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Setting a Better Standard: Evaluating Jail Officials' Constitutional Duties in Preventing the Sexual Assault of Pretrial Detainees

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NOTE

Setting a Better Standard: Evaluating Jail Officials' Constitutional Duties in Preventing the Sexual Assault of Pretrial Detainees

Walton v. Dawson, 752 F.3d 1109 (8th Cir. 2014).

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I. INTRODUCTION

According to a recent survey of American federal and state inmates, 4.5 percent of the nation's prisoners – roughly 60,500 people – reported experiencing sexual violence while in prison.[1] The Supreme Court has stressed that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[2] Congress responded to this ongoing problem by enacting the Prison Rape Elimination Act ("PREA") in 2003.[3] PREA established a zero-tolerance standard for prison sexual assault and mandated the United States Department of Justice to make the prevention of such assault a top priority in American prisons.[4]

Jail and prison officials have a duty to protect inmates under their supervision from being subject to violence at the hands of fellow inmates.[5] When employees of a jail do not adhere to the jailhouse policy of locking the cell doors each night and an inmate is sexually assaulted by another inmate as a result, a question arises as to who is culpable for the breach of safety.[6] However, just because a jailhouse policy has been violated does not mean the

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1. Pat Kaufman, *Prison Rape: Research Explores Prevalence, Prevention*, NAT'L INST. JUST. (Mar. 2008), http://www.nij.gov/journals/259/Pages/prison-rape.aspx#back1.

2. JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 745 (Routledge, ed., 9th ed. 2015) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); *see also* ROBERT E. TOONE, PROTECTING YOUR HEALTH AND SAFETY: A LITIGATION GUIDE FOR INMATES 53 (Daniel Manville, ed., 2nd ed. 2009), *available at* http://www.splcenter.org/sites/default/files/legacy/pdf/static/pyhs_chapter_5.pdf.

3. Kaufman, *supra* note 1.

4. *Id.*

5. Walton v. Dawson, 752 F.3d 1109, 1120 (8th Cir. 2014) [hereinafter *Walton II*] (quoting Spruce v. Sargent, 149 F.3d 783, 785 (8th Cir. 1998)).

6. *Id.* at 1115.

inmate has suffered a violation of his constitutional rights.[7] It is when the policy equates to a constitutional minimum, given the totality of the circumstances, that the court properly considers the breach of policy to amount to a constitutional deprivation.[8]

This Note examines *Walton v. Dawson*, a recent Eighth Circuit decision that considers whether jail officials should be held accountable when an inmate-on-inmate sexual assault occurs and the assault was directly facilitated by the failure of the officials' subordinates to follow the jailhouse policy of locking cell doors overnight.[9] Parts II and III introduce the facts and holding of *Walton* and the legal context within which an analysis of the instant case may be framed. Part IV synthesizes the court's rationale in the *Walton* decision with the established legal context. Finally, Part V discusses *Walton's* foreseeable impact on future deliberate indifference claims. This Note argues that the Eighth Circuit should adopt an objective standard when reviewing claims of deliberate indifference brought by pretrial detainees against jail officials.

II. FACTS AND HOLDING

The defendants in this case were Macon County Jail administrator David Moore and Macon County Sheriff Robert Dawson (hereinafter, collectively "Officials").[10] These Officials were not the individuals actually responsible for locking the cell doors at the Macon County Jail on a nightly basis.[11] In fact, they were not even present at the jail on the night the plaintiff ("Walton") was sexually assaulted by his cellblock neighbor, Nathaniel Flennory ("Flennory").[12] On interlocutory appeal, the Officials argued that the United States District Court for the Eastern District of Missouri, Northern Division, erred in denying both of them qualified immunity against Walton's failure to train claims.[13] Walton brought his claims against the Officials under 42 U.S.C. Section 1983, which states in the pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights,

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7. *Id.* at 1122.

8. *Id.*

9. *Id.* at 1109.

10. Jon Dwiggins, Nathaniel Flennory, Drew Belt, Alan Wyatt, and an unknown deputy were also joined as defendants in this action; however, this Note focuses only on the claims against Moore and Dawson. *See id.*

11. Ryszard Bilinski was the jailer on duty the night of the assault. *See id.* at 1115.

12. *See id.* at 1114.

13. *Id*.

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[14]

Walton argued that the Officials violated his Fourteenth Amendment rights by failing to train jailer Ryszard Bilinski ("Bilinski") to properly lock the cell doors at night, thereby failing to provide Walton with physical protection from Flennory.[15] Walton asserted a Fourteenth Amendment violation rather than an Eighth Amendment violation[16] because the Eighth Amendment applies only to post-conviction prisoners, whereas Walton was a pretrial detainee at the time of the assault.[17]

Walton's detainment in the Macon County Jail stemmed from events that occurred in February 2010.[18] He arrived at the jail on August 25, 2010, and was assigned to a cell in the same cellblock as Flennory.[19] Flennory was a convicted rapist with a known history of sexual misconduct toward fellow inmates[20] and was in the Macon County Jail at the time of the assault awaiting transfer to the Missouri Department of Corrections to serve out a fifteen-year sentence.[21] Each cellblock at the Macon County Jail contained three individual cells.[22] The cellblocks were self-contained, but each cell also had its own locking door.[23] At the time when Flennory and Walton were held in the same block, they were housed in adjoining cells and had no other cellmates.[24]

On May 31, 2010, three months before the assault took place, Flennory was disciplined for entering the unlocked cell of another inmate in the night

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14. 42 U.S.C. § 1983 (2012).

15. *Walton II*, 752 F.3d at 1114.

16. The overwhelming majority of cases bearing facts similar to this one are brought by convicted prisoners under the Eighth Amendment. *A Jailhouse Lawyer's Manual*, COLUM. HUM. RTS. L. REV. 659 (9th ed. 2011), *available at* http://www3.law.columbia.edu/hrlr/jlm/chapter-1.pdf.

17. *Walton II*, 752 F.3d at 1117.

18. On February 28, 2010, in Macon County, Missouri, Walton stole a truck, a gun, and cash. Walton v. Dawson, No.2:11CV48 JCH, 2012 U.S. Dist. LEXIS 174884, at *1 (E.D. Mo. Dec. 11, 2012) [hereinafter *Walton I*] *aff'd in part, rev'd in part and remanded*, 752 F.3d 1109 (8th Cir. 2014). He was eventually charged with three class C felonies under Section 570.030 of the Missouri Revised Statutes and later pled guilty to each, receiving a suspended execution of sentence. *Id.* at *2 n.1; *see* MO. REV. STAT. § 570.030 (Cum. Supp. 2013). At the time of his assault, Walton had not yet been arraigned on these charges. *Walton II*, 752 F.3d at 1114.

19. *See Walton II,* 752 F.3d at 1114.

20. *Id.*

21. *Walton I*, 2012 U.S. Dist. LEXIS 174884, at *2 n.2. Flennory pled guilty to one count of forcible rape on August 26, 2010. *Id.*

22. *See* Defendant's Exhibit EE (on file with the *Missouri Law Review*) (architectural drawing of Macon County Jail).

23. *See id.*

24. Interview with Stephen Wyse, Attorney, The Wyse Law Firm, in Columbia, Mo. (Sept. 24, 2014).

and "nibbl[ing] his penis over his clothes."[25] Flennory was confined to segregation because of this incident until June 4, 2010, when he attempted suicide.[26] For the following eighteen days Flennory remained in a psychiatric center.[27] He was transferred back to the Macon County Jail on June 22, 2010, and returned to the segregation unit at that time.[28] However, due to a renewed display of suicidal tendencies, Sheriff Dawson returned Flennory to the general prison population several weeks later.[29] On August 29, 2010, the day before the assault, Flennory passed Walton a sexually explicit note.[30] Walton took the note as a joke[31] and did not bring it to the attention of any of the jail's personnel.[32] He simply flushed the note down his toilet.[33]

The next morning, shortly before 4:00 a.m., and only five days after Walton had first arrived at the jail, Flennory entered Walton's cell and fondled him against his will.[34] Flennory then induced Walton to go next door to Flennory's cell, and Walton reluctantly complied.[35] It was at this time that Bilinski arrived at their cellblock for a walk-through.[36] When he reached Flennory's cell, Walton did not say anything to Bilinski about the imminent assault.[37] It was after Bilinski continued walking that Walton alleged Flennory sexually assaulted him.[38] Bilinski performed one more walk-through that morning, after the assault was over, and Walton maintained his silence towards the jailer once again.[39] A short time later, another officer arrived at Walton's cell with his breakfast.[40] Walton gave this officer a note stating he had been raped.[41]

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25. *Walton I*, 2012 U.S. Dist. LEXIS 174884, at *2.

26. *See id.* at *2.

27. *Id.* at *2-3.

28. *Id.* at *3.

29. *Id.* Flennory was apparently returned to the general population "for his own safety and well-being. Dawson warned Flennory that future infractions would result in a return to segregation, and Flennory indicated [his understanding]." *Id.* (internal citation omitted).

30. *Id.* at *4.

31. *Id.* Walton and Flennory had maintained a friendly rapport to this point and had even played cards together a few times since Walton's arrival. *Id.* at *3-4.

32. *Id.* at *4.

33. *Id.*

34. *Id.*

35. *Id.* Walton indicated that he complied with Flennory's wishes out of fear that Flennory would kill him if he did not go. *Id.* at *4 n.4.

36. *Id.* at *4.

37. *Id.* at *5.

38. *Id.*

39. *Id.* *See also* Walton v. Dawson, 752 F.3d 1109, 1129 (8th Cir. 2014) (Gruender, J., concurring in part and dissenting in part). Bilinski performed a walkthrough every two hours at most. *Id.* at 1120.

40. *See Walton I*, 2012 U.S. Dist. LEXIS 174884, at *5.

41. *Id.* The Prison Rape Elimination Act defines rape as "carnal knowledge (contact between the penis and . . . the anus, including penetration of any sort, howev-

In his complaint, Walton argued that prisoners have a reasonable expectation of physical safety and protection from other inmates while incarcerated.[42] He claimed that locking cell doors at night, when constant supervision is not available, is a simple and effective way of preventing inmates' access to one another.[43] The complaint went on to say that when an overnight jailer fails to take such a step and states that the policy of locking the cells at night was never enforced prior to the instant assault, the management of the facility is called into question.[44] Enduring sexual assault at the hands of another inmate has been equated to a form of "cruel and unusual punishment," which is expressly prohibited by the Eighth Amendment.[45] However, this interpretation has only been applied to persons already convicted of a crime.[46] Because Walton was a pretrial detainee at the time of the assault, the Fourteenth Amendment was invoked instead.[47] This amendment affords state pretrial detainees "rights which are at least as great as the Eighth Amendment protections available to a convicted prisoner."[48] Walton maintained that the Officials violated his Fourteenth Amendment rights through a showing of deliberate indifference to those rights.[49] He contended that because the Officials were previously aware that the cell-locking protocol was not regularly followed, they were aware of the risk posed by their inadequate training or supervision.[50]

The Officials responded to the allegations that they violated Walton's constitutional rights by claiming they were entitled to qualified immunity in the matter.[51] "[A] defendant official is entitled to qualified immunity *unless* (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; *and* (2) the right was

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er slight) . . . or sexual fondling of a person . . . [a]chieved through the *exploitation of the fear* or threat of physical violence or bodily injury." Kaufman, *supra* note 1 (emphasis added).

42. Amended Complaint at ¶ 34, Walton v. Dawson, 752 F.3d 1109 (8th Cir. 2014) (No. 2:11CV48 JCH), 2012 WL 12090346.

43. *See Walton II*, 752 F.3d at 1119.

44. *See id.* at 1114.

45. *See* Farmer v. Brennan, 511 U.S. 825, 833-34 (1994).

46. *Walton II*, 752 F.3d at 1117 ("[T]he Eighth Amendment has no application until there has been a formal adjudication of guilt . . . ." (internal quotation marks omitted)).

47. Walton had yet to be arraigned at the time of the assault and therefore deserved to be shielded from punishment until he received due process. *Id.* ("When [a defendant has] not been arraigned, much less convicted, the [U.S. Constitution shields] him not only from 'cruel and unusual punishments,' but from any punishment whatsoever.").

48. *Id.* (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)) (internal quotation marks omitted).

49. *Id.*

50. *Id.* at 1119.

51. *Id.* at 1114.

clearly established at the time of the deprivation."[52] The Officials maintained that they were entitled to summary judgment on the matter of qualified immunity because they were unaware that Bilinski was not locking the cell doors at night.[53]

The district court denied the Officials' motion for summary judgment in pertinent part.[54] The United States Court of Appeals for the Eighth Circuit heard the instant case on interlocutory appeal, with each official requesting to have his denial of qualified immunity reevaluated.[55] The nature of this interlocutory appeal granted the reviewing court limited jurisdiction only to determine whether there was a genuine violation of federal law and required the Eighth Circuit to accept as true the district court's findings of fact.[56] The Eighth Circuit held that in the pretrial detainee's action for violation of his constitutional rights under the Fourteenth Amendment, the Officials' motion for summary judgment was properly denied.[57] The court concluded that the Officials were not entitled to qualified immunity when they knew that the jail cell doors were not being locked at night and that an obvious and substantial risk to inmate safety existed as a result.[58]

III. LEGAL BACKGROUND

The Fourteenth Amendment of the U.S. Constitution prohibits states from depriving any person of life, liberty, or property without due process of the law.[59] This amendment is applicable to the states through the Due Process clause.[60] Generally, the Constitution prohibits only governmental infringement of constitutional rights.[61] Therefore, to find some action unconstitutional, it is necessary to attribute the action to the state, which includes government agencies and officials acting under the color of state law.[62] The U.S. Supreme Court has defined action taken "under color of state law" as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[63] When a protocol is breached and a person's constitutional rights are violated as a re-

52. *Id.* at 1116 (emphasis added) (quoting Howard v. Kan. City Police Dep't., 570 F.3d 984, 988 (8th Cir. 2009)) (internal quotation marks omitted).

53. *Id.* at 1115.

54. *Id.* at 1114.

55. *Id.* at 1114-15.

56. In other words, the Eighth Circuit had no jurisdiction to weigh in on whether the district court's determination of evidentiary sufficiency was correct. *Id.* at 1116.

57. *Id.* at 1125.

58. *Id.* at 1124-25.

59. U.S. CONST. amend. XIV, § 1.

60. *Id.*

61. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

62. *Id.* at 721-22.

63. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982).

sult, Section 1983 is typically invoked. Municipal employees are state actors for purposes of Section 1983.[64]

Section 1983 claims allege a constitutional deprivation of rights under one of two amendments.[65] In a post-conviction context, regardless of whether the convict is a federal or state prisoner, the Cruel and Unusual Punishment Clause of the Eighth Amendment is invoked.[66] In the case of pretrial detainees, the federal-state distinction matters: Federal pretrial detainees assert their right to be protected under the Due Process Clause of the Fifth Amendment, whereas state pretrial detainees invoke due process under the Fourteenth Amendment.[67] Where there is an action by a government officer whose behavior meets the requirements for state action, the Fourteenth Amendment is invoked.[68]

A constitutional duty of care arises when an individual's liberty has been restrained through the state's affirmative exercise of power over him, rendering him unable to care for himself.[69] Confinement to jail for the purpose of awaiting arraignment restrains an individual's liberty to the point where he is totally reliant upon agents of the state to provide the basic necessities of life, such as food, sleep, and reasonable physical safety.[70] In order to succeed on a Section 1983 claim against prison officials, a plaintiff must allege and prove that the officials were deliberately indifferent toward his safety.[71] The officials may in turn argue that they deserve qualified immunity in the matter – that is, that they can show they had no knowledge of the substantial risk posed to the plaintiff and therefore should be immune from liability.[72] In order to better understand a Section 1983 claim of this nature, a look at the evolution of several aspects of the related law is necessary.

A. Constitutional Standard

Federal civil rights violation statute Section 1983 has a long and varied history. This statute "traces its origins back to Congress' response to abuses suffered by African-Americans at the hands of state and local government officials in the post-Civil War South."[73] It originated as part of the Ku Klux

64. Jon Loevy, *Section 1983 Litigation in a Nutshell: Make a Case Out of It!*, 17 J. DUPAGE CNTY. B. ASS'N (2004-05), http://www.dcbabrief.org/vol171004art2.html.

65. Randy Means, *The History and Dynamics of Section 1983*, POLICE CHIEF MAG. (May 2004), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=299&issue_id=52004.

66. *Id.*

67. *Id.*

68. *Loevy, supra* note 64.

69. Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993).

70. Walton v. Dawson, 752 F.3d 1109, 1117 (8th Cir. 2014).

71. *Id.*

72. *Id.*

73. Loevy, *supra* note 64.

Klan Act of 1871.[74] Section 1983 remained in its original form for nearly ninety years, but was seldom utilized because at the time, a portion of the language used in the statute was interpreted to "exclude coverage of behaviors that were prohibited by the letter of state law" and other "technical legal problems."[75] This meant that Section 1983 could not be invoked in a claim against a government official who had violated a state law in the course of official dealings.[76] "Section 1983 does not expand citizens' substantive rights, but rather serves as the mechanism under which individuals may bring a private, civil cause of action for violations of their constitutionally protected rights (separate and apart from any rights they have in the criminal context)."[77]

Then, in 1961, the case of *Monroe v. Pape* was brought before the Supreme Court.[78] The Court in *Pape* held that behavior in violation of the letter of state law was in fact actionable under Section 1983.[79] Unfortunately, this change was still not enough to make Section 1983 actions more widely accessible; a vast majority of potential plaintiffs meeting the criteria for an actionable claim lacked the extensive financial resources needed to pursue their claims.[80] Compounding the issue was that only "persons"[81] could be sued under the statute, making the ultimate target – the deep pockets of the government – unreachable.

The financial stalemate under Section 1983 was finally addressed in 1978 when the Supreme Court heard *Monell v. Department of Social Services*.[82] This decision reversed the persons-only limitation of *Monroe*, extending liability under the statute to municipalities, cities, counties, and subdivisions.[83] Additionally, *Monell* enabled a prevailing plaintiff to recover

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74. This is known today as the Civil Rights Act of 1871. *Ku Klux Klan Act*, FREE LEGAL DICTIONARY, http://legal-dictionary.thefreedictionary.com/ku+klux+klan+act (last visited Apr. 13, 2015).

75. Means, *supra* note 65.

76. *Id.*

77. Loevy, *supra* note 64.

78. Monroe v. Pape, 365 U.S. 167 (1961). The plaintiffs in *Monroe* – a husband, wife, and their children – alleged that Chicago police officers broke into their home and searched it absent a warrant and then proceeded to detain and arrest the husband without a warrant or arraignment. *Id.* at 169. The plaintiffs brought their action against the officers under Section 1983, contending that the officers' actions constituted a deprivation of their Constitutional rights. *Id.* at 168-69. The district court dismissed the complaint, citing failure to state a cause of action, and the Seventh Circuit affirmed the dismissal. *Id.* at 170. On a grant of certiorari, the Supreme Court reversed the dismissal. *Id.* at 192.

79. *Id.* at 167.

80. Means, *supra* note 65.

81. At the time *Monroe* was decided, municipalities were not included within the definition of "persons." *See id.*; *infra* note 83 and accompanying text.

82. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S 658 (1978).

83. *Id.* at 690-91.

attorney's fees from the defendant.[84] These changes facilitated the evolution of aggrieved parties' ability to feasibly sue the deep-pocketed entities whose agents caused the harm.[85] "By definition, [so-called] *Monell* claims are not based on *respondeat superior*;[86] rather, they are brought against the governmental entity for injuries caused directly by the entity itself."[87] Asserting a *Monell* allegation allows a litigant to address, and thereby correct, violations of his civil rights resulting from a governmental entity's policy or practice.[88]

B. Deliberate Indifference

"At its core, the deliberate indifference standard attempts to define conduct that is more blame-worthy than simple negligence, but less egregious than intentional conduct."[89] This standard is the one most commonly used for establishing civil rights claims in the jail setting.[90] Deliberate indifference can result in a substantial constitutional deprivation[91] and can have consequences that are life threatening.[92] Given the serious nature of circumstances involving deliberate indifference, prison officials must continually evaluate the realities of in-custody violence.[93]

In 1994, the Supreme Court heard *Farmer v. Brennan*, the landmark case among Section 1983 claims.[94] The Court in *Farmer* articulated deliberate indifference as the general standard by which to examine inmate-on-inmate sexual assault claims brought against prison officials by convicted prisoners.[95] In that case, an inmate alleged that prison officials violated his constitutional rights when they were deliberately indifferent to his safety.[96] The question presented under the Eighth Amendment was "whether prison

84. *Id.* at 697-99.

85. Means, *supra* note 65.

86. "A superior is responsible for any acts of omission or commission by a person of less responsibility to him." Paul Montemayor, Moore v. Regents of University of California: *Annotation*, STAN. L. SCH. (May 31, 2013), http://scocal.stanford.edu/opinion/moore-v-regents-university-california-31115 (citing Black's Law Dictionary).

87. Loevy, *supra* note 64.

88. *Id.*

89. *Deliberate Indifference*, BRYAN & TERRILL LAW, PLLC, http://www.bryanterrill.com/deliberate-indifference/ (last visited Apr. 13, 2015).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Alison Flowers, *Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But that's Not the Half of It.*, VILLAGE VOICE (Jan. 29, 2014), http://www.villagevoice.com/2014-01-29/news/dee-farmer-v-brennan-prison-rape-elimination-act-transgender-lgbt-inmate-rights/.

95. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

96. *Id.* at 830-31.

officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health."[97] The inmate argued that an objective, civil-style standard be employed to define the term, while the defendants asked the Court to construe the term in its subjective, criminal law form.[98] The Court in *Farmer* chose to adopt a quasi-subjective standard, which required that "[t]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[99]

However, the Supreme Court has yet to specify whether deliberate indifference is subjective or objective when a pretrial detainee brings a Fourteenth Amendment claim against a municipal jail official.[100] The Eighth Circuit previously noted that "[it] has yet to establish a clear standard for pretrial detainees."[101] The *Walton* court determined that municipal liability on a deliberate indifference theory is purely objective and may be sufficiently premised on "obviousness or constructive notice."[102] Due to the myriad of inconsistencies in applying the deliberate indifference theory to Fourteenth Amendment claims, a circuit split developed as to whether the correct standard is one of objectiveness or subjectiveness in this context.

C. Qualified Immunity

Qualified immunity is an affirmative defense that may be pleaded by a government official in defense of his official acts in a suit for civil damages.[103] In 1982, the Supreme Court decided *Harlow v. Fitzgerald*, sparking "'a quiet revolution' in the law governing the qualified immunity defense available to state officials in [S]ection 1983 suits."[104] In order to receive qualified immunity, the public official must be able to show that he could have reasonably believed that his actions were constitutional under clearly established

97. *Id.* at 843 (quoting Helling v. McKinney, 509 U.S. 25, 35 (1993)) (internal quotation marks omitted).

98. *Id.* at 837.

99. *Id.*

100. Walton v. Dawson, 752 F.3d 1109, 1117 (8th Cir. 2014); *see also* Spencer v. Kanpheide Truck Equip. Co., 183 F.3d. 902, 905-06 (8th Cir. 1999).

101. *Walton II,* 752 F.3d at 1118 n.2 (quoting Morris v. Zefferi, 601 F.3d 805, 809 (8th Cir. 2010)) (internal quotation marks omitted).

102. *Id.* at 1117 (emphasis omitted) (quoting *Farmer*, 511 U.S. at 841) (internal quotation marks omitted); *see also* City of Canton v. Harris, 489 U.S. 378, 390 (1989).

103. Harlow v. Fitzgerald, 457 U.S. 800, 802, 815 (1982). The Supreme Court in *Harlow* held that presidential aides were not entitled to immunity as a blanket protection by virtue of their position and that they must show they did not reasonably know that their conduct violated clearly established constitutional rights. *Id.* at 808-09, 817-18.

104. Kit Kinports, Note, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 597 (1989).

law.[105] This renders qualified immunity somewhat of an anomaly – ignorance of the law is virtually never excused in most other legal contexts.[106] The practical importance of qualified immunity decisions is immense.[107] "On the one hand, qualified immunity protects public officials, allowing them to do their jobs without fear of liability. But on the other hand, it can limit the ability of individuals to recover damages in many cases involving civil rights and civil liberties."[108]

Qualified immunity "protects government officials from lawsuits alleging that the officials violated plaintiffs' rights, only allowing suits where officials violated a 'clearly established' statutory or constitutional right."[109] Indeed, qualified immunity balances two significant interests.[110] On the one hand is the "need to hold public officials accountable when they exercise power irresponsibly."[111] On the other hand is the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[112] Qualified immunity is an issue to be decided prior to trial in order to save state actors from the burden and expense of unnecessarily defending themselves.[113] The Supreme Court has been clear: where a finding of qualified immunity is proper, the lawsuit is to be dismissed as early as possible in order to avoid subjecting the state actor to discovery.[114]

Whether qualified immunity applies to a certain situation involves determining whether a constitutional right was clearly established.[115] The Supreme Court has held that the determination should be measured by whether a reasonable person would have known the constitutional or statutory rules at the time.[116] To contextualize the issue in a more practical sense, "a government official who reasonably believes he is acting lawfully should be entitled to qualified immunity."[117]

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105. Barbara E. Armacost, Note, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 583 (1998).

106. *Id.*

107. Stephen Wermeil, *SCOTUS for Law Students: Qualified Immunity*, SCOTUSBLOG (Feb. 17, 2014, 1:18 PM), http://www.scotusblog.com/2014/02/scotus-for-law-students-sponsored-by-bloomberg-law-qualified-immunity/.

108. *Id.*

109. *Qualified Immunity: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/qualified_immunity (last visited Apr. 13, 2015).

110. *See id.* (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

111. *Pearson*, 555 U.S. at 231.

112. *Id.*

113. Loevy, *supra* note 64.

114. Wermeil, *supra* note 107.

115. *Id.*

116. *Id.*

117. *Id.*

IV. INSTANT DECISION

The limited-scope questions before the Eighth Circuit in this interlocutory appeal were (1) whether the district court properly denied summary judgment to both officials regarding their assertions of qualified immunity and (2) whether a reasonable jury could potentially find in Walton's favor.[118] The district court initially denied summary judgment to both officials on this count because it found lingering questions of fact as to whether the defendants had notice of Bilinski's failure to lock the cells at night and if they were tacitly aware of, or else deliberately indifferent to, the behavior.[119] The Eighth Circuit reviewed the decision for the purpose of deciding whether a reasonable jury could find in Walton's favor.[120] The district court's findings of fact were all accepted as true, and all conclusions of law were reviewed *de novo*.[121]

A. Liability of the Jail Administrator

The Eighth Circuit in *Walton* made it abundantly clear that enduring a sexual assault by another prisoner is grave enough to be considered a constitutional deprivation and that the right at issue – that of a pretrial detainee to be protected from sexual assault by another inmate – is clearly established.[122] This well-settled standard left but one legal question for the Eighth Circuit to answer regarding the failure-to-train claim against Moore: "Do the facts, as found by the district court, permit a reasonable jury to find that Moore violated this clearly established right?"[123]

In order to answer this question, the court employed the two-pronged test for knowledge set forth in *Farmer v. Brennan*.[124] This test stipulates that an official's knowledge of the substantial risk of serious harm need not be particularized.[125] To be held liable for a constitutional violation, the official need only have failed to take reasonable steps to prevent a risk known to him.[126] To satisfy the *Farmer* test, the court needed to establish that (1) Moore knew the jail cell doors were not being locked at night, and (2) that failure to lock the doors was an obvious and substantial risk to inmate safety.[127]

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118. Walton v. Dawson, 752 F.3d 1109, 1114-22 (8th Cir. 2014).

119. Walton v. Dawson, No. 2:11CV48 JCH, 2012 U.S. Dist. LEXIS 174884, at *17 (E.D. Mo. Dec. 11, 2012).

120. *See Walton II*, 752 F.3d at 1122.

121. *Id.* at 1116.

122. *Id.* at 1118.

123. *Id.* (emphasis added).

124. *Id.* at 1119 (citing Farmer v. Brennan, 511 U.S. 825, 843-44 (1994)).

125. *Farmer*, 511 U.S. at 843-44.

126. Toone, *supra* note 2, at 54-55.

127. *Walton II*, 752 F.3d at 1119.

In establishing Moore's knowledge under the first prong, the court looked to three primary pieces of evidence that it believed could allow a reasonable jury to reject Moore's testimony: (1) Bilinski's uncontroverted statement, which contradicted Moore's own testimony; (2) that Moore personally worked in the jail, and that the doors were not being locked was so obvious that his presence in the jail alone was enough to substantiate knowledge; and (3) that Moore's testimony was contradicted by the tone and content of Sheriff Dawson's written reprimand to the jailhouse staff following Flennory's assault on Walton.[128]

Regarding the first piece of evidence, the court relied on Bilinski's testimony.[129] He testified that his two releasing officers, one of whom was Moore, never questioned his noncompliance with the overnight cell-locking policy in the three months prior to the assault.[130] After deducing this evidence, the court determined that regardless of whether Moore ever reprimanded Bilinksi for not locking the cell doors, his failure to ever verify that Bilinski was adhering to the policy was enough to establish that he should have known the cell doors were not being locked at night.[131] The court noted that the subjective standard of *Farmer* does not make it acceptable for a jail administrator to operate under the guise of willful blindness.[132]

The second piece of evidence on which the court relied to establish Moore's knowledge was that the risk posed by Bilinski's failure to lock the cell doors each night was so obvious that Moore, who worked in the jail, surely knew of the risk by virtue of its obviousness.[133] Moore was one of two "releasing officers" for Bilinski's shift, meaning that every fourth morning, as Bilinski was coming off duty, Moore took his place.[134] The court concluded from this circumstance that a reasonable jury would be able to infer that Moore would see the cell doors were unlocked each morning when he arrived to relieve Bilinski.[135]

The third piece of evidence the court examined in rejecting Moore's testimony was the tone and content of the written reprimand issued by Sheriff Dawson.[136] In this reprimand, Dawson stated that "he had 'learned from talking to [Moore] after the [assault that] some of the jailers *have not been* adher-

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (quoting Farmer v. Brennan, 511 U.S. 825, 844 (1994)) ("[A] prison official . . . would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.").

133. *Id.*

134. *Id.* at 1119 n.4.; Interview with Stephen Wyse, Attorney, The Wyse Law Firm, in Columbia, Mo. (Nov. 19, 2014).

135. *Walton II,* 752 F.3d at 1119.

136. *Id.*

ing to the policy [of locking cell doors overnight] on a regular basis.'"[137] The court found that Dawson's admonishment of the jail staff supported an inference that Moore knew the door-locking policy was not being followed, but did not acknowledge or react to the issue until after the assault.[138]

After reviewing the evidence for establishing knowledge under the first prong of the *Farmer* test, the court analyzed facts relating to the second prong – establishing that Moore knew his subordinate's failure to lock the cell doors at night was an obvious and substantial risk to inmate safety.[139] The court determined that Bilinski's failure to lock the jail cell doors at night, and Moore's failure to train him to do so, resulted in "an objectively obvious, substantial risk to detainees' safety in the particular context of this jail."[140]

Here, the court turned to a discussion of constitutional guarantees of a detainee's right to sleep and highlighted the fact that detainees are at their most vulnerable when asleep.[141] In a recent opinion by the Second Circuit, conditions preventing sleep were held to amount to an Eighth Amendment violation.[142] The court in *Walton* was required to consider "whether unlocked cell doors pose an unconstitutional risk to detainees, such that 'potential victims dare[] not sleep' or risk attack if they do."[143] The court noted that answering this question depends on the specific circumstances of the prison in question and prison officials' awareness regarding the risk.[144] It also noted that prison officials are afforded great deference in determining how to best protect detainees charged under their care from the risk of nighttime assaults.[145] However, an absolute failure to take preventive steps to avoid unconstitutional safety risks violates the duty that a prison official has to protect an inmate from violence by other inmates.[146]

The court concluded that the instant case was an example of such a failure.[147] It found that Moore and the jailers did next to nothing, despite the policies in place that required frequent walk-throughs and nightly lockdown.[148] During nighttime hours, walkthroughs were infrequent[149] and the cell doors were never locked.[150] The court concluded that because of Flennory's prior nighttime assault, the risk posed by leaving the cell doors

137. *Id.* (alteration in original).
138. *Id.*
139. *Id.* at 1119-20.
140. *Id.*
141. *Id.* at 1120.
142. Walker v. Schult, 717 F.3d 119, 126 (2d Cir. 2013).
143. *Walton II*, 752 F.3d at 1120 (alteration in original) (quoting Hutto v. Finney, 437 U.S. 678, 682 n.3 (1978)).
144. *Id.*
145. *Id.*
146. *Id.*; *see also* Farmer v. Brennan, 511 U.S. 825, 833 (1994).
147. *Walton II*, 752 F.3d at 1120.
148. *Id.*
149. *Id.* (finding that Bilinski performed a walkthrough every two hours, at most).
150. *Id.*

unlocked "was both obvious and known to the prison officials."[151] "Under the totality of the circumstances, failing to do anything to mitigate this risk – whether by locking doors, increasing cell checks, installing cameras, segregating violent prisoners, or some other approach – potentially fell below minimum constitutional standards."[152]

The court pointed out that it placed an emphasis on Bilinski and Moore's disregard for the door-locking policy because that policy represented the Macon County Jail's decision of how to best prevent nighttime assaults from occurring.[153] The policy was considered to be the best method in this particular context, given the outdated nature of the facilities.[154] In response to the dissenting opinion in *Walton*,[155] the majority expressed "no view regarding this jail's choice among the wide variety of ways to protect detainees from nighttime attack. [They merely reiterated] the officials' long-established obligation to implement some reasonable method . . . of protecting non-violent detainees housed in close proximity to violent inmates."[156] The court held that there was enough evidence adduced to satisfy the *Farmer* test and to allow a reasonable jury to potentially conclude that Walton should succeed on his failure-to-train claim against Moore.[157]

B. Liability of the Macon County Sheriff

The Eighth Circuit reversed the district court's denial of qualified immunity for Sheriff Dawson, concluding that, as Macon County Sheriff, he had many responsibilities outside of the jailhouse walls and therefore was unlikely to know as much about day-to-day operations and policy adherence as Moore did.[158] Qualified immunity requires that each officer's conduct be analyzed individually.[159] The Eighth Circuit noted that "[e]ven if the district court [was] right that Sheriff Dawson may not have responded reasonably to Flennory's earlier assault of another inmate, that factual question alone [was] an insufficient basis to deny qualified immunity under *Farmer's* subjective standard."[160]

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151. *Id.*

152. *Id.*

153. *Id.* at 1121.

154. *Id.* at 1122. There were no cameras installed in the jail, and the facilities are over one hundred years old. Interview with Stephen Wyse, *supra* note 134.

155. The dissenting opinion lamented that the majority was "impos[ing] a 'one-strike-you're-out' rule," that cell doors must be locked as soon as "an inmate . . . has committed one prior in-jail assault and his neighbor looks concerned . . . ." *Walton II*, 752 F.3d at 1129 (Gruender, J., dissenting).

156. *See Walton II*, 752 F.3d at 1122.

157. *Id.*

158. *Id.* at 1125.

159. *Id.* (quoting Roberts v. City of Omaha, 723 F.3d 966, 974 (8th Cir. 2013)).

160. *Id.*

The court reasoned that it "is not enough to say that a factual question exists: the factual dispute must be both 'genuine' and 'material.'"[161] Because all of Walton's proffered evidence related directly to the subjective knowledge of Moore, and not Dawson, the Eighth Circuit determined that Sheriff Dawson was in fact entitled to qualified immunity in this case and that he was not to be held responsible under a failure-to-train theory.[162] After reviewing the record in an attempt to determine Dawson's subjective knowledge of the risk that existed, the court concluded that there was nothing more than conjecture on which to base a denial of qualified immunity, and thus the district court's denial of the defense to Dawson was reversed.[163] In support of its decision on the matter, the court noted that "Dawson's response to the sexual assault . . . [gave] every indication that he, unlike Moore, did not know inmates like Walton were in jeopardy."[164]

C. Holding

The Eighth Circuit, in a 2-1 decision, affirmed in part and reversed in part the district court's judgment and remanded the case for further proceedings consistent with its opinion.[165] The denial of qualified immunity to Moore was affirmed, and the denial of qualified immunity to Dawson was reversed.[166] The Court found sufficient evidence existed to make it plausible for Walton to prove at trial that Bilinski's failure to adhere to the overnight cell-locking policy gave rise to Moore's failure-to-train liability under a deliberate indifference theory.[167]

V. COMMENT

The court in *Walton v. Dawson* acknowledged that the Eighth Circuit has yet to adopt a formal stance on whether an objective or a subjective standard should be employed when evaluating deliberate indifference claims brought by state pretrial detainees under the Fourteenth Amendment.[168] *Butler v. Fletcher* answered the question of whether deliberate indifference is the appropriate standard under the Fourteenth Amendment, but the meaning of the phrase – specifically, whether it is subjective or objective – was not con-

161. *Id.* (quoting FED. R. CIV. P. 56(a)).
162. *Id.* at 1125-26.
163. *Id.* at 1126.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1122-23. This case went to trial in October 2014, and the jury found in favor of Walton. Walton v. Dawson, No. 2:11CV48 JCH, 2015 WL 331628, at *1 (E.D. Mo. Jan. 26, 2015).
168. *Walton II*, 752 F.3d at 1118.

tested.[169] It was following *Butler* that the Eighth Circuit noted that it has not yet established a clear standard for pretrial detainees.[170] Case law across the circuits has been vague and inconsistent in taking a stance on this issue.[171] In evaluating *Walton*, the Eighth Circuit promulgated a subjective standard, as set forth in *Farmer v. Brennan*,[172] because that was what it had always done.[173] This action is in conflict with the approach that a majority of other circuits employ. For example, the Seventh Circuit utilizes an ostensibly objective standard.[174] Because the difference between the practical impacts of the two standards is virtually non-existent, the Eighth Circuit ought to join the majority of the circuits in formally adopting the objective standard for pretrial detainees' claims of deliberate indifference against prison officials.

It is noteworthy that *convicted* inmates who have brought deliberate indifference claims against jail and prison officials have enjoyed a fair success rate despite the subjective component of the *Farmer* two-pronged test.[175] In fact, the Supreme Court has held that distinguishing between a subjective and an objective standard by which to judge deliberate indifference would serve little practical importance in the post-conviction context.[176] The Court supported this reasoning by emphasizing that analyzing deliberate indifference claims under a subjective test would not allow prison officials to freely ignore dangers posed to the inmates under their supervision.[177] Indeed, the requisite

169. *Id.* at 1117 (citing Butler v. Fletcher, 465 F.3d 340, 345 (8th Cir. 2006)).

170. *Id.* at 1118 (quoting Morris v. Zefferi, 601 F.3d 805, 809 (8th Cir. 2010)).

171. Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1112 (2013).

172. Farmer v. Brennan, 11 U.S. 825, 829 (1994).

173. *Walton II*, 752 F.3d at 1117-18.

174. *See* Brown v. Budz, 398 F.3d 904 (7th Cir. 2005). The plaintiff in *Brown* was a pretrial detainee at the time he was severely beaten by another inmate. *Id.* at 907. The plaintiff brought a Section 1983 action against the jail employees and directors, whom the plaintiff alleged were deliberately indifferent towards his rights. *Id.* at 908. He premised this argument on the fact that the officials were aware of the assailant's violent propensities and yet allowed him unsupervised access to the room in which the plaintiff was located. *Id.* The district court dismissed the case, citing the plaintiff's failure to state a cause of action. *Id.* On appeal, the judgment was reversed and remanded for further proceedings. *Id.* at 907. The Seventh Circuit noted that prior to this case, it had often held that proof of deliberate indifference in this context required showing that the custodians knew that the specific detainee posed a threat to a specific victim, but clarified that the court was not in fact constrained to this fact pattern. *Id.* at 915. The appellate court ultimately concluded that deliberate indifference "may also be predicated on the custodians' knowledge of an assailant's *predatory nature*," a distinct departure from the traditional subjective knowledge approach. *Id.* at 915 (emphasis added).

175. *Id.*

176. Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. CRIM. L. & CRIMINOLOGY 127, 135 (2002).

177. *Id.* at 134.

culpability required to get a deliberate indifference claim to a jury can be satisfied simply by showing "that a prison official knew of a substantial risk from the very fact that the risk was obvious."[178]

However, the problem with formally adopting the subjective standard for *pretrial detainees* follows from this train of thought. Choosing a subjective interpretation leaves the door open for the official to show that obviousness escaped him, therefore allowing him to evade liability. This is problematic because the Eighth Amendment protects against cruel and unusual punishment.[179] A pretrial detainee is an individual who has not yet received a formal adjudication of guilt and therefore must not be subject to punishment of any kind.[180] Allowing a pretrial detainee's claims to be evaluated in a subjective context creates too wide a scope for the defendant official to evade liability where a person was subjected to such cruel and unusual punishments by way of the official's inaction. For claims brought by a pretrial detainee, for whom a judicial determination of probable cause has yet to be established as the basis for his detainment, an objective standard of deliberate indifference should apply.

VI. CONCLUSION

The Eighth Circuit correctly decided the issues before it in the Officials' interlocutory appeal by denying them summary judgment as to the plaintiff's claim of deliberate indifference. A pretrial detainee is to be afforded protections under the Fourteenth Amendment at least as great as those given to convicted prisoners under the Eighth Amendment. When a detainee is not availed of these protections due to the failure of jailhouse personnel to act reasonably in guarding his safety, a court is correct to conclude that questions of fact remain as to whether a jury could reasonably find in the plaintiff's favor.

Though the court's conclusion was reached under a subjective standard – that is, that the Officials had actual knowledge of the fact that the cell doors were not being locked at night[181] – the Eighth Circuit should formally adopt an objective standard by which to judge deliberate indifference claims of pretrial detainees in the future. This standard would best serve the constitutional interests of those detainees who have yet to be arraigned and would prompt jailhouse officials to adhere to more specific policies relating to this particular class of inmates. That personnel should retain wide deference in how to best protect inmates from danger is not a point of contention; the problem arises when they do not take even the most basic steps necessary to reasonably prevent inmate-on-inmate assault. Failure to take such steps too

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

179. U.S. CONST. amend. VIII.

180. Walton v. Dawson, 752 F.3d 1109, 1117 (quoting City of Revere v. Mass. Gen. Hosp., 436 U.S. 239, 244 (1983)).

181. *Id.* at 1119.

often results in detainees and prisoners becoming victims of sexual assault. Adopting an objective standard would send a clear message that preventing sexual assault in American jails and prisons requires active participation by personnel, and, further, that no one – regardless of their offender status – should have to endure sexual violence while in custody.