AIDS BEHIND BARS: JUDICIAL BARRIERS TO PRISONERS' CONSTITUTIONAL CLAIMS

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Prison walls are not supposed to separate inmates from their constitutional rights.[1]

I. INTRODUCTION

The passage of nearly a quarter of a century unveils the unforeseen and far-reaching effects of President Nixon's War on Drugs.[2] Our nation currently incarcerates a greater percentage of its citizens than any other country

1. Turner v. Safley, 482 U.S. 78, 84 (1979).

2. Andrew Skolnick, *'Collateral Casualties' Climb in Drug War*, 271 JAMA 1636, 1636 (1994).

in the world.[3] One thousand new prison beds are needed each week to accommodate the nation's rapidly growing prison population.[4] These astounding incarceration rates are due—to a great extent—to our nation's policy on drugs.[5] Under our nation's current policy, it is estimated by 1995, seventy percent of the federal inmate population will be comprised of drug offenders.[6]

One commentator notes, "[e]pidemics of disease always follow closely in the footsteps of war and the war on drugs is no exception."[7] In making this comparison, the commentator notes that the increasing inability of intravenous drug users to obtain clean needles has resulted in the sharing of needles and the diseases associated with shared needles.[8] The number of drug-associated hepatitis, bacteremia, and tuberculosis cases are on the rise.[9] The deadliest of modern diseases, however, is HIV-AIDS,[10] and the number of people infected is reaching epidemic proportions.[11]

The purpose of this Note is three-fold. Part II discusses the prevalence of AIDS in the general population, the statistics and realities of AIDS in the prison population, and correctional facilities' policies on AIDS. Part III provides a background on prisoners' rights cases, including the history and current framework of the Eighth Amendment, and describes the way in which courts overwhelmingly defer to correctional facilities' policies designed to deal with HIV-AIDS. Part III of this Note also analyzes the way in which the Eleventh Amendment and the doctrines of immunity further preclude successful outcomes of prisoners' constitutional claims. Finally, Part IV concludes that the issue of AIDS in prisons may be best left to the prison administration and the legislature and suggests alternatives that may be utilized through these avenues.

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3. *Id.* at 1638.

4. *Id.*; *see also* C. Ryan et al., *HIV Prevention in U.S. Correctional System*, 268 JAMA 23, 23 (1992) (finding that the number of adults under correctional supervision in the United States has increased 75% since 1983).

5. Skolnick, *supra* note 2, at 1638.

6. NATIONAL COMM'N ON AIDS, REPORT NUMBER FOUR: HIV IN CORRECTIONAL FACILITIES 4 (1988) [hereinafter REPORT NUMBER FOUR].

7. Skolnick, *supra* note 2, at 1636.

8. *Id.*

9. *Id.*

10. HIV is an abbreviation for Human Immunodeficiency Virus, the virus that causes AIDS, Acquired Immune Deficiency Syndrome. CHARLES F. CLARK, AIDS AND THE ARROWS OF PESTILENCE 42 (1994). AIDS is a disease that destroys the human body's immune system, making people with AIDS susceptible to diseases that ordinarily would not be life-threatening. THEODORE HAMMETT ET AL., NATIONAL INSTITUTE OF JUSTICE AIDS BULLETIN, THE CAUSE, TRANSMISSION, AND INCIDENCE OF AIDS 1 (June 1987).

11. *See, e.g.*, Centers For Disease Control and Prevention, *Projections of the Number of Persons Diagnosed with AIDS and the Number of Immunosuppressed HIV-Infected Persons—United States, 1992-1994*, MORBIDITY & MORTALITY WKLY. REP., Dec. 25, 1992, at 1; Geoffrey Cowley et al., *AIDS—The Next Ten Years*, NEWSWEEK, June 25, 1990, at 20 ("The AIDS epidemic is far from over. It's not even under control." The World Health Organization's Global Program on AIDS estimates that by the year 2000, an estimated five to six million will have AIDS, while the number of HIV-positive may approach 20 million.).

II. AIDS

A. *Prevalence of AIDS*

Every thirteen minutes another American becomes infected with HIV.[12] One million individuals in the United States are HIV-positive,[13] and over 400,000 of those have developed AIDS.[14] Almost one-third of those cases were contracted in 1993 alone.[15] Seventy percent of those infections were transmitted by intravenous drug use.[16] Combining "zero-tolerance" incarceration trends,[17] HIV-AIDS transmission rates, and modes of transmission create an alarming situation: HIV-AIDS in the prison population.[18]

B. *AIDS in the Prison Population*

The problem of HIV-AIDS in the prison population is two-fold[19]—not only is HIV seropositivity high among prison entrants,[20] but additional

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12. *Network Educates Businesses About HIV*, CHI. TRIB., Dec. 13, 1992, § 8, at 1 ("One in 250 Americans is HIV positive . . . ."). American statistics pale in comparison to worldwide statistics—in certain parts of Africa, one-third of the population is HIV-positive. Cowley et al., *supra* note 11, at 20. AIDS is more heavily concentrated in certain parts of the United States. For example, the infection rate among women in the Bronx is 5% to 12%, and 25% of young males surveyed in Newark, New Jersey tested positive. *Id.*

13. Centers For Disease Control and Prevention, *1993 Reclassification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, MORBIDITY & MORTALITY WKLY. REP., Dec. 18, 1992, at 1, 8.

14. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HIV/AIDS SURVEILLANCE REPORT, June 1994, at 8 (1994).

15. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH, UNITED STATES, 1993, at 146.

16. *Id.* This number corresponds with the number of incarcerated individuals testing positive for HIV who identify themselves as intravenous drug users (IDUs). *See* Ryan et al., *supra* note 4, at 23.

17. Skolnick, *supra* note 2, at 1636; *see also* Heather Rhoads, *The New Death Row: Prisons Abuse Inmates with AIDS*, THE PROGRESSIVE, Sept. 1991, at 18 (discussing the increase of HIV-positive prisoners and the treatment they endure across the nation). Zero-tolerance refers to the United States' increasingly stringent policy of incarceration for drug offenders, including casual drug users and first-time offenders. *Id.* Proponents of the policy believe drug users deserve the "worst of fates." Skolnick, *supra* note 2, at 1638. Former First Lady Nancy Reagan told the press in 1988 that "if you're a casual drug user, you are an accomplice to murder." *Id.*

18. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, HIV IN U.S. PRISONS AND JAILS 1 (Bureau of Justice Statistics Special Report Sept. 1993); *see also* Rhoads, *supra* note 17, at 19 ("By choosing mass imprisonment as the response to drug use, Federal and state governments have created a de facto policy of incarcerating more and more HIV-infected individuals.").

19. Skolnick, *supra* note 2, at 1638.

20. *Id.*; *see also* David Vlahov et al., *Prevalence of Antibody to HIV-1 Among Entrants to U.S. Correctional Facilities*, 265 JAMA 1129, 1129-32 (1991) (finding that 2.1% to 7.6% of males and 2.5% to 14.7% of females entering correctional institutions were HIV-positive). *But see* HARLOW, *supra* note 18, at 1 (indicating that 17,479 of 792,176 inmates or 2.2% of the total U.S. custody population were reported as HIV-positive). Accurate data on the number of prison inmates who are HIV-AIDS positive and the number who contract HIV-AIDS once

transmission occurs within the prison environment.[21] In addition to overcrowding,[22] high-risk activities within the prison setting, including drug use[23] and homosexuality, create a fertile breeding ground for HIV-AIDS.[24]

1. *Statistics on AIDS in Prison*

While statistics vary according to the geographic location of the institution,[25] infection rates generally increase with the size of the prison[26] and the length of the term served.[27] In New York, for example, almost fourteen percent of prisoners are HIV-positive, and AIDS accounts for two-thirds of all prisoner deaths.[28] These statistics, although startling, do not reflect the horrors that occur within the prison walls everyday.[29]

2. *The Reality of AIDS in Prison*

In prison, brutal homosexual rapes are terrifyingly commonplace.[30] The psychological and emotional impact of forcible rape is magnified by the deadly physical threat that AIDS poses to a victimized inmate.[31] Inmates in

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incarcerated is extremely difficult to obtain because testing procedures vary among prisons. *See id.* at 1. The United States Department of Justice bases its results on a survey of 14,000 inmates. *Id.* at 2. Although this sample may be an accurate representation, only 51% of state prison inmates reported participating in HIV testing, indicating that the incidence of HIV-AIDS in the prison population may be vastly unknown and under-reported. *Id.* at 1.

21. *See* Ryan et al., *supra* note 4, at 23-24; *see, e.g.*, Rhoads, *supra* note 17, at 18 ("The National Institute of Justice reports a 606 per cent increase in confirmed AIDS cases in U.S. prisons and a sample of large jails from 1985 to 1989.").

22. Rhoads, *supra* note 17, at 19 ("Chronic overcrowding increases inmates' exposure to infectious diseases—a particularly grim situation for immunodeficient prisoners.").

23. Rhoads, *supra* note 17, at 22 (finding that the scarcity of syringes in prisons and jails results in the sharing of needles among prisoners to a greater degree than in the general population).

24. The transmission of AIDS in prison is growing at an alarming rate. *See, e.g.*, M.E. Malone & Elizabeth Neuffer, *AIDS on Rise in Prisons; Strained Mass. System Grapples with Burden*, BOSTON GLOBE, Mar. 29, 1992, at Metro/Region 1 (indicating that a thirty-fold increase in the number of prisoners with AIDS was identified in Massachusetts between 1987 and 1992).

25. HARLOW, *supra* note 18, at 2 (finding that northeastern states lead the nation with the highest percentage (8.1%) of HIV-positive inmates).

26. *Id.* at 6.

27. Ryan et al., *supra* note 4, at 24.

28. HARLOW, *supra* note 18, at 4; *see also* Rhoads, *supra* note 17, at 18 (noting that in New York state prisons, an estimated 9000 of 54,000 inmates are HIV-positive). AIDS has hit the correctional systems in New York, New Jersey, California, and Florida the hardest. *Id.* at 19. The Department of Corrections in New Jersey estimates that between 30% and 50% of inmates are HIV-positive. *Id.* In Broward County, Florida, over 50% of inmates who were voluntarily tested were HIV-positive. *Id.*

29. *See generally* CARL WEISS & DAVID J. FRIAR, TERROR IN THE PRISONS (1974).

30. *See generally id.* (describing the frequency and brutality of homosexual rape within male prisons); *see also infra* text accompanying notes 145-50.

31. *See, e.g.*, Farmer v. Brennan, 114 S. Ct. 1970, 1975 (1994) (describing the beating and rape of a male prisoner who subsequently tested positive for HIV).

the advanced stages of AIDS, who are unable to walk or control their bodily functions, are sometimes left to dehydrate and lie in their own urine and feces.[32] One study indicates that prisoners with AIDS are dying at twice the rate of nonprisoners with AIDS.[33] More than one commentator has characterized AIDS as prison's second death row.[34]

C. *Divergent Correctional Policies on AIDS-Related Issues*

The AIDS policies utilized by different correctional systems are surprisingly varied.[35] While a few prisons test all inmates presently in custody,[36] for varying reasons,[37] others will not test an inmate even upon that inmate's request.[38] In addition, while no state statute requires automatic segregation of HIV-positive prisoners,[39] many prisons mandate segregation of all HIV-positive inmates.[40] Other prisons do not segregate at all[41] or only remove prisoners in the advanced stages of AIDS.[42] As the Eleventh Circuit indicates "[t]wo bodies of thought currently exist within correctional and public health communities regarding HIV and AIDS prevention in prisons: mandatory testing and separation versus voluntary testing and education."[43]

The variance in policies regarding testing and housing may also be shaped by the information a correctional facility receives on AIDS and how it

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32. Rhoads, *supra* note 17, at 20.

33. *Id.* at 18; *see also* REPORT NUMBER FOUR, *supra* note 6, at 2 (citing a 1987 study by the Correctional Association of New York, which found that the median time period between diagnosis with AIDS and death was 159 days for prisoners who have intravenous drug-use history as compared to 318 days for nonprisoners with similar intravenous drug-use background).

34. Kathy J. Gardner, Comment, *Sentenced to Prison, Sentenced to AIDS: The Eighth Amendment Right to Be Free From Prison's Second Death Row*, 92 DICK. L. REV. 863, 863 (1988); *see also* Rhoads, *supra* note 17, at 18.

35. *See infra* notes 36-42 and accompanying text.

36. HARLOW, *supra* note 18, at 3.

37. *Id.* Testing may occur upon entering the facility, while in custody, upon release, with high-risk groups, upon inmate request, upon clinical indication of need, upon accident involvement, in a random sample, or for other reasons. *Id.*

38. *See, e.g.*, Feigley v. Fulcomer, 720 F. Supp. 475, 478 (M.D. Pa. 1989). *But see* HARLOW, *supra* note 18, at 1 ("All prison jurisdictions tested at least some inmates for HIV . . . .").

39. Theodore H. Hammett & Saira Moini, *Update on AIDS in Prisons and Jails*, NATIONAL INST. OF JUST. AIDS BULL., Sept. 1990, at 1, 8. As of 1989, only four state prison systems segregated HIV-positive inmates, ten state prison systems segregated inmates with AIDS, and some segregated inmates with Aids Related Complex (ARC). *Id.* at 9.

40. *See* Harris v. Thigpen, 941 F.2d 1495, 1512 (11th Cir. 1991); Muhammad v. Carlson, 845 F.2d 175, 178 (8th Cir. 1985); McDuffie v. Rikers Island Med. Dep't, 668 F. Supp. 328, 329-30 (S.D.N.Y. 1987).

41. *See, e.g.*, Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1988); Goss v. Sullivan, 839 F. Supp. 1532, 1536 (D. Wyo. 1993); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990); Feigley v. Fulcomer, 720 F. Supp. 475, 482 (M.D. Pa. 1989); Cameron v. Metcuz, 705 F. Supp. 454, 456 (N.D. Ind. 1989).

42. *See* Hammett & Moini, *supra* note 39, at 9.

43. Harris v. Thigpen, 941 F.2d at 1519.

utilizes that information in terms of educating its guards and inmate population. The number of HIV-AIDS prisoners in a given institution may also be responsible for the divergent policies as the incidence of HIV-AIDS varies greatly in different geographic areas across the United States.[44] Finally, the dynamic nature of scientific research on AIDS may also cause a discrepancy between the facts on AIDS and the individual prison policies designed to deal with it.[45]

III. PRISONERS' RIGHTS, AIDS, AND THE COURTS

Prisoners' rights cases often quote several landmark Supreme Court opinions describing principles that frame an analysis of prisoners' constitutional claims.[46] In *Wolff v. McDonnell*,[47] for example, the Court stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[48] The Court reemphasized this position in *Turner v. Safley*[49] by stating that "[p]rison walls do not form a barrier separating prison inmates from the protection of the Constitution."[50] The Court has held that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[51]

Despite the grandiose resonance of the principles espoused by these decisions, prisoner claims challenging the constitutionality of inhumane living conditions and prison policies creating those conditions, for the most part, do not fare well in our legal system.[52] Although civil rights groups try to protect prisoner rights,[53] the interplay between judicial, legal, and correctional factors results in the withdrawal or limitation of inmates' privileges as well as rights.[54] Such factors include the requisite standard of culpability under the Eighth

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44. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HIV/AIDS SURVEILLANCE REPORT, Dec. 1993, at 1.

45. *See* LaRocca v. Dalsheim, 467 N.Y.S.2d 302 (Sup. Ct. 1983).

46. The quoted cases are: Turner v. Safley, 482 U.S. 78, 84 (1987); Procunier v. Martinez, 416 U.S. 396, 398 (1974).

47. Wolff v. McDonnell, 418 U.S. 539 (1974).

48. *Id.* at 555-56.

49. Turner v. Safley, 482 U.S. 78 (1987).

50. *Id.* at 84.

51. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

52. *See* Dunn v. White, 880 F.2d 1188, 1197-98 (10th Cir. 1989) (holding that nonconsensual AIDS test did not violate prisoner's First or Fourth Amendment rights); Nolley v. County of Erie, 776 F. Supp. 715, 739-40 (W.D.N.Y. 1991) (finding that conditions of confinement, although deplorable, did not violate the Eighth Amendment); Harris v. Thigpen, 727 F. Supp. 1564, 1583 (M.D. Ala. 1990) (finding that the Department of Corrections was not deliberately indifferent to prisoner's medical and psychiatric needs, nor did disclosure of HIV status violate privacy rights of inmates), *aff'd*, 941 F.2d 1495 (11th Cir. 1991); Feigley v. Fulcomer, 720 F. Supp. 475, 481 (M.D. Pa. 1989) (holding that prison policy of not routinely testing inmates for HIV and not testing inmates upon request did not violate inmate's Eighth Amendment rights).

53. Civil rights groups include the American Civil Liberties Union, Legal Aid Society Prisoners' Rights Project, AIDS Coalition (ACT UP), and New York's Prisoners Legal Services. Rhoads, *supra* note 17, at 20.

54. *See infra* text accompanying notes 89-101.

Amendment,[55] the underlying foundation of our penal system,[56] and the Supreme Court's policies of judicial restraint and customary deference to the discretion of the prison administration.[57]

A. *The Eighth Amendment*

An examination of AIDS cases brought by prisoners indicates that although claims may involve violations of a number of rights,[58] the constitutional right most clearly implicated is the Eighth Amendment.[59] Indeed, prisoners' AIDS cases often allege that involuntary exposure, attacks by HIV-infected inmates, and the failure of prison officials to reduce the risk of exposure constitute cruel and unusual punishments.[60] The history of the Cruel and Unusual Punishments Clause of the Eighth Amendment is helpful in evaluating and understanding the outcomes of these recent cases. The history is somewhat convoluted, however, because as the criteria evolve from the "standards of decency that mark the progress of a maturing society," the constitutional analysis changes as well.[61]

1. *History*

While the primary concern of the drafters of the Eighth Amendment was to prohibit torture and other barbarous methods of punishment, the prohibition against cruel and unusual punishment proscribes more than inhumane means of punishment.[62] The Eighth Amendment embodies

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55. *See infra* text accompanying notes 58-91.

56. Price v. Johnston, 334 U.S. 266, 285-86 (1948). Maintaining institutional security, order, and discipline are necessary goals that often limit and restrict prisoner's rights. *Id.*; *see also* Pell v. Procunier, 417 U.S. 817, 823 (1974) ("[C]entral to all other correctional goals is the institutional . . . security within the correctional facilities themselves.").

57. *See infra* text accompanying notes 92-101.

58. *See* Dunn v. White, 880 F.2d 1188, 1190-91 (10th Cir. 1989) (alleging First, Fourth, and Fourteenth Amendment violations for nonconsensual AIDS test); Nolley v. County of Erie, 776 F. Supp. 715, 717-18 (W.D.N.Y. 1991) (alleging that policy of placing a red sticker on inmate's possessions, thereby revealing her HIV-positive status, violated the Due Process Clause and her privacy rights under the U.S. Constitution and the state public health law).

59. Whitley v. Albers, 475 U.S. 312, 317 (1986); *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). While inmates are usually granted only injunctive relief as a remedy to a constitutional violation, if a prison official imposes conditions that yield a finding of cruel and unusual punishment, the official may be liable for damages under 42 U.S.C. § 1983. *See, e.g.*, Martin v. White, 742 F.2d 469, 469 (8th Cir. 1984) (recognizing the possibility of monetary relief for prisoners under § 1983); Judd v. Packard, 669 F. Supp. 741, 742 (D. Md. 1987).

60. Farmer v. Brennan, 114 S. Ct. 1970, 1972 (1994); Goss v. Sullivan, 839 F. Supp. 1532, 1534 (D. Wyo. 1993); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 263 (S.D.N.Y. 1990); Cameron v. Metcuz, 705 F. Supp. 454, 455-56 (N.D. Ind. 1989).

61. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

62. *See* Whitney v. Albers, 475 U.S. 312, 327 (1986) (finding that the Eighth Amendment, "which is specifically concerned with the unnecessary and wanton infliction of

"broad and idealistic concepts of dignity, civilized standards, humanity, and decency"[63] against which penal measures must be evaluated.[64] Originally, punishment that was "repugnant to the conscience of mankind"[65] or involved the "unnecessary and wanton infliction of pain" constituted cruel and unusual punishment proscribed by the Eighth Amendment.[66]

2. *Early Treatment*

In *Estelle v. Gamble*,[67] the Supreme Court first acknowledged that the prohibition against "cruel and unusual punishments" could be applied to deprivations that were not expressly part of the punishment but were endured during incarceration.[68] The Court concluded that deliberate indifference to serious medical requirements constitutes "unnecessary and wanton infliction of pain,"[69] which is prohibited by the Eighth Amendment.[70] The *Estelle* Court's early standard of deliberate indifference endures in court opinions today and is a consistent theme in prisoners' claims challenging facilities' AIDS-related policies.[71]

In *Wilson v. Seiter*,[72] the Court extended the "deliberate indifference" standard set forth by the *Estelle* Court to all prisoner claims challenging conditions of confinement under the Eighth Amendment.[73] The *Wilson* Court, however, reformulated the *Estelle* standard and applied an objective test and a subjective test to determine whether an Eighth Amendment violation occurred.[74] First, the objective test requires that the alleged deprivation be sufficiently serious as to deny "the minimal civilized measure of life's necessities."[75] This requisite level of deprivation has been termed "pervasive risk of harm" in subsequent cases.[76] The subjective portion of the inquiry requires a sufficiently culpable state of mind establishing "deliberate indifference" by the prison officials.[77] Consequently, the *Wilson* decision

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pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners").

63. Estelle v. Gamble, 429 U.S. 97, 102 (1976); *see also* Gregg v. Georgia, 428 U.S. 153, 169-73 (1976) (recounting the history of the constitutional ban against cruel and unusual punishment).

64. Estelle v. Gamble, 429 U.S. at 102.

65. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947).

66. Gregg v. Georgia, 428 U.S. at 173.

67. Estelle v. Gamble, 429 U.S. 97 (1976).

68. *Id.* at 103.

69. Gregg v. Georgia, 428 U.S. at 173.

70. Estelle v. Gamble, 429 U.S. at 104.

71. *See infra* text accompanying notes 108-86.

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

73. *Id.* at 303.

74. *Id.*

75. *Id.* at 304 (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

76. *See, e.g.*, Goss v. Sullivan, 839 F. Supp. 1532, 1537 (D. Wyo. 1993); Myers v. Maryland Div. of Correction, 782 F. Supp. 1095, 1096 (D. Md. 1992).

77. Wilson v. Seiter, 501 U.S. at 306; *cf.* Whitley v. Albers, 475 U.S. 312, 320 (1986) (holding that deliberate indifference is not always the ultimate level of culpability in

precluded nearly all prisoner claims because any pain and suffering, regardless of how severe or unnecessary, did not violate the Eighth Amendment unless the official intended the specific harm incurred by the inmate or recklessly disregarded the safety of the inmate.[78]

3. *Current Framework*

The courts of appeals equate deliberate indifference with recklessness, which lies somewhere between the standards of negligence on one side and purpose and knowledge on the other.[79] Since *Wilson*, however, the circuits are split as to what level of knowledge by a prison official satisfies the deliberate indifference, or recklessness, requirement.[80] Since *Wilson*, courts have turned to the civil and criminal law definitions of recklessness to determine the applicable standard of recklessness.[81] The civil law generally defines a reckless person as one who acts or fails to act in light of an unjustifiably high risk of harm that is known or so obvious that it should be known.[82] The criminal law, however, allows a finding of recklessness only when an individual disregards a risk of harm of which the individual is aware.[83]

The Third and the Ninth Circuits equate deliberate indifference with the standard of recklessness applied in civil cases and find prison officials deliberately indifferent for purposes of the Eighth Amendment if they "knew or should have known" of the impending danger to the inmate.[84] In a controversial case, *McGill v. Duckworth*,[85] the Seventh Circuit applied a subjective and "actual knowledge" standard modeled after criminal recklessness.[86] The *McGill* court held that prison officials are liable only if they had "actual knowledge of impending harm," thereby rejecting liability

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the prison environment). In *Whitley*, the Supreme Court considered the claim of a prisoner who was seriously wounded by guards' gunfire during a prison riot. *See id.* at 317. The Court held that the proper inquiry was whether the "'force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21 (citations omitted).

78. *See generally* Harris v. Thigpen, 941 F.2d 1495, 1503 (11th Cir. 1991); Goss v. Sullivan, 839 F. Supp. at 1539; Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990); Feigley v. Fulcomer, 720 F. Supp. 474, 478 (M.D. Pa. 1989); Cameron v. Metcuz, 705 F. Supp. 454, 459 (N.D. Ind. 1989).

79. Farmer v. Brennan, 114 S. Ct. 1970, 1978 (1994).

80. *See* Young v. Quinlan, 960 F.2d 351, 360 (3d Cir. 1992); DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991); McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991); Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991); Morello v. James, 797 F. Supp. 223, 227 (W.D.N.Y. 1992).

81. *See, e.g.*, Del Raine v. Williford, 32 F.3d 1024, 1032 (7th Cir. 1994); Young v. Quinlan, 960 F.2d at 360; DesRosiers v. Moran, 949 F.2d at 19; McGill v. Duckworth, 944 F.2d at 348; Redman v. County of San Diego, 942 F.2d at 1443.

82. Del Raine v. Williford, 32 F.3d at 1032.

83. *Id.*

84. Young v. Quinlan, 960 F.2d at 360; Redman v. County of San Diego, 942 F.2d at 1443.

85. McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991).

86. *Id.* at 348.

for prison officials who "should have known" of the danger facing an inmate.[87] Other courts adopted the *McGill* standard of recklessness.[88]

The Supreme Court recently resolved the split between the circuits in its latest decision on prisoners' Eighth Amendment rights, *Farmer v. Brennan*.[89] The *Farmer* Court refused to apply an objective standard and held that a prison official would not be liable under the Eighth Amendment for denying a prisoner the civilized conditions of confinement "unless the official knows of and disregards an excessive risk to inmate health or safety."[90] It seems that the *Farmer* Court's decision will effectively limit constitutional protection to rare cases in which the prisoner notified officials about a specific threat of harm before it occurred.[91]

B. *Judicial Restraint and the Protection of Constitutional Rights*

1. *Customary Deference*

In addition to the barriers presented by the framework of the Eighth Amendment, federal courts are traditionally reluctant to interfere with the problems of prison administration.[92] Courts regularly exercise a policy of judicial restraint in response to prisoners' constitutional claims.[93] This approach is a result of the Supreme Court's decision in *Procunier v. Martinez*,[94] in which the Court admonished that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform."[95] This broad "hands-off" attitude originated because the difficulties experienced in correctional systems are "complex and intractable" and not readily susceptible to "resolution by decree."[96] The presence of AIDS in the correctional system is not likely to change the judicial system's deference to prison administrators because, as one court stated, "[t]he problem of protecting prisoners from AIDS is best left to the legislature and prison administrators."[97]

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87. *Id.* at 349.

88. *See, e.g.*, DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991); Morello v. James, 797 F. Supp. 223, 227 (W.D.N.Y. 1992).

89. Farmer v. Brennan, 114 S. Ct. 1970, 1977-78 (1994).

90. *Id.* at 1979.

91. *Id.* at 1983.

92. Procunier v. Martinez, 416 U.S. 396, 404 (1974); Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990); Tillery v. Owens, 719 F. Supp. 1256, 1261 (W.D. Pa. 1989).

93. Turner v. Safley, 482 U.S. 78, 84-85 (1987); Procunier v. Martinez, 416 U.S. at 404; Lopez v. Robinson, 914 F.2d at 490; Tillery v. Owens, 719 F. Supp. at 1261 ("Prison administration must be left to the discretion of prison administrators.").

94. Procunier v. Martinez, 416 U.S. 396 (1974).

95. *Id.* at 405; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (recommending that courts should not "'substitute [their] judgment . . . on difficult and sensitive matters of institutional administration' . . . for the determinations of those charged with the formidable task of running a prison") (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).

96. Procunier v. Martinez, 416 U.S. at 404-05.

97. Jarrett v. Faulkner, 662 F. Supp. 928, 929 (S.D. Ind. 1987) (granting motion to

2. *Necessary Deviation*

Despite the Supreme Court's policy of judicial restraint and usual deferral to the prison administration, it will intervene, when necessary, to preclude the clear violation of prisoners' constitutional rights.[98] Because "prison walls are not supposed to separate inmates from their constitutional rights,"[99] the Court plays a delicate role in determining when judicial intervention into the realm of the prison world is required. As the Court articulated in *Johnson v. Avery*,[100] however, when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.[101]

C. *Courts and Constitutional Challenges to Correctional Facilities' Policies on AIDS*

The Court's recent decisions involving the Eighth Amendment, and the policy of traditional deference, form the backdrop against which prisoners' HIV-AIDS cases are evaluated—and to a great extent—account for their failures. In most cases, inmates' AIDS-related complaints challenge the constitutionality of the methods by which prison officials deal with AIDS within the prison.[102] An evaluation of prisoners' AIDS-related complaints indicates that correctional facilities most often face challenges to their policies on HIV-AIDS testing,[103] disclosure,[104] housing,[105] violence and sexual assault,[106] and medical care.[107]

1. *Testing Policies*

While courts recognize that exposure by inmates to communicable diseases may violate the Eighth Amendment,[108] prison officials' policy

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dismiss complaint for failure to show that the plaintiff class was so at risk for contracting AIDS that prisoners' constitutional rights were implicated); *see also* Turner v. Safley, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking . . . peculiarly within the province of the legislative and executive branches of government."); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990) (stating that prison officials should be accorded wide ranging deference in the adoption and creation of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security); Harris v. Thigpen, 727 F. Supp. 1564, 1580 (M.D. Ala. 1990) (stating the penal institutions of Alabama are best served by continuity of experienced officials in those systems), *aff'd*, 941 F.2d 1495 (11th Cir. 1991).

98. Procunier v. Martinez, 416 U.S. at 405-06.
99. Turner v. Safley, 482 U.S. 78, 84 (1987).
100. Johnson v. Avery, 393 U.S. 483 (1969).
101. *Id.* at 486.
102. *See infra* text accompanying notes 108-86.
103. *See infra* text accompanying notes 108-21.
104. *See infra* text accompanying notes 122-26.
105. *See infra* text accompanying notes 127-44.
106. *See infra* text accompanying notes 145-69.
107. *See infra* text accompanying notes 170-86.
108. Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that failure to screen

decisions not to test every prisoner for HIV have been found constitutional.[109] For a court to find the lack of a mandatory testing policy unconstitutional, the prisoner must show that the absence of a testing program creates a pervasive risk of harm and that the prison officials or guards were deliberately indifferent to that risk.[110] Because prison rules prohibit sexual activity and intravenous drug use—the behaviors that most typically transmit HIV-AIDS—courts reason that prisoners who follow the rules are not at risk for contracting the disease.[111] Therefore, even though an inmate may establish that a pervasive risk of harm exists,[112] prison officials' policy decisions not to test each inmate for the virus may not rise to the level of deliberate indifference.[113] The fallacy of this argument, however, is readily apparent in situations when HIV-AIDS prisoners rape, bite, and violently assault prisoners.[114] Furthermore, in light of the Court's decision in *Farmer*, the absence of a mandatory testing program leaves a loophole through which officials will not be found liable for almost any AIDS-related injury because they will not have actual knowledge of which inmates are HIV-positive.[115]

Conversely, at least one circuit court has found mandatory, and even nonconsensual,[116] testing of all inmates to be constitutionally permissible

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prisoners for communicable diseases violates the constitutional rights of other prisoners); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (finding that keeping individuals with contagious or communicable diseases in the general inmate population without medical attention violates required medical standards).

109. Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988) (rejecting prisoner's request to require prison officials to test all prisoners for AIDS and segregate those prisoners testing positive); Portee v. Tollison, 753 F. Supp. 184, 186 (D.S.C. 1990) (finding no deliberate indifference in failing to test all incoming prisoners for HIV); Feigley v. Fulcomer, 720 F. Supp. 475, 480 (M.D. Pa. 1989) (holding that failure to routinely test for HIV did not violate the Eighth Amendment's right to be free from cruel and unusual punishment).

110. Wilson v. Seiter, 501 U.S. 294, 303 (1991).

111. *See* Portee v. Tollison, 753 F. Supp. at 186 (holding that prisoners who follow the rules are not in significant danger of contracting HIV, therefore, HIV carriers are not segregated from the rest of the prison population). Such reasoning, however, seems only to apply to AIDS. *See, e.g.*, Lareau v. Manson, 651 F.2d at 109 (holding that when handling communicable diseases the threat to inmates' well-being is so serious that all prisoners must be screened, and then properly segregated).

112. Myers v. Maryland Div. of Correction, 782 F. Supp. 1095, 1096 (D. Md. 1992). The district court found a pervasive risk of harm in light of the high-risk behaviors of intravenous drug use, consensual sex, rape, and tattooing, because 60 to 70 inmates annually become infected with HIV, and because the 1 in 200 chance that an uninfected inmate will contract HIV during each year of confinement. *Id.* at 1096.

113. *See* Portee v. Tollison, 753 F. Supp. at 186.

114. For a discussion of HIV-AIDS status as a deadly and dangerous weapon in charging defendants with crimes, which is beyond the scope of this Note, see Carlton D. Stansbury, Comment, *Deadly and Dangerous Weapons and AIDS: The Moore Analysis Is Likely to Be Dangerous*, 74 IOWA L. REV. 951 (1989).

115. *See* Farmer v. Brennan, 114 S. Ct. 1970 (1994).

116. Dunn v. White, 880 F.2d 1188, 1198 (10th Cir. 1989). While some sources cite misdiagnosis (including false positives and false negatives) as a disincentive for mandatory testing, in one case a false finding of seropositivity and subsequent segregation of an inmate for five months was insufficient to state a constitutional violation. *See* McDuffie v. Rikers

under the Fourth Amendment.[117] In *Dunn v. White*,[118] the Tenth Circuit held that the prison's interest in treating and preventing the transmission of AIDS outweighs the prisoner's privacy interest, as long as the method by which the prison's interest is furthered is a "productive mechanism."[119] To constitute a productive mechanism, a logical connection between the policy and the goal of curtailing the spread of AIDS must not be "so remote as to render the policy arbitrary or irrational."[120] The Tenth Circuit found the requisite link even when, as the prisoner alleged, the prison did not use the information it gathered from the tests to treat or quarantine HIV-AIDS prisoners.[121]

2. *Disclosure Policies*

Closely connected to the issue of HIV-testing is the constitutionality of disclosing inmates' HIV-AIDS status. Although courts recognize a constitutionally protected privacy right of inmates to preclude dissemination of their seropositive status to other inmates and to their families,[122] often such privacy rights are necessarily restricted to achieve the overriding correctional goals and maintenance of institutional security.[123] In *Nolley v. County of Erie*,[124] however, the district court found that disclosure occurring in response to unjustified fear and hysteria over AIDS, not reasonably related to serving a legitimate penological interest, violated the inmate's constitutional rights to

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Island Med. Dep't, 668 F. Supp. 328, 329 (S.D.N.Y. 1987).

117. Dunn v. White, 880 F.2d at 1198; *see also* U.S. CONST. amend. IV (prohibiting "unreasonable search and seizure").

118. Dunn v. White, 880 F.2d 1188 (10th Cir. 1989).

119. *Id.* at 1197; *see, e.g.*, Glover v. Eastern Neb. Community Office, 867 F.2d 461, 462 (8th Cir. 1989) (finding nexus between screening social workers for AIDS and curtailing the transmission of AIDS in the disabled community to be insufficient to justify mandatory testing).

120. Dunn v. White, 880 F.2d at 1196 (citing Turner v. Safley, 482 U.S. 78, 89-90 (1979)).

121. *Id.*

122. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1513 (11th Cir. 1991); Doe v. Coughlin, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988) (recognizing HIV-positive inmates' right to privacy in preventing involuntary disclosure of diagnosis); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) ("[I]t is difficult to argue that information about [AIDS or HIV] is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information."), *aff'd*, 899 F.2d 17 (7th Cir. 1990).

> It may be even more essential for a prisoner than a person who enjoys the freedoms associated with life outside of prison, and the personal strength derived from those freedoms, that the prisoner be accorded the ability to protect and shape his identity to as great a degree as possible. There is little question but that the prisoner identified as having AIDS will be severely compromised in his ability to maintain whatever dignity and individuality a prison environment allows.

Harris v. Thigpen, 941 F.2d at 1514; *cf.* Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (rejecting a prisoner's claim because inmates are entitled to only limited privacy rights).

123. Harris v. Thigpen, 941 F.2d at 1514.

124. Nolley v. County of Erie, 776 F. Supp. 715 (W.D.N.Y. 1991).

privacy.[125] The failure to disclose an inmate's HIV-positive status to his HIV-negative cellmate has been found constitutional, however, because the decision to house two inmates together has not been found to constitute deliberate indifference to the healthy inmate's medical needs.[126]

3. *Housing Policies*

The issue of disclosure is entwined with the constitutionality of segregated housing for seropositive prisoners because a prisoner's HIV-positive status is implicitly revealed to the other inmates and guards once segregation occurs.[127] Closely paralleling the previous issues of testing and disclosure, claims by HIV-positive prisoners that mandatory segregation[128] violates their privacy rights are usually struck down because the claims are outweighed by the penological interests of the department of corrections.[129] In a few somewhat aberrational cases, however, courts have found that mandatory segregation of HIV-positive prisoners revealed their medical condition in violation of their privacy rights.[130]

The marginal success of these privacy cases has not carried over to seropositive prisoners' claims that mandatory segregation violates other constitutionally protected rights. Claims brought under the First,[131] Fifth,[132] Eighth,[133] and Fourteenth Amendments[134] have uniformly failed in the courts.

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125. *Id.* at 733 (finding that the policy of placing red stickers on all of an inmate's possessions, thus revealing her seropositivity to staff and inmates, violated her privacy rights as well as the state's health law); *see also* Doe v. Coughlin, 687 F. Supp. at 1240-43 (finding that mandatory segregation of seropositive prisoners disclosed their medical condition in violation of their privacy rights).

126. Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990); *see also* Goss v. Sullivan, 839 F. Supp. 1532, 1536 (D. Wyo. 1993) (finding no Eighth Amendment violation for failure to disclose result of inmate's test to the general prison population).

127. *See* Harris v. Thigpen, 941 F.2d 1495, 1514 n.28 (11th Cir. 1991).

128. Segregated inmates are often denied access to church services, work opportunities, visitation rights, law libraries, educational and recreational programs, and treatment for drugs and alcohol. *Id.* at 1500 n.6.

129. *Id.* at 1520. "[P]rivacy rights are among those most obviously curtailed by the fact of a prisoner's confinement in a correctional institution." *Id.* at 1515.

130. *See* Doe v. Coughlin, 697 F. Supp. 1234, 1240-43 (N.D.N.Y. 1988) (granting preliminary injunction that enjoined any further transfers of inmates to segregated dormitory); Nolley v. County of Erie, 776 F. Supp. 715, 734-35 (W.D.N.Y. 1991) (finding segregation that revealed seropositivity violated inmate's privacy rights). The *Nolley* court distinguished the particular inmate's situation from the usual situation because she was not placed in a ward limited to HIV-positive inmates. *See id.* at 736. Given the psychotic and suicidal tendencies of other inmates, the chances of blood-to-blood contact increased, thereby justifying a finding that the segregation policy did not reasonably relate to a legitimate penological interest. *See id.*

131. Cordero v. Coughlin, 607 F. Supp. 9, 11 (S.D.N.Y. 1984).

132. Muhammad v. Carlson, 845 F.2d 175, 177 (8th Cir. 1988).

133. McDuffie v. Rikers Island Med. Dep't, 668 F. Supp. 328, 330 (S.D.N.Y. 1987).

134. Robbins v. Clarke, 946 F.2d 1331, 1333 n.2 (8th Cir. 1991); Cordero v. Coughlin, 607 F. Supp. at 10.

Challenges by uninfected inmates, who argue that failure to segregate seropositive inmates violates their right to be free from cruel and unusual punishment, are similarly unsuccessful.[135] Courts simply do not find that failure to segregate seropositive inmates rises to the requisite level of deliberate indifference to the well-being of uninfected prisoners.[136] "Those prisoners who follow the rules are not in significant danger of contracting the disease; therefore, prison officials' policy decisions not to segregate the HIV carriers . . . cannot be said to constitute deliberate indifference."[137] This broad rationale has been applied by courts even when a prisoner's seropositive cellmate is in the last stages of AIDS[138] or has a known violent character.[139]

This rationale does not allow for the minimal possibility that the HIV virus will be transmitted through objects.[140] Several inmates have brought suit alleging that housing them with an HIV-infected inmate who shares their toothbrush, toilet, and razor poses an unconstitutional threat to their medical safety.[141] Courts have rejected these challenges as based on "unsubstantiated fears and ignorance."[142] The dynamic nature of research on a disease like AIDS, however, often precludes the reconciliation of judicial opinions with scientific evidence.[143] The latest publication by the Centers for Disease Control and Prevention recommends that precautions should be taken in all

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135. Portee v. Tollison, 753 F. Supp. 184, 186 (D.S.C. 1990); Davis v. Stanley, 740 F. Supp. 815, 817 (N.D. Ala. 1987). Likewise, failure to segregate also does not violate inmates' rights to due process or equal protection of the law. Robbins v. Clarke, 946 F.2d at 1333 n.2.

136. Glick v. Henderson, 855 F.2d 536, 539-40 (8th Cir. 1988); Johnson v. United States, 816 F. Supp. 1519, 1523 (N.D. Ala. 1993); Portee v. Tollison, 753 F. Supp. at 186-87; Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990).

137. Portee v. Tollison, 753 F. Supp. at 186; *see also* Johnson v. United States, 816 F. Supp. at 1524-25 (holding that, absent deliberate indifference to serious medical needs of an inmate, nonsegregation policies would not violate the Eighth Amendment's prohibition against cruel and unusual punishment); Davis v. Stanley, 740 F. Supp. at 815-16 (holding that it would be unreasonable to require screening and testing of all incoming inmates when rules against behavior typically associated with AIDS transmission is strictly prohibited).

138. Johnson v. United States, 816 F. Supp. at 1521; Feigley v. Fulcomer, 720 F. Supp. 475, 482 (M.D. Pa. 1989).

139. Goss v. Sullivan, 839 F. Supp. 1532, 1535 (D. Wyo. 1993); Johnson v. United States, 816 F. Supp. at 1521; Cameron v. Metcuz, 705 F. Supp. 454, 458-60 (N.D. Ind. 1989). *But see* Redman v. County of San Diego, 942 F.2d 1435, 1445 (9th Cir. 1991) (finding that placement of an eighteen year old pretrial detainee in a cell with an adult inmate known for aggressive homosexuality could constitute deliberate indifference by prison officials).

140. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT THE HUMAN IMMUNODEFICIENCY VIRUS AND ITS TRANSMISSION, HIV/AIDS PREVENTION 2 (1994) [hereinafter CENTERS FOR DISEASE CONTROL AND PREVENTION].

141. Marcussen v. Brandstat, 836 F. Supp. 624, 628 (N.D. Iowa 1993); Johnson v. United States, 816 F. Supp. at 1524; Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990).

142. *See, e.g.*, Johnson v. United States, 816 F. Supp. 1519, 1524 (N.D. Ala. 1993) (citing Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1989)).

143. *See* La Rocca v. Dalsheim, 467 N.Y.S.2d 302 (Sup. Ct. 1983). This is a prime example of an issue in the correction system that is not amenable to "resolution by decree," justifying the policy of judicial restraint. *See supra* notes 92-97 and accompanying text.

housing settings and practices to avoid the increased likelihood of contact with blood, including the sharing of razors and toothbrushes.[144]

4. *Violence and Sexual Assault Policies*

The rationale behind the holding that the enforcement of rules prohibiting intravenous drug use and sexual contact is sufficient to prevent the risk of contracting AIDS[145] does not account for those prisoners who follow the rules but are attacked or sexually assaulted by other inmates. For example, another widespread "epidemic" in the prison environment is sexual assault.[146] While public knowledge of homosexual activity in prison is prevalent,[147] mass prison rape is "still the most closely guarded secret activity of American prisons" and the most terrifying.[148] Shocking brutality and intimidation accompany most rapes.[149] The cruelty with which such rapes occur combined with the incidence of HIV-AIDS among prisoners can create a condition that cannot be remedied by counseling or time—infection with a deadly disease.[150]

It is well established that the Eighth Amendment affords an inmate a right to be protected from violence inflicted by other prisoners.[151] In addition, courts have established an Eighth Amendment right to be free from homosexual attack.[152] The recognition of these rights has an impact on the potential right to be protected from AIDS, a disease that may expose prisoners to another form of physical abuse. Considering the public concern over AIDS in the general population,[153] exposing an inmate to a potential sentence of infection with AIDS seems to offend our country's standards of decency.[154] In *Glick v. Henderson*,[155] the Eighth Circuit suggested, that under

144. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 140, at 2.

145. *See* Davis v. Stanley, 740 F. Supp. 815, 818 (N.D. Ala. 1987).

146. WEISS & FRIAR, *supra* note 29, at ix.

147. *Id.* at x.

148. *See id.*

149. *Id.* at 139.

150. David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REV. 1541, 1542 (1992).

151. Wilson v. Seiter, 501 U.S. 294, 303 (1991).

152. *See, e.g.*, Wojtczak v. Cuyler, 480 F. Supp. 1288, 1303 (E.D. Pa. 1979) ("'[T]he right of a prisoner to be reasonably free from an atmosphere conducive of sexual assault is a constitutional right—it falls within the Eighth Amendment right against cruel and unusual punishment.'"); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980) (stating that an inmate does have a right to be reasonably protected from constant threats of violence and sexual assaults from other inmates), *cert. denied*, 450 U.S. 1041 (1981); Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (asserting that all prisoners have the right to be protected from physical aggression and sexual assault by other prisoners).

153. Over twenty-four states have enacted HIV-AIDS criminal transmission statutes. *See, e.g.*, GA. CODE ANN. § 16-5-60 (1994); LA. REV. STAT. ANN. § 43.5 (West 1994); VA. CODE ANN. § 32.1-289.2 (Michie 1992).

154. Estell v. Gamble, 429 U.S. 97, 102 (1976).

155. Glick v. Henderson, 855 F.2d 536 (8th Cir. 1988).

certain circumstances, a prison's failure to protect prisoners from HIV-positive inmates may violate the Eighth Amendment.[156]

These circumstances were recently set forth by the Supreme Court in *Farmer v. Brennan*.[157] The Court stated that, to constitute deliberate indifference, "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[158] An Eighth Amendment plaintiff can demonstrate substantial risk of harm with evidence that inmate attacks were "longstanding, pervasive, or expressly noted by prison officials in the past . . . sufficient to permit a trier of fact to find that the official had actual knowledge of the risk."[159] The inability of prisoners to produce this type of evidence is shown by the plethora of cases in which courts did not find officials deliberately indifferent to inmate violence, even before the legal standard required actual knowledge.[160]

In *Farmer v. Brennan*, however, the Supreme Court reversed and remanded the lower court's finding that officials did not show deliberate indifference by failing to protect an inmate from the harm inflicted by other inmates.[161] The facts of *Farmer*, however, distinguish it from the typical prisoner case. The petitioning inmate, a biological male serving a sentence for credit card fraud, was a pre-operative transsexual who had undergone estrogen therapy and had received silicone breast implants.[162] Despite knowledge that the facility had a violent environment and a history of inmate assaults and that the petitioner had feminine characteristics that made him particularly vulnerable to sexual attack, prison officials placed the petitioner in the general population of the maximum-security, all-male prison.[163] Within two weeks, the petitioner was brutally beaten and raped by another inmate and subsequently tested positive for HIV.[164] Although the *Farmer* Court held that prison officials may be liable for failure to remedy a risk of harm so obvious and substantial that the officials must have known about it, it was the distinctly feminine characteristics of the petitioner, when added to the violent environment of the Terre Haute prison, which gave the officials the knowledge that risk of harm was inevitable without proper precautions.[165] The appearance of the petitioner is distinguishable from the average male prisoner, making the holding of *Farmer* largely limited to its facts.[166]

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156. *Id.* at 539.

157. Farmer v. Brennan, 114 S. Ct. 1970 (1994).

158. *Id.* at 1981.

159. *Id.* at 1981-82.

160. *See, e.g.*, Goss v. Sullivan, 839 F. Supp. 1532, 1537 (D. Wyo. 1993) ("Plaintiff has failed to establish the requisite deliberate indifference to a pervasive risk of harm . . . ."); Cameron v. Metcuz, 705 F. Supp. 454, 459 (N.D. Ind. 1989) (finding insufficient allegations of deliberate indifference).

161. Farmer v. Brennan, 114 S. Ct. at 1986.

162. *See id.* at 1975. Other penitentiaries had segregated the petitioner because of safety concerns. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*; *see also* Hutto v. Finney, 437 U.S. 678, 681-82 n.3 (1978) (finding that the conditions in the Arkansas penal system were cruel and unusual punishment in violation of the

Even assuming a prisoner can establish that prison officials had actual knowledge of a substantial risk to an inmate's well-being, the officials will be absolved of liability if they responded reasonably to the risk, even if the harm was not avoided.[167] Thus, the duty the Eighth Amendment imposes on a prison official is only to guarantee "reasonable safety."[168] According to one court of appeals judge, this standard is one that acknowledges prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions."[169]

5. *Medical Care Policies*

In the medical context, a violation of the Eighth Amendment's ban against cruel and unusual punishment is proven by demonstrating that an official's conduct consists of "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[170] While prison officials have a duty to provide medical care to inmates, courts have held that no violation of this duty will occur absent a finding that officials intentionally denied or delayed the inmate's access to medical care or interfered with prescribed treatment.[171] Because courts grant prison administrators broad discretion to determine the nature and character of the medical treatment inmates receive,[172] courts have found that no constitutional violation occurred even when the standard of care fell below that which a hospital could provide.[173]

In the context of AIDS in prison, the prison administration is afforded broad discretion.[174] As the Eighth Circuit stated in *Glick v. Henderson*,[175] "It is the rare case in which a court should venture forth to establish medical procedures and guidelines in an area where the medical profession has not yet been able to ascertain what they should be."[176] Again, this policy of judicial restraint in the prison environment means that, absent a finding of deliberate indifference or intentional interference with regard to medical treatment, denial or delay of special medical care and medicine needed by an AIDS

Eighth Amendment). *Hutto* is another case exemplifying how obvious the risk must be before a court will impute knowledge to prison officials. "Homosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to bars nearest the guards' station." *Id.* at 682.

167. Farmer v. Brennan, 114 S. Ct. 1970, 1982-83 (1994).

168. *See id.* at 1983.

169. Spain v. Procunier, 600 F.2d 189, 193 (9th Cir. 1979).

170. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

171. *See, e.g.*, Wilson v. Franceschi, 735 F. Supp. 395, 397 (M.D. Fla. 1990).

172. *See, e.g.*, Ross v. Kelly, 784 F. Supp. 35, 44 (W.D.N.Y. 1992); *see supra* text accompanying footnotes 92-97.

173. Ross v. Kelly, 784 F. Supp. at 45; *see also* Ruiz v. Estelle, 679 F.2d 1115, 1149 (5th Cir. 1982) ("The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves . . . .").

174. Glick v. Henderson, 855 F.2d 536, 541 (8th Cir. 1988).

175. Glick v. Henderson, 855 F.2d 536 (8th Cir. 1988).

176. *Id.* at 541.

patient is acceptable.[177] Perhaps the current stance on prisoner medical care can, at least to some extent, account for the fact that prisoners with AIDS die at a rate twice that of nonprisoners with AIDS.[178]

Even when a court finds that treatment for AIDS is inadequate, to the point of violating the Eighth Amendment, an inmate's only remedy is an injunction prohibiting the unconstitutional practices or conditions.[179] In *Gomez v. United States*,[180] however, given the practical and constitutional concerns surrounding prisoners dying of AIDS, the district court held that a prisoner in the advanced stages of AIDS was entitled to release on bond.[181] The court justified early release because the institution in which the inmate was incarcerated did not provide continuous medical and psychological care for patients in the advanced stages of AIDS.[182] The court based its decision, at least in part, on the fact that the prisoner had no prior criminal record, and AIDS left him incapable of flight.[183] The possibility of early release for prisoners in the advanced stages of AIDS has been noted not only as a practical and economic alternative, but also as a humane one.[184]

The early release alternative, however, does not fare well in our current "tough-on-crime" political climate.[185] The Eleventh Circuit Court of Appeals reversed the district court's decision in the *Gomez* case, finding that even assuming the conditions were unconstitutional, the appropriate relief is correction of the condition resulting in the cruel and unusual punishment or discontinuance of the improper practice.[186]

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177. Wilson v. Franceschi, 735 F. Supp. 395, 397 (M.D. Fla. 1990). In a letter to the National Commission on AIDS, one inmate wrote that "Having AIDS in prison is an endless vigil to insure that you receive the medications and treatment that you need." Rhoads, *supra* note 17, at 19-20.

178. Rhoads, *supra* note 17, at 18; *see also* Nolley v. County of Erie, 776 F. Supp. 715, 719 (W.D.N.Y. 1991) (including testimony by doctor indicating that "[i]t is necessary to take AZT every four hours because, by then, it is effectively gone from the bloodstream. Missing an entire day's dose of AZT can lead to uncontrollable replication of the virus, which could have longterm serious consequences for an HIV [positive] person.").

179. *See* Gomez v. United States, 899 F.2d 1124, 1126 (11th Cir. 1990).

180. Gomez v. United States, 725 F. Supp. 526, 527 (S.D. Fla. 1989), *rev'd*, 899 F.2d 1124 (11th Cir. 1990).

181. *Id.* at 527.

182. *Id.*

183. *Id.* at 528.

184. *See* Rhoads, *supra* note 17, at 18. Reports indicate that the cost of housing an HIV-infected inmate is $40,000 more per year than the cost for an uninfected inmate. *Id.* at 22. Furthermore, "[p]eople should not have to die in prison," according to Doug Nelson, director of the Milwaukee AIDS Project. *Id.* "Those who are very sick with AIDS should be released to their families to receive better medical care and emotional support, to manage the devastation of the disease and the death process." *Id.*

185. *See id.* at 18.

186. Gomez v. United States, 899 F.2d 1124, 1126 (11th Cir. 1990).

D. *Correctional Facilities and Prison Employees Granted Immunity*

Assuming that a prisoner's claim overcomes all the barriers presented by the judicial system's framework for evaluating prisoner's rights, the doctrines of sovereign immunity, qualified immunity, and the Eleventh Amendment line up as additional obstacles to prisoner relief.[187]

1. *The Doctrine of Sovereign Immunity*

Under the doctrine of sovereign immunity, the United States may not be sued without its consent.[188] A claim against the state is one in which "the judgment sought would expend itself on the public treasury or domain."[189] Therefore, any lawsuit brought against an agency of the United States or against an officer of the United States in an official capacity, is considered an action against the government.[190] The doctrine rests primarily on the principle that litigation must not slow down official activities that are essential to governing the nation.[191]

Because the federal treasury would pay for any judgments entered against the Federal Bureau of Prisons and its officers acting in their official capacities, for purposes of a sovereign immunity analysis, these claims are treated as if maintained against the United States.[192] Lack of consent or lack of an express waiver of sovereign immunity is treated as a fundamental jurisdictional defect;[193] therefore, prisoner claims seeking monetary damages will be dismissed.[194] The Federal Tort Claims Act[195] provides a limited waiver of sovereign immunity, allowing the United States to be liable for the negligent or wrongful acts or omissions of federal employees.[196] This liability, however, "does not extend or apply to a civil action . . . which is brought for a violation of the Constitution of the United States."[197] Therefore, a suit brought by

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187. The following discussion is intended to show how governmental immunities present additional obstacles to prisoner relief in the court system. It is not intended to be a complete treatment of the issues of sovereign immunity, qualified immunity, and the Eleventh Amendment.

188. United States v. Dalm, 494 U.S. 596, 608 (1990); United States v. Mitchell, 463 U.S. 206, 212 (1983); Lehman v. Nakshian, 453 U.S. 156, 160 (1981); 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (1976).

189. Land v. Dollar, 330 U.S. 731, 738 (1947).

190. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).

191. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949); Ogletree v. McNamera, 449 F.2d 93, 100 (6th Cir. 1971).

192. Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 265 (S.D.N.Y. 1990).

193. United States v. Sherwood, 312 U.S. 584, 586 (1941); Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982); *see* 14 WRIGHT ET AL., *supra* note 188, § 3654.

194. Durre v. Dempsey, 869 F.2d 543, 547 (10th Cir. 1989); Fuller v. Georgia State Bd. of Pardons & Paroles, 851 F.2d 1307, 1309 (11th Cir. 1988); Dover v. Rose, 709 F.2d 436, 439 (6th Cir. 1983); McKnight v. Civiletti, 497 F. Supp. 657, 660-61 (E.D. Pa. 1980).

195. 28 U.S.C. §§ 2671-2680 (1994).

196. Johnson v. United States, 816 F. Supp. 1519, 1522 (N.D. Ala. 1993).

197. *Id.* (quoting Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1) and (b)(2)(A)).

a prisoner against the United States alleging a constitutional violation will be dismissed.[198]

2. *The Doctrine of Qualified Immunity*

The doctrine of qualified immunity grants immunity to government officials performing discretionary functions as long as their acts do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[199] To be clearly established, the contours of the right must be adequately clear so that a reasonable official would know his or her behavior is in violation of that right.[200] Because constitutional rights are deemed clearly established rights, the doctrine of qualified immunity will not often be granted in prisoners' cases challenging the conditions of confinement.[201] In one recent case, however, a district court found that because the law has not addressed whether a male prisoner's attempts to infect a female prisoner with AIDS violates the Eighth Amendment, the plaintiff did not allege a violation of a clearly established right.[202] Once a court determines that the officials' actions have not knowingly violated a clearly established right, the defense of qualified immunity applies, and the prison officials will be entitled to summary judgment.[203]

3. *The Eleventh Amendment*

Although "[a]ny step through the looking glass of the Eleventh Amendment leads to a wonderland of judicially created and perpetuated fiction and paradox,"[204] it is undisputed that the Eleventh Amendment[205] acts as a total jurisdictional bar to monetary claims brought against a state or state officials acting in their official capacities.[206] A claim is not, however, barred by the Eleventh Amendment to the extent that it seeks equitable relief as opposed to damages from the state.[207] Again, the policy underlying the

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198. *Id.*; Durre v. Dempsey, 869 F.2d at 547; Fuller v. Georgia State Bd. of Pardons & Paroles, 851 F.2d at 1309; Dover v. Rose, 709 F.2d at 439; McKnight v. Civiletti, 497 F. Supp. at 660-61.

199. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

200. Johnson-El v. Schoemehl, 878 F.2d 1043, 1048 (8th Cir. 1989).

201. *See, e.g.*, Farmer v. Brennan, 114 S. Ct. 1970 (1994).

202. Galvin v. Carothers, 855 F. Supp. 285, 293-94 (D. Alaska 1994); *see also* Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 268 (S.D.N.Y. 1990) (finding that prisoner did not have clearly established right to be informed of seropositivity of cellmate or to have all HIV-positive prisoners segregated from the general inmate population).

203. Marcussen v. Brandstat, 836 F. Supp. 624, 629 (N.D. Iowa 1993); Johnson v. United States, 816 F. Supp. 1519, 1522 (N.D. Ala. 1993); Wilson v. Franceschi, 735 F. Supp. 395, 397 (M.D. Fla. 1990).

204. Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980).

205. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

206. 13 WRIGHT ET AL., *supra* note 188, § 3524.

207. Quern v. Jordan, 440 U.S. 332 (1979). *But see* Hutto v. Finney, 437 U.S. 678, 692

immunity is the protection of state funds.[208] In deciding whether an entity is "an arm of the state," a court will look at the "essential nature and effect of the proceeding" and will find the state to be the real party in interest if the action seeks to recover money from the state treasury.[209] Federal courts have found that the Eleventh Amendment grants immunity for many state instrumentalities, including correctional facilities.[210]

Furthermore, in *Will v. Michigan Department of State Police*,[211] the Supreme Court held that neither a state nor its officials are considered "persons" for purposes of section 1983 if they are acting in their official capacities, and consequently, are not liable for claims brought under the statute.[212] Although a state official is literally a person, the Court stated that a claim against a state official acting in an official capacity is not a claim against the official; rather, it is a claim against the official's office, and does not differ from a claim solely against a state.[213] Thus, the Eleventh Amendment mandates the dismissal of all prisoners' section 1983 claims and suits for money damages brought against correctional facilities and prison officials acting in their official capacities.[214]

IV. CONCLUSION

The widespread failure of prisoners' AIDS-related complaints in our judicial system can be attributed to several factors. The doctrines of sovereign and qualified immunity as well as the Eleventh Amendment often preclude prison officials' liability from the outset. In addition, AIDS was first discovered in 1984, making it a relatively new disease, the contours of which remained uncertain until recently. Furthermore, specific prison policies arising from the need to maintain institutional security and order in the often highly volatile nature of the prison environment leads judges nationwide to adhere to a policy of judicial restraint in deferring to the discretion of prison administrations. Finally, the Supreme Court's recent decisions on prisoners' rights have restructured the framework of the Eighth Amendment to provide a stringent theme of deliberate indifference that runs through prisoners' claims,

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(1978) (finding financial sanction appropriate following a bad faith effort on the part of Arkansas penal system to cure a previous constitutional violation).

208. *See generally* Papasan v. Allain, 478 U.S. 265, 267-70 (1986); Kentucky v. Graham, 473 U.S. 159, 165-69 (1985).

209. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463-64 (1945); *see* Quern v. Jordan, 440 U.S. 332, 340 (1979); Edelman v. Jordan, 415 U.S. 651, 665 (1974).

210. Allen v. Purkett, 5 F.3d 1151, 1152-53 (8th Cir. 1993); Moore v. Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993); Knox v. McGinnis, 998 F.2d 1405, 1412 (7th Cir. 1993); Hughes v. Joliet Correctional Ctr., 931 F.2d 425, 427 (7th Cir. 1991); Loya v. Texas Dep't of Corrections, 878 F.2d 860, 861 (5th Cir. 1989); Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988).

211. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

212. *Id.* at 71; Rice v. Ohio Dep't of Transp., 887 F.2d 716, 719 (6th Cir. 1989); Gutierrez-Rodriguez v. Soto, 882 F.2d 553, 557 (1st Cir. 1989).

213. Will v. Michigan Dep't of State Police, 491 U.S. at 71.

214. *See* Goss v. Sullivan, 839 F. Supp. 1532, 1538 (D. Wyo. 1993); Cameron v. Metcutz, 705 F. Supp. 454, 457 (N.D. Ind. 1989) (dismissing prisoner's claim).

regardless of the policies challenged. Other than to virtually preclude prison officials' liability for injury suffered by prisoners, the effect of the Supreme Court's 1994 decision, *Farmer v. Brennan,* is unclear at this time.

What is clear, however, is that the number of AIDS cases nationwide is multiplying rapidly. The doctrines of immunity that shield prison officials from liability are not going to change, nor are the courts' stance on traditional deference, policies of judicial restraint, and constructions of the Eighth Amendment likely to change.

Perhaps the judicial system is not the answer to the problem of AIDS in prisons. At best, the courts can offer injunctive relief to remedy a harm already incurred. In the case of AIDS, the harm is irreversible and the result is death. Perhaps the war on drugs needs to be re-evaluated considering its enormous human and financial cost. " 'Its effectiveness in managing and preventing drug abuse must be evaluated, and alternative approaches that put less emphasis on criminal sanctions and more on prevention and treatment must be considered.' " [215]

Furthermore, regardless of courts' conclusions that most testing, housing, sexual assault, and medical policies are acceptable, updated uniform policies based on the reality of AIDS and the recommendations of the Centers for Disease Control can be legislatively mandated. Massive educational efforts for all inmates and staff, confidential voluntary testing, increased guard surveillance, push-button alarm systems, and cell assignment plans can be implemented.[216] If it is true that the best way to protect prisoners from AIDS is to leave the problem to prison administrators and legislators, perhaps hope lies through recognition and utilization of these avenues.

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215. Skolnick, *supra* note 2, at 1639 (quoting a joint position paper by the American College of Physicians, the National Commission on Correctional Health Care, and the American Correctional Health Services Association).

216. *See* Marsha F. Goldsmith, *Inescapable Problem: AIDS in Prison*, 258 JAMA 3215, 3215 (1987).