. The purpose of this Part is to identify those factors.

#### A. PHYSICAL APPEARANCE

Many physical characteristics are indicators of sexual abuse that can be assessed immediately. An inmate's physical characteristics allow a potential rapist to assess the likelihood that an attempted rape will be successful. These physical characteristics are obvious. The most illustrative example is Dee Farmer, whose litigation gave rise to the "deliberate indifference" standard. Farmer displayed many of the physical features that make an inmate vulnerable: Farmer was a young transsexual with breast implants and had taken female hormones that caused

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<sup>180</sup> Donaldson, *The Rape Crisis Behind Bars*, *supra* note 12, at A11.

<sup>181</sup> WOODEN & PARKER, *supra* note 112, at 101.

<sup>182</sup> *Id.*

<sup>183</sup> Davis, *supra* note 139, at 118-20.



her to look youthful and feminine.<sup>184</sup> Upon first setting eyes on Farmer, guards and fellow inmates alike should have had little doubt that she would be victimized. Even in less obvious cases, however, guards are able to determine whether an inmate is likely to become a victim of sexual assault. As we demonstrate in this Section, various studies consistently have established certain identifiable physical characteristics that serve as extremely reliable indicators of the likelihood of rape.

### 1. Race

Prisons are not multi-cultural institutions where diversity is respected; rather, race is highly polarizing. In fact, racism is often considered the most divisive and dominant feature of inmate life.<sup>185</sup> In prison, there is an overwhelming sense that each race must stick together to protect its own. This racial polarization ties directly into the subculture of masculinity. In society, Blacks and Hispanics are minorities<sup>186</sup> that are disproportionately in the lower economic classes.<sup>187</sup> Many racial minorities perceive White men as responsible for preventing them from achieving socio-economic power and often view oppression by White society as responsible for their imprisonment.<sup>188</sup> White society, therefore, is deemed a threat to their sense of "manhood."<sup>189</sup> Within prison walls, the social make-up is flipped. Racial and ethnic minorities constitute the majority of the prison

<sup>184</sup> *Farmer v. Brennan*, 511 U.S. 825, 848 (1994).

<sup>185</sup> HUMAN RIGHTS WATCH, *supra* note 126, at ch II.

<sup>186</sup> United States Census data indicates that, in 2000, Whites constituted 75.1% of the population, Blacks constituted 12.3% of the population, and Hispanics constituted 12.5% of the population. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 3 (2001), *available at* <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf> (last visited Apr. 3, 2002).

<sup>187</sup> Census data from 1999 reveal that 23.6% of Blacks and 22.8% of Hispanics were below the poverty level, as opposed to 7.7% of Whites. U.S. CENSUS BUREAU, POVERTY (1999), *available at* <http://www.census.gov/hhes/poverty/poverty99/pv99est1.html> (last visited Apr. 3, 2002).

<sup>188</sup> HUMAN RIGHTS WATCH, *supra* note 126, at ch II (quoting a Black prisoner, "Most blacks see whites as "The Man" or "The Law!" . . . I may be beating a dead horse when I say this, but black men as a whole do not trust white law officials, male or female, from judge to lawyer. Most feel that the legal system is fundamentally racist and officers are the most visible symbol of a corrupt institution & with good reason.").

<sup>189</sup> *Id.*

population.<sup>190</sup> Among these minorities, Blacks are the largest racial group, with the number of incarcerated Blacks skyrocketing in recent years.<sup>191</sup> From 1986 to 1997, the number of adult Blacks under correctional supervision nearly doubled.<sup>192</sup> Black inmates often use this newfound power to seek retribution against White inmates.<sup>193</sup> In addition, Cindy Struckman-Johnson, who has studied extensively the dynamics of prisoner sexual coercion, has noted that the White prisoners often view themselves to be in the minority because of the preponderance of Black prisoners and guards.<sup>194</sup>

Several scholars have explained the role of race in sexual assaults in terms of what race represents. In modern society, race often serves as a proxy for the characteristics necessary for survival in a prison. Nobuhle Chonco, who conducted a descriptive study of male inmate rape, explains that Black inmate aggression arises because “most black inmates start criminality at a very early age” and therefore learn how to survive in the institution.<sup>195</sup> Anthony Scacco, a leading scholar in the socio-racial

<sup>190</sup> The most recent Department of Justice statistics are from 1991, when sixty-five percent of prison inmates belonged to racial or ethnic minorities. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CRIMINAL OFFENDER STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Apr. 3, 2002).

<sup>191</sup> See, e.g., NICHOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA 105 (1999). Although Blacks comprise only about fifteen percent of the total U.S. population, Blacks comprised 48.3% of the total prison population in 1995. *Id.* at 105-14. The Department of Justice's statistics estimated that, in 1997, a total of 2,149,900 were under correctional supervision, as compared to 3,429,000 Whites. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS: NUMBER OF ADULTS UNDER CORRECTIONAL SUPERVISION (2000), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/cpracetab.htm> (last visited Apr. 3, 2002); see HUMAN RIGHTS WATCH, *supra* note 126, ch. II (estimating that Blacks constitute forty-four percent of the prisoner population, Whites constitute forty percent, Hispanics constitute fifteen percent, and other minorities constitute the remaining one to two percent).

<sup>192</sup> In 1986, 1,117,200 adult Blacks were incarcerated, on probation, or on parole, as compared to 2,149,900 in 1997. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS: NUMBER OF ADULTS UNDER CORRECTIONAL SUPERVISION, *supra* note 191.

<sup>193</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. II (quoting a Black prisoner who noted the distrust that many Blacks harbor for Whites, and commented, “is it any wonder than when a white man comes to prison, that blacks see him as a target”). This sense of racial polarization explains why White power organizations continue organizations continue to thrive. ROBERT WALKER, GANGS: OTHER PRISON GANGS, available at <http://www.gangsor.us.com/otherprison.html> (last visited Apr. 3, 2002); HUMAN RIGHTS WATCH, *supra* note 126, ch. II (“The white supremacist movement has many adherents in the prison system.”).

<sup>194</sup> Cindy Struckman-Johnson, Remarks at the “Not Part of the Penalty”: Ending Prisoner Rape Conference (Oct. 19, 2001).

<sup>195</sup> Chonco, *supra* note 149, at 78.

aspect of prison sexual victimization, reports that one Black explains his desire to force Whites to submit to sexual assault as, "now it is their turn."<sup>196</sup> As a result, rape serves as a mechanism by which Black inmates can obtain retribution and assert their dominance over Whites.<sup>197</sup> Donaldson explains, "[i]t is essential to their concept of manhood to make White prisoners the victims of their assaults . . . ."<sup>198</sup> These racial dynamics in prison have resulted in race becoming a critical factor in predicting the likelihood of sexual victimization.<sup>199</sup>

As a result, prisoners' social relationships are largely determined by race and gang affiliations usually are dictated along racial lines.<sup>200</sup> For these reasons, it is less common for Black or Chicano inmates to be "turned out" and to become "punks." Black and Chicano prisoners often tend to look out for their own, and are less inclined to "turn out" one of their own race.<sup>201</sup> White inmates lack a similar sense of racial identity and cohesiveness.<sup>202</sup> If a White inmate faces unwanted sexual pressure by either Black or Chicano inmates, other White heterosexuals rarely come to his rescue, but rather will use the pressure to their advantage to "turn him out."<sup>203</sup> The result is that White inmates become prey to inmates of all races.<sup>204</sup> Based on similar rationales, White inmates are often hesitant to assault Black and Chicano inmates because they know that other Black and Chicano inmates will back up members of their races.<sup>205</sup>

Racism further exacerbates sexual assaults. Because of the animosity between the races in prison, rapes committed by one racial group against a member of another tend to be the most

<sup>196</sup> Anthony M. Scacco, Jr., *The Scapegoat Is Almost Always White*, in MALE RAPE, *supra* note 139, at 91.

<sup>197</sup> See Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154, at 1042.

<sup>198</sup> *Id.*

<sup>199</sup> Scacco, Jr., *supra* note 196, at 91 ("The issue of racism predominates as a central point in sexual victimization within correctional institutions."); see *id.* (quoting Simon Dinitz et al., *Inmate Exploitation—A Study of the Juvenile Victim* 9 (Paper presented to the First International Symposium on Victimology, Hebrew University, Jerusalem, Israel, Sept. 1973)) (characterizing race as "the single most important sociodemographic characteristic associated with victimization").

<sup>200</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. II.

<sup>201</sup> WOODEN & PARKER, *supra* note 112, at 106.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 106-07.

<sup>204</sup> *Id.* at 107.

<sup>205</sup> *Id.*

brutal and there often is little respect for such persons as human beings. Extreme abuse, such as knocking out the teeth of an inmate to make oral sex more pleasurable, is more common in these instances. When rape occurs among men of the same race, it is more common that the attackers will share some level of camaraderie with their victims. For example, the attacker may be willing to protect the victim against other attackers and, with the exception of demands for sex, otherwise treat their victims as friends.<sup>206</sup>

Numerous studies have revealed consistently that victimization is not randomly distributed within the prison population according to race. These studies have demonstrated the prevalence of Black on White sexual violence in prison.<sup>207</sup> The most recent comprehensive study on prisoner rape, conducted in 1996 by Cindy Struckman-Johnson, found a clear relationship between race and prisoner rape. The study found that the targets of sexual coercion had a greater representation of Whites than the total return sample.<sup>208</sup> Seventy-eight percent of the victims were White, compared with sixty-two percent of the prison population.<sup>209</sup> Meanwhile, eighteen percent of the victims were Black, compared with thirty-three percent of the prison population.<sup>210</sup> Struckman-Johnson's most recent study of sexual coercion rates in prisons, published in 2000, arrived at similar conclusions.<sup>211</sup> Struckman-Johnson found that "White inmates complained that Black sexual aggressors routinely preyed on young White inmates."<sup>212</sup> Struckman-Johnson's empirical data showed that the targets in sixty percent of the incidents of sexual coercion were White, while the perpetrators in seventy-four percent of the incidents were Black.<sup>213</sup>

<sup>206</sup> See, e.g., *The Story of a Black Punk*, Jan. 28, 1983, available at <http://www.spr.org> (last visited Apr. 4, 2002); David Pittman, *Memories of Rape*, available at <http://www.spr.org> (last visited Apr. 4, 2002) (making a distinction between "violent rapists" and what he describes as "nice rapists").

<sup>207</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV ("Past studies have documented the prevalence of black on white sexual aggression in prison.").

<sup>208</sup> Struckman-Johnson et al., *supra* note 12, at 71.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379 (2000).

<sup>212</sup> *Id.* at 386.

<sup>213</sup> *Id.*

Davis's study of the Philadelphia jail system offers further evidence that racial tensions and hostilities are intensified in confinement. The majority of prisoner rapes, fifty-six percent, involved Black aggressors and White victims.<sup>214</sup> Only twenty-nine percent of the rapes involved Black aggressors and Black victims and fifteen percent involved White aggressors and White victims.<sup>215</sup> Even more striking was Davis's inability to find a single case of a White inmate raping a Black inmate.<sup>216</sup>

Davis offers two explanations for his findings, both of which tie into the prison subculture of masculine domination. First, many Black inmates are organized into gangs. A primary goal of many sexual assailants is to retain membership in the groups led by militant sexual aggressors.<sup>217</sup> Second, Black inmates are predominantly members of the lower economic classes. These individuals are members of a subculture that has found most nonsexual avenues of asserting their masculinity, such as job success, raising a family, and achieving social respect, closed.<sup>218</sup> For these inmates, only sexual and physical prowess stands between them and a sense of emasculation.<sup>219</sup>

Davis's study may be subject to criticism because it examined a prison system where the inmates were predominantly Black, and thus may merely have shown that the dominant race also dominates sexual aggression. Another study, conducted by Leo Carroll, examined a penitentiary where only twenty-two percent of the inmates were Black. Yet, Carroll found a rape distribution very similar to the distribution Davis found in the Philadelphia prison system.<sup>220</sup> Carroll discovered that most as-

<sup>214</sup> Davis, *supra* note 139, at 116.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* In 1976, David A. Jones's study of prisoner rape arrived at similar conclusions. DAVID A. JONES, *THE HEALTH RISK OF IMPRISONMENT* (1976). Although less comprehensive than Davis's study, Jones's study found that Black inmates tended to be the aggressors of prisoner rapes, with White inmates being the victims. *Id.*; *see also* BOWKER, *supra* note 14, at 68. This is not to suggest that Black inmates are not raped by Whites. Indeed, Stop Prisoner Rapes has compiled many letters from Black inmates who claim to have been raped by Whites. *See* The Story of a Black Punk, *available at* <http://www.spr.org> (last visited Apr. 5, 2002).

<sup>217</sup> Davis, *supra* note 139, at 117.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See* BOWKER, *supra* note 14, at 67 (citing Leo Carroll, *Race and Sexual Assault in a Prison* (paper presented at the Annual Meeting of the Society for the Study of Social Problems, Montreal, 1974)).

saults were interracial, with Blacks attacking Whites repeatedly in efforts to affirm their masculinity and to express their rage over racial oppression.<sup>221</sup> One explanation that Carroll offered was that, although the Black inmates were a small minority in this prison, they were better organized as a group than their White counterparts.<sup>222</sup> Carroll believed that White inmates were victimized not because they exhibited female characteristics, but rather because they represented the White middle class toward which the Black inmates felt the greatest rage.<sup>223</sup> Other studies have supported Struckman-Johnson, Davis, and Carroll's findings that White inmates are at the greatest risk of sexual assault.<sup>224</sup>

Wooden and Parker's study of the California penal system offers further insight. In addition to finding that Black inmates are most likely to become the sexual aggressors, Black inmates also are the least likely to be victims of sexual assault. More specifically, Wooden and Parker found it relatively rare that a Black inmate would be sexually victimized as a "punk." Of the sixteen "punks" identified by the authors, only two were Black.<sup>225</sup> The remaining fourteen "punks" were young White inmates.<sup>226</sup> Along similar lines, it is less common for a White inmate to victimize a Black or Chicano inmate. In the words of a Texas prisoner, "only a black can turn out a black, and only a chicano can turn out a chicano."<sup>227</sup>

Race comes into play not just with sexual assault, but with prison violence in general. Toch studied inmate victimization in New York state prisons, looking at not just rape but all forms of violence.<sup>228</sup> This inquiry is insightful because, as discussed

<sup>221</sup> *Id.* (discussing Carroll's conclusions).

<sup>222</sup> *Id.* at 67-68 (discussing Carroll's conclusions).

<sup>223</sup> *Id.* at 68 (discussing Carroll's conclusions). Carroll further observed that White leaders often would cooperate with Black inmates to seduce and degrade the victims in order to have those victims as permanent sexual partners. *Id.* (discussing Carroll's conclusions).

<sup>224</sup> See, e.g., LOCKWOOD, *supra* note 12, at 105-06 (finding a 250% differential in victimization among racial groups); C. Scott Moss et al., *Sexual Assault in a Prison*, 44 PSYCHOLOGICAL REPORTS (1979); JONES, *supra* note 216; see also HUMAN RIGHTS WATCH, *supra* note 126, ch. IV (interviewing White, Black, and Hispanic inmates, and concluding that "white inmates are disproportionately targeted for abuse").

<sup>225</sup> WOODEN & PARKER, *supra* note 112, at 107.

<sup>226</sup> *Id.*

<sup>227</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV.

<sup>228</sup> TOCH, *supra* note 134.

earlier, the subculture that promotes sexual abuse is one of aggression and domination.<sup>229</sup> Although sexual abuse constitutes an extreme form of masculine aggression, other forms of dominance exist. Toch found that race played a major role in whether a person would commit violence or be a victim of violence.<sup>230</sup> Eighty percent of the aggressors were Black, while only ten percent were White.<sup>231</sup> Yet, only nineteen percent of the victims were Black, while seventy-nine percent of the victims were White.<sup>232</sup>

## 2. Age

Prison sex has been depicted as a “young man’s game.”<sup>233</sup> Youthful prisoners are far more vulnerable to sexual assault and more likely to respond to the need for protection.<sup>234</sup> A variety of reasons explain the increased vulnerability of younger inmates. First, young inmates are more likely to have certain feminine features that make them more attractive to predators.<sup>235</sup> In addition, young inmates are easier targets because they are likely to be ignorant of the “rules” of prison life. As a result, young inmates quickly become the focus of the “men” who perceive them as a likely sexual victory. In addition, the aggressors tend to target young prisoners quickly to establish their claim. Young prisoners, especially those new to prison life, are also more appealing to the “men” because they are less likely to be attracted to other inmates and, therefore, more faithful to their part-

<sup>229</sup> See *supra* part II.B.

<sup>230</sup> TOCH, *supra* note 134, at 145.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* Puerto Ricans made up the remainder of the prison population. Ten percent of the Puerto Rican inmates were aggressors of prison violence, and two percent were victims of violence. *Id.*

<sup>233</sup> WOODEN & PARKER, *supra* note 112, at 24.

<sup>234</sup> JACOBO SCHIFTER, MACHO LOVE: SEX BEHIND BARS IN CENTRAL AMERICA 35 (1999); see BOWKER, *supra* note 14, at 11. In fact, the term “kid,” a close synonym for “punk” in the prison lexicon, is often used to describe the victim of a coercive sexual relationship. HUMAN RIGHTS WATCH, *supra* note 126, ch. IV.

Age does not seem to be as strong of an indicator for the rapist. The rapists tend to be older than the victims, but younger than the general prison population. See Chonco, *supra* note 149, at 74.

<sup>235</sup> See HUMAN RIGHTS WATCH, *supra* note 126, ch. IV (quoting victimized inmates as expressing the “typical” view that young prisoners “are viewed as more attractive sexually and more easily abused”); Chonco, *supra* note 149, at 73 (presenting accounts of why certain inmates become victims of prisoner rape).

ner.<sup>236</sup> Older inmates, in contrast, tend to be less susceptible to prisoner rape. Men over the age of fifty, including homosexual inmates, are considered far less desirable than the younger inmates and, therefore, are often left alone.<sup>237</sup>

Studies have confirmed the vulnerability of young inmates. Davis's study revealed that the average age of rape victims was twenty-one, far below the average prisoner age of twenty-nine.<sup>238</sup> Wooden and Parker's study of California prisons found that the average age of a rape victim was twenty-three, while the average inmate age was twenty-nine.<sup>239</sup> Furthermore, sexual assaults tend to occur more often in prisons with younger inmates, regardless of the security level of the institution.<sup>240</sup> Institutions housing older inmates are more likely to be the site of consensual sexual activity.<sup>241</sup>

There also appears to be widespread recognition among prison authorities that younger inmates are notably susceptible to prisoner rape. In the words of a correction officer in a report to the state legislature, a young inmate's chance of avoiding rape is "almost zero. . . . He'll get raped within the first twenty-four to forty-eight hours. That's almost standard."<sup>242</sup> Justice Harry Blackmun painted an equally grim picture of prison life for young inmates. Dissenting in *United States v. Bailey*,<sup>243</sup> Justice Blackmun observed, "a youthful inmate can expect to be subjected to homosexual gang rape in his first night in jail, or, it has been said, even in the van on the way to the jail."<sup>244</sup>

It is not surprising that this relationship between youth and sexual assault has translated into enhanced fear among younger inmates. Tewksbury's study of the fear of sexual assaults among inmates found a significantly greater percentage of young inmates fearing sexual assault or rape than older inmates. Thirty-four point two percent of inmates under thirty years of age had

<sup>236</sup> See *infra* notes 216-222 and accompanying text.

<sup>237</sup> WOODEN & PARKER, *supra* note 112, at 24.

<sup>238</sup> See Davis, *supra* note 139, at 115.

<sup>239</sup> See, e.g., WOODEN & PARKER, *supra* note 112 at 13-24.

<sup>240</sup> See *id.*

<sup>241</sup> See Chonco, *supra* note 149, at 74.

<sup>242</sup> See Steve Lerner, *Rule of the Cruel*, NEW REPUBLIC, Oct. 15, 1984, at 17-21. *But see* Struckman-Johnson et al, *supra* note 12, at 71 (finding that targets of sexual coercion in prison were slightly older than the total return sample).

<sup>243</sup> 444 U.S. 394 (1980).

<sup>244</sup> *Id.* at 421 (Blackmun, J., dissenting).



a "high" fear of sexual assault or rape, while only 19.2% of inmates thirty years old and over shared a "high" fear.<sup>245</sup>

### 3. *Feminine Characteristics*

Any characteristic perceived in prison as feminine puts an inmate at severe risk. In many ways, an inmate's aura of femininity can overlap with his age and size, as younger and smaller inmates are often perceived as more feminine than older inmates.<sup>246</sup> Homosexual inmates, especially those with stereotypical feminine characteristics, are particularly vulnerable.<sup>247</sup> Wooden and Parker found that homosexual inmates were almost five times more likely to be sexually assaulted than their heterosexual counterparts.<sup>248</sup> Most of these characteristics can be readily observed by prison officials. For example, inmates with high pitch voices are likely to be victimized.<sup>249</sup> Other "feminine" characteristics, such as hairstyles, gestures, and clothing, as well as affiliation with known homosexuals, suggest to other inmates that you are available for sex.<sup>250</sup> In particular, an inmate who is openly gay or who is a transvestite or a pre-operational transsexual, such as Dee Farmer (the litigant in *Farmer v. Brennan*), is a clear target of sexual aggression.<sup>251</sup>

In addition, an inmate who fails to act with a sufficient aura of masculinity stands at risk. For example, inmates who look scared, shy, or nervous face immediate danger because they exude signs of weaknesses.<sup>252</sup> Similarly, inmates who talk too much, thinking that it is the only way to fit in, may be perceived as nervous and become targets of rape.<sup>253</sup> On the other hand, if

<sup>245</sup> See Richard Tewksbury, *Fear of Sexual Assault in Prison Inmates*, 69 PRISON J. 62, 67 (1989).

<sup>246</sup> Chonco, *supra* note 149, at 73; see *supra* Part III.A.3.

<sup>247</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV.

<sup>248</sup> WOODEN & PARKER, *supra* note 112, at 18 (discovering that forty-one percent of homosexual inmates were victims of sexual assaults, as opposed to nine percent of heterosexual inmates).

<sup>249</sup> Chonco, *supra* note 149, at 74.

<sup>250</sup> Daniel Lockwood, *Issues in Prison: Sexual Violence*, in PRISON VIOLENCE IN AMERICA 101 (Michael C. Braswell et al. eds., 2d ed. 1991) (citing Peter L. Nacci, *Sex Sexual Aggression in Federal Prisons* (unpublished manuscript)).

<sup>251</sup> For a discussion of Dee Farmer's situation, see text accompanying *supra* notes 37-42.

<sup>252</sup> See Chonco, *supra* note 149, at 73-74.

<sup>253</sup> See *id.* at 74.

an inmate gives off a more confident aura, along with physical attributes that support confidence, he may be able to avoid victimization. This inmate is able to maintain the fine line of minding his own business while not isolating himself from others.<sup>254</sup>

#### 4. Physical Size

A particularly strong indicator of whether an inmate will be victimized is his physical build. Physical force, or at least the threat of physical force, is the most common element of coercion used in prisoner rape.<sup>255</sup> Smaller inmates face a substantial risk of being victims of sexual assault, while larger inmates are likely to use their size to their advantage. One smaller inmate may have put it best when he likened his life in prison to that of "a hunted animal."<sup>256</sup>

The explanations for this phenomenon lie in the prison subculture of masculinity discussed earlier.<sup>257</sup> The first is obvious: physically weaker victims are more easily dominated, thereby giving an inmate an opportunity to assert his masculinity.<sup>258</sup> The prison subculture calls for inmates to use force to establish themselves as men. Larger inmates are able to use their size as a means to attain power within the institution. Larger inmates can exert physical force with greater ease, while smaller inmates are less able to defend themselves. Second, a male inmate with a slight build can be perceived as being more feminine than larger inmates. By raping someone perceived as feminine, an inmate can assert his dominance without thinking of himself as a homosexual and, thereby, securing his male

<sup>254</sup> See *id.*

<sup>255</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV. Human Rights Watch, which recently published a report on the epidemic of prisoner rape, related the story of a small inmate, weighing about 140 pounds, who was attacked by an inmate standing about 6'7" and weighing approximately 280 pounds. *Id.* Several other former victims of prisoner rape report similar examples of physical dominance to Human Rights Watch. *Id.*

<sup>256</sup> *Id.* (reporting interview of a Texas prisoner who was only five feet tall).

<sup>257</sup> See *supra* Part II.B.

<sup>258</sup> See HUMAN RIGHTS WATCH, *supra* note 126, ch. IV ("Unsurprisingly—given that physical force, or at least the implicit threat of physical force, is a common element of rape in prison—victims of rape tend to be smaller and weaker than perpetrators.").

identity. Thus, the inmate redefines seemingly homosexual activity as a heterosexual activity.<sup>259</sup>

Studies have left little doubt that size is a significant factor in prisoner sexual assault.<sup>260</sup> Davis's study of sexual abuse in the Philadelphia prisons found that the average weight of a victim of prisoner rape was only 141 pounds, lighter than the average weight of the rapist.<sup>261</sup> Davis also discovered that the assailants were, on average, one inch taller than their victims.<sup>262</sup> Davis reported that three wardens admitted that "virtually every slightly built young man committed by the courts is sexually approached within a day or two after his admission to prison."<sup>263</sup> Daniel Lockwood made similar discoveries in his survey of six New York state prisons. Lockwood found that victims of sexual aggression weighed an average of fifteen pounds less than their aggressor.<sup>264</sup> Smaller inmates are well aware, or upon arrival at prison soon become aware, of the increased danger of rape that they face. Richard Tewksbury, in his study of the fear of sexual assaults among inmates, found a greater percentage of inmates of below average height fearing sexual assault or rape than inmates of above average height.<sup>265</sup>

## B. PERSONAL HISTORY

Like many of the physical characteristics discussed above, some aspects of an inmate's personal history can be assessed almost immediately. For example, new inmates are usually easy to identify, especially because they often are forced to wear spe-

<sup>259</sup> See *id.*

<sup>260</sup> It must be remembered, though, that any inmate—regardless of his size—can be overcome by gangs of men or even a smaller man who is armed. See, e.g., David Pittman, *Memories of Rape*, available at <http://www.spr.org> (last visited Apr. 5, 2002) (describing himself as 6'1", 180 pounds, and having received military training, but was gang-raped and forced to become a punk).

<sup>261</sup> See Davis, *supra* note 139, at 115. Davis found that the average weight of the rapists was one hundred fifty-seven pounds. *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 108; see also Charles M. Sennott, *AIDS Adds a Fatal Factor to Prison Assault*, BOSTON GLOBE, May 2, 1994, at 1 [hereinafter Sennott, *AIDS*] ("The fact that [the victim of sexual assault] is slightly built and only 5 feet 6 made him that much more vulnerable.").

<sup>264</sup> LOCKWOOD, *supra* note 12, at 31.

<sup>265</sup> See Tewksbury, *supra* note 245, at 67. *But see id.* (finding that a greater percentage of inmates of above average weight feared sexual assault or rape than inmates of below average weight).

cial uniforms for their first days in prison. But other aspects of an inmate's personal history can take a little more time to determine. To a certain extent, however, experienced inmates infer these characteristics rather quickly. An inmate convicted of a violent crime or who was a gang member is likely to appear different than a white-collar criminal. Even if inmates cannot assess another's personal history at first glance, this assessment will not take long. It is not hard to figure out than an inmate is a first-time offender if he is completely ignorant of the "rules" of prison life.

### 1. *New Inmates*

An inmate is most susceptible to rape upon his initial arrival in prison. Many new inmates are unaccustomed to the prison subculture, making them more vulnerable to intimidation and domination.<sup>266</sup> Brorby interviewed a Texas prison warden who confirmed the advantage of understanding the reality of prison life. The warden explained that an inmate who simply "goes along with the program" can avoid rape.<sup>267</sup> For instance, the inmate should leave the cell if his cellmate is being attacked and should ignore another inmate's sexual abuse instead of trying to stop it.<sup>268</sup> Brorby recommends the inmate must understand that it is everyone for himself and instead of trying to be a hero, the inmate must focus on getting out of prison alive.<sup>269</sup> Therefore, an inmate who knows about the prison culture and takes great care to act appropriately has a better chance of avoiding victimization.

The problem, however, is that the intricacies of prison culture are not intuitive and new inmates do not know how they should act. Moreover, new inmates face a closely related problem. In addition to being unfamiliar with proper behavior, new inmates lack allies that could help protect them when violence occurs.<sup>270</sup> An aggressor is far less likely to target another inmate if he perceives the inmate to have allies willing to fight on his behalf. Developing these protective relationships of course

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<sup>266</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV.

<sup>267</sup> Brorby, *supra* note 155 (explaining conversation with a Texas prison warden).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV.

takes time, leaving new inmates unlikely to have any allies willing to offer protection.

At the same time, the "men" want to claim new inmates before other inmates have the opportunity to stake their claim. It is very easy to identify new inmates in a correctional facility. In addition to the simple fact that other inmates have not seen them previously, new inmates are often forced to wear distinctive outfits for the first days of their confinement. Typically, new inmates are often dressed in a white cotton outfit with white drawstring pants.<sup>271</sup> Although the stated purpose of making new inmates wear their "whites" for the first three days is to allow guards to get acquainted with and recognize them,<sup>272</sup> it allows other inmates to identify them as well.

This increased danger is intensified for new inmates who are younger and more slightly built. Recall the warning of the Florida Corrections Officer that it is "almost standard" for a young new inmate to be "raped within the first twenty-four to forty-eight hours."<sup>273</sup> Similarly, Davis' investigation of Philadelphia institutions revealed that, "Virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison."<sup>274</sup>

It also is well established that first-time offenders are particularly vulnerable.<sup>275</sup> District Court Judge Merhige, in *Van Horn v. Luckhard*,<sup>276</sup> recognized the serious risk of victimization faced by a first imprisonment offender. Judge Merhige observed, "new inmates will often be unfamiliar with the realities of prison life and will, therefore, be less adept at avoiding situations which could lead to sexual assault, and in defending against such assaults."<sup>277</sup> The reason for their increased vulnerability is obvious. First-time offenders do not know the "rules" of the prison. Lacking firsthand experience, the new inmate often constructs a prison image on the basis of a variety of secondary sources of information, such as newspaper accounts,

<sup>271</sup> WOODEN & PARKER, *supra* note 112, at 101.

<sup>272</sup> *Id.*

<sup>273</sup> Lerner, *supra* note 242.

<sup>274</sup> Davis, *supra* note 139.

<sup>275</sup> See David Cotton & Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. OF PRISON & JAIL HEALTH 1, 53 (1982).

<sup>276</sup> 392 F. Supp. 384 (E.D. Va. 1975).

<sup>277</sup> *Id.* at 387.

novels, television programs, and movies.<sup>278</sup> Therefore, he knows relatively little about true prison life, and is overcome by fear of injury, death, and sexual assault.<sup>279</sup> For example, a basic rule of the prison is nothing is free. If one inmate gives another candy or a cigarette, there is a high probability that something, often sexual gratification, will be demanded in return.<sup>280</sup> New inmates do not know these rules, and may take the candy or cigarette, thinking the item is a gift for which nothing is expected in return.

By contrast, an inmate who previously has served time is familiar with the "rules of the game." This familiarity not only allows the inmate to take precautionary steps to minimize the danger of sexual assault, but also to more easily assume the role of the aggressor if he so chooses. The inmate already has experienced the prison subculture and the inmate is more likely to have learned how to choose a victim.<sup>281</sup> These inmates use their superior knowledge of the institution to their advantage and prey on less knowledgeable inmates.<sup>282</sup>

## 2. *Life Prior to Imprisonment*

A prisoner's experience in the "outside world" may indicate how well he will adapt to the prison subculture. Inmates who avoid victimization tend to be more "street-wise" and the fighters. If an inmate can prove that he knows how to fight, he may avoid rape because potential aggressors would fear the consequences of an attack.<sup>283</sup> In contrast, inmates who are less experienced in personal combat or confinement situations are prime candidates to be turned into "punks."<sup>284</sup> John Irwin explained that inmates who are not "street-wise" are vulnerable because

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<sup>278</sup> See Jones & Schmid, *supra* note 167, at 54.

<sup>279</sup> See *id.* at 55.

<sup>280</sup> See Chonco, *supra* note 149, at 73 (relating tales of the types of inmates who are likely to be victimized).

<sup>281</sup> See *id.* at 74.

<sup>282</sup> See Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154.

<sup>283</sup> See Chonco, *supra* note 149, at 74-75.

<sup>284</sup> See Donaldson, *Prisons, Jails, and Reformatories*, *supra* note 154. Similarly, many of the "punks" are inmates who lack mental toughness and are not "street-wise." Kevin N. Wright, *The Violent and Victimized in the Male Prison*, in *PRISON VIOLENCE IN AMERICA*, *supra* note 250, at 107 (reviewing studies on occurrence of prisoner rape).

"they don't know the street language, roles and games and don't know how to protect themselves."<sup>285</sup>

Knowing the life history of an inmate also make it easier to predict which inmates are likely to engage in violence. Many sexual aggressors are merely continuing the violent behavior that they were accustomed to on the outside.<sup>286</sup> The main distinction is that, while confined, inmates predisposed to violence adjust their aggression to conform with the prison subculture of masculinity, in which a main mechanism for asserting dominance is sexual aggression. Bowker observed that many inmates who are prone to violence "have not generally been socialized to reject violence as a way of solving problems."<sup>287</sup> These men define masculinity in terms of domination and force their sexual aggression on their wives and other women as a means of affirming their domination.<sup>288</sup> For these reasons, characteristics that indicate violent tendencies, such as gang membership, are strong indicators of whether an inmate will commit violence in prison.<sup>289</sup> John Irwin agrees with Bowker, noting that most male prisoners come "from a social layer that shares extremely reduced life options, meager material existence, limited experience with formal, polite, and complex urban social organizations, and traditional suspicions and hostilities toward people different from their own kind."<sup>290</sup> These inmates draw upon their violent pasts as they participate in the prison culture.<sup>291</sup>

Another reliable indicator relating to an inmate's previous life is his economic status. Inmates with a lower socio-economic status are more likely to be the aggressors, while inmates who are in the middle and upper classes are more likely to be victims. Davis reasoned that members of the lower classes are more often unable to assert their masculinity through socially acceptable means, and engage in rape to demonstrate their

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<sup>285</sup> JOHN IRWIN, *THE FELON* (1970).

<sup>286</sup> See BOWKER, *supra* note 14, at 11.

<sup>287</sup> Lee H. Bowker, *An Essay on Prison Violence*, in *PRISON VIOLENCE IN AMERICA*, *supra* note 250.

<sup>288</sup> See BOWKER, *supra* note 14, at 11.

<sup>289</sup> See TODD R. CLEAR & GEORGE F. COLE, *AMERICAN CORRECTIONS* (1986).

<sup>290</sup> JOHN IRWIN, *PRISONS IN TURMOIL* (1980).

<sup>291</sup> See *id.*

dominance and assert their masculinity.<sup>292</sup> In contrast, members of the middle class are more likely to be victimized.<sup>293</sup>

Toch's study of New York state prisons also revealed a clear disproportion with respect to urban/non-urban origin. Toch discovered that inmates coming from urban settings were more likely to be the aggressors, and inmates from non-urban areas were far more likely to be victims.<sup>294</sup> Seventy-four percent of the aggressors in this study were from New York City, while only twenty-six percent were from outside of the city.<sup>295</sup> Moreover, only fifteen percent of the targets of violence were from the city, while eighty-five percent of the victims were from non-urban areas.<sup>296</sup>

### 3. Nature of Conviction

Closely related to the inmate's experience in the "outside world" is the nature of the crime for which the inmate was convicted. A prisoner convicted of a nonviolent crime is more likely to become a rape victim than a violent offender.<sup>297</sup> Similarly, inmates convicted of more serious offenses, such as those serving long, or even life, sentences, tend to take on the role of the aggressor in prisoner rape. Davis found that sixty-eight percent of the aggressors were charged with serious felonies, while only thirty-eight percent of the victims were charged with serious felonies.<sup>298</sup> Chonco's study also revealed that the crimes for which victims of rape generally are incarcerated are far less violent than those of their attackers.<sup>299</sup> Additionally, the rate of prisoner rape is higher in maximum security prisons than in

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<sup>292</sup> See Davis, *supra* note 139, at 117.

<sup>293</sup> See Kevin N. Wright, *The Violent and Victimized in the Male Prison*, in PRISON VIOLENCE IN AMERICA, *supra* note 250, at 107 (reviewing studies on occurrence of prisoner rape).

<sup>294</sup> TOCH, *supra* note 134, at 145.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV. Human Rights Watch noted, however, that its findings on this issue are tentative because many victims of sexual abuse are unaware of the crime of which their attacker was incarcerated. *Id.*

<sup>298</sup> See Davis, *supra* note 139, at 115.

<sup>299</sup> Chonco, *supra* note 149, at 74.



minimum security prisons,<sup>300</sup> and higher security institutions tend to have more “punks” than lower security institutions.<sup>301</sup>

The explanations for this relationship also are grounded in the prison subculture of dominance. Men convicted of minor property offenses and misdemeanors, such as credit card misuse,<sup>302</sup> are perceived as less masculine than other inmates and, therefore, are more likely to be raped.<sup>303</sup> Thus, inmates like Stephen Donaldson, who was imprisoned following a peaceful sit-in,<sup>304</sup> are immensely more vulnerable to sexual assault. Meanwhile, prisoners convicted of violent crimes are already predisposed to violence.<sup>305</sup> In addition, egregious violent crimes often carry harsher sentences, thereby making these inmates not only more experienced with the prison subculture, but also more willing to take the risks involved and feeling a greater need for sexual partners.<sup>306</sup>

There is one important, and well-accepted, exception to the general rule that inmates of more serious crimes are less vulnerable.<sup>307</sup> Inmates convicted of sex crimes, known as “skimmers,” are frequent targets of vicious beatings and rapes under the inmates’ collective sense of prison justice.<sup>308</sup> Even if the sex crime was one of violence, these inmates are often perceived as “the lowest of the low,” and therefore less masculine than other inmates.<sup>309</sup> This is especially true of child sex abuse, in which case rape of the child molester is perceived as justified.<sup>310</sup> As a result,

<sup>300</sup> See Brief of Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), at 2, available at <http://www.spr.org> (last visited Aug. 9, 2000).

<sup>301</sup> See Donaldson, *Prisons, Jails and Reformatories*, *supra* note 154.

<sup>302</sup> See, e.g., *Alberti v. Klevenhagen*, 790 F.2d 158, 160 (4th Cir. 1980) (reviewing testimony of an inmate, incarcerated for the misdemeanor of credit card misuse, who was victimized by sexual assault).

<sup>303</sup> See BOWKER, *supra* note 14, at 11.

<sup>304</sup> See text accompanying *supra* notes 1-7.

<sup>305</sup> See Donaldson, *Prisons, Jails and Reformatories*, *supra* note 154.

<sup>306</sup> See *id.*

<sup>307</sup> Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), at n.68, available at <http://www.spr.org> (last visited Aug. 9, 2000); see also *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000); see also *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000) (addressing the heightened risk a White inmate faced in prison for being convicted of raping a 15 year-old girl and his case was highly publicized).

<sup>308</sup> See Sennott, *AIDS*, *supra* note 263, at 1.

<sup>309</sup> See *id.*

<sup>310</sup> Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), at n.68, available at <http://www.spr.org> (last visited Aug. 9, 2000).

inmates convicted of sex crimes against minors often attempt to conceal their reason for incarceration, but once their crime becomes known, the ensuing abuse is notably brutal.<sup>311</sup>

#### 4. *Length of Incarceration*

Inmates facing long-term incarceration are more likely to assume the role of a sexual aggressor.<sup>312</sup> Such inmates are more willing to take the risks involved in turning an inmate into a "punk" for his own use.<sup>313</sup> Similarly, the benefits of having a "partner" for the duration of a sentence are greater for inmates serving longer sentences. In contrast, inmates who are imprisoned only for brief periods may be more reluctant to assume the risks involved, and may be better able to resist their sexual urges because of the shorter separation from females.<sup>314</sup>

### IV. THE LEGAL SIGNIFICANCE OF FORECASTING PRISONER RAPE

The aforementioned factors prove one simple point: prisoner rape is highly predictable. The more characteristics of vulnerability an inmate possesses, the more likely he is to be victimized.<sup>315</sup> Moreover, these criteria are relatively basic, and can easily be assessed by prison officials. An inmate is vulnerable to sexual assault if he possesses characteristics perceived to be associated with weakness and femininity.<sup>316</sup> Men with many of the above characteristics, including being members of the White middle class, being young, feminine, inexperienced with prison life, convicted of minor property offenses, and slight of build, are seen as attractive targets.<sup>317</sup>

This predictability is critical in light of the existing legal standard for Eighth Amendment claims in prisoner rape

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<sup>311</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. IV (relating story of child sex criminal who hid his crime for seven months, but when his crime became known, "everyone came down on" him and beat him up with mop handles and broom sticks).

<sup>312</sup> Donaldson, *Prisons, Jails and Reformatories*, *supra* note 154.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), at 8, available at <http://www.spr.org> (last visited Aug. 9, 2000).

<sup>316</sup> See Chonco, *supra* note 149, at 78.

<sup>317</sup> See BOWKER, *supra* note 14, at 11.

cases.<sup>318</sup> That standard, articulated in *Farmer v. Brennan*, set forth a two-part burden of proof for the plaintiff inmate. First, the inmate must prove that “he is incarcerated in conditions posing a substantial risk of serious harm.”<sup>319</sup> The second, and more difficult, part of the *Farmer* test requires the inmate to demonstrate that the prison officials acted with “deliberate indifference” towards his health and safety. In this Part, we discuss each prong of the test in turn, with a focus on the more important prong, the “deliberate indifference” inquiry.

#### A. “CONDITIONS POSING A SUBSTANTIAL RISK OF SERIOUS HARM”

The first prong of the *Farmer* test traditionally has been relatively easy for inmates to satisfy, as rape clearly constitutes a serious harm.<sup>320</sup> In addition, there are certain inmates who are at a unique danger and face particular conditions of incarceration that pose a notably substantial risk of serious harm. The studies discussed earlier in Part III of this Article clearly reinforce the increased danger certain inmates face.

#### B. “DELIBERATE INDIFFERENCE”

The more rigorous obstacle under *Farmer* is the “deliberate indifference” test. To establish “deliberate indifference,” an inmate must show that the prison official “[knew] of and disregard[ed] an excessive risk to inmate health or safety.”<sup>321</sup> An official is not “free to ignore obvious dangers to the inmates,”<sup>322</sup> and “deliberate indifference” occurs if “the official acted or failed to act despite knowledge of a substantial risk of harm.”<sup>323</sup>

Not only is it often easy to forecast whether a certain inmate will become a sexual aggressor or victim, but prison officials are well aware of the indicators that enable such forecasting. A prison official, who witnesses the prison subculture of masculinity on a daily basis, probably knows which inmates face “a substantial risk of harm.”<sup>324</sup> These officials know about the “pecking

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<sup>318</sup> See *supra* Part I.

<sup>319</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

<sup>320</sup> See *supra* note 21.

<sup>321</sup> *Farmer*, 511 U.S. at 832.

<sup>322</sup> *Id.* at 842.

<sup>323</sup> *Id.*

<sup>324</sup> See *supra* note 43.

order” that permeates the prison subculture better than anyone, except perhaps the inmates themselves. Indeed, a lay observer, with the most primitive understanding of prison life, can predict, with high accuracy, which inmates will be “punks” and which inmates will be the “men” that turn the “punks” out. This basic comprehension of the prison subculture, in light of the psychology of rape, makes predicting prisoner rape remarkably easy.<sup>325</sup>

In addition, not only can prison officials determine which inmates are likely to be victims and which are likely to be assailants, they can make this determination almost instantaneously when an inmate arrives at the institution. For example, a young, small, and timid inmate will almost certainly be targeted for sexual aggression within his first days of incarceration. Based on these criteria, prison administrators can classify incoming prisoners as to vulnerability as a target and treat them accordingly.<sup>326</sup> As discussed earlier, Dee Farmer was the prototypical example.<sup>327</sup> When a young transsexual with overtly feminine features entered the prison, officials should have instantaneously identified her as a likely, if not inevitable, target and taken appropriate action.

A prison official who observes these apparent indicators of vulnerability, yet nonetheless fails to take any action to prevent sexual assault, acts with “deliberate indifference.” There are several simple steps that prison officials can take to minimize the risk of sexual abuse. Yet, very few prisons have taken these actions. For the rest of this Section, we discuss certain action that officials can and should take to combat the “substantial risk of harm” that certain inmates face.

### *1. General Cognizance of the Dangers Certain Inmates Face*

Simply put, prison officials must make themselves aware of the dangers certain inmates face and accept some responsibility

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<sup>325</sup> American judges are very familiar with these factors that indicate whether an inmate will face victimization. For instance, the Second Circuit has upheld a trial court’s conclusion that a defendant’s overall appearance and demeanor made him unusually vulnerable to physical attack, warranting downward departure from the Sentencing Guidelines. *United States v. Gonzalez*, 945 F.2d 525, 526 (2d Cir. 1991).

<sup>326</sup> See *Amicus Curiae for Stop Prisoner Rape, Farmer v. Brennan*, 511 U.S. 825 (1994), at 8, available at <http://www.spr.org> (last visited Aug. 9, 2000).

<sup>327</sup> See text accompanying *supra* notes 37-42, 184.

for preventing these attacks. First, prison officials need to acknowledge that sexual assault is a problem, and one that needs to be addressed.<sup>328</sup> It seems ludicrous to contend that prison officials do not realize sexual assault occurs behind bars.<sup>329</sup> Some prison officials admit that sexual abuse is rampant.<sup>330</sup> Furthermore, it is well accepted in society that prisoner rape occurs and is a serious problem.<sup>331</sup>

Guards also must give more credence to the claims of rape victims. Officials often erroneously assume that inmates who are homosexual or presumed to be homosexual are consenting to the sexual act.<sup>332</sup> Guards must understand that sexual acts involving homosexual and bisexual inmates are often nonconsensual.<sup>333</sup> Similarly, guards often mistakenly believe that a prisoner who does not fight off his attacker is consenting to sex.<sup>334</sup>

Second, officials must take preventive measures based on this knowledge of the problem. Officials know which inmates are the most dangerous and which are the most likely to be victims of sexual assault. The factors which indicate an inmate's vulnerability are readily available to any prison official. Officials should identify these inmates upon incarceration and guards

<sup>328</sup> See Charles M. Sennott, *Prison System Enacts Reforms to Stop Inmate Rape*, BOSTON GLOBE, Nov. 9, 1994, at 37 [hereinafter Sennott, *Prison System*] (reporting that the Massachusetts Department of Corrections has undertaken a series of steps, including training seminars for correction officers and prison health officials on handling rape allegations and an overhaul of the inmate classification system to try to separate predators from potential victims); Charles Sennott, *More Steps Urged on Prison Rapes*, BOSTON GLOBE, May 24, 1994, at (reporting testimony of Massachusetts Department of Correction Commission Larry DuBois before the State House, which stated that he planned to implement a new training program for guards to address prisoner rape).

<sup>329</sup> See Eigenberg, *supra* note 43, at 47 tbl.3 (noting that eighty-six percent of Texas correctional officials surveyed "disagreed" or "strongly disagreed" with the suggestion that prisoner rape is rare); see also Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), at 8, available at <http://www.spr.org> (last visited Aug. 9, 2000) ("This predictability of risk is relevant, given the widespread knowledge among confinement officials of these facts, to liability inquiries concerning prisoners who should have stood out as targets in the mind of any competent professional.").

<sup>330</sup> See, e.g., Lerner, *supra* note 242.

<sup>331</sup> See Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape*, BOSTON GLOBE, May 17, 1994, at 22 (reporting findings of a Boston Globe Poll on concerns about prisoner rape); see also *id.* (observing that prisoner rape "has been long tacitly accepted by prison officials").

<sup>332</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. VIII.

<sup>333</sup> See NACCI & KANE, *supra* note 94, at 16 (reporting that federal correctional officials assume that sex acts involving homosexual or bisexual inmates are consensual).

<sup>334</sup> Lewin, *supra* note 7.

should make a concerted effort to protect them.<sup>335</sup> Guards have a responsibility to protect those inmates and ensure that they refrain from abuse. Moreover, guards also need to be mindful of those inmates with characteristics that make them particularly vulnerable to sexual abuse. These inmates cannot defend themselves, and the guards have a responsibility to do so.

Yet, stories abound of guards turning a blind eye to sexual abuse, and even committing it themselves.<sup>336</sup> In its recent report on prisoner rape, Human Rights Watch concluded that “[a]n absolutely central problem with regard to sexual abuse in prison . . . is the inadequate—and, in many instances, callous and irresponsible—response of correctional staff to complaints of rape.”<sup>337</sup> The report documented several instances of victimized inmates informing prison officials of sexual assault, only to have their pleas for help ignored.<sup>338</sup> Brorby, who studied prisons in Texas, explained that many officials believe that the inmates should protect themselves.<sup>339</sup> Brorby noted that the mentality among many prison officials is that inmates are supposed to protect themselves and inmates who cannot protect themselves are not considered worthy of their concern.<sup>340</sup> These officials reason that it is a “man’s prison” and, therefore, it is the inmate’s job to fend for himself.<sup>341</sup>

Struckman-Johnson’s 2000 study of prison sexual coercion found the lax attitude of prison security officials to be a major factor that promotes prisoner rape.<sup>342</sup> Struckman-Johnson reported that “inmate and staff respondents complained about poorly paid, unmotivated staff who failed to complete basic rounds.”<sup>343</sup> In addition, Struckman-Johnson found evidence

<sup>335</sup> Amicus Curiae for Stop Prisoner Rape, *Farmer v. Brennan*, 511 U.S. 825 (1994), available at <http://www.spr.org> (last visited Aug. 9, 2000) (“Readily available facts about any prisoner, plus a few questions, enable administrators to classify incoming prisoners as to vulnerability as a target, and treat them accordingly.”).

<sup>336</sup> TOROK, *supra* note 9, at 41.

<sup>337</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. I.

<sup>338</sup> *Id.* at chs. IV, VIII.

<sup>339</sup> Brorby, *supra* note 155.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> Struckman-Johnson & Struckman-Johnson, *supra* note 211, at 386. The article identified three main factors that result in prisoner sexual assault: lax security, racial tensions, and barracks housing. *Id.*

<sup>343</sup> *Id.*

that many officials even permitted or encouraged sexual assault. Struckman-Johnson noted, "Many inmates also complained that some homosexual and/or Black staff tended to be permissive about sexual coercion. Numerous inmates alleged that a few high-level officers had for years demanded sexual favors from inmates."<sup>344</sup>

Proof of officials' failure to respond to prisoner pleas is the refusal of prisons to subject prison rapists to criminal prosecution. Human Rights Watch discovered that prisoners "uniformly agreed that criminal prosecution of rapists never occurs."<sup>345</sup> In fact, of the well over one hundred rapes reported to Human Rights Watch, not a single rape led to the prosecution of the perpetrator.<sup>346</sup> Human Rights Watch also reported that the vast majority of state corrections departments were unable to identify a single instance in which a prison rapist was prosecuted for the crime.<sup>347</sup>

In addition, there have been allegations of attempts by prison officials to cover-up sexual assault.<sup>348</sup> For example, James R. Smith, the Connecticut Claims Commissioner who investigated the conditions at a state jail leading to an alleged rape, discovered, "someone, presumably correctional staff, had removed a page from the institution logbook which covered the time that the rape occurred."<sup>349</sup> There were even allegations in Massachusetts that inmates who come forward with allegations of rape are punished by placement in lock-up and not released until they sign waivers giving the prison legal protection against lawsuit.<sup>350</sup> Robert Dumond also identified this danger of institutional punishment as a reason why rapes are often not disclosed. According to Dumond, the lack of disclosure of rapes "is, as noted by many researchers, supported by the institutional envi-

<sup>344</sup> *Id.*

<sup>345</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. VIII.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 126, ch. I (relating story of a Texas inmate who filed repeated grievances reporting sexual assaults, only to be informed by prison officials that he was never raped).

<sup>349</sup> See Edward Fitzpatrick, *Report Blasts Security at Jail: Official Backs Rape Victim's Bid To Sue*, HARTFORD COURANT, July 24, 2000, at A3.

<sup>350</sup> See Charles M. Sennott, *Prison Staffers Allege Deep Flaws at Shirley*, BOSTON GLOBE, May 11, 1994, at 1 [hereinafter, Sennott, *Prison Staffers*].

ronment and staff who often 'penalize' inmate victims when they come forward with such complaints."<sup>351</sup>

Furthermore, prison officials should realize that inmates who complain about prisoner rape are likely to be subject to retaliation. In the rare occasions when prison rapists receive some form of institutional discipline, such as lock-up in "the hole," inmates are usually released back to the general prison population once their term of special punishment expires. It is not surprising that when these inmates return to the general prison population, they often are primed for revenge against the inmates who reported them.<sup>352</sup> Therefore, prison officials need to pay special attention to the safety of those inmates who report prisoner rape.

Unfortunately, however, prison officials too often do not offer special protection for such inmates. Rather, the Human Rights Watch report suggests that some prison officials take actions that endanger the safety of inmates who report rape. The report relates the story of a victimized inmate who was forced to identify his assailant in front of approximately twenty other inmates.<sup>353</sup> This public identification immediately put the inmate's life in danger as a "snitch" when he was returned to the general prison population.<sup>354</sup>

## 2. Parity in Cell-Matching

An extremely logical and simple solution is to avoid pairing inmates as cellmates if sexual assault is likely to result from the matching.<sup>355</sup> Most prisoner rapes occur at night when inmates are in their housing areas because of the absence of staff supervision.<sup>356</sup> An inmate falling into the category of a likely sexual aggressor should not be paired with an inmate who is likely to

<sup>351</sup> Dumond, *supra* note 11, at 151.

<sup>352</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. VIII; see Robertson, *supra* note 31, at 39 (describing inmates as facing the dilemma of becoming a snitch or foregoing intervention by prison officials).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> See Helen M. Eigenberg, *Rape in Male Prison: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and Their Willingness To Respond to Acts of Rape*, in PRISON VIOLENCE IN AMERICA, *supra* note 250, at 152 (finding that ninety-three percent of prison officers surveyed do not believe that it is acceptable to place inmates in cells where they might be raped).

<sup>356</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. VIII.



become a victim. Therefore, prison officials should avoid cell matchings that increase the danger of sexual victimization. A large, multi-offender, serving a long sentence for a violent crime, for example, should not share a cell with a more diminutive first-time offender imprisoned for tax evasion.

This is a common sense solution. It seems hard to imagine a more obvious and straightforward way to combat sexual assault. When Struckman-Johnson asked inmates to suggest ways to prevent assault, the most frequently mentioned solution "was to segregate vulnerable inmates (e.g., those who are young, non-violent, new in prison, white) from sexual predators."<sup>357</sup> More importantly, the prison staff surveyed agreed that segregating vulnerable inmates from sexual predators, as well as the use of single cells, would be effective ways to combat sexual assault.<sup>358</sup>

Despite the obvious nature of this solution, there have been very egregious instances of cell-matching which made sexual assault virtually inevitable. Recall, for example, the inmates at issue in *Wilson v. Wright*.<sup>359</sup> A nineteen-year-old, White, and nonviolent offender, who stood 5'8" and weighed 136 pounds, was forced to share a cell with a 6'1", 290-pound Black inmate who had been classified as a high-risk prisoner because of his history of violence and sexual assault.<sup>360</sup> It is hardly a surprise that a sexual assault occurred the first night they shared the cell. Fortunately, the court found that a jury could conclude that the prison official responsible for this imprudent cell assignment acted with "deliberate indifference."<sup>361</sup>

The *Boston Globe*, in its exposé of prisoner rape in Massachusetts prisons, uncovered an equally distasteful cell pairing. Shawn Medina, a scrawny and baby-faced teenage inmate, was paired with a cellmate nearly twice his size.<sup>362</sup> Medina's cellmate, Clarence Slade, stood 6'4 and weighed 260 pounds.<sup>363</sup>

<sup>357</sup> Struckman-Johnson et al., *supra* note 12, at 74.

<sup>358</sup> *See id.*

<sup>359</sup> 998 F. Supp. 650 (E.D. Va. 1998). For a discussion of *Wilson v. Wright*, see text accompanying *supra* notes 47-57.

<sup>360</sup> *Wilson*, 998 F. Supp. at 652.

<sup>361</sup> *Id.* at 655; *see also supra* at 12 & n.45 (providing additional examples).

<sup>362</sup> Charles M. Sennott, *Rape Behind Bars: Prison's Hidden Horror*, BOSTON GLOBE, May 1, 1994, at 1.

<sup>363</sup> *See Sennott, Prison Staffers, supra* note 350, at 1.

Medina was targeted the first day in prison, and was raped repeatedly and brutally, often with a razor against his neck, throughout his incarceration.<sup>364</sup> To make the situation even more revolting, prison officials then paired Slade with another young inmate, Binh Nguyen, who also fit the profile of a vulnerable inmate.<sup>365</sup> Needless to say, Nguyen too found himself the victim of violent rapes at the hands of Slade.<sup>366</sup>

Along similar lines, if an inmate objects to being paired with another inmate out of fear of ensuing sexual assault, prison officials need to respect those objections. The *New York Times* reported the plight of Eddie Dillard, a victim of violent sexual assault at Corcoran State Prison in California.<sup>367</sup> Dillard, a 120-pound inmate, had identified Wayne Robertson, a 230-pound known sexual predator, on a list of known enemies with whom he should not share a cell.<sup>368</sup> Prison officials ignored this request, and moved Dillard into Robertson's cell.<sup>369</sup> The next two nights, Dillard was raped and sodomized "all night long."<sup>370</sup> Dillard only escaped the abuse because he was taken out of the cell for a hearing the following day, and refused to return.<sup>371</sup> The actions of a guard who engages in such outrageous cell-matching would seem to satisfy any conception of "deliberate indifference."

### 3. Mindful Cell Blocking

Most prisons are large facilities divided into tiers. Wooden and Parker liken "life on the tier" to life in a college dormitory.<sup>372</sup> In their study, the tier consisted of approximately fifty men. These fifty men live, shower, and eat together, developing a sort of social cohesion and tolerance for each other.<sup>373</sup> The solution may be to segregate inmates based on their propensity to

<sup>364</sup> *Id.*

<sup>365</sup> See Sennott, *Prison Staffers*, *supra* note 350, at 1; Charles M. Sennott, *Authorities Move To Respond to Accounts of Prison Rape*, BOSTON GLOBE, May 5, 1994, at 32.

<sup>366</sup> See Sennott, *Prison System*, *supra* note 328, at 37; Sennott, *Prison Staffers*, *supra* note 350, at 1.

<sup>367</sup> Lewin, *supra* note 7.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> WOODEN & PARKER, *supra* note 112, at 34.

<sup>373</sup> *Id.*

become sexual aggressors or victims. Prison officials should identify the likely targets for sexual aggression and separate them from the likely attackers.<sup>374</sup> This was a recommendation endorsed by Cotton and Groth in their study of prison violence. The authors observed that, "One strategy is to identify the profile characteristics of victims and offenders and to segregate these groups as much as the physical plant and the resources will allow."<sup>375</sup> Again, this basic reform has not been adopted in many prisons. A *Washington Post* report on rape in county jails found that many rapists are violent offenders that had been placed in cell blocks with those awaiting trial on nonviolent charges.<sup>376</sup>

#### 4. Sufficient Supervision

A major reason why aggressors successfully rape other inmates is the absence of any officials to witness the assault. This problem is largely a result of the exponential growth of the prison population, and the failure of prison staffing to keep pace with this growth.<sup>377</sup> Prisoner rape most often occurs when there is no prison staff to see or hear it, and mostly occurs at night when the inmates are left alone and unsupervised in their housing areas.<sup>378</sup> The obvious solution is to increase staffing and supervision during these periods.<sup>379</sup> This recommendation has strong support. As one prisoner told Human Rights Watch, "The greatest preventive measure [against rape] is posting staff, monitoring areas that are high risk for assault."<sup>380</sup> The Struckman-Johnson studies also found that increasing staff and supervision receives widespread support.<sup>381</sup> Even prison staff agree

<sup>374</sup> See Charles M. Sennott, *Prisoners Urged To Wrest Assault from the Shadows*, BOSTON GLOBE, May 3, 1994, at 1 (discussing Fay Honey Knopp, an inmate's rights advocate, endorsing this reform).

<sup>375</sup> Cotton & Groth, *supra* note 275, at 53.

<sup>376</sup> Loretta Tofani, *Rape in the County Jail: Prince George's Hidden Horror*, WASH. POST, Sept. 26, 1982, at A1.

<sup>377</sup> HUMAN RIGHTS WATCH, *supra* note 126, ch. I.

<sup>378</sup> *Id.* ch. VIII.

<sup>379</sup> See BOWKER, *supra* note 14, at 12 (proposing increased staffing as a solution to prisoner sexual assault).

<sup>380</sup> See HUMAN RIGHTS WATCH, *supra* note 126, ch. VIII (quoting a Virginia inmate).

<sup>381</sup> Struckman-Johnson et al., *supra* note 12, at 74; Struckman-Johnson & Struckman-Johnson, *supra* note 211, at 386.

that increased staff and supervision would significantly help prevent prisoner sexual assault.<sup>382</sup>

### CONCLUSION

Popular culture has dubbed prisoner rape a joke.<sup>383</sup> There is nothing funny about what is happening in contemporary American prisons. Sexual abuse is a grim reality of prison life that subjects inmates to horrifying punishments that far exceed their sentences. Prisoner rape also does not occur randomly. The subculture of prison fosters a milieu in which the likelihood of sexual abuse is highly predictable. The factors that reveal the likelihood of rape, such as age, size, race, and personal history, are both highly reliable indicators and easily identified. Any informed observer can predict whether sexual abuse will occur based on these factors.<sup>384</sup> Guards who ignore these characteristics and fail to take precautionary measures in response to them demonstrate, in the words of the Supreme Court, "deliberate indifference."

Victims of prisoner rape can prevail in suits against prisons and officials by citing the failure of guards to anticipate rape. More importantly, successful suits relying on the predictability of rape and the failure of guards to act when assault is foreseeable may prod prison reform. Maybe then, prison officials will stop ignoring the constant terror that far too many inmates face.

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<sup>382</sup> See *id.*

<sup>383</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 126, ch. I ("Judging by the popular media, rape is accepted as a commonplace of imprisonment, so much so that when the topic of prison arises, a joking reference to rape seems almost obligatory."). Contemporary movies, for example, routinely make jokes about prisoner rape. See, e.g., DIRTY WORK (MGM Distribution Company 1998); HOUSE PARTY (New Line Cinema 1990); NAKED GUN 33 1/3 (Paramount Pictures 1994). In addition, various movies have portrayed prisoner rape as commonplace and have depicted guards as routinely ignoring the assaults. See, e.g., AMERICAN ME (Universal Pictures 1992); AMERICAN HISTORY X (New Line Cinema 1998); POISON (Zeitgeist Films 1991); THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

<sup>384</sup> For example, recently a judge refused to imprison a young, thin, White man because she believed that he would be a certain victim of sexual abuse. Associated Press, *Jail a Risk for Thin, White Man, Judge Rules*, FLORIDA TIMES-UNION, Jan. 7, 2001, at B5; see also Loretta Tofani, *Justice May Not Be Served*, WASH. POST, Sept. 27, 1982, at A9 (reporting that some Maryland judges say that the potential for rape in the county jail influences some of their sentences).

