A PRISONER'S RIGHT TO BE FREE FROM SEXUAL
ABUSE—AN EXPANDING ROLE FOR
FEDERAL COURTS

INTRODUCTION

In recent years, a judicial recognition of a prisoner's right to be
free from sexual attacks by fellow inmates has become firmly estab-
lished in the federal courts of appeals. It is now generally accepted
that homosexual rape runs rampant throughout American penal in-
stitutions. Breeding on youth and infirmity, homosexual rape has
been described as the most significant manifestation of prison unrest
and violence. Outside prison walls, it is regarded as one of the most
degrading and disgusting crimes against an individual's bodily integ-
ritry. Yet inside prison walls, homosexual rape is often unreported
and allowed to continue. As one commentator suggests: "[P]rison
rape is still the most closely guarded secret activity of American
prisons." 6

This Comment analyzes the Eighth Circuit's recent decision in
Martin v. White, 7 holding that prisoners have an eighth amendment 8
right enforceable under 42 U.S.C. section 1983 9 to reasonable protec-

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1. E.g., Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984); Withers v. Levine, 615
F.2d 158, 161 (4th Cir. 1978); Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977). See also
notes 50-93 and accompanying text infra (discussing the development and recognition
of the right).

2. See United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting);
Martin, 742 F.2d at 473. See, e.g., C. Silberman, Criminal Violence, Criminal Justi-
ce 382-92 (1978); Report on Sexual Assaults in a Prison System and Sheriffs Vans,
III Crime and Justice 141-46 (L. Radzinowicz & M. Wolfgang eds. 1971) [hereinafter
cited as Crime and Justice]. See also Plotkin, Surviving Justice: Prisoners' Rights to
be Free From Physical Assault, 23 Cleve. St. L. Rev. 381, 388 (1974); Note, Sexual As-
saults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punish-

3. See notes 116-147 and accompanying text infra. See also C. Weiss & D. Friar,


5. Bailey, 444 U.S. at 421 (stating that “[p]rison officials are either disinterested
in stopping abuse of prisoners by other prisoners or are incapable of doing so”).

6. C. Weiss & D. Friar, supra note 3, at X.

7. 742 F.2d 469 (8th Cir. 1984).

8. U.S. Const. amend. VIII provides: "Excessive bail shall not be required, nor
excessive fines imposed, nor cruel and unusual punishment inflicted."

which was adopted April 20, 1871, ch. 22, § 1, 17 Stat. 13, and codified as amended in
1973, provides:

   Every person who, under color of any statute, ordinance, regulation, cus-
ton, or usage of any State or Territory or the District of Columbia, subjects,
or causes to be subjected, any citizen of the United States or other person
within the jurisdiction thereof to the deprivation of any rights, privileges, or
tion from violence and sexual assaults perpetrated by fellow inmates. Since the state has a duty to reasonably protect those whom it incarcerates, this Comment suggests that a negligent breach of that duty under most circumstances should be actionable where declaratory or injunctive relief is sought. Finally, this Comment suggests that federal court intervention is the most effective method of eradicating unconstitutional conditions at prisons and preventing their recurrence.

_MARTIN v. WHITE_

In _Martin v. White_, Michael Gleason and Gary Martin, inmates at the Moberly Training Center for Men in Moberly, Missouri, brought suit under section 1983 alleging that Carl White, Superintendent of the Missouri Training Center, deliberately deprived them of their eighth amendment right to be free from cruel and unusual punishment. Praying for both injunctive relief and compensatory damages, Martin and Gleason asserted that White failed to provide reasonable protection from both the threat of homosexual rape and homosexual rape itself.

At trial, the evidence established that Martin, in an effort to escape being forcibly raped, obtained a knife for self-defense. Although Martin escaped several rape attempts, he was discovered with the weapon and sentenced to an additional three years behind bars. Inmate Gleason, however, was not as fortunate. Within two weeks of his arrival at the prison, his cell lock was picked, and he was dragged from his cell into an adjacent one by three men, stripped, spread-eagled, and sodomized by another inmate.

In claiming that Superintendent White failed to provide reasonable protection from attacks by other inmates, Martin and Gleason specifically alleged that White failed to: 1) establish adequate patrol procedures by guards; 2) classify prisoners according to their violent histories; 3) examine locks for defects to assure their security; and 4) report prior assaults to the local prosecutor for the purpose of de-
terring future assaults. At the close of the inmates’ case, the Superintendent’s motion for a directed verdict was granted.

The Eighth Circuit Court of Appeals, per Judge Ross, reversed, holding that “prison officials may be liable where they are deliberately indifferent to [a prisoner’s] constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.” Noting that the trial record contained no evidence of intentional deprivation, the court stated that reckless disregard may be proven by “a pervasive risk of harm to inmates from other prisoners and a failure by prison officials to reasonably respond to that risk.” Although a single isolated attack will not establish a pervasive risk of harm, frequently occurring attacks may. Once a pervasive risk of harm has been shown, the court must decide “whether the officials reasonably responded to that risk.”

BACKGROUND

The Eighth Amendment

The eighth amendment was applied initially to proscribe “torture and other barbarous methods of punishment.” Today, a punishment cannot be either grossly disproportionate to the severity of the crime or “so totally without penological justification that it results in the gratuitous infliction of suffering.” In addition, the eighth amendment “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” Punishments which are incompatible with “the evolving standards of decency that mark the progress of a maturing society” are constitutionally

17. Id.
18. Id.
19. Id. at 474.
20. Id. (stating that “[w]e can find no evidence in the record suggesting that White actually intended to deprive the plaintiffs of their right”).
21. Id.
22. Id. Although no showing of a “reign of violence and terror” is necessary, Withers, 615 F.2d at 161, it is enough that the frequency of attacks causes prisoners to fear for their safety and apprises officials of the problem.
23. Martin, 742 F.2d at 475.
27. Gregg, 428 U.S. at 183.
Included in the eighth amendment's concept of punishment are conditions of confinement inside a penal institution. Accordingly, the eighth amendment proscribes as inconsistent with contemporary standards of decency conditions of confinement which either "alone or in combination... deprive inmates of the minimal civilized measure of life's necessities." Prisoners are by nature dependent upon their keepers for fulfillment of their basic needs. If these needs are not met, the confinement may, depending upon the nature of the deprivation, constitute cruel and unusual punishment.

Section 1983 Actions

Although federal courts traditionally decline subject matter jurisdiction of petitions by state prisoners, federal courts today are willing to intervene when eighth amendment rights have been violated. A state prisoner's primary vehicle for this purpose is section 1983. Intended to vindicate rights from state deprivation and provide a remedy where the state remedy was inadequate in theory or in practice, section 1983 provides a federal forum against state officials acting under color of state law. If unconstitutional conditions of confinement are the result of official prison policy or practice, a prisoner may pray for declaratory, injunctive, or monetary relief from such policy or practice.

A prisoner's section 1983 action, however, may be both difficult to prove and limited in remedy. Section 1983 does not overrule the common law immunity afforded to governmental officials when performing discretionary functions. Therefore, a qualified or good faith belief that the action taken was constitutional will defeat liabil-

32. Rhodes, 452 U.S. at 347.
33. See Estelle, 429 U.S. at 103 (noting that inmates must rely on keepers for medical needs).
34. Id. (stating that if needs are not met, "torture or a lingering death" may result, contravening the eighth amendment).
38. Kerr v. United States Dist. Court, 511 F.2d 192, 197 (9th Cir. 1975).
40. Id.; Battle v. Mulholland, 439 F.2d 321, 325 (5th Cir. 1971).
41. Martin, 742 F.2d at 470, 474 (prison officials may be personally liable for constitutional deprivations and relief may be injunctive and/or monetary).
ity for damages.\textsuperscript{43} In order to recover, a plaintiff must show something more than mere negligence,\textsuperscript{44} to the point of gross negligence or deliberate indifference.\textsuperscript{45}

In addition, the eleventh amendment precludes a suit seeking compensatory damages from the state.\textsuperscript{46} Thus, a suit for damages may be sustained against state officials only in their individual capacity.\textsuperscript{47} So, although the prison official is presumed to be acting under color of state law, allegations of unconstitutional deprivations strip the official of his official capacity and subject "his person to the consequence of his individual conduct."\textsuperscript{48} Nevertheless, injunctive relief may be sought in all instances, even though the relief effectively would run against the state.\textsuperscript{49}

The Right To Reasonable Protection From Other Prisoners

In \textit{Holt v. Sarver},\textsuperscript{50} the Eighth Circuit laid the foundation for a new era in protecting prisoners' rights.\textsuperscript{51} In \textit{Holt}, inmates at two Arkansas penal institutions brought suit on behalf of themselves and all other similarly situated prisoners against members of the Arkansas State Board of Corrections, seeking declaratory and permanent injunctive relief.\textsuperscript{52} The inmates claimed that conditions at the prison were so inhumane as to constitute cruel and unusual punishment.\textsuperscript{53} The court stated, among other things, that prison officials had not designed any method of keeping prisoners reasonably safe from one
another. The court noted that “[p]risoners are frequently attacked and raped in the dormitories and injuries and deaths have resulted.” The court held that the totality of conditions shocked the court’s conscience and that confinement under such conditions constituted cruel and unusual punishment.

The Holt decision stated the proposition that inmates in a class action suit may sustain their cause of action against state prison officials when conditions of confinement amount to cruel and unusual punishment. Although conditions examined independently would not warrant the finding of unconstitutional confinement, the cumulative impact of these conditions under the totality of the circumstances may be constitutionally repugnant. Equally important, prisoners are entitled to some protection from violence and attacks perpetrated by other inmates. But failure to provide security to inmates is not determinative of cruel and unusual punishment; rather, Holt turned on the totality of the conditions of which frequent sexual assault was one such condition.

In Penn v. Oliver, a federal district court altered the focus of Holt by holding that an individual claimant seeking damages under section 1983 for inadequate protection resulting in an attack by a fellow inmate need not allege general unconstitutional conditions of confinement. Citing Holt for the proposition that inmates have a right to protection from attacks by fellow inmates, the court stated that to prove deprivation of a constitutional right, “there must be a showing either of a pattern of indisputed and unchecked violence or, on a different level, of an egregious failure to provide security to a particular inmate.” However, the court stated that “[a]n isolated act or omission by a prison official that allows an attack to occur and which involves only simple negligence does not, absent special circumstances, create a constitutional deprivation over which this court

54. Holt, 442 F.2d at 308.
55. Id.
56. Holt, 309 F. Supp. at 373 (stating that conditions of confinement must be considered in “combination” for their “cumulative impact”).
57. See Holt, 442 F.2d at 308-09 (affirming district court holding of eighth amendment violation after reciting traditional test requiring a shocked conscience).
58. Holt, 442 F.2d at 308.
60. See Holt, 442 F.2d at 308.
63. Id. at 1294.
64. Id. (citing Holt, 309 F. Supp. at 362).
65. Penn, 351 F. Supp. at 1294 (emphasis added). See also Note, supra note 51, at 600-01 (noting that the second portion of the Penn test broadened the protection that Holt recognized, granting to individuals an unprecedented right to protection from assaults).
has jurisdiction."\(^66\)

In *Woodhous v. Virginia*,\(^67\) the Fourth Circuit held that the threat of violence of sexual assault alone is sufficient to constitute a constitutional deprivation.\(^68\) According to the court, an inmate "has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief."\(^69\) While noting that more than a single isolated occurrence is necessary to establish a constitutional deprivation under Penn, the court stated that "confinement in a prison where violence and terror reign is actionable."\(^70\) If an inmate proves a pervasive risk of harm\(^71\) and the prison officials fail to reasonably respond to that risk of harm, he may sustain his cause of action.\(^72\)

Setting the parameters of a pervasive risk of harm, the Fourth Circuit in *Withers v. Levine*\(^73\) declared that "[i]t is enough that violence and sexual assaults occur . . . with sufficient frequency that younger prisoners, particularly those slightly built, are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures."\(^74\) Thus, much less than a reign of violence and terror need be shown. Nor is it necessary that all inmates suffer from the pervasive risk of harm; it is sufficient if an identifiable class of inmates suffers and the plaintiff is a member of that class.\(^75\)

The *Withers* court held that if a pervasive risk of harm could be shown, the eighth amendment requires that prison officials exercise reasonable care in combating the risk.\(^76\) In these circumstances, negligence by prison officials would constitute a deprivation of constitutional rights and would be actionable under section 1983.\(^77\) Because the risk is so pervasive, a negligent failure to reasonably respond to that risk is commensurate to deliberate deprivation.\(^78\) According to the court: "The constitutional right would often remain unredressed

\(^66\) 351 F. Supp. at 1294.
\(^67\) 487 F.2d 889 (4th Cir. 1973).
\(^68\) See id. at 890.
\(^69\) *Id.* (emphasis added). *The Woodhous* court cited *Holt* as support for this proposition, although it clearly is a broad expansion of the *Holt* holding.
\(^70\) *Id.*
\(^71\) Although the court did not define the term, "pervasive risk of harm" appears to be an environment in which violence is "imminent and constant." *Id.*
\(^72\) *Id.*
\(^73\) 615 F.2d 158 (4th Cir. 1980).
\(^74\) *Id.* at 161.
\(^75\) *Id.*
\(^76\) *Id.* at 162.
\(^77\) *Id.*
\(^78\) *Id.*
if a higher standard of care were required."

Relying on traditional notions of decency and fundamental fairness, the Seventh Circuit, in *Little v. Walker*, became the first circuit court to award damages to an inmate for inadequate protection from assaults by other prisoners. Little, a former inmate of the Illinois State Penitentiary, alleged that he "repeatedly suffered acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates from whom [he and other] plaintiffs were not reasonably protected." Specifically, Little asserted that while placed in "segregated safekeeping" with the stated purpose of avoiding gang-affiliated violence, he and other inmates were forced to "perform unnatural sexual acts through the cells bars" to obtain food controlled by gang members. In addition, the cell block "was seized by a group of rebellious inmates for nine hours while gang rapes were inflicted on other inmates" due to the defendants' failure to provide reasonable security.

Rather than relying upon the *Penn* and *Woodhous* line of cases, the court held that violent attacks and sexual assaults on inmates in protective segregation were inconsistent with contemporary standards of decency and that deliberate indifference to those occurrences constituted the "unnecessary and wanton infliction of pain proscribed by the eighth amendment."

As the foregoing discussion shows, the lower federal courts have recognized a prisoner's right to be reasonably safe from sexual assaults and violent attacks perpetrated by fellow inmates. The established rule is best summarized by the Fourth Circuit:

A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

Although this right initially was viewed as one condition to be consid-
erred in the totality of the conditions,91 it clearly has established its own footing. When the overall conditions of a penal institution are not at issue, a prisoner may sustain a cause of action under section 1983 on the basis of a pervasive risk of harm to a particular group of inmates if the prison officials' response to the risk is inadequate.92 Threats and constant fear of homosexual rape make the prison environment unbearable and inconsistent with contemporary standards of decency so as to constitute cruel and unusual punishment.

Nevertheless, these decisions leave some unanswered questions. First, it is not clear whether an inmate must prove reckless disregard or if negligence alone is sufficient to prove liability under section 1983. As noted above, the Fourth Circuit has held that once a pervasive risk of harm is shown, negligence alone is sufficient to state a cause of action. In light of the common law immunity still available under section 1983, it would appear that something more than mere negligence to refute the good faith immunity defense.

Second, although it is clear that a good faith immunity is irrelevant when injunctive relief is sought, the cases make no distinction between an inmate's cause of action and the type of relief sought. If an inmate prays for injunctive relief only and courts require reckless disregard as the standard of review, the remedy may not be available to compensate the wrong.

Supreme Court Cases

The Supreme Court has never recognized a prisoner's right to be free from violence and rapes perpetrated by other inmates. In United States v. Bailey,93 the Court avoided the issue by interpreting 18 U.S.C. section 751(a), the federal escape statute, as intending the crime of escape to be a continuous offense. Accordingly, the Court stated that evidence alleging unconstitutional conditions of confinement could be introduced to justify the defense of necessity only after the escapees had produced evidence of a bona fide effort to surrender.94 Yet, an analytical starting point is the principle that inmates must be afforded all constitutional rights "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."95

In Estelle v. Gamble,96 the Court held that deliberate indiffer-

91. See notes 50-57 and accompanying text supra (discussing Holt).
92. See notes 68-76 and accompanying text supra (discussing Woodhous and Withers); see also notes 81-90 and accompanying text supra (discussing Little).
94. Id. at 415.
ence to a prisoner’s right to medical treatment will constitute cruel and unusual punishment.  The decision rested on the premise that a prisoner is dependent upon prison officials for his medical needs. The Court stated:

In the worst cases, such a failure [to treat illness] may actually produce physical “torture or a lingering death”. . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency. . . .

When restricting or entirely abrogating a constitutional right in the prison environment, the state must assert and prove a legitimate state interest. In Pell v. Procunier, the Court recognized three state interests: deterrence of crime, rehabilitation, and internal security. It is clear, for example, that prison officials may place limitations on visitation, association, and access to the media. Noting that the “loss of freedom of choice and privacy are inherent incidents of confinement” in any type of detention facility, the Court in Bell v. Wolfish held that visual body cavity searches of pretrial detainees were constitutional as rationally related to a legitimate state interest in penal security. The Court’s holding was based on allowing prison officials broad deference in how best to maintain internal order and prison security.

The Court has recently held in Block v. Rutherford that blanket prohibitions against contact visits and random shake down searches of pretrial detainees’ cells were constitutional as being rationally related to maintaining the internal security of the jail.

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97. Id. at 104.
98. Id. at 103.
99. Id. See also notes 32-34 and accompanying text supra (discussing eighth amendment proscriptions).
102. Id. at 822-23.
104. Bell, 441 U.S. at 537.
105. Id. at 520.
106. Id. at 560.
107. Id. at 544-48.
109. Id. at 3232-35.
the same day, the Court in *Hudson v. Palmer*\(^{110}\) held that prisoners have no reasonable expectation of privacy in their prison cells.\(^{111}\) According to the Court, a right to privacy rooted in the fourth amendment is "fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."\(^{112}\) Both *Block* and *Hudson* emphasized the broad deference that is afforded prison officials when adopting regulations to maintain internal security.\(^{113}\) This emphasis has led at least one commentator to suggest that these cases "signal a move by the Court toward eliminating the judiciary's role as a safeguard against inhumane conditions of incarceration."\(^{114}\)

**The Disheartening Reality Of Homosexual Rape**

In *Martin v. White*, the Eighth Circuit stated:

In this case we deal with a subject matter which has become a national disgrace in some of our nation's prisons. We speak, of course, of the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates.\(^{115}\)

When stripped of its aesthetically bearable euphemism, the term "sexual assault" in prison means nothing but homosexual rape. It is the nonconsensual or forced submission into playing the feminine role in a sexual relationship.\(^{116}\) An unfortunate, although common fact pattern, explains the horror:\(^{117}\)

The sound of the pick in Green's cell door abruptly stops. The door is flung open. . . . A knife is put to this throat. He is seized, stripped, and repeatedly sodomized. It is unbearably painful, and he bleeds severely. He is forced to perform fellatio on both of the men. Threats accompany each act. . . .

[Two weeks later after being told by prison officials to fight it out, Green is again assaulted by inmates.] They close in on him, swinging simultaneously. Green goes down on the concrete floor. They kick him until he is unconscious. Green is homosexually assaulted in shifts. They force his

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111. *Id.* at 3200.
112. *Id.* at 3201.
113. *Hudson*, 104 S. Ct. at 3199; *Block*, 104 S. Ct. at 3232.
115. *Martin*, 742 F.2d at 470.
117. *See Crime and Justice*, supra note 2, at 141 (stating that "[a] few typical examples of sexual assaults convey the enormity of the problem").
mouth open while he is unconscious. When awareness returns, he finds himself in excruciating pain. Every part of his body is bruised and big discolored blotches cover most of his skin. He is bleeding from the rectum, and he chokes on the taste of semen in his mouth.\textsuperscript{118}

This encounter is far from atypical. As one commentator’s findings suggest:

Virtually every slightly built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are overwhelmed and repeatedly “raped” by gangs of inmate aggressors. Others are compelled by the terrible threat of gang rape to seek protection by entering into a “housekeeping relationship” with an individual tormentor. Only the toughest . . . young men . . . escape penetration of their bodies.\textsuperscript{119}

A reporter investigating the North Carolina prison system\textsuperscript{120} brought it closer to home:

[S]omewhere in North Carolina’s prison system this week a boy will be raped—maybe once, possibly three or four times in one night by different men. Somewhere behind the bars an effeminate young man too weak or too scared to fight back will be auctioned as a homosexual partner. . . . The victim might be serving as little as 30 days for public drunkenness. He might be a high school student from a “good home” who stole a car. He might be a businessman who was a solid citizen until he stole some money in one moment of desperation.\textsuperscript{121}

Estimates vary considerably on the frequency of homosexual rape.\textsuperscript{122} Some penologists estimate as many as ninety-five percent of inmates participate in homosexual activity although many agree on a figure of fifty percent.\textsuperscript{123} This variation is primarily due to the inherent difficulty with reporting and documenting.\textsuperscript{124} In \textit{Martin}, for example, the court listed “59 actual reported assaults and over 300 claimed assaults,”\textsuperscript{125} while noting that many assaults go unreported.\textsuperscript{126} While documenting 156 assaults by at least 176 different

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\textsuperscript{118} C. Weiss \& D. Friar, \textit{supra} note 6, at 406 (expounding on the facts of \textit{State v. Green}, 470 S.W.2d 565, 566 (Mo. 1971)).

\textsuperscript{119} \textit{Crime and Justice, supra} note 2, at 141.


\textsuperscript{121} Comment, \textit{supra} note 120, at 867 n.125.

\textsuperscript{122} Note, \textit{supra} note 2, at 431.

\textsuperscript{123} Id.

\textsuperscript{124} \textit{Crime and Justice, supra} note 2, at 144.

\textsuperscript{125} \textit{Martin}, 742 F.2d at 471-72.

\textsuperscript{126} Id.
aggressors over a twenty-six month period, an investigative report of
the Philadelphia penal system noted that if all 60,000 persons who
passed through the system had been interviewed, approximately
1,880 additional rapes would have been discovered.\textsuperscript{127} In actuality,
this is only the "tip of the iceberg."\textsuperscript{128}

Prison life brings out the "most brutal, violent, and sadistic ten-
dencies . . . in human behavior."\textsuperscript{129} From 1981 to 1983, there were
1,109 reported inmate assaults on other inmates and 797 reported in-
mate assaults on prison personnel.\textsuperscript{130} During 1981 and the first half
of 1982, there were over 120 murders by fellow inmates, 29 riots, and
125 suicides reported in state and federal prisons.\textsuperscript{131} Obviously, the
"situation is intolerable."\textsuperscript{132}

The psychological and sociological causes of homosexual rape in
prison are many.\textsuperscript{133} Prison life is characterized by sensory depriva-
tion, boredom, and lack of trust.\textsuperscript{134} It contained numerous daily re-
minders of personal rejection and worthlessness.\textsuperscript{135} Prisoners are
under constant surveillance,\textsuperscript{136} and they have no privacy rights.\textsuperscript{137}
Furthermore, they are often subjected to body cavity strip searches
and other violations of privacy.\textsuperscript{138}

Within this environment, inmates who are either too weak or too
scared to fend off their aggressors are subjected to homosexual
rapes.\textsuperscript{139} New, inexperienced prisoners are often bribed by luxuries
such as cigarettes to enter housekeeping arrangements.\textsuperscript{140} As there
are no "free" favors in the inmates' code,\textsuperscript{141} paying for luxuries is a
coerced choice between serious body mutilation or subjection to ho-
mosexual activity.\textsuperscript{142} Added to the confusion, new inmates provide a
new opportunity for both victimizers and victims to assert their mas-
culinity, thus resulting in a constant cycle.\textsuperscript{143} As one commentator
has stated: "In the zero-sum games that inmates play, one man's de-

\textsuperscript{127.} CRIME AND JUSTICE, supra note 2, at 143-44; C. SILBERMAN, supra note 2, at
390 (also stating that the figures were compiled 10 years earlier).

\textsuperscript{128.} CRIME AND JUSTICE, supra note 2, at 144 (present epidemic of violence).

\textsuperscript{129.} See C. SILBERMAN, supra note 2, at 392.

\textsuperscript{130.} Martin, 742 F.2d at 473 (citing Hudson, 104 S. Ct. at 3200).

\textsuperscript{131.} Id.

\textsuperscript{132.} CRIME AND JUSTICE, supra note 2, at 144.

\textsuperscript{133.} C. SILBERMAN, supra note 2, at 382-89.

\textsuperscript{134.} Id. at 382-87.

\textsuperscript{135.} Id. at 382-83.

\textsuperscript{136.} Id. at 385.

\textsuperscript{137.} Hudson, 104 S. Ct. at 3200. See also notes 111-15 and accompanying text supra.

\textsuperscript{138.} Bell, 441 U.S. at 560. See notes 105-08 and accompanying text supra.

\textsuperscript{139.} CRIME AND JUSTICE, supra note 2, at 145.

\textsuperscript{140.} Id.

\textsuperscript{141.} C. SILBERMAN, supra note 2, at 390.

\textsuperscript{142.} Id. at 390-91.

\textsuperscript{143.} Id. at 387.
feat is another's triumph; the ultimate triumph is to destroy another man's manhood—to break his will, defile his body, and make him feel totally (and often permanently) degraded." At the same time, only the passive partner in the relationship is considered homosexual. To the rapist or victimizer, the rape is viewed merely as a form of mutual masturbation with another person who incidentally happens to be another man rather than a woman because of the circumstances.

As demonstrated by the foregoing discussion, homosexual rape is prison results from numerous and perhaps incomprehensible factors. Clearly, a court may be able to identify the tangible structural problems, such as defective locks or overcrowding, and mandate specific changes to address those problems. On the other hand, the judiciary must address whether it is capable of comprehending and effectively changing the intangible conditions of confinement which promote homosexual rape. Sexual tension and constant anxiety generated from continual close confinement with others may not, and may never be, within a court's purview. Short of ordering solitary confinement and independent supervision of each prisoner, these problems might not be subject to judicial resolution.

ANALYSIS

Martin v. White And The Right To Reasonable Protection

In Martin, the Eighth Circuit required the plaintiffs to show the existence of a clearly established constitutional right and the defendants' deliberate deprivation of that right. Deliberate deprivation may be shown either by intentional deprivation or reckless disregard for the inmate's constitutional right. The latter may be established by showing that a pervasive risk of harm exists, manifested by violence and sexual assaults occurring on a regular basis, and that prison officials did not reasonably respond to that risk.

The standard articulated in Martin is consistent with the case law which has emerged in the other circuits. More importantly, however, it also appears consistent with the Supreme Court's per-

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144. Id. at 389.
145. Id. at 388. See also G. SYKES, supra note 117, at 97.
146. G. SYKES, supra note 117, at 97.
147. Martin, 742 F.2d at 474.
148. Id.
149. Id.
150. See notes 62-90 and accompanying text supra (summarizing the evolution of the right to be free from sexual assault in prison).
spective on prisoners' rights.\textsuperscript{151} Although an inmate loses rights inconsistent with incarceration,\textsuperscript{152} there is no justification for a lessening or entire abrogation of an inmate's right to reasonable protection from fellow inmates.\textsuperscript{153} Clearly, a right to be free from homosexual rape must be afforded constitutional status, for the converse cannot be predicated on a legitimate state interest in prison security.\textsuperscript{154} Neither public sentiment nor general apathy, as the case may be, can support the view that homosexual rape is simply part of prison punishment legitimately imposed against someone who has committed a crime against society.\textsuperscript{155} Such a perspective is beyond all bounds of decency.\textsuperscript{156}

Consistent with the Supreme Court's delineation of a prisoner's right to medical care in \textit{Estelle v. Gamble},\textsuperscript{157} a prisoner is dependent upon prison officials for protection from other inmates.\textsuperscript{158} As one commentator has noted, "[t]he State has created prisons where it herds together its criminals, forcing citizens into associations with others who may be likely to harm them, while at the same time depriving them of their normal powers of self-defense or escape . . . ."\textsuperscript{159} If prison officials fail to provide reasonable security from other inmates, an inmate's security needs will go unfulfilled\textsuperscript{160} and in the worst cases, such a failure may actually result in an inmate's murder, maiming, or rape.\textsuperscript{161} As Justice Blackmun stated in his dissent in \textit{United States v. Bailey}:\textsuperscript{162}

The reasons that support the Court's holding in \textit{Estelle v. Gamble} lead . . . [to the conclusion] that failure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity. Prisoners must depend, and rightly so, upon the prison administrators for protection from abuse of this kind.\textsuperscript{163}

With the \textit{Estelle} reasoning as a backdrop, the Eighth Circuit re-

\begin{itemize}
\item \textsuperscript{151} See notes 94-115 and accompanying text supra.
\item \textsuperscript{152} \textit{Hudson}, 104 S. Ct. at 3198.
\item \textsuperscript{153} \textit{Martin}, 742 F.2d at 474.
\item \textsuperscript{154} \textit{Id}.
\item \textsuperscript{155} See \textit{id}. (rejecting sexual assault as legitimate part of punishment).
\item \textsuperscript{156} \textit{Id}.
\item \textsuperscript{157} See notes 96-100 and accompanying text supra.
\item \textsuperscript{158} \textit{Id}.
\item \textsuperscript{159} Plotkin, supra note 2, at 404.
\item \textsuperscript{159} \textit{Estelle}, 492 U.S. at 103.
\item \textsuperscript{160} See notes 96-100 and accompanying text supra (discussing \textit{Estelle}).
\item \textsuperscript{161} \textit{Id}. at 423.
\item \textsuperscript{162} 444 U.S. 394 (1980).
\item \textsuperscript{163} \textit{Id}.
\end{itemize}
quires an inmate to pass a two-tier test: 1) do sexual assaults occur on a regular basis? 2) if so, did prison officials develop adequate policies and procedures to combat the assault?\textsuperscript{164} At first glance, this two-prong test appears to be a negligence standard best justified by the common law rule that once a person owes a duty of care to another, notice of that person's need for protection raises "a constitutional duty of care . . . binding such officials to take reasonable measures to ensure that inmate's safety."\textsuperscript{165} If homosexual rapes occur frequently so that the reasonable and prudent prison official should have known of their existence and if he did nothing to protect the inmates at risk, he is negligent and can be held liable under section 1983.\textsuperscript{166} He has, in effect, acquiesced to unbearable prison conditions which constitute cruel and unusual punishment.

However, section 1983 does not abrogate the common law immunity of state officials acting in their official capacity.\textsuperscript{167} As stated above, a qualified or good faith immunity is available in an action for damages for prison officials performing discretionary functions.\textsuperscript{168} Under the \textit{Estelle} rational, recklessness is required to negate the existence of good faith.\textsuperscript{169} Perhaps by requiring a pervasive risk of harm, an objective recklessness standard is brought back into the test.\textsuperscript{170} If the rapes occur frequently, the prison officials could not reasonably be deemed unaware of their existence. Moreover, by requiring more than a single, isolated attack, the Court is both limiting liability and admitting that it is not capable of redressing all wrongs in prison.\textsuperscript{171} Some things are just part of the penal system, and no matter how many precautions are enacted, intangible conditions of confinement cannot be entirely eradicated.\textsuperscript{172}

The \textit{Martin} court took notice that Martin was threatened during the orientation process and Gleason was raped within two weeks of his arrival, suggesting that prison officials may owe a greater duty of

\begin{itemize}
  \item\textsuperscript{164} Martin, 742 F.2d at 474.
  \item\textsuperscript{165} West v. Roe, 448 F. Supp. 58, 60 (N.D. Ill. 1978).
  \item\textsuperscript{166} Withers, 615 F.2d at 162. \textit{See} notes 74-80 and accompanying text \textit{supra}.
  \item\textsuperscript{167} \textit{Id}.
  \item\textsuperscript{168} \textit{Id}.
  \item\textsuperscript{169} \textit{Id}.
  \item\textsuperscript{170} \textit{Id}.
  \item\textsuperscript{171} \textit{See} Monell v. Department of Soc. Servs., 436 U.S. 658, 691 (1978) (analogizing liability of municipalities to prison officials and \textit{respondeat superior} to recklessness).
  \item\textsuperscript{172} \textit{See} notes 134-147 and accompanying text \textit{supra}.
\end{itemize}
care to new arrivals. As one court has recognized: "[N]ew inmates will . . . be less adept at avoiding situations which could lead to sexual assaults, and in defending against such assaults. Furthermore, subjection to gang rape and sodomy during the first day of incarceration hardly sets an appropriate prelude for ultimate rehabilitation." If so, Martin and Gleason would be members of an identifiable group. The fact that no other group of prisoners at the Moberly Training Center may suffer a pervasive risk of harm is irrelevant.

Although the Martin court concluded that "White's policies not only failed to reasonably protect inmates, but may have actually encouraged inmates to attack others with impunity," the court unfortunately did not distinctly define the parameters of the Superintendent's liability. Clearly, White should be held liable for damages resulting from a breach of duty for those conditions which were within his ability to prevent. At the same time, however, he should not be held liable for damages for conditions which were beyond his control. Failure to inspect cell blocks and to report rapes to the local prosecutor were clearly within White's means. Inadequate guard supervision, however, is a more difficult question. If prisoners were adequately supervised due to the structural design of the prison or a lack of state funding, the warden should not be held liable. Although a lack of state funds is no bar to remedying constitutional violations, it is determinative on the issue of with whom the liability should rest. In this situation, that liability would rest with the State of Missouri. Yet, because the eleventh amendment for the most part bars a grant of compensatory relief running against a state, the plaintiff would be relegated to only prospective injunctive relief.

Unfortunately, the Martin court makes no distinction between requests for damages and injunctive relief. Although good faith immunity insulates officials from liability for damages, it does nothing to prevent an award of injunctive relief. In these cases, the underlying concern should be remedying any policy or prison condition which promotes homosexual rape. It should be apparent that awarding monetary relief will not be the most effective remedy in every

173. Martin, 742 F.2d at 475 n.6.
175. Martin, 742 F.2d at 475 n.6.
176. Id. at 474.
177. Id. at 475.
178. See id.
180. See notes 46-49 and accompanying text supra.
As one commentator has noted, when a prisoner is repeatedly raped, there is little comfort in knowing he may later collect damages from the warden.\textsuperscript{182}

More importantly, if an inmate must prove a pervasive risk of harm to an identifiable group of which he is a member, many prisoners who should have been protected, but were not, may be without recourse. If injunctive relief is prayed for, perhaps all that should be required is some causal nexus between the condition complained of and the homosexual rape. If the condition is the cause of the rape, it should be enjoined, irrespective of the pervasiveness of the risk. By requiring less than a pervasive risk of harm for injunctive relief only, courts would not be making prison administrators insurers of their captives; rather, they would be enhancing institutional security.

\textbf{BEYOND \textit{MARTIN V. WHITE}: FEDERAL COURT INTERVENTION IN STATE PRISON SYSTEMS}

\textit{Martin} stands for the proposition that since federal court intervention into state penal systems is essential for compliance with constitutional standards,\textsuperscript{183} the court will not hesitate in finding a violation nor in providing a remedy.\textsuperscript{184} Despite the Eighth Circuit's willingness to intervene after the fact, it still remains that official acquiescence in conditions promoting homosexual rape is the rule, not the exception:\textsuperscript{185} "[t]hese conditions exist because there is little political motivation for legislatures to allocate correctional appropriations greater than those sums necessary to 'keep criminals off the street.'"\textsuperscript{186} In an era of state budget slashing, increased prison appropriations often fall last on a state's list of priorities.\textsuperscript{187} Yet, with society demanding tougher criminal sanctions and longer, mandatory sentencing, it is unconceivable that prisons can become any more humane than they currently are.

Given this social reality, federal courts are, by default, left with the choice of either invading a state's traditional domain or allowing constitutional violations to continue.\textsuperscript{188} As the Supreme Court recog-

\begin{itemize}
\item \textsuperscript{181} R. \textsc{Goldfarb} \& L. \textsc{Singer}, \textsc{After Conviction} 450 (1973) (noting that means of compensating prisoners or punishing officials was tenuous at best).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} \textit{Martin}, 742 F.2d at 473.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Note, \textit{supra} note 2, at 428.
\item \textsuperscript{186} Note, \textit{Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates}, 44 S. Cal. L. Rev. 1060, 1060 (1971).
\item \textsuperscript{187} Id. at 1065.
\item \textsuperscript{188} \textit{Johnson, The Constitution and the Federal District Judge}, 54 Tex. L. Rev. 903, 906 (1976).
\end{itemize}
nized in *Rhodes v. Chapman*:189 "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost."

Federal courts have the authority to sustain jurisdiction over suits brought by state prisoners against state officials.191 Although early cases relied on the fourteenth amendment due process clause, the eighth amendment itself provides a source of authority for such intervention.192 Once a constitutional right has been violated, the federal judiciary may intervene to vindicate that right.193 Accompanying this authority are federal equitable remedies which can be tailored to meet any type of constitutional challenge.194

Yet, even conceding this federal judicial authority to grant affirmative remedies when vindicating constitutional rights, questions concerning the extent to which federal courts may change or completely revise a state penal institution still exist.195 Admittedly, the resolution of *Martin v. White* may be very simple: if the district court determines, for example, that the rapes were the result of the Superintendent's failure to inspect and replace defective locks, the court may order such inspection and replacement. More difficult questions arise, however, when, for example, defective structural design or overcrowding is targeted as the cause of the constitutional violation. It would seem that as the federal courts' intervention becomes more intrusive, threats to states' autonomy become more acute. If numerous changes are required to comport with constitutional standards, the state must often appropriate large sums of money.196 At the same time, the federal courts require that their decrees take precedence over other budgetary matters, which depending upon the amount of money needed, may require the state to rearrange its budget.197 Taken to its logical extension, the state could be required to levy a tax to provide necessary funds for remedying the constitutional violations.198 All this stands in the shadows of the steadfast rule that a lack of funds is no excuse for noncompliance.

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190. Id. at 337.
192. *Holt*, 442 F.2d at 308.
195. Id. at 732-33. See also notes 46-49 and accompanying text supra (discussing *Pennhurst* and the eleventh amendment).
196. Id. at 727.
197. See id. at 726.
198. Id. at 735.
Arguably, federal court decrees which go to the extent of requiring large monetary expenditures raise questions of separation of powers and federalism.\textsuperscript{200} Requiring a state to allocate a specific amount of its budget to prisons and away from other state services or requiring a state to levy new taxes to support required changes is a usurpation of the legislative function.\textsuperscript{201} Even if the judiciary possessed the institutional capacity for making decisions concerning how a state should collect and allocate money, these are nonetheless state legislative responsibilities.\textsuperscript{202} The legislature is politically accountable to the public; the judiciary is not.\textsuperscript{203} Since budget allocation is essential to a state's independence and federal court supervision over a state penal institution invades the province of the state, the federal judiciary may effectively be undermining the state's ability to function within a federal system.\textsuperscript{204}

Despite these misgivings, however, history clearly depicts an unfortunate lack of effort by states where prisons are concerned.\textsuperscript{205} To date, federal courts have ordered, \textit{inter alia}, minimum amounts of living space per prisoner, minimum amounts of recreation and visitation, minimal nutritional requirements, educational opportunities, vocational training, increased numbers of prison personnel, transfer of prisoners to alleviate overcrowding, structural improvements, and the closing of institutions.\textsuperscript{206} If the state prisons currently under court order are any indication of state initiative, most state institutions would not be in harmony with constitutional standards.\textsuperscript{207} Moreover, unconstitutional conditions of confinement arguably do not represent a legislative judgment; rather, they are a result of legislative apathy in allowing conditions to deteriorate.\textsuperscript{208} In this light, federal court intervention does not supersede “political choices made by state legislative and executive officials.”\textsuperscript{209}

Since the states are either unable or unwilling to make their prisons comport with the Constitution,\textsuperscript{210} federal court intervention

\begin{footnotesize}
\begin{enumerate}
\item 199. Holt, 309 F. Supp. at 385. See note 181 supra.
\item 200. Frug, supra note 196, at 734-50.
\item 201. Id. at 735, 741.
\item 202. Id. at 743-44.
\item 203. Id. at 740.
\item 204. Id. at 743-49.
\item 205. See Rhodes, 452 U.S. at 353 n.1 (listing prison systems under federal injunctive decrees to remedy constitutional violations).
\item 206. Id.
\item 207. Id.
\item 208. Comment, supra note 35, at 378-80.
\item 209. Id. at 379.
\item 210. Martin, 742 F.2d at 470.
\end{enumerate}
\end{footnotesize}
is indispensible if constitutional rights are to be vindicated. Accordingly, the question is narrowed to the scope of intervention that a court should exercise rather than the authority for or propriety of the intervention itself.

In Procunier v. Martinez, the Supreme Court stated:

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the providence of the legislative and executive branches of government. For all these reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform.

Looking specifically at the problems associated with homosexual rape, attempting to counteract inherent incidents of confinement such as boredom, sensory deprivation, and worthlessness is a monumental task. Sexual tension, the drive to break another man's will, constant anxiety, and continual lack of trust present the judiciary with problems perhaps not capable of resolution by decree. Added to this is the inherent nature of prisons themselves, which daily create new opportunities for both victimizers and victims.

Despite these difficulties, it has already been shown that federal court intervention is indispensible if constitutional rights are to be protected. Courts should allow prison administrators broad flexibility in managing their prisons; prison administrators are best capable of identifying sociological patterns and implementing policies consistent with the safekeeping of prisoners. But when prison officials have abdicated their responsibilities, federal courts should not be hesitant to intervene. A showing of a pervasive risk of harm could very easily be classified as an abdication of responsibility. At the same time, that standard allows courts to identify tangible causes of the harm that they are capable of addressing.

Federal court intervention should be implemented using the least intrusive means possible. After declaring the permissible constitutional standards, the federal court should solicit plans from state...
officials on how best to meet those standards.\textsuperscript{220} This approach has two benefits: first, any resentment harbored by state prison officials in being told how to run their prisons may be quickly overcome;\textsuperscript{221} second, this approach allows the court to overcome its own lack of expertise in the area.\textsuperscript{222} Since the state has a strong interest in prison administration, it should be given the first opportunity to correct its own errors.\textsuperscript{223} This is the least intrusive means. From the meager documentation, it appears that state officials have been allotted the money they need and substantial progress in alleviating unconstitutional conditions of confinement has occurred.\textsuperscript{224} Of course, if the state delays or shirks its responsibility entirely, the federal court may devise its own plan.\textsuperscript{225}

In sum, based on the premise that many unconstitutional conditions of confinement may be remedied by increased monetary appropriations, the Constitution should prevail despite infringement into areas traditionally left to the state. The states must abide by the federal Constitution, the supreme law of the land. As the \textit{Holt} court stated: "If [a state] is going to run a prison it must do so within the confines of the United States Constitution."\textsuperscript{226}

\textbf{CONCLUSION}

As there is no justification for failing to protect inmates from the sexual attacks of other inmates, officials must develop policies and procedures to limit the opportunities for homosexual rape to occur. While broad deference to prison officials should be considered, it should not be conclusive. States have repeatedly shown both their inability and unwillingness to effectively deal with the situation. The indecent answer is to assume that homosexual attacks are simply part of imprisonment and essentially deterrents to crime.

In \textit{Martin v. White}, the Eighth Circuit takes a step toward making incarceration comport with the concept of human dignity. As the court discovers, limiting the opportunity for homosexual rape to occur may involve changes that are relatively simple to implement. If prison officials fail to take precautionary measures, federal courts

\begin{itemize}
\item \textsuperscript{220} \textit{Holt}, 309 F. Supp. at 383.
\item \textsuperscript{221} Note, \textit{Decency and Fairness: An Emerging Judicial Role in Prison Reform}, 47 VA. L. REV. 841, 881 (1971).
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{224} Note, \textit{supra} note 221, at 881.
\item \textsuperscript{225} Comment, \textit{supra} note 35, at 389.
\item \textsuperscript{226} \textit{Holt}, 309 F. Supp. at 385.
\end{itemize}
should, and must, as guardians of the Constitution, dictate the constitutional standards with which a state must comply.

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