Rethinking the Use of Class Actions to Combat Inmate-on-Inmate Sexual Assault: A Case Study of *LaMarca v. Turner*

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This paper argues that the class action is a critical litigation tool for combating the problem of inmate-on-inmate sexual assault in prisons and jails.[3] First, the "deliberate indifference" standard of culpability under the Eighth Amendment for prison officials is difficult to show in individual actions. The class action provides plaintiffs an effective means for showing prison conditions from which the fact-finder can infer the prison officials' culpability. Second, class actions allow plaintiffs to seek class-wide injunctive relief to redress the risk of sexual assault. Third, the equitable nature of injunctive relief gives plaintiffs the option to have the case tried by a judge. For the plaintiff, injunctive relief is generally better than damages because juries may factor in plaintiffs' convictions against any award for damages.

To demonstrate the effectiveness of the class action as a litigation strategy, this paper incorporates a case study of *LaMarca v. Turner*,[4] a class action involving a Florida state prison called Glades Correctional Institution ("GCI").

I. Introduction

In human rights circles, the media, and politics, male rape in prisons has begun to gain widespread attention. In 2001, Human Rights Watch published *No Escape: Male*

[3] Throughout this paper, the term "prisons" refers to both prisons and jails.

[4] There have been a number of reported opinions in *LaMarca v. Turner*: 662 F.Supp. 647 (S.D. Fla. 1987) (nonjury trial on damages and injunctive relief incorporating Magistrate's Report and Recommendations), *appeal dism'd,* 861 F.2d 724 (11th Cir. 1988) (order not justiciable because not final), 995 F.2d 1526 (11th Cir. 1993) (reversing portion of unreported injunctive relief from 1990, reversing award of damages from 1987 decision), *cert. denied,* 510 U.S. 1164 (1994), *unreported order for damages aff'd,* 113 F.3d 1250 (11th Cir. 1997).

Rape in U.S. Prison, a report detailing the accounts of 11 men who had been sexually abused by other prisoners while incarcerated.[5] Concurrent with the publication of the report, the ACLU National Prison Project, Stop Prisoner Rape, and other human rights groups held the first ever conference to address the sexual abuse of prisoners in Washington, D.C.[6] The conference addressed such issues as litigation strategies, media portrayal of rape, and HIV/AIDS.[7]

On September 4, 2003, President Bush signed into federal law the Prison Rape Elimination Act of 2003,[8] the first time the U.S. government has ever passed a law to deal with sexual assault in prison.[9] The law creates a National Prison Rape Reduction Commission, provides for statistical analysis of the incidence and effects of rape in federal, state, and local institutions, calls for recommendations in addressing prison rape, and provides funding to combat the problem.[10]

The recent national recognition of prison rape highlights the urgency of the problem. There have been a number of studies on the pervasiveness of sexual abuse in the

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[5] JOANNE MARINER, NO ESCAPE: MALE RAPE IN U.S. PRISONS (Human Rights Watch 2001).

[6] The conference, entitled *"Not Part of the Penalty": Ending Prisoner Rape*, was held from October 19 to 20, 2001, at American University, Washington College of Law in Washington, D.C. *"Not Part of the Penalty": Ending Prisoner Rape*, Human Rights Watch, *available at* http://www.hrw.org/prisons/conference.html (last visited May 18, 2004).

[7] *See id.* ("The conference will address both prisoner-on-prisoner sexual abuse and custodial sexual misconduct (sexual abuse of prisoners by guards and other custodial staff). Panels consisting of activists, rape survivors, lawyers, academic experts, public health specialists, and others will cover topics ranging from the incidence of prisoner rape, to its effects on survivors, to its impact on the spread of HIV/AIDS.")

[8] Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

[9] *Prison Rape Elimination Act Becomes Federal Law*, Stop Prisoner Rape, *available at* http://www.spr.org (Sept. 4, 2004).

[10] Statement on Prison Rape Elimination Act by the President, *available at* http://www.whitehouse.gov/news/releases/2003/09/20030904-9.html (Sept. 4, 2003).

U.S. prison system indicating that approximately several hundred thousand inmates are being raped each year,[11] a remarkable number that will likely increase as the U.S. inmate population burgeons past 2 million.[12]

II. Decreasing use of the class action

Despite the increasing attention being paid to prison sexual abuse, there have not been as many class actions targeting male prison rape as one would expect. Although there have been some class actions involving prison violence generally that allude to sexual assault,[13] *LaMarca v. Turner* is the only class action including provisions specific

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[11] *See* 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 (2002), nn.11–12. (citing (Sue Lees, *Ruling Passions: Sexual Violence*, Reputation and the Law 96 (1997) (discussing study by Stop Prisoner Rape that estimates the number of rapes in U.S. prisons is in excess of 60,000 taking place every day); Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 Int'l J. of the Sociology of L. 135 (1992) (citing Stephen Donaldson, Dissertation, *Rape of Males: A Preliminary Look a the Scope of the Problem* (1984) (estimating that 18 adult males in state and local facilities are raped every minute)). Donaldson estimated that 300,000 inmates in juvenile centers, adult jails, and prisons nationwide are victims of sexual assault each year. *See also* Daniel Lockwood, *Prison Sexual Violence* (1980) (studying a New York state prison and finding that although twenty-eight percent of respondents had been the target of sexual aggression, only 1.3% were raped); Martin L. Haines, *Prison Rape Highlights the Need for Better Prison Administration*, 154 N.J. L.J. at 23 (Dec. 14, 1998) ("Estimates of the number of rapes occurring in prisons, countrywide, run as high as 7,000 per day, a figure said to be conservative... Gang rape is common."); Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. of Sex Res. 67, 68 (1996) ("[E]ven the most conservative estimates of prisoner sexual assault rates translate into a high number of victims among inmate populations nationwide."); Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. Times Dec. 29, 1993, at A11 ("[A] conservative estimate, based on extrapolations of two decades of surveys, is that more than 290,000 males are sexually assaulted behind bars every year.").

[12] The Justice Department's Bureau of Justice Statistics (BJS) stated in a report released July 27, 2003, that U.S. prisons, jails and juvenile facilities held 2,166,260 persons at the end of 2002. Bureau of Justice Statistics, *Prisoners in 2002, available at* http://www.ojp.usdoj.gov/bjs/abstract/p02.htm (Jul. 27, 2003).

[13] There have been class actions that have globally targeted prison conditions, with sexual assault as one component, with injunctive relief to reduce prison violence, like increasing patrols, eliminating double bunking and classification systems. *See* Hutto v. Finney, 437 U.S. 678 (1974), Fisher v. Koehler, 902 F.2d 2 (2nd Cir. 1990), Tillery v. Owens, 907 F.2d 418 (3rd Cir. 1990), Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), Newman v. State of Ala., 559 F.2d 283 (5th Cir. 1977), Williams v. Edwards, 547 F.2d 1206

to sexual assault, like training for correctional officers and psychiatrists in handling rape situations, referral to counseling for raped inmates, and clear shower panes to increase visibility for correctional officers in the shower area.[14] In the area of custodial sexual abuse, *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*[15] was a landmark case. Strikingly, the ACLU National Prison Project recently started a prison and jail rape initiative to bring individual claims for damages; [16] outside of sexual assault cases, the National Prison Project brings exclusively injunctive relief cases.[17]

It is not entirely clear why there are so few class actions in this area. It may simply be that prison litigators simply are not filing them. Since the passage of the Prison Litigation Reform Act in 1996 ("PLRA"), the number of new federal filings by

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(5th Cir. 1977), Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), Balla v. Idaho State Bd. of Corrections, 595 F.Supp. 1558 (D.C.Idaho 1984), McMurry v. Phelps, 533 F.Supp. 742 (D.C.La., 1982), Ruiz v. Estelle, 503 F.Supp. 1265 (D.C.Tex., 1980), *reopened,* Ruiz v. Johnson, 154 F.Supp.2d 975 (S.D.Tex. 2001), Holt v. Sarver, 309 F.Supp. 362 (D.C.Ark. 1970), Pugh v. Locke, 406 F.Supp. 318 (D.C.Ala. 1976).

[14] 995 F.2d 1526, 1543-47 (11th Cir. 1993).

[15] *See* Amy Lederberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the only viable option for women inmates attempting to satisfy the subjective prong of the Eighth Amendment in suits for custodial sexual abuse,* 40 WM. AND MARY L 322, Oct. 1998 (citing generally to Women Prisoners of District of Columbia Department of Corrections v. District of Columbia, 877 F. Supp. 634, 664-66 (D.D.C. 1994) (Women Prisoners I) (discussing the rights of inmates under § 1983 to prevent violations of the Eighth Amendment), stay denied and motion to modify granted in part, 899 F. Supp. 659 (D.D.C. 1995) (Women Prisoners II), *vacated in part, remanded*, 93 F.3d 910 (D.C. Cir. 1996) (Women Prisoners III)).

[16] The ACLU started its rape initiative after the conference *"Not Part of the Penalty": Ending Prisoner Rape* in 2001, see *supra* note __. Telephone interview with Craig Cowie, Staff Attorney, ACLU National Prison Project, Washington, D.C. (Apr. 16, 2004). In the 7 years that David Fathe has worked at the ACLU, he did not recall the ACLU bringing a class action pertaining to inmate-on-inmate sexual assault. Telephone interview with David Fathe, Staff Attorney, ACLU National Prison Project, Washington, D.C. (Mar. 25, 2004).

[17] Telephone interview with David Fathe, *supra* note ____.

inmates has decreased over forty percent despite the increase in the incarcerated population.[18] According to Randy Berg of the Florida Justice Institute,

> The PLRA is the biggest impediment to getting injunctive relief class actions. It needs to be repealed by Congress: it ties the hands of both parties in terms of settling cases; it limits the jurisdiction of the federal court in terms of imposing remedial relief; it limits the period of time of remedial relief; it limits plaintiffs' attorneys from being adequately compensated for costs and for expert witness fees. It has, more so than anything, curtailed the ability of plaintiffs' attorneys to bring long-lasting, systemic relief cases as well as for federal courts to continue their jurisdiction over cleaning up prisons and jails.[19]

With the cap on attorney's fees imposed by the PLRA, the ability for private attorneys to bring long, complicated, and work-intensive class actions like the one in *LaMarca v. Turner* has decreased. Nevertheless, this paper argues that plaintiffs potentially reap more benefit from class actions.

In addition to the PLRA, the perceived inefficiency of the class action in light of procedural hurdles to certification may discourage prison litigators from bringing class actions.[20] According to Edward Tuddenham, a private attorney,

> The world has changed a lot since *Ruiz* [*v. Estelle*]. It used to be relatively easy to file class actions to achieve systemic relief, but since then the courts have become much more conservative and hostile to that kind of class action. It is still done,

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[18] Margo Schlanger, *Individual Inmate Litigation as It Is: Goals and Consequences of the Prison Litigation Reform Act,* 116 HARV. L. REV. 1555, 1557 (2003).

[19] Telephone interview with Randy Berg, Attorney, Florida Justice Institute, Miami, FL (Mar. 25, 2004).

[20] Telephone interview with Edward Tuddenham, Partner, Wiseman, Durst, Tuddenham & Owen, Austin, TX (Mar. 18 and Apr. 9, 2004). Telephone interview with Deborah Labelle, Attorney, Law Offices of Deborah Labelle, Ann Arbor, MI (Mar. 24, 2004).

> but it's much harder to do, and it's not the kind of claim that one files as frequently as one used to.... Because individual relief is so much easier to get than class relief, you may ultimately end up having more of an effect on an institution by filing individual claims than class claims. The number of individual damage actions could be more persuasive than a large and unwieldy class action that will be a procedural nightmare.[21]

Prison litigators perceive a general trend for a tougher approach to class actions by the judiciary.[22] The Texas Supreme Court, for instance, adopted a new approach where trial courts, before certifying a class, must assign a precise class definition to the putative class, perform a "rigorous analysis" to determine the satisfaction of class prerequisites (most notably the predominance inquiry), and indicate the likely outcome of claims.[23] Texas may have taken cues from the Supreme Court's decision in *Anchem Products, Inc. v. Windsor,*[24] in which the Supreme Court rejected an asbestos litigation class partly due to the failure to fulfill the predominance requirement in Federal Rule of Civil Procedure 23(b)(3)).[25] However, at least one prison litigator counters the notion that prison classes are hard to certify. According to Donna Brorby,

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[21] Telephone interview with Edward Tuddenham, *supra* note ____.

[22] *Id.* Telephone interview with Deborah Labelle, *supra* note ____.

[23] Russell T. Brown, *Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court*, 32 ST. MARY'S L.J. 449, 466-67 (2001) (suggesting that Texas may have taken cues from the Supreme Court's decision in *Anchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), in which the Supreme Court rejected an asbestos litigation class partly due to the failure to fulfill the predominance requirement in Federal Rule of Civil Procedure 23(b)(3)).

[24] 521 U.S. 591 (1997).

[25] *Id.*

> It's easy to certify a class in the prison system because lots of prisoners have common issues.... If you're bringing a suit for injunctive relief, you easily and naturally meet the requirements for injunctive relief... Class actions for damages are the one in which you have a fight about certification. Usually it's about commonality: do common issues so greatly outweigh separate issues, that it makes sense to bring a class action?[26]

The prisoner class is pretty defined, so that the cost of searching out and evaluating potential claims and joining plaintiffs is relatively manageable.[27]Unlike class actions for diseases like asbestos involving potential claimants from across the country in all stages of various diseases,[28] the prisoner class is limited to those prisoners incarcerated, or to be incarcerated, in the prison. Given that the difficulty of class certification is debatable, this paper will attempt to show that the advantages to bringing a class action are great enough to outweigh the added procedural complications of class actions, at least in those courts with manageable procedures.

There is also the concern that class actions require plaintiffs to meet an insurmountable "deliberate indifference"; that is, by showing that rape is "so endemic in an institution that it happens frequently and to a large number of people."[29] Donna Brorby, counsel in the *Ruiz* case, noted that prison officials have generally become more

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[26] Telephone interview with Donna Brorby, Attorney at Law, The Law Office of Donna Brorby, San Francisco, CA (Mar. 26, 2004).

[27] David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't,* 37 HARV. J. ON LEGIS. 393, 413–14 (2000).

[28] *See id.*

[29] Telephone interview with David Fathe, *supra* note ___. A number of prison litigators pointed to the difficulty of the legal standard as a major obstacle for bringing class actions. Telephone interview with Craig Cowie, *supra* note _____. Telephone interview with Donna Brorby, *supra* note ___.. Telephone interview with Caroline Kravath, Attorney, Florida Institutional Legal Services, Gainesville, FL (Mar. 29, 2004).

sophisticated in defending themselves against potential lawsuits.[30] In the past, correctional institutions did not have policies in place for handling inmate complaints, and it was easier for prison litigators to show constitutional violations from the absence of such policies.[31] When a prison does have policies for addressing sexual abuse complaints, it is more difficult to prove deliberate indifference from prison officials' non-adherence to them.[32]

Nevertheless, incidents of sexual abuse like those documented in *No Escape* suggest that in some institutions, prison officials may be condoning or ignoring sexual abuse.[33] Where this is the case, it is likely that plaintiffs can show an unconstitutional risk of sexual assault within the prison. For instance, the ACLU is currently bringing a lawsuit on behalf of Roderick Johnson, a 35-year-old African-American who is suing the Texas Department of Criminal Justice.[34] Johnson asserts that while incarcerated, he was repeatedly raped and treated as sexual chattel by several prison gangs.[35] In his complaint, Johnson alleged that correctional officers repeatedly insisted that because Johnson is

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[30] Telephone interview with Donna Brorby, *supra* note ____.

[31] *Id.*

[32] *Id.*

[33] *See* JOANNE MARINER, NO ESCAPE: MALE RAPE IN U.S. PRISONS (Human Rights Watch 2001) (In the case of Rodney Hulin, Jr., prison officials denied Hulin protective custody despite the fact that a medical examination confirmed the rape. (183–84.) After facing continued sexual abuse, Hulin hung himself. Similarly, in the case of S.M., after S.M. told the sergeant that had been raped by his cellmate, the sergeant said "that he didn't care, that he would force me back into the cell if he had to, that if I didn't come out of the shower that he would beat me himself." (18–21.) In the case of C.R., C.R. experience repeated sexual abuse and requested safekeeping at an initial classification hearing, telling the warden that he was gay and vulnerable to sexual abuse, but the warden said that he "didn't care." (25.))

[34] Daniel Brook, *The Problem of Prison Rape*, Legal Affairs (Mar./Apr. 2004), *available at* http://www.legalaffairs.org/issues/March-April-2004/feature_brook_marapr04.html. Telephone interview with Craig Cowie, *supra* note _____.

[35] *Id.*

black, he should either be able to fight off his attackers or else accept his sexual victimization, that they repeatedly expressed contempt for non-aggressive gay men, and made explicit that it was their practice to refuse to protect such inmates from sexual assault, at least until they had been savagely beaten or "gutted."[36] Johnson's allegations suggest not only prison officials' callousness towards his own plight, but an attitude among guards that generally condones the sexual abuse of inmates.

The strategy may be to reserve structural injunction for those institutions with the worst track record for sexual assault, and to use individual actions to target those cases where correctional officers have taken part in some kind of sadistic or retaliatory action towards a specific inmate. But in Johnson's case, the allegations tending to prove the individual case also tend to prove the class action case.[37]

Still, other litigators have expressed concerns about ethical conflicts from representing a class that involves both predators and victims.[38] As this paper will show, this perceived dilemma did not hamper the effective litigation of the suit in *LaMarca v. Turner.*

While the PLRA has impacted the filing of prisoner lawsuits across the board, the other cited reasons should not discourage prison litigators from bringing class actions lawsuits. Class actions actually aid plaintiffs in meeting the Eighth Amendment "deliberate indifference" standard and increase the likelihood of success.

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[36] Johnson Complaint at 1 (N.D. Tex. 2002).

[37] Indeed, the standard of liability is the same for class claims seeking injunctive relief and individual claims for damages.

[38] Telephone interview with Deborah Labelle, *supra,* note ____. Interview with Jim Pingeon, Attorney, Massachusetts Correctional Legal Service, Boston, MA (Mar. 15, 2004).

III. The Eighth Amendment "deliberate indifference" standard.

First, the class action is more effective than individual actions in showing that prison officials are deliberately indifferent towards a substantial risk of assault in prisons.[39] In the 1994 case *Farmer v. Brennan*,[40] the Supreme Court clarified the Eighth Amendment[41] standard of "deliberate indifference." The Court declared that "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society,"[42] and imposed an affirmative duty on prison officials to take "reasonable measures to guarantee the safety of the inmates."[43]

For plaintiffs to prevail, the court required that the risk of assault be "sufficiently serious"[44]: "For a claim... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."[45] In addition to showing an objectively substantial risk of harm, the plaintiffs must also show a "sufficiently culpable state of mind" of the prison official with regard to that risk.[46]

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[39] *Cf.* Amy Lederberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the only viable option for women inmates attempting to satisfy the subjective prong of the Eighth Amendment in suits for custodial sexual abuse,* 40 WM. AND MARY L 322, Oct. 1998.

[40] 511 U.S. 825 (1994).

[41] 511 U.S. 825, 832 (1994). The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

[42] *Id.* at 834.

[43] *Id* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27).

[44] *Id.* at 834.

[45] *Id.* The Court did not address at what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes. *Id.* at 834, n.4.

[46] *Id.*

> We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate human conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[47]

This standard is exceedingly difficult for plaintiffs to prove: either the plaintiffs must have evidence of actual knowledge on the part of the prison official followed by disregard of the risk, or proof of circumstances from which the inference could be drawn that the official *must have known* about the risk of harm.[48] In the absence of proof of actual knowledge, a "factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[49] But here, the mens rea standard is higher than mere negligence:

> For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."[50]

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[47] *Id.* at 838.

[48] *Id.* at 842.

[49] *Id.*

[50] *Id.*

In order to show the prison official's culpability through circumstantial evidence, the plaintiffs must build a strong, factual case about the pervasiveness of assaults within the institution.

A. The failure of individual actions to show deliberate indifference: *Webb v. Lawrence* and *Bolden v. Ramos*.

As opposed to class actions, individual damages actions seeking to show the requisite culpability of prison officials through the obviousness of the risk often fail because of evidentiary inadequacy. In *Webb v. Lawrence*, a prisoner brought a section 1983 claim after being repeatedly sexually assaulted by his cellmate.[51] The prisoner, who was five foot four inches and 120 pounds, alleged that the prison officials were aware of the fact that his cellmate was being incarcerated for rape of a minor, that the correctional officers came into the maximum security cell block only once a day, and that they did not receive any specific training as to which inmates may be more likely to be sexually assaulted and which may be more likely to sexually assault others.[52] The court granted summary judgment on behalf of the defendants because the plaintiff failed to show the prison officials' requisite culpability.[53] The court stated that the plaintiff had the burden either of showing the correctional officers knew the plaintiff was especially likely to be assaulted by his cellmate, or of showing that "inmate rape is a common occurrence" in

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[51] 950 F.Supp. 960, 963 (D.S.D. 1996).

[52] *Id.*

[53] *Id.* at 966.

the jail.[54] Had the plaintiff shown the obviousness of the risk through general prison conditions, he could have met the standard of deliberate indifference as to his own situation.

Similarly, in *Bolden v. Ramos*,[55] the district court granted summary judgment on behalf of prison officials under the subjective prong of the deliberate indifference standard. In *Bolden*, an inmate alleged being stabbed and assaulted repeatedly by other inmates, and that prison officials failed to protect him by not searching the prisoners for contraband before releasing them into the yard.[56] The court stated that the plaintiff failed to produce any evidence that defendants knew he was in serious danger, and that his prior involvement in a fight with other inmates was insufficient.[57] Considering the presentation of an affidavit of another inmate stating that he was not shaken down before going into the yard that day, the court found that the failure to search prisoners at best showed negligence.[58] The court then went on to say, regarding prison conditions generally, that there was no evidence that "the risk of inmate-on-inmate assault among prisoners was substantial or pervasive and that the risk was so well known that a jury could infer that [the defendant-officials] knew that their failure to search the prisoners constituted deliberate indifference to Bolden's safety."[59] Since Bolden did not have

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[54] *Id.*

[55] 1996 WL 66135 (N.D. Ill. 1996) (unreported decision).

[56] *Id.* at 1–3.

[57] *Id.* at 6–7.

[58] *Id.* at 7.

[59] *Id.* at 8.

proof of actual knowledge by prison officials, he was without remedy unless he could prove the obviousness of the risk through general prison conditions.

In both cases, the plaintiffs had enough evidence to prove negligence, but not enough to prove recklessness, or actual knowledge of increased risk of sexual assault. Instead, they tried to prove their cases by showing the obviousness of the risk so that knowledge could be inferred, but they did establish a factual foundation from which the inference could be drawn. The plaintiffs' allegations suggest that had their action been larger in scope, i.e., a class action, they may have been able to prove that the risk of assault was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," and thus sufficient to establish liability.[60]

B. The success of the class action for showing deliberative indifference in *LaMarca v. Turner.*

In *LaMarca v. Turner*,[61] the class action was an effective tool for showing prison officials' liability by proving the obviousness of the risk of inmate assault. In *LaMarca*,[62] plaintiffs' counsel used a long-term strategy of painting "a dark picture of life at GCI; a picture that would be apparent to any knowledgeable observer, and certainly to an official in [Warden] Turner's position."[63] In finding the warden liable for deliberate indifference,

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[60] *Farmer v. Brennan,* 511 U.S. 825, 842 (1994).

[61] 995 F.2d 1526 (11th Cir. 1993). *See also supra*, note 4 (listing other reported decisions).

[62] The Eleventh Circuit's opinion in *LaMarca* preceded the Supreme Court's decision in *Farmer v. Brennan*, but for all intents and purposes the standard is very similar. *Compare LaMarca v. Turner*, 955 F.2d 1526 *with Farmer v. Brennan*, 511 U.S. 825.

the court concluded, "An inference can be drawn from this evidence that Turner did know that GCI failed to provide inmates with reasonable protection from violence."[64]

There were a number of steps between 1982 and 1993 that led to the appellate court's conclusion of "deliberate indifference," including a trial before a magistrate in 1986, and two trials before a district court judge in 1987, and 1990. The class action originated with a handwritten pro se complaint filed by an inmate named Anthony LaMarca on May 14, 1982 in federal district court.[65] Incarcerated at Glades Correctional Institution from 1980, Anthony LaMarca complained of being subjected to ongoing physical violence and harassment by other inmates because of his refusal to participate in homosexual activity, and that officials at the institution failed to take any corrective action to alleviate the situation.[66] He named as the defendant the Superintendent of GCI, R.V. Turner.

As the second-oldest prison in Florida, GCI had a number of old facilities. The prison became a close-security prison in 1960,[67] housing a range of prisoners from burglars to first-degree murderers[68] in barracks-style buildings with a number of open dormitories. Located deep in the sugarcane fields on Lake Okeechobee's eastern side, GCI is located just 1 mile north of rural Belle Glade in Palm Beach County.[69] Built in

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[63] 995 F.2d at 1536.

[64] *Id.* at 1536–37.

[65] Docket Sheet. #1, p. 1. The complaint had a Forma Pauperis Affidavit attached.

[66] *See* LaMarca v. Turner, 662 F. Supp. 647, 667 (S.D. Fla. 1987) (Report and Recommendation of Magistrate Peter Nimkoff).

[67] Glades Correctional Institution, Florida Department of Corrections, *available at* http://www.dc.state.fl.us/facilities/region4/406.html (site last visited May 18, 2004).

[68] Carol Marbin, *Inmates' Lawsuit Bringing Changes,* PALM BEACH POST, Jan. 26, 1986, at A18.

1932 and named State Prison Farm No. 2, the facility was originally used to house black segregated prisoners.[70] In the past, the chain gang grew fresh vegetables for themselves and the two other state prisons,[71] and to this day the prisoners work outside in the fields.[72]

The magistrate assigned to the case, Peter Nimkoff, adopted a proactive approach early in the case.[73] As was his custom in prisoner cases, Nimkoff visited LaMarca at GCI and conducted an informal hearing with the Assistant Superintendent.[74] The State Attorney General's office sent an Assistant Attorney General to attend the conference.[75] In a conference room, LaMarca explained to Nimkoff, the Assistant Superintendent, and the Assistant Attorney General that several inmates, mostly black, were harassing him and other vulnerable inmates in order to obtain sexual favors, and that prison officials were condoning this behavior by turning the other way or finding it amusing.[76] LaMarca

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[69] The State of Florida had obtained the land through land acquisitions from delinquent tax payers under the Depression Era Murphy Act. 662 F.Supp. at 671.

[70] *Id.*

[71] *Id.* According to Plaintiffs' lawyer William R. Amlong, GCI is nicknamed "The Muck" because the institution is located in the "mucklands," an area with dark, moist soil. Telephone interview with William R. Amlong, Partner, Amlong & Amlong, Fort Lauderdale, FL. (Feb. 25, 2004).

[72] Telephone interview with William R. Amlong, *supra* note ___.

[73] On June 15, 1982, the case was transferred to Peter Nimkoff, a United States Magistrate. Docket Sheet #2, p.1 (At the time Magistrate Judges were called "United States Magistrates"). Peter Nimkoff graduated from Florida State University in 1955 and from Yale Law School in 1960. Nimkoff was a visiting scholar at Yale in the Guggenheim Criminal Justice Program from 1977–78 where he worked on bail reform; became Chief Assistant in Civil Litigation at the United States Attorney's Office in Miami, FL; taught at Nova Southeastern University School of Law for two years full-time; and from 1982 to 1986 served as a U.S. Magistrate. Nimkoff became involved in racial segregation cases as a civil rights litigator during the 1960s and cites as his primary influences Earl Warren, William O'Douglas, Alexander Bickel, and Louis Brandeis. Telephone interview with Peter Nimkoff, Attorney, Seneca Gaming Authority, Buffalo, N.Y. (Mar. 15, 2004).

[74] Telephone interview with Peter Nimkoff, *supra* note _____. *See also* Lamarca, 662 F. Supp. at 654. The "Warden" was then referred to as the "Superintendent."

[75] *See* LaMarca, 662 F. Supp. at 654.

[76] Telephone interview with Peter Nimkoff, *supra* note _____;

was only 150 pounds and had a large posterior, which was found sexually attractive to some inmates.[77] It was later found that a prison official responded to LaMarca's complaints of harassment by giving him a pocket knife, and that a group of aggressors, one of them brandishing a bush axe, made an unsuccessful attempt to assault LaMarca sexually.[78] LaMarca complained about being disciplined for protecting himself through loss of "good time," time spent in good standing in the prisonthat may later be used to reduce a prisoner's sentence. .[79]

At that initial meeting, Nimkoff encouraged LaMarca to turn his individual action into a class action. He told LaMarca that by the time LaMarca had gone through the grievance process and his claim became ripe for district court, he would be out of prison and his claim would become moot.[80] Nimkoff recalled, "LaMarca said he didn't care just for himself. It wasn't fair to these other guys because they're wimps and were getting molested and tyrannized by this cadre of bad guys to a shocking extent."[81]

Nimkoff asked the Assistant Attorney General to conduct a full investigation, but when he later called the Attorney General's office to inquire about it, he learned that the assistant AG had resigned without leaving any record of an investigation.[82]

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[77] LaMarca, 662 F. Supp. at 701-702 (Report and Recommendation of Magistrate Peter Nimkoff)

[78] *Id.* In the Magistrate's Report and Recommendations, Nimkoff also found that on the third day of his stay, an inmate informed LaMarca that LaMarca should pick either that inmate or someone like him as a "daddy" or he would be unable to live in the compound. LaMarca did not seek help for a year after his arrival, but when he did seek help and identified the inmates who were harassing him, one of the inmates swung at him with a bat, and the prison official responded by giving LaMarca a pocket knife.

[79] Telephone interview with Peter Nimkoff, *supra* note ____.

[80] *Id*

[81] *Id*

[82] *Id.*

During the summer of 1983, three other inmate plaintiffs joined LaMarca in the action. One of the three inmates joining LaMarca, Henry Rosenbaum, called collect from GCI to Bruce Rogow, the Dean of Nova Southeastern University Law School.[83] Although Rogow could not personally handle the case, he called an experienced litigator based in Miami to take it, David Lipman, and advised Lipman to enlist William R. Amlong, one of his law students from his civil rights litigation class.[84]

On September 21, 1983,[85] the inmate-plaintiffs filed an Amended Class Action Complaint designating as the class all present and future inmates at GCI, with the inmate class constituting about 800 people. The complaint sought damages under section 1983 and declaratory and injunctive relief against various practices and inaction that perpetuated the violence, threats and sexual abuse by other prisoners.[86]

The class certification process did not pose any special obstacles for the plaintiffs. On October 14, 1983, the plaintiffs moved for class certification for the purposes of injunctive relief.[87] The plaintiffs' allegations in favor of class certification under Rule 23[88] of the Federal Rules of Civil Procedure were succinct.[89] The plaintiffs alleged that

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[83] Carol Marbin, *Inmates' Lawsuit Bringing Changes,* PALM BEACH POST, Jan. 26, 1986, at A18.

[84] Telephone interview with Bruce Rogow, Dean, Nova Southeastern University Law School, Fort Lauderdale, FL. (Mar. 30, 2004).

[85] *See LaMarca*, 662 F. Supp. at 667–68.

[86] *Id.*

[87] Third Amended Complaint, p.2.

[88] A class action is maintainable under Federal Rules of Civil Procedure 23 only if "(a)... (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defense of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Under Rule 23(b)(2) and (3), the class action is maintainable if "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions

the named plaintiffs were representative of the class in that they "suffered attacks, robberies, extortions, and homosexual rapes as a result of the violent atmosphere created at GCI as a direct, natural and proximate result of the negligence, gross negligence and deliberate indifference of the defendants."[90] They stated that the common issue of law and fact was whether the defendants' conduct constituted negligence, gross negligence, or deliberate indifference under the Eighth Amendment.[91] Finally, they asserted that the merits of resolving the claims of the named plaintiffs as a class action outweighed the interest of members of the class in individually controlling the litigation of separate actions, that other inmates sought to join as co-plaintiffs; that the economy of judicial resources would be served from resolving the action before a single forum; and that there were no problems in the management of the action because all of the members of the class were institutionalized and had been given notice.[92]

Judge Paine granted the motion for class certification on April 13, 1984.[93] According to Judge Paine, "nobody really fought over the certification really hard."[94] In October of 1983, the court also ordered that plaintiffs' counsel be permitted to communicate with potential or actual class members.[95] Plaintiffs' attorneys William R.

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of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[89] Third Amended Complaint, ¶¶ 3–7 (citing to Federal Rules of Civil Procedure 23(a)(1)(2)(3) and (4), (b)(1)(B), (b)(2) and (b)(3))

[90] Third Amended Complaint, ¶ 5.

[91] *Id.* at ¶ 6.

[92] *Id.* at ¶ 7.

[93] Docket Sheet # 47, p.2. Telephone interview with Judge James C. Paine, Senior United States District Judge for the Southern District of Florida (Apr. 1, 2004.) Judge Paine was appointed by President Carter.

[94] Telephone interview with Judge James C. Paine, *supra* note ____.

Amlong and his wife created posters for the Department of Corrections to post around the prison system announcing the existence of the class action, inquiring whether inmates had raped, and asking such inmates to contact them.[96] From their publicity around the prison, they were able to add an additional seven named plaintiffs to their class action complaint.

The plaintiffs carefully delineated issues common to the class of prisoners that would show a pattern of inaction in dealing with unconstitutional conditions "obvious" to the Superintendent. On August 26, 1985, the plaintiffs filed a Second Amended Complaint adding seven plaintiffs, each of whom had suffered injuries similar to those of the named plaintiffs and the class, and seeking compensatory damages from the Superintendent.[97] On November 15, 1985, the Plaintiffs filed a final and Third Amended Complaint adding the State of Florida as a Defendant solely for the purposes of an attorney fee award.[98] The complaint alleged facts general to the class and specific to the named class plaintiffs. In the general facts section, the complaint alleged that inmates staying in common barracks-like areas were not being segregated according to criminal histories, length of sentences, custody classifications, or known propensities for violence or aggressive homosexual behavior – despite the fact that GCI housed inmates of various

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[95] Docket Sheet # 37, p.1. (October 21, 1983.)

[96] Telephone interview with William R. Amlong, *supra* note _____, (Feb. 25 and Mar. 25, 2004).

[97] Telephone interview with Michael B. Davis, Attorney, Paxton, Crow, Bragg, Smith & Keyser, P.A., West Palm Beach, FL (Mar. 30, 2004); LaMarca v. Turner, 662 F.Supp. at 668 (Report and Recommendation of Magistrate Peter Nimkoff).

[98] The complaint also provided for the dismissal of all claims related to Plaintiff Keith Harris, and substituted Billy Joe Harper as a Plaintiff. *See also* LaMarca, 662 F. Supp. at 667–68.

custody classifications, from minimum to close custody.[99] The complaint also alleged failure on the part of the defendants to:

1. Adequately staff the barracks with guards to prevent attacks, robberies, homosexual rapes and extortions (hereinafter "attacks");
2. Report to superiors within the Florida Department of Corrections regarding the level of attacks;
3. Punish or prosecute those engaged in the attacks;
4. Provide adequate protection to inmates in legitimate fear of attacks;
5. Segregate from other inmates those inmates known to have a propensity for the attacks;
6. Keep weapons out of the hands of those with a propensity to commit attacks;
7. Adequately train correctional officers;
8. And/or otherwise provide adequate security to inmates incarcerated at GCI.[100]

The plaintiffs sought an injunction requiring the Defendant to present a plan for reducing the instances of attacks, robberies, homosexual rapes and extortions at the institution.[101]

Arguably, plaintiffs' counsel had more incentives in this case than in the individual action to work hard because they were bringing a class action. According to David M. Lipman, hard work and preparation were vital to the success of the case.[102]

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[99] Third Amended Complaint ¶ 9, p. 4.

[100] *Id.* at ¶ 10, p. 4–5.

[101] *Id.* at subdivision (b), ¶ 36, p. 22.

They visited the prison many times, took long depositions, and built the case "from the ground up" "brick by brick, fact by fact."[103] They took "micro-facts, from piece to piece to piece," wove them in, and hired excellent experts to testify.[104]

Plaintiffs' counsels' hard work appears to have been the appropriate amount of work for meeting the deliberate indifference standard. For both individual claims and class claims, the deliberate indifference standard is the same.[105] In *LaMarca*, plaintiffs' counsel effectively focused on facts common to the class, including lax security, staff corruption, contraband, and inmate assaults, to show an atmosphere of tolerated violence.[106] They hired a correctional expert, Dr. Swanson, to tour the compound, interview the plaintiffs, witnesses, and correctional staff, and evaluate numerous incident reports, internal staff reports, and reports by outside investigators.[107] The joinder of several plaintiffs could create similar incentives to work hard and focus on common issues, but class actions may have the psychological effect of being more monumental in scale.

During the two weeks of evidentiary hearings in December of 1985, the large scale of the class action helped establish, by thorough presentation of evidence, an atmosphere in GCI where sexual assault was tolerated. In addition to having the inmates

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[102] Telephone interview with David M. Lipman, Attorney, David M. Lipman P.A., Miami, FL (Mar. 3, 2004).

[103] *Id.*

[104] *Id.*

[105] *See* Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 299 (1995) ("The Farmer Court ruled that individual prisoner claims based upon specific risks of harm should be treated in the same way as claims involving the general risk of harm to all prisoners.").

[106] 995 F.2d 1526, 1536 (11th Cir. 1993).

[107] *Id. Telephone* interview with William R. Amlong, *supra* note _____.

take the stand, the plaintiffs principally used two expert witnesses to testify on behalf of the class of plaintiffs at GCI: Richard Swanson, a correctional expert trained in both psychology and law,[108] and Glenn Caddy, a clinical psychologist based in Fort Lauderdale.[109]

In preparation for the trial, Dr. Richard Swanson interviewed the plaintiffs and inmate witnesses and correctional staff at GCI, reviewed volumes of GCI records from 1980 to 1984[110] as well as records external to GCI, and toured the prison facilities.[111] Swanson gave his opinion about staff corruption and Superintendent Turner's lax supervision of correctional staff.[112] He discussed the misconduct of the chief correctional officer, Lt. Barrett, who drunkenly took a loaded shotgun into the compound and used it to beat several inmates in the back of the head. According to Swanson, Turner unduly delayed in suspending Lt. Barrett.[113] Swanson also discussed the corrupt activities of Clarence Dixon, who was eventually investigated for trafficking in drug contraband and extorting inmates and their families, as an example of improper screening of employment applications.[114] Additionally, Swanson testified about the general climate of the facility as having a staff that was improperly trained, with low staff morale, and who were

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[108] *See* LaMarca, 662 F. Supp. at 685. Dr. Swanson was also the former deputy superintendent at Alachua County Jail and a forensic psychologist at the University of Florida. George McEvoy, *Tale of GCI rape, Robbery Revealed*, PALM BEACH POST TIMES, Dec. 4, 1985, at A1.

[109] *Id.*

[110] Brian Duffy, *Prison abuses widespread, witness says,* MIAMI HERALD, Dec. 4, 1985, at __. [Could not find page on Westlaw]

[111] LaMarca, 662 F. Supp. at 685.

[112] *See id.* at 675.

[113] *Id.*

[114] *Id.* at 675–76 .

inexperienced, over-worked, undereducated, ill-informed, insecure, and otherwise unable to protect inmates.[115] Related to that issue was the failure of the staff to supervise properly the dorm area due to sheets, clothes and personal lockers hanging from the bunks.[116] Swanson testified that GCI at the time had four open dormitories that mostly had three rows of bunk beds.[117] The guards sat in an area separated from contact with the inmates by a cage called a "wicket."[118] Because the view from the wicket into the dormitory and shower area at the far end of the dormitory wing was obscured by inmates' sheets and personal items,[119] the guards' supervision of the shower area was especially poor.

In his testimony, Swanson also described the sexual abuse of inmates. He stated that new inmates were often subject to general "wolfing" and cat-calls of aggressive inmates stationed around the compound,[120] and noted that there was a pattern for black assailants to assault whites.[121] Swanson reported the experiences of Larry Brown, who arrived at Glades on June 10, 1985:

> He said everything seemed normal until about 2 o'clock in the morning, when several inmates surrounded his bed. There were five of them, and they had knives.

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[115] *Id.* at 677.

[116] *Id.* at 678.

[117] *Id.* at 672.

[118] *Id.*

[119] *Id.* at 678.

[120] *Id.* at 679–80.

[121] *Id.* at 687–88.

> The inmate who was talking told Larry to get down on his belly... They took turns. The gang rape lasted a little more than an hour.[122]

According to Swanson, Turner appeared to tolerate aggressive assailants rather than transfer them out of GCI, and even allowed them to recruit and prey on vulnerable inmates.[123] In contrast, interim Superintendent Jones shipped out six busloads of problem inmates during his short stay at GCI in 1984.[124] Swanson also inferred that no investigations of rapes occurred based on the absence of any reference to rapes in the reams of internal documents he analyzed.[125]

According to Swanson, prison officials screened hard-core pornographic movies showing explicit acts of intercourse and anal penetration on a regular basis inside a recreational trailer.[126] The movies were unsupervised, and sounds of inmates screaming and crying could be heard from inside the trailer.[127] Furthermore, Swanson found that there was "readily available contraband," including "drugs, alcohol and weapons to inmates apparently upon demand."[128] Swanson concluded that "[b]etween 1980 and 1983, the institution was not under the control of the formal authorities."[129]

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[122] Brian Duffy, *Prison abuses widespread, witness says,* MIAMI HERALD, Dec. 4, 1985, at __. [Could not find page on Westlaw]

[123] 662 F. Supp. at 682.

[124] *Id.*

[125] *Id.* at 681.

[126] *Id.* at 683.

[127] *Id.*

[128] *Id.* at 676.

[129] George McEvoy, *Tale of GCI rape, robbery revealed,* PALM BEACH POSTTIMES, Dec. 4, 1985, at A2.

More than a dozen inmates then took the stand to describe the rape, stabbing, bludgeoning with pipes, and robberies they had endured. Six witnesses testified to being gang-raped by inmate "wolves" carrying knives and a baseball bat.[130] For example, inmate David Aldred said he was approached by a Jamaican man named "Captain" his first day at GCI and told he had to be Captain's sexual partner.[131] When Aldred refused, Captain "told me 'I'm going to have to resort to force.'"[132] Upon going into the shower that evening, Aldred testified that he was raped by several men with knives.[133] He said that his first request for help was ignored by a guard, so he sought help from a lieutenant.[134] "I asked for protective custody, and he told me something like 'you've got to start being a man sometime.'"[135]

In addition to a pattern of assaults and maltreatment by guards, the inmate-witnesses corroborated Swanson's testimony regarding the showing of pornographic films.[136] They testified that guards encouraged and profited from a free flow of contraband, including marijuana, cocaine, homemade wine, knives and other weapons.[137]

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[130] Carol Marbin, *Inmates' Lawsuit Bringing Changes,* PALM BEACH POST, Jan. 26, 1986, at A1.

[131] Carol Marbin, *Inmates Tell of Sexual Abuse, Drugs, Lax Security at GCI,* PALM BEACH POST, Dec. 6, 1985, at A16.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at A18.

[137] Carol Marbin, *Inmates' Lawsuit Bringing Changes,* PALM BEACH POST, Jan. 26, 1986, at A1–A2.

Glenn Caddy, a clinical psychologist,[138] took the stand to support the credibility of the inmates and diagnosed several of them as suffering from post traumatic anxiety disorder.[139] He based his conclusions on the emotional responses of each of the named plaintiffs from recounting being raped, the internal consistency of some of their experiences from varied circumstances, and the disincentives within the prison population to report rape due to humiliation and increased risk of future rape.[140] He also described factors that increase psychological trauma for rape victims, including anal rape, the use of a weapon, multiple or gang rapes by numerous assailants, cross racial rape, and lack of support services.[141] He described the inmates checking into protective confinement as being very distressed.[142]

During the course of the defense, there were a number of damaging admissions that corroborated the plaintiffs' case. The state called the Inspector General for the Department of Corrections, David Brierton, who stood by a September 1983 inspection report in which he wrote, "We fail to understand and appreciate the laxity and in some instances the disregard for procedures. The team finds that there is a need for a great deal of improvement at Glades Correctional Institution."[143]

R.V. Turner, the superintendent of GCI until 1984, defended himself on the stand, but testified from a report voicing his concerns about security to the state's highest prison

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[138] 662 F. Supp. at 685. *See* Carol Marbin, *Psychologist: Inmates Due Compensation,* PALM BEACH POST, Dec. 11, 1985.

[139] 772 F.Supp. at 686 n.30.

[140] *Id.* at 685–686.

[141] *Id.* at 688.

[142] *Id.* at 679.

[143] Carol Marbin, *Inspector Says State Unable to Protect Inmates*, PALM BEACH POST, Dec. 13, 1985.

official in 1981, "On an almost daily basis, I feel the security staff is simply being tolerated by the inmate population, rather than being in control of that population."[144] Turner said his comment referred mainly to the prison's recurring staff shortages, which led to a "substantial lack of control."[145] Turner complained of tight budgets, low salaries, substandard equipment and antiquated buildings.[146] He stated,

> I viewed the problems at the institution as very substantial. The fact that they were almost overwhelming made it a very difficult task.[147]

Additionally, Turner could not recall any action taken against an officer for failure to patrol the dormitories, though there were instances of such failure,[148] and could only recall one rape that had ever been prosecuted.[149]

The findings included within the Magistrate's 135-page Report and Recommendations on January 8, 1986, were overwhelmingly favorable to the plaintiff class. It was clear in the report that the testimony regarding facts general to the class impacted the Magistrate's view of individual plaintiffs' claims:

> The individual named Plaintiffs' damage claims can by analyzed only within the context of the general operational policies, practices, conditions and events existing at the general time period in which their claims arise. Disparate factors – ranging from wholesale manufacture of prison wine and regular screenings of

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[144] Carol Marbin, *Former Warden Sometimes Felt Control Slipping,* PALM BEACH POST, Dec. 14, 1985.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] 662 F. Supp. at 659.

[149] *Id.* at 680.

> sexually explicit videotapes to maintenance of an ill-assorted guard corps whose members the inmates perceived as regularly trafficking in contraband, extortion, and neglect – converge into a tapestry that forms the backdrop for Plaintiffs' claims.[150]

Additionally, Nimkoff found that "due to its very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI."[151]

Nimkoff's favorable findings impacted the course of the lawsuit through the appeals process. Judge Paine of the federal district court adopted the greater part of the Magistrate's findings, overruling almost all of the defendants' 199 objections to the findings of fact.[152] The Eleventh Circuit Court of Appeals in 1993 cited to the Magistrate's 1986 findings in reviewing Turner's liability. In support of a finding of an "atmosphere of tolerance" of rape that enhanced the risk that incidents would occur,[153] the court noted the regular, unsupervised showings of hard-core pornography,[154] the staff's treatment of victims to deal with problems "like men" (as occurred with Lt. Barrett giving LaMarca a knife to defend himself),[155] and the lack of procedures for rape investigation.[156] The court found indicative of the "prevailing atmosphere," Turner's

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[150] *Id.* at 715.

[151] *Id.* at 687.

[152] *Id.* at 654-62.

[153] 995 F.2d. at 1533.

[154] *Id.* at 1533

[155] *Id.* at 1533, n.10.

[156] *Id.* at 1533.

testimony about feeling out of control of the operation of the institution, noting that "[t]he presence of contraband (weapons, alcohol, and drugs), corruption of GCI's staff, inmate violence, and homosexual activity were accepted as part of prison life."[157]

Furthermore, in finding causation between the prison conditions and the actual harm suffered by inmates, the appellate court noted that the plaintiffs had presented evidence supporting their allegations that Turner "was in a position to take steps that could have averted the alleged unconstitutional condition at GCI, but, through deliberate indifference, he failed to do so."[158] The court found support for an inference of Turner's knowledge through the incident reports, internal staff reports, and reports by external investigators, and from evidence that Turner failed to ensure that his subordinates followed the policies he established.[159] In 1995, Turner was ultimately held liable to three of the named plaintiffs for damages totaling $115,000,[160] and the district court awarded the plaintiffs substantial attorneys' fees.

In sum, the class action in *LaMarca v. Turner* helped establish the requisite liability under the "deliberate indifference" standard. The class action complaint alleged facts regarding prison conditions general to the class and "obvious" to prison officials, like inadequate staffing and training of correctional officers and the presence of contraband. Second, class certification enhanced discovery by permitting intra-class communication and the joinder of additional named plaintiffs. Third, the large scale of

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[157] *Id.* at 1532.

[158] *Id.* at 1539.

[159] 995 F.2d at 1536.

[160] Docket Sheet # 428 (May 16, 1995). Martin Saunders was awarded $50,000, Edwin Johnson was awarded $40,000, and Anthony LaMarca was awarded $25,000.

the class action provided incentives for plaintiffs' counsel to dedicate large quantities of time into building the case factually. Fourth, the class action provided for a thorough presentation of evidence relating to the atmosphere at GCI, which formed a backdrop to the named plaintiffs' individual claims. Because the deliberate indifference standard is so difficult to meet, it makes sense to invest the work of litigation into a class action than into individual actions.

C. Overcoming defendant-officials' advantages.

Class actions also help to level the playing field against defendant-officials who are often represented by the institution. According to David Rosenberg in his article, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't,* the process of bringing individual tort claims against the defendants again and again is inefficient for plaintiffs, while allowing the defendant institution to take advantage of its large scale to defeat plaintiffs' claims.[161] In facing numerous claims presenting common questions of liability and damages, "the defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side."[162]

Correctional institutions facing repeated complaints of prison violence can defend themselves more easily against individual claimants than against plaintiff-classes. By treating the individual's experience as at best a sign of negligence on the part of prison administration, and isolated to the facts, the defendant can take advantage of the high bar

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[161] David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't,* 37 HARV. J. ON LEGIS. 393 (2000).

[162] *Id.* at 394.

of the "deliberate indifference" standard to deny allegations of unconstitutional conditions. To overcome the systemic bias in favor of repeat players like the defendant institution, plaintiffs should join their claims together and thoroughly discover all the evidence necessary to obtain relief – both to benefit the class in the award of injunctive relief, and to benefit the individually named plaintiffs for damages.

IV. Injunctive relief.

In addition to facilitating the showing of deliberate indifference, the class action is a powerful mechanism for obtaining class-wide injunctive relief to address the *risk* of sexual assault. Under *Farmer v. Brennan*, "an inmate does not have to await the consummation of threatened injury to obtain preventive relief."[163] But in order to bring suit for preventive relief, the plaintiff must first demonstrate that he has standing. The class action is helpful for satisfying the standing requirement of bringing a case or controversy before the court. Additionally, it allows plaintiffs to obtain injunctive relief that is class-wide in scope.

A. Standing

Class actions facilitate the award of injunctive relief by helping plaintiffs fulfill the standing requirement for seeking injunctive relief under Article III of the Constitution. In order to have standing to obtain a preliminary injunction, a plaintiff must demonstrate

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[163] *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

they will suffer irreparable harm in the absence of an injunction, and demonstrate either "(1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor."[164] While the standard for injunctive relief is lower than that of preliminary injunctive relief, it is still high: to obtain injunctive relief, the plaintiff must allege real and immediate threat of future injury by the defendant.[165] Both standards are extremely difficult to meet unless the plaintiff-inmate demonstrates that he personally is at substantial risk of future sexual assault,[166] or unless the plaintiff is part of a class action.[167]

In *Butler v. Dowd*,[168] the court denied injunctive relief to the individual plaintiff for lack of standing. The plaintiff's showing that unconstitutional practices took place in the past was insufficient to obtain standing.[169] Instead, the plaintiff had to show that such practices were likely to affect him in the future.[170] "Although he claims that he is still subject to *threats* from fellow inmates, he does not claim that he is still subject to sexual assault. The testimony was that none of the plaintiffs has been sexually assaulted since

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[164] Jolly v. Coughlin, 76 F.3d 468 (2nd Cir. 1996).

[165] *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–102 (1983), *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 643–44 (8th Cir. 1996).

[166] *But see* Smith v. Arkansas Dept. of Correction, 103 F.3d 637, 643–44 (8th Cir. 1996) (testimony from inmate about having stolen from and harming other inmates in open barracks, and of trouble sleeping for fear of retaliation against him was sufficient to show imminent threat of harm from prison conditions).

[167] Class actions by their nature join together the claims of those plaintiffs who have been injured and those plaintiffs who risk injury in the future.

[168] 979 F.2d 661, 673–74 (8th Cir. 1992).

[169] *Id.*

[170] *Id.*

January 1, 1989."[171] The court specifically noted that because the suit was not a class action, the plaintiff was not entitled to injunctive relief.[172]

In addition to the standing requirement, plaintiffs must ensure against procedural mootness. While class actions are vulnerable to mootness if the class representative is transferred or released from the institution, the class representative may still represent the class after removal from the institution.[173] For the individual, the defendant may easily moot the request for injunctive relief, which is usually limited to that individual's circumstances. In Roderick Johnson's case, for example, prison officials complied with Johnson's request for injunctive relief by maintaining him in safekeeping status so long as he remained in custody[174] and treating him with "kid gloves."[175] Thus, by bringing suit as a class, plaintiffs can obtain standing to seek injunctive relief, and through class certification avoid their claims from becoming moot.

B. Remedying institutional risk factors.

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[171] *Id.*

[172] *Id.*

[173] Class certification can also save litigation from mootness even after the named plaintiff no longer has an individual claim. United States Parole Commission v. Geraghty, 445 U.S. 388 (1980), Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), Gerstein v. Pugh, 420 U.S. 103 (1975), Sosna v. Iowa, 419 U.S. 393 (1975).

[174] Telephone interview with David Fathe, *supra* note ____.

[175] Telephone interview with Edward Tuddenham, local counsel for Roderick Johnson, *supra* note ____, (Apr. 9, 2004).

Once a class meets the standard of liability and obtains injunctive relief, such relief can address the risk of future harm that all inmates within an institution face.[176] According to David Rosenberg, the "disaggregative, linearly retrospective character of ... [the traditional private law] process leads courts to ignore the ex ante effects of accident risks on the rights and lives of the at-risk population."[177] While damages can provide compensation for individuals and can potentially prevent future harm, injunctions, by proscribing specified activities or ordering action, "may satisfy that desire for prevention in a way that a damage remedy cannot."[178] Indeed, inmates being psychologically intimidated, but who have not yet been assaulted, have historically had little success in bringing individual actions.[179]

In reducing the risk of harm to within constitutional bounds, plaintiffs' counsel can redress a number of institutional risk factors. Institutional risk factors can be categorized into policies and dangerous conditions increasing the risk of inmate-on-inmate assault.[180] They include overcrowding; inadequate staffing and training, including training to respond to and investigate incidents of violence; inadequate supervision of

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[176] *See* Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989) (only a plaintiff class has the ability to seek class-wide injunctive relief).

[177] David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 568.

[178] PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (Yale U. Press 1983) 150. ("By ordering officials to do, or to refrain from doing, particular things and by placing the court's coercive power behind that order, this remedy achieves a more specific, predictable, and rapid change in officials behavior than damages remedies can accomplish.")

[179] *See, e.g.,* Elliott v. Byers, 975 F.2d 1375, 1376 (8th Cir. 1992) (inmates' suit under § 1983 claiming "pervasive risk of attack by other prisoners" on "hoe squad" failed because none of the evidence on inmate-on-inmate assaults involved inmates on the hoe squad).

[180] Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 278–79 (1995).

prisoners and staff; inadequate classification systems for separating out violent prisoners; inadequate systems for reporting and tracking violence incidents; placement of some prisoners in positions of supervisory authority over others; over-reliance on open dormitory housing; and failure to control tools or other materials that can be used as weapons.[181] The work that plaintiffs invest into meeting the deliberate indifference standard of liability – in identifying a causal link between prison officials' actions (or inaction) and unconstitutional risk of sexual assault – can be subsequently used to bring those risks within constitutional bounds through an injunctive order.

In contrast, the scope of relief for the individual is limited to the risk of re-victimization and the needs of that individual. In Roderick Johnson's case, although the complaint alleged facts both specific to Roderick Johnson and general to those who are similarly situated to him, the injunctive relief was oriented towards the individual: to maintain Johnson in safekeeping status so long as he remained in custody, to expunge the disciplinary violations caused by the defendants' failure to protect him, and to offer him medical and psychiatric treatment and counseling.[182] In sum, the class action both permits plaintiffs to seek injunctive relief, and to seek relief that addresses institution-wide risk factors for sexual assault.

C. The threat of injunctive relief in *LaMarca v. Turner*

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[181] *Id.*

[182] Johnson Complaint at 23–24.

In *LaMarca v. Turner*, the plaintiffs benefited from bringing a class action: they obtained standing to seek injunctive relief and were granted class-wide relief specific to sexual assault. Additionally, where the plaintiffs did not obtain everything they sought through an injunctive order, the sheer threat they posed of obtaining a broad structural injunctive order motivated the defendants to search for and rectify potential constitutional violations.[183]

1. The changing order for injunctive relief

Throughout the course of litigation in *LaMarca*, the orders for injunctive relief changed significantly from a two-committee structure in 1987, to a wide-ranging set of provisions in 1990, to a smaller set of provisions in 1993. On June 4, 1987, Judge Paine of the district court accepted Magistrate Nimkoff's recommendation for the establishment of two committees, one of penologists and the other of psychologists or psychiatrists, to advise the Court in the formulation of specific injunctive relief.[184] The mission of the committees would be two-fold: to "prescribe a treatment plan for the plaintiffs and witnesses in this action who remain incarcerated," and "to develop an internal mechanism within the prison for providing male rape victims of Glades Correctional Institution the same kind of support that female rape victims on the outside receive from rape crisis centers."[185] Each committee would be comprised of three members, with each party

[183] For a detailed discussion on liability threat and deterrence in the area of corrections, see Margo Schlanger, *Individual Inmate Litigation as It Is: Goals and Consequences of the Prison Litigation Reform Act,* 116 HARV. L. REV. 1555, 1664-90 (2003) (discussing the concepts of overdeterrence, underdeterrence, and anti-deterrence).

[184] LaMarca, 662 F. Supp. at 716.

nominating one member of each committee, and the district court selecting the third member, who would chair the committee.

But noting that "neither party strongly advocated the alternative of appointing committees to evaluate the prison conditions,"[186] the district court abandoned the two-committee structure in October 1989, and decided to hold an evidentiary hearing for a final order on injunctive relief.[187]

The weeklong hearing that the district court conducted in January of 1990 was essentially a continuation of the 1985 trial, with presentation of evidence starting from January 1986, the date of the Magistrate's Report, up until the date of the hearing. Instead of filing a proposed order and briefing for injunctive relief, the plaintiffs decided to use expert testimony to present proposed recommendations for change. Their key witnesses were therefore their experts, Dr. Richard Swanson and Glenn Caddy, both of whom had testified in the 1985 trial. In preparation for trial, both experts interviewed inmates at GCI, and Dr. Swanson prepared a 50-minute videotape for the court[188] of his visit to show the lay-out of the institution, the dormitories, and the confinement areas.

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[185] *Id* at 666, 716. The committee structure is similar to the one adopted in the state class action in *Costello v. Wainwright*, 489 F.Supp. 1100, 1104, where by orders dated March 29, 2979 and June 6, 1979, the Court appointed medical expert witnesses to conduct a survey within the prison system to determine whether medical care was above constitutional minimums. Magistrate Nimkoff said that he endorsed the committee structure because he came from a background of public law jurisprudence, in which penal reform was oriented towards the social sciences. His wife at the time was a social worker in psychiatry, his mother was a cultural anthropologist, and his father was a sociologist. Telephone interview with Peter Nimkoff, *supra* note ___.

[186] District Court, Findings of Facts and Conclusions of Law, April 29, 1990, p. 4–5.

[187] The court determined on October 23, 1989, that it would consider evidence as to then-current conditions at GCI at a trial set for January of 1990. Transcript from trial, Southern District of Florida, Jan. 8, 1990, vol. 1, page 29–30. Docket sheet # 254, p.10.

[188] Transcript from trial, vol. 1.

Dr. Swanson testified to the need to improve conditions relating to inmate security,[189] conditions in protective confinement,[190] and psychological counseling for rape victims.[191] Glenn Caddy expanded on the area of treatment of rape victims, recommending the promulgation of guidelines for respectfully handling rape victims and sensitivity training for the guards, supervisors, and the medical department on dealing with rape victims.[192]

Three inmates testified about being raped at GCI and the subsequent inaction of GCI staff. Mark White testified that he was in a double-bunked protective confinement

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[189] In the area of inmate safety, Dr. Swanson discussed five major areas that needed improvement. He recommended ways to:

1. reduce the free flow of contraband and extortion through comprehensive shakedowns, maintenance of metal detectors in good repair, and the elimination of currency to reduce inmates' ability to trade in drugs;
2. improve the relationship between the staff and the inmates by adding better trained staff to reduce the number of hours and double-shifting of current staff, increasing limited confinement space to lock up inmates for disciplinary problems, and staff training in professionalism to balance the officers' befriending of inmates and their unprofessional horseplay;
3. increase staff supervision through changing the glass in the shower area or keeping it clear for better visual surveillance, the placement of a time clock so patrolling officers would have a record of how often they went to the dormitories on each shift, and the addition of an officer to make a surveillance of the television or recreational room;
4. control inmate movement within GCI by separating the north compound, which housed minimum security inmates, from the main compound, and adding support services like food service in the north area to minimize inmate movement between the compounds;
5. implement a classification system through a classification staff to conduct intake interviews with each incoming inmate to verify the propriety of their classification assignment to GCI.

Transcript from trial, vol's 1, 2.

[190] Dr. Swanson recommended ways to improve the conditions of protective confinement, by speeding up the transfer of inmates who could not make it in the population so they need not be incarcerated in protective confinement for extended lengths of time, greatly expanding the confinement area, creating a work crew of protective confinement inmates so they could leave the areas and hold jobs in the institution or lose gain time, the providing counseling services and the ability to participate in programs like Alcoholics Anonymous or Narcotics Anonymous, and improving the lighting. *Id.*

[191] Dr. Swanson recommended ways to reform the procedure for investigating sexual assault and dealing with sexual assault victims. In this area, Swanson found that a procedure existed for the investigation of rapes, which involved an interview process with the alleged rape victim, a rectal examination at an outside hospital, and reporting to law enforcement, but felt that mental health services be provided to the rape victims. *Id.*

[192] Transcript from trial, vol. 3. Caddy also suggested avoiding putting the victim back in the same environment as the rapist and providing counseling to individuals so that any rape victim would receive at least 10 one-hour sessions of psychotherapy.

cell when he was raped by his cell-mate, and that his complaint was received with cynicism.[193] Despite the fact that the medical report indicated sexual assault, the investigation of the rape was limited so that due to a lack of evidence, there was no internal reprimand or state prosecution of the alleged rapist.[194] Similarly, Arnold Dennis testified that he was raped in the bathroom of his dormitory and that after he informed an officer, the officer told him to fight his rapist so that he would not bother him anymore. He also stated that after being placed in protective custody, he was transferred in a van to another institution with his rapist.[195] John Haveard testified to being raped in a closet by an inmate, but that the Detective investigating the rape showed no mugshots to he victim and no search was conducted to find the rapist.[196]

The defendants vigorously opposed the plaintiffs' assertions regarding the unconstitutional conditions at GCI. They presented a number of defense witnesses, including correctional officers, an internal investigator at GCI, a correctional training officer, the chief health officer at GCI, a correctional consultant, a sergeant from a sheriff's office, and then-Superintendent Chester Lambdin.[197] Their expert witness,

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[193] Findings of Fact and Conclusions of Law by Judge Paine, Southern District of Florida, Apr. 29, 1990, 11, 15.

[194] *Id.* at 15.

[195] *Id.* at 15–16.

[196] *Id.* at 16.

[197] Transcript from trial, vols. 3-5.

Daniel Lockwood, was a professor in Criminal Justice at Syracuse University[198] who had published a 1980 study called *Prison Sexual Violence.*[199]

Judge Paine held that despite improvement in the conditions at GCI since 1986, certain conditions existed within GCI that violated the Eighth Amendment and ordered injunctive relief.[200] He found that "GCI officials are aware that there is presently a 'strong likelihood, rather than a mere possibility,' that a callous attitude regarding prison rape will surely result in the underreporting of same."[201]

Judge Paine's order for injunctive relief provided for improvements to inmate security, confiscation of contraband, improved conditions in protective confinement, and better treatment of rape victims.[202] With regard to inmate security, Paine ordered the replacement and cleaning of opaque glass panes in the showers; promulgation and enforcement by the administration of rules requiring roving guard patrols; and maintenance of metal detectors between two housing compounds and at the main gate.[203]

In dealing with contraband, he provided for the promulgation and enforcement of a harsh, standard policy for prisoners in possession of contraband; conduct of regular dormitory "shake-downs"; disciplining, including termination, of staff members when contraband is repeatedly discovered in the area of the prison under their responsibility;

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[198] Transcript from trial, vol. 4, p. 566. *See supra*, note

[199] Daniel Lockwood, Prison Sexual Violence (1980) (studying a New York state prison and finding that although twenty-eight percent of respondents had been the target of sexual aggression, only 1.3% were raped).

[200] Findings of Fact and Conclusions of Law by Judge Paine, Southern District of Florida, Apr. 29, 1990, 22-23.

[201] *Id.* at 16.

[202] *Id.* at 22-28.

[203] *Id.*

and thorough searches by staff for contraband of all people entering the compound, including the guards.[204]

Regarding conditions in protective confinement, Paine ordered the elimination of double bunking in confinement cells; elimination of protective confinement stays exceeding 30 days; transfer of all inmates in protective confinement for whom it would be unsafe to return to the general population; and improved lighting in protective confinement.[205]

Finally, Paine mandated a better response to allegations of rape, including prompt investigations of all allegations of sexual assault and referral of cases to the state attorney; additional training in rape counseling for the staff psychiatrist and psychologists and sensitivity training for all correctional officers handling the rape complaints, and promulgation of a referral procedure of rape victims to counseling.[206]

When the Court of Appeals decided the issue of injunctive relief in 1993, it upheld several provisions in the district court's 1990 injunctive relief order, including psychological counseling for rape victims and specific provisions relating to inmate safety,[207] like the maintenance and location of metal detectors, the use of specific search methods for location of contraband, and the replacement and maintenance of glass windows in the showers.[208]

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[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] 995 F.2d at 1544.

[208] *Id.* at 1543.

At the same time, the court struck down a number of provisions in the 1990 order. The court objected to the portion of the order addressing conditions of protective confinement because it held that such conditions, taken singularly or together, did not constitute cruel and unusual punishment.[209] The court therefore struck down the provisions eliminating double-bunking, precluding stays in protective confinement in excess of 30 days, requiring the transfer of inmates in protective confinement who could not be returned to the general prison population, and ensuring that the lighting conformed to American Correctional Association guidelines.[210]

The court also found provisions to be unnecessarily intrusive on GCI's operations.[211] For instance, the court disapproved of the provision ordering the Superintendent to discipline correctional staff with specified sanctions and employment conditions, finding that enjoining the Superintendent to ensure specific polices were carried out was sufficient.[212]

After a decade of litigation, the plaintiffs finally obtained an injunctive order that had a minor impact on GCI operations. While the class action was successful in showing 'liability,' a gap appeared to exist between effectiveness in proving liability and the remedy obtained. Due to the complexity and length of the lawsuit, the information the court used to formulate injunctive relief became susceptible to being outdated. As Peter Schuck noted regarding the problems of structural injunctions,

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[209] *Id.* at 1544.

[210] *Id.* at 1543–44.

[211] *Id.* at 1543.

[212] *Id.*

> In protracted, complex, structural litigation, the facts in the court record upon which both liability determination and decree formulation are based can quickly become stale. By the time implementation is at hand, these transitory data may bear little resemblance to reality.[213]

The final order from 1993 revealed both the transitoriness of the data and the short-lived quality of the order. First, while the appeal was pending from 1990 until 1993, there was no enforcement of the district court opinion.[214] When the order was implemented in 1993, it did not entail much judicial oversight or cost to the Department of Corrections.[215]

Currently, there is no oversight for compliance of the affirmed provisions of the injunctive order from 1993. According to the Department of Corrections legal department, the provisions on training for prison guards and the staff psychiatrist and psychologist were a "one-time deal" dependent on the personnel at the facility at the time.[216] Similarly, GCI's physical structure had changed significantly over the years of the lawsuit – both instigated by the defense lawyers and internal changes. The current Warden, Willie Floyd, stated that GCI has been revamped and dormitories were torn down, so the provisions on opaque glass panes in the shower area and the metal detectors

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[213] PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (Yale U. Press 1983) 157.

[214] Telephone interview with Chester Lambdin, former Superintendent, Glades Correctional Institution, after December 16, 1984 (Mar. 31, 2004).

[215] The Department of Corrections did not get additional resources to implement the injunctive relief, as the class action was limited to one institution and it was "not impossible within the budgetary resources that were available to the prison at the time to make changes." Telephone interview with Susan Maher, Deputy General Counsel, Office of General Counsel, Tallahassee, FL (Mar. 31, 2004).

[216] *Id.*

would likely not be applicable.[217] Currently, there is no oversight for compliance of the affirmed provisions of the injunctive order from 1993.[218] Many of the provisions related to the promulgation of policies, which the Florida Administrative Code's chapter on the Department of Corrections or GCI had already or eventually developed.[219] Thus, the injunctive order itself did not lead to long-lasting change.

2. Preemptive actions of the Defendant

Ultimately, the predictive power of the defense, in attempting to moot any possible court order, may have been more effective at targeting risk of sexual assault than what the judge issued in the order. This section argues that the preemptive actions of the defendant-institution in combating the suit may be just as important as the final injunctive order resulting from a court.

From 1985 until 1993, the threat of a broad, structural injunction loomed in the distance for the defendants. From the filing of the pro se complaint in 1982 until the summer of 1985, the Department of Corrections did not take the case seriously.[220] When

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[217] Telephone interview with Willie Floyd, Warden, Glades Correctional Institution, Belle Glade, FL. (Mar. 31, 2004).

[218] William R. Amlong, plaintiffs' attorney, and Michael B. Davis, defendants' attorney, did not know who was in charge of compliance. Telephone interview with William R. Amlong, *supra* note _____. Telephone interview with Michael B. Davis, *supra* note _____.

[219] For instance, the Administrative Code has state-wide policies on the handling and severity of violations involving contraband, 33-601.314. There are also comprehensive policies on inmates entering administrative confinement, including investigation procedures for allegations of sexual assault and length of stay. 33-602.220. The prison conducts regular "shake downs" for weapons and contraband. Telephone interview with Susan Maher, *supra* note ____. According to the defense, GCI already had policies in place for the investigation of assaults and referral to the state attorney, referral of alleged rape victims to psychological counseling, and patrol and search procedures. Telephone interview with Michael B. Davis, *supra* note _____.

the case gained momentum and was set for trial before Magistrate Nimkoff in July of 1985, the Department of Corrections became concerned about the class action aspect of the case because it did not want to make changes at GCI under court order.[221] The Department of Corrections then hired Michael B. Davis, a private lawyer, to handle the defense for the trial.[222]

In the months before trial, the Department of Corrections refused to settle the case – partly because they felt, according to Superintendent Chester Lambdin, that "they were absolutely right" and "had no desire to settle"[223]; partly because they did not have time before the trial to formulate a proposal for settlement[224]; and partly because there were no settlement offers from either side.[225]

At the same time, the Assistant Attorney General and Davis, the defense lawyer, adopted the strategy of mooting any court order for injunctive relief. Especially after the first trial in 1985, they were inspecting GCI's facilities and procedure, and were making recommendations to change certain aspects of the facilities or procedures that might constitute violations of constitutional standards.[226] According to Davis, although there

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[220] Telephone interview with Michael B. Davis, *supra* note ____.

[221] *Id.* Interestingly, after the issuance of the Magistrate's Report and Recommendations, few prison officials were willing to comment on the case, while one said the decision would not affect other Florida prisons because the GCI case was an isolated one. *See* Renee Graham, *Case one-of-a-kind, say prison officials: No rash of lawsuits expected,* MIAMI HERALD, Dec. 28, 1985, at ___.

[222] *Id.*

[223] Telephone interview with Chester Lambdin, *supra* note ____.

[224] Telephone interview with Michael B. Davis, *supra* note ____.

[225] *Id.* Telephone interview with David Lipman, *supra* note _____.

[226] Interview with Michael B. Davis, *supra* note ____.

was no formal settlement, "there were some things that were done informally."[227] At the time of the 1985 trial, the Magistrate noted "beneficial changes at GCI since the retirement of Defendant Turner as superintendent -- e.g., expeditious transferring of known 'wolves,' the barbed-wiring beneath the fence surrounding the confinement area, and the removal from dormitory bunks of such obstructions as towels and lockers."[228] According to Carol Marbin of the *Palm Beach Post*, within two months of the 1985 trial signs of change were already apparent: in addition to noting that inmates could no longer hang towels, bedsheets and lockers along the sides of their bunks to obscure the view of correctional officers, she found that correctional officers had no chair to sit on or television to watch in their wicket, so they had to patrol the crowded dormitories; and a fewer number of young white inmates, as compared to black inmates, were checking into protective confinement as a result of being terrorized by black assailants.[229] Thus, although a final injunctive order itself required a decade-long wait, defendants were surveying the institution and making swift, broad changes.

While defendants' preemptive actions are desirable from the plaintiffs' standpoint, they also bear the threat of mooting the plaintiffs' claim and precluding an award for attorney's fees.[230] For a couple of reasons, this strategy is likely to fail.[231] First, the defendant bears the burden of showing that improvements in prison conditions are

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[227] *Id.*

[228] LaMarca, 662 F. Supp. at 716.

[229] Carol Marbin in *Inmates' Lawsuit Bringing Changes*, PALM BEACH POST,. Jan. 26, 1986, at A18.

[230] Telephone interview with Edward Tuddenham, *supra* note ____.

[231] The defendants in *LaMarca v. Turner* attempted this strategy by making changes to the facility after the lawsuit was brought, and trying to argue that the injunctive relief was not necessary. See Defendants' proposed Order for Plaintiffs' Prayer for Class Action Injunctive Relief, filed April 24, 1990.

permanent. In *LaMarca*, the court stated "[w]hen a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state."[232] Second, plaintiffs can argue that any improvements made after the filing of the lawsuit were caused by plaintiffs' lawsuit, and therefore that the plaintiffs have "prevailed" under the Civil Rights Attorney's Fee Awards Act of 1976. The Act, codified in 42 U.S.C. § 1988, provides that a court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Act has been construed liberally,[233] and success for the plaintiff may be achieved through a consent decree or without formal relief.[234]

To the extent that GCI is a better institution today, the lawsuit likely had a significant effect. In addition to the defendant making changes to counteract a potential injunctive relief order, the class action brought with it media attention in Florida newspapers like the *Miami Herald*, the *Palm Beach Post*, and the *Sun Sentinel.* In the wake of the 1985 trial, Governor Graham ordered an internal probe of GCI by the Inspector General's office.[235] Throughout the lawsuit, GCI also went through three different wardens: R.V. Turner retired as Superintendent of GCI in June of 1984, Randall Music became Superintendent on October 15, 1984, and Chester Lambdin

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[232] 995 F.2d at 1541.

[233] Inmates of the Maine State Prison v. Zitnay, 590 F. Supp. 979 (D.Me. 1984).

[234] Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985). But with the Prison Litigation Reform Act, the possibility for recouping attorney's fees at fair market value has all but disappeared. *See* Martin v. Hadix, 527 U.S. 343 (1999) (holding that work done before the enactment of the PLRA is to be compensated at pre-PLRA rates; work after it is governed by the PLRA).

[235] Robert McClure, *Graham orders Glades prison investigation,* Jan. 14, 1986, at 1B.

succeeded Superintendent Music on December 16, 1984. With each succession, the new Superintendent was substituted as the defendant with respect to the injunctive aspect of the claim. Thus, *LaMarca* reveals that the class action lawsuit, even when vigorously opposed by a formidable defendant-state, can be effective in merely threatening the imposition of classwide injunctive relief.

V. Jury perceptions

Suits seeking classwide injunctive relief have the additional benefit of non-jury trials due to their equitable nature. Damages, in contrast, are legal in nature and carry with them the right to a jury trial for either party. According to Donna Brorby, "Damages have a right to a jury – if you're serious about getting injunctive relief, you're better off without one."[236] A plaintiff class, then, can evade juries altogether by abstaining from seeking damages.

It is possible to seek both injunctive relief for the class and damages for the individual named plaintiffs, as occurred in *LaMarca*. In such a case, the proper procedure is for the jury trial for each plaintiff to precede any hearing on the equitable claim.[237] The jury's findings control as to any "common" factual issues – disputed issues that might arise both in the legal and the equitable claims.[238] Interestingly, the procedural history of *LaMarca* allowed the plaintiffs to obtain a nonjury trial on injunctive relief.

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[236] Telephone interview with Donna Brorby, *supra* note ____.

[237] Beacon Theatres v. Westover, 359 U.S. 500, 503–508 (1959).

[238] *Id.*

Judge Paine tried both the damages and injunctive relief parts of the case in 1987,[239] and then produced the final injunctive order in 1990. In 1993, the case was partially reversed and remanded by the appellate court, with the defendant able to retry the damages part with a jury.[240]

In prison litigation, nonjury trials are desirable because juries have tended to be unsympathetic to inmate plaintiffs seeking money from the state. For instance, in *Flint v. Kentucky Department of Corrections*, a jury awarded only $2,641 in compensation and $1 in pain and suffering to the estate of a prisoner whose wrongful death was found to have resulted from the deliberate indifference of a prison official.[241] The plaintiff's attorney, David Friedman, said, "The message sent by the jury was that they weren't going to give money to an inmate... [The award] clearly resulted from an anti-inmate passion, and not the evidence regarding damages."[242]

It is true that jurors may be outright biased against inmate-plaintiffs, but according to Neal Feigenson, the dynamics of jury-decision-making relate more to a juror's "common sense." Jurors may, through depressed damages awards or a finding of non-liability, be trying to achieve "total justice":

> If there is any overarching pattern in this complexity, it is that jurors in accident cases try to achieve what I call *total justice.* They strive to square all accounts

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[239] 662 F.Supp. 647.

[240] 995 F.2d 1526 (11th Cir. 1993).

[241] Flint v. Kentucky Department of Corrections, No. 96-0591, 2003 WL 22170465 (E.D. Kentucky July 10, 2003).

[242] 2003 WL 22170465. Similarly, in *Neel v. Henderson*, No. 1998 WL 2024147 (S.D. Tex. Feb. 16, 1998), a jury found that defendants were not liable where the Plaintiff had been removed from safekeeping for engaging in a fight with another inmate despite his admitted homosexuality and his warnings to the Defendants about the enemies he would face in the general population.

> between the parties (even though the issues the law asks them to resolve may not be framed in those terms), to consider all information they deem relevant (even if the law tries to keep them from relying on some of it), to reach a decision that is correct as a whole (even if they reach it by blurring legally distinct questions), and to feel right about their decision (even though the law discourages them from using their emotions to decide). The decisions that result are often, like common sense itself, "right for the wrong reasons": consistent with the law, but not necessarily the result of strict adherence to legal rules and procedures.[243]

In trying to square all accounts between the parties, jurors in a civil prison suit may place strong emphasis on the identity of the inmates. In determining liability or awarding damages, they likely consider the extent of the inmates' harm to society for their underlying convictions, the expense to the state for housing inmates in prison, their reputation for dishonesty, and their likely station as "rabble"[244] in society. Furthermore, credibility problems inherent in sexual assault cases become exacerbated where inmates become the accusers in sexual assault cases. Juries can be persuaded to believe that the sex had been consensual for the inmate, especially where inmates felt intimidated to perform sex acts, there was a delay in reporting the alleged assault, or little or no medical evidence. Class actions seeking exclusively injunctive relief are helpful in that they allow the plaintiff class to evade juries altogether. Even where the plaintiff class seeks

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[243] NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 5 (American Psychological Association 2000).

[244] JOHN IRWIN, THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY (U. of California Press 1985).

both legal and equitable relief, a judge may at least award injunctive relief where a jury awards little or no damages.

In *LaMarca*, the identity of the fact finder as either judge or jury ultimately determined the outcome of the damages claims for the named plaintiffs. Finding in part that the district court had improperly denied the defendant jury trials for the damages claims, the appellate court in 1993 ordered the district court to retry them.[245] In December of 1994, the district court conducted jury and nonjury trials for all ten plaintiffs. Because defendant Turner had knowingly waived his right to a jury trial as to the original three plaintiffs' claims, he was not entitled to a jury trial in those cases. In every case tried before the district court judge, the plaintiffs won damages. On May 5, 1995, the judge affirmed the damages award from the 1987 order for the original three plaintiffs: $50,000 for Martin Saunders, $40,000 for Edwin Johnson, and $25,000 for Anthony LaMarca.

But for the seven new plaintiffs added in the amended complaints, the defendant was entitled to a jury trial. In every case retried by juries, the juries awarded no money to the plaintiffs. Interestingly, they received no award even though Judge Paine had previously awarded four of the new plaintiffs $30,000 each, and a fifth plaintiff $6,500. In *LaMarca*, it is clear that trials in front of a jury were less likely to obtain relief than trials in front of a judge.[246]

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[245] 995 F.2d at 1544-47.

[246] To a certain extent, Judge Paine may have been unusually liberal. He was appointed by President Carter, and strongly advocates the legalization of drugs. Telephone interview with Judge Paine, *supra* note ___. And with the current presidential administration, the political composition of the judiciary has changed dramatically. But to the extent that judges are a kind of expert factfinder, they may be more willing to adhere to the law and facts than juries. FEIGENSON, *supra* note ____, at 5.

VI. Conclusion

The class action is a powerful weapon for prison litigators seeking to combat prison rape. In order to meet the difficult standard of deliberate indifference under the Eighth Amendment, plaintiffs lacking direct evidence of prison official knowledge of the risks of sexual assault can try to show that such risks were obvious by presenting evidence about prison conditions. In such cases, the class actions aids in the finding of liability: the class action orients counsel towards common issues that tend to show an atmosphere of tolerated violence; intra-class communication can help build up the case factually; and the large scale of the class action motivates plaintiffs' counsel to invest more work into the case. Through use of the class action in *LaMarca v. Turner*, plaintiffs' counsel successfully presented evidence through inmates and expert witnesses that painted a "dark picture of life at GCI" which would be "apparent to any knowledgeable observer." Magistrate Nimkoff found that "due to its very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI."[247] In an area of litigation where the defendants benefit from systemic biases – here, a nearly insurmountable legal standard and vast resources, the class action helps plaintiffs level the playing field.

Second, the class action allows plaintiffs to seek class-wide injunctive relief that redresses the very sources of unconstitutional risk for sexual assault, like inadequate staffing or overcrowding. The class action facilitates the award of injunctive relief by helping plaintiffs fulfill the standing requirement to seek class-wide relief. Such relief

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[247] 662 F.Supp. 647, 687.

not only helps plaintiffs who have been injured, but those members of the class who face an unconstitutional risk of being sexually assaulted. *LaMarca v. Turner* reveals that even the pressure of a class action lawsuit, through publicity and the mere threat of injunctive relief, can motivate defendants to make broad and swift preemptive changes.

Third, the class action enables plaintiffs to avoid unsympathetic juries, at least where they seek injunctive relief. This principle was strongly evident in *LaMarca*, in which the identity of the factfinder was crucial to the outcome of the damages awards: where the judge tried the case, the plaintiff won an award, but where the jury tried the case, the plaintiff received no award. Thus, prison litigators should consider coordinating with each other to bring class actions to combat the urgent issue of sexual assault in prison.