# NOTE

# *WILSON V. SEITER*: DEFINING THE COMPONENTS OF AND PROPOSING A DIRECTION FOR EIGHTH AMENDMENT PRISON CONDITION LAW

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## INTRODUCTION

There are more prisoners in the United States today than at any time in our nation's history.[1] Since 1980, the number of persons imprisoned in federal and state correctional facilities has more than doubled.[2] Additionally, the percentage of the nation's residents incarcerated for more than one year is currently at an all-time high.[3] It is not surprising, therefore, that prisons across the country are overcrowded[4]—overcrowded to the point of creating conditions

1. The combined federal and state prison population reached a record high of 771,243 at the end of 1990. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1990 1 (1991) [hereinafter PRISONERS IN 1990]. The federal and state prisons added 58,686 inmates in 1990, up 8.2% from 1989. *Id.*

2. The total number of prisoners in state and federal institutions rose from 329,821 in 1980 to 771,243 in 1990, an increase of nearly 134% in the ten-year period. *Id.* The population in federal prisons alone nearly doubled from October 1980 to May 1989, growing from 24,162 to 48,017 inmates. UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS, PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYSTEMS 9 (1989) [hereinafter GAO, PRISON CROWDING]. This sharp increase is even more startling when compared to the fact that from 1950 to 1980 the federal prison population grew by less than 40%. *Id.*

3. The number of sentenced prisoners—meaning sentences of more than one year—per 100,000 residents was 293 at the 1990 year-end, a record-high rate of incarceration. PRISONERS IN 1990, *supra* note 1, at 2. In 1980, the rate of incarceration was 139 sentenced prisoners per 100,000 residents. *Id.* Thus, the rate of incarceration has increased 111% since 1980. *Id.*

4. At the end of 1990, prisons nationwide were estimated to be operating from 18% to 29% over capacity. *Id.* at 6. In Massachusetts, the state prisons were operating at 173% of their capacity at the end of March 1991, prompting state officials to consider using a ship as a floating prison to house 600-800 inmates. *State Considering Building Prison Ship*, WASH. TIMES, Sept. 20, 1991, at A6.

that violate the cruel and unusual punishment clause of the Eighth Amendment.[5] Indeed, as of January 1, 1992, sixty-six percent of the nation's jurisdictions had their entire prison systems or major institutions therein under court order or consent decree to alleviate overcrowded prison conditions.[6]

The growth in the prison population can be attributed in part to the nationwide crackdown on crime that occurred in the 1970s and 1980s.[7] This crackdown has been highlighted by congressional and state increases in mandatory sentencing guidelines[8] and Supreme

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5. U.S. CONST. amend. VIII. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

6. The court orders or consent decrees apply to major institutions in 24 out of 53 jurisdictions (50 states plus the District of Columbia, Puerto Rico, and the Virgin Islands) in the United States. THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, STATUS REPORT: STATE PRISONS AND THE COURTS (JANUARY 1, 1992). These jurisdictions are Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Utah, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia. *Id.* Additionally, 11 out of 53 jurisdictions had their entire prison systems under court order or consent decree as of January 1, 1992. *Id.* These jurisdictions are Alaska, Delaware, Florida, Mississippi, New Mexico, Rhode Island, South Carolina, Tennessee, Texas, Puerto Rico, and the Virgin Islands. *Id.* Thus, as of January 1, 1992, 35 out of 53 jurisdictions (66%) were affected by court order or consent decree to alleviate overcrowded prison conditions. *Id.*

7. In a 1990 publication, the Bureau of Justice Statistics reported that "[t]here is some evidence that during the period 1980-89 changes in criminal justice policies have increased a criminal's probability of being incarcerated from levels existing in prior years." PRISONERS IN 1990, *supra* note 1, at 7. The Bureau supported this proposition by tracking the number of prison commitments resulting from reports of crimes from 1970 to the present. The serious crimes of murder, nonnegligent manslaughter, rape, robbery, aggravated assault, and burglary accounted for approximately one-half of prison commitments from courts. *Id.* In 1970, 23 prison commitments resulted per 1000 of these crimes reported to law enforcement agencies. *Id.* In 1980, this number increased to 25 commitments per 1000 reported serious crimes, and by 1989, the number had soared to 62 commitments per 1000 reported serious crimes, an increase of 148% since 1980. *Id.* Likewise, in 1970, 170 prison commitments resulted for every 1000 adults arrested for the above-listed crimes. *Id.* In 1980, this number increased to 196 prison commitments per 1000 adult arrests for serious crimes. *Id.* By 1989, the number had soared to 332 commitments per 1000 adult arrests for serious crimes, an increase of nearly 70% since 1980. *Id.*; *see also* GAO, PRISON CROWDING, *supra* note 2, at 3 (1989) ("Reasons for the growth in prison population include the trend toward mandatory prison sentences for more criminals, longer prison sentences, and more arrests for drug law violations.").

8. *See* The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3580 (1991)) (creating and charging United States Sentencing Commission with development of federal sentencing guidelines, requiring federal courts to adhere to promulgated guidelines, and abolishing parole for those convicted after guidelines become effective); UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1991) (establishing minimum mandatory sentences for variety of federal offenses). State legislatures were also active in this period enacting mandatory prison sentencing laws. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 71 (1983) (noting that between 1975 and 1982 more than 35 states enacted statutes requiring minimum terms of incarceration for specific crimes). A number of commentators have argued that the mandatory federal sentencing guidelines have contributed to the prison overcrowding problem. *See* Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1147 (1989) (observing that primary source of prison population increase during late 1970s and early 1980s was dramatic change in criminal justice policies that

Court decisions granting those in the criminal justice system greater freedom to investigate and convict criminals.[9] The crackdown on crime in the last two decades translates into the growth of prison populations in the 1990s and beyond.[10] With this growth, the problems of poor prison conditions caused by overcrowding are poised for further aggravation, and the personal safety and health of prison inmates are at risk.

In *Wilson v. Seiter*,[11] the Supreme Court added an interesting twist to this troublesome situation. The Court held that to challenge successfully poor prison conditions under the Eighth Amendment, two requirements must be met. First, the conditions must deprive an inmate of an "identifiable human need,"[12] and second, the officials responsible for the conditions must be "deliberately indifferent" to the inmate's needs.[13] Thus the proper analysis of Eighth Amendment challenges to prison conditions under *Wilson* involves an objective and a subjective component: the conditions must be objectively severe, and the officials responsible for the conditions must be subjectively culpable.

With this formulation, the Court articulated for the first time a state-of-mind requirement for establishing that prison conditions violate the Eighth Amendment. It is no longer enough for a prisoner to demonstrate that he is confined in squalor. He must prove the squalor to be the product of a "deliberately indifferent" official.

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mandated incarceration for various offenses and imposed lengthy sentences for various federal offenses); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 444 (1991) (concluding that guidelines have exacerbated prison overcrowding); Charles J. Ogletree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1954-55 (1988) (asserting that Sentencing Commission was aware guidelines would increase prison population but failed to propose solution to problem).

9. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 164 (1986) (finding that confession must be obtained by coercive police activity to be involuntary and thus violate due process of law); United States v. Leon, 468 U.S. 897, 922-23 (1984) (limiting exclusionary rule by creating good faith exception); Illinois v. Gates, 462 U.S. 213, 238 (1983) (abandoning two-pronged *Aguilar* and *Spinelli* test and holding that probable cause for Fourth Amendment search and seizures may be based on totality of circumstances).

10. The expansion plans of the Bureau of Prisons are to operate in 1995 at 30% over capacity for an estimated 83,500 federal prisoners. GAO, PRISON CROWDING, *supra* note 2, at 15-17. Revised planning figures have estimated the federal prison population in 1995 to be 95,000. *Id.* at 17. If expansion of facilities is not planned to meet this higher estimate, the federal prisons will be operating at 48% over capacity in 1995. *Id.* The United States Sentencing Commission estimates that the federal prison population will be between 116,000 and 147,000 inmates by the year 2002. *Id.* at 15.

11. 111 S. Ct. 2321 (1991).

12. Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991); *see infra* text accompanying notes 125-31 (discussing Court's reasoning in holding that prisoners must prove under Eighth Amendment that they have been deprived of identifiable human need).

13. *Wilson*, 111 S. Ct. at 2327; *see infra* text accompanying notes 93-121 (discussing Court's derivation of state-of-mind requirement and deliberate indifference standard).

Furthermore, the Court restricted the objective component of Eighth Amendment challenges by holding that conditions are unconstitutionally severe only when they deprive an inmate of an identifiable human need. It is no longer enough that overall prison conditions are harsh.[14] The conditions must now be shown to deprive an inmate of a need such as food, warmth, or exercise.[15]

These new requirements create a volatile situation. At the same time that large prison populations and elevated rates of incarceration are exacerbating prison conditions around the nation,[16] the Supreme Court has made it more difficult for inmates to challenge successfully poor prison conditions on Eighth Amendment grounds.[17] This combination of events places the basic human

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14. *See infra* notes 62-79 and accompanying text (discussing different tests courts have applied to evaluate severity of conditions).

15. *Wilson*, 111 S. Ct. at 2327. It should be noted that state prisoners may seek relief from poor prison conditions under state law. Possibilities for such relief include habeas corpus actions, constitutional claims, tort actions, actions for injunctive relief, and actions for declaratory judgments. *See* HAZEL B. KERPER & JANEEN KERPER, LEGAL RIGHTS OF THE CONVICTED 321-45 (1974) (listing and discussing mechanics of prisoners' suits under state law); *see also* Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1275-88 (1985) (discussing possible actions for violations of state constitutional rights); SHELDON KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS 563-76 (3d ed. 1986) (summarizing possible state remedies for prisoners). Massachusetts has a civil rights law that provides relief similar to that of 42 U.S.C. § 1983 under federal law. MASS. GEN. LAWS ANN. ch. 12, §§ 11-H to -I (West 1991); *see* Friesen, *supra*, at 1285-87 (discussing applications of Massachusetts statute); *see also infra* note 81 (providing explanation of 42 U.S.C. § 1983). Obtaining effective relief under state law, however, is problematic. For instance, when prisoners challenge harsh prison conditions under state habeas corpus laws, courts may deny relief for reasons including that the writ only provides for an inmate's total release or that the writ requires an inmate to exhaust all other remedies. *See* KERPER & KERPER, *supra*, at 322 (explaining that prisoners seeking relief for prison conditions under state habeas corpus laws will likely find: (1) writ will be denied because of total release doctrine; (2) writ will be denied because of hands-off doctrine; (3) writ will be denied because of exhaustion of remedies requirement; (4) writ will be considered if prisoner alleges facts showing conditions amount to cruel and unusual punishment; or, (5) writ will be allowed to challenge any administrative decision that is uncontrolled and arbitrary).

Other problems arise when prisoners seek damages under state tort or constitutional law for injuries caused by harsh prison conditions. Recovery may be barred in these suits due to the doctrine of sovereign immunity, the doctrine of judicial immunity, the doctrine of respondeat superior, or various other state-imposed obstacles. *See* KERPER & KERPER, *supra*, at 321-45 (discussing application of doctrines barring recovery of damages); *see also* Friesen, *supra*, at 1276 (finding that recovering damages under state constitutional law may be frustrated by obstacles such as sovereign immunity for defendant governmental entity, shields against official liability found in state statutory or common law doctrines, possible common law defenses for public employees based on "good faith" and "reasonableness," the availability of alternative remedies, general unavailability of attorneys' fees, notice provisions in state tort claims acts, strict damages limitations, and denial of punitive damages and jury trials).

16. *See supra* notes 1-10 and accompanying text (discussing problems of prison overcrowding and rates of incarceration).

17. The difficulty arises from the fact that the Court in *Wilson* added a previously unarticulated burden on prisoners to prove the culpability of prison officials in Eighth Amendment challenges to confinement conditions, i.e., the state-of-mind requirement. *See infra* notes 95-109 and accompanying text (discussing Court's derivation of state-of-mind requirement and deliberate indifference standard). In addition to limiting prisoners' Eighth Amendment protection to cases when prison officials are mentally culpable, the Supreme Court has also lim-

needs of prisoners in jeopardy and adds another source of aggravation to the problems facing the nation's prisons. Moreover, the conflicting policies of incarcerating more individuals and restricting prisoners' Eighth Amendment protection could result in an increase of prison riots and other violent means of reform instigated by inmates.[18]

The Court's decision in *Wilson v. Seiter*, however, does not necessarily spell such doom. There is sufficient flexibility in the terms "deliberate indifference" and "identifiable human need" for lower courts to avoid compounding problems created by the conflicting policies.[19] This Note focuses on these two terms and on other ambiguities in the decision, and recommends that courts interpret *Wilson* in a light most favorable to prisoners. If this is done, the safety of prisoners and their right to be free from cruel and unusual punishment will be preserved during the present prison dilemma and for times to come.

Part I of this Note traces the origin of the Eighth Amendment's state-of-mind requirement. Part I also identifies the development of the Eighth Amendment's objective standard in confinement condition cases. Part II presents the facts of *Wilson v. Seiter*, and discusses the holding and reasoning of the Supreme Court. Part III analyzes the impact of *Wilson* by providing possible interpretations for the ambiguities in the decision. The Note concludes in Part IV with a recommendation that courts apply interpretations that construe am-

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ited the protection afforded to prisoners under the Due Process Clause of the Fifth and Fourteenth Amendments. Prior to 1986, a prisoner deprived of property through the negligence of state officials could make out a successful claim under the Due Process Clause of the Fourteenth Amendment. *See* Parratt v. Taylor, 451 U.S. 527, 536-37 (1981) (finding that Due Process Clause may be implicated by negligent conduct of prison officials). This point of law, however, was overturned in Daniels v. Williams, 474 U.S. 327 (1986) and its companion case of Davidson v. Cannon, 474 U.S. 344 (1986). In *Daniels*, a prisoner claimed that he had been deprived of liberty without due process of law when he was injured by slipping on a pillow negligently left on the stairs by a correctional facility deputy. *Daniels*, 474 U.S. at 328. Striking its finding in *Parratt*, the Court rejected the prisoner's claim and held that a lack of due care was not enough to implicate the Due Process Clause of the Fourteenth Amendment. *Id.* at 330-31. The Court found that there must be more than a negligent act causing unintended loss or injury to life, liberty, or property to implicate the Due Process Clause. *Id.* at 328. Therefore, by adding a similar state-of-mind requirement for Due Process claims, the Supreme Court effectively foreclosed the availability of the Due Process Clause as a viable alternative to the Eighth Amendment in prison conditions cases. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986) (asserting that in context of officers injuring prisoners with forceful security measures during prison riot, Due Process Clause affords no greater protection than Eighth Amendment).

18. *See* William C. Collins, *The Defense Perspective on Prison-Conditions Cases*, *in* 1 PRISONERS AND THE LAW 7-3, at 7-7 (Ira P. Robbins ed., 1990) ("[O]ne potential effect of reduced court intervention may be to return to those unfortunate days when prison reform occurred only as the intermittent result of prison riots and other institutional scandals.").

19. *See infra* Parts III(A)(1) and III(C) (discussing possible interpretations of terms).

biguities in favor of prisoners, so as to mitigate the adverse impact of *Wilson v. Seiter*.

## I. BACKGROUND

Challenging prison conditions in federal courts is a relatively recent development, having its beginnings in the mid-1960s.[20] Prior to the 1960s, federal courts took a "hands-off" approach when dealing with prison issues.[21] With the departure from this approach came dramatic growth in the number of cases brought by prisoners alleging constitutional violations.[22] Courts abandoned their reluctance to become involved and took an active role in reforming prisons.[23]

In 1978, the Supreme Court in *Hutto v. Finney*[24] joined the lower courts in condemning unconstitutional prison conditions by uphold-

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20. Prisoners gained substantial access to the federal courts in the 1960s through the decisions of the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), and Robinson v. California, 370 U.S. 660 (1962). In *Monroe*, the Court expanded the availability of section 1983 claims to claims against officials acting under color of state law who violate the constitutional rights of individuals. *Monroe*, 365 U.S. at 183-84. In *Robinson*, the Court extended the applicability of the Eighth Amendment to the states. *Robinson*, 370 U.S. at 666-67; *see also* David J. Gottlieb, *The Legacy of* Wolfish *and* Chapman*: Some Thoughts About "Big Prison Case" Litigation in the 1980s, in* 1 PRISONERS AND THE LAW 2-3, at 2-5 (Ira P. Robbins ed., 1990) (discussing Supreme Court's revival of Civil Rights Act, beginning in Monroe v. Pape, 365 U.S. 167 (1961) and use of Act to encompass abuse of state-delegated authority within federal court jurisdiction under 42 U.S.C. § 1983); James Rosenzweig, *State Prison Conditions and the Eighth Amendment: What Standard for Reform Under Section 1983?*, 1987 U. CHI. LEGAL F. 411, 428 (1987) ("Prison reform suits are a modern phenomenon . . . .").

21. *See, e.g.*, United States *ex rel.* Knight v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) (noting that state penitentiary issues are sole concern of state and would only be addressed by federal courts under exceptional circumstances), *cert. denied*, 380 U.S. 985 (1965); Kirby v. Thomas, 336 F.2d 462, 464 (6th Cir. 1964) (finding that federal courts do not have authority to regulate ordinary internal management and discipline of prisons); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.) (stating that it is well settled that courts' function is not to superintend treatment and discipline of prisoners in penitentiaries), *cert. denied*, 342 U.S. 829 (1951); *see also* Gottlieb, *supra* note 20, at 2-4 (noting that reasons for "hands-off" doctrine include theory that prisoners are slaves of state, demands of federalism, separation of powers, lack of judicial expertise in prison affairs, potential for flood of litigation, and need to conserve state financial reserves).

22. *See* Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON U. L. REV. 1, 6 (1988) (remarking that in 1966, 218 cases were filed by prisoners alleging constitutional violations; in 1982, the number of cases filed by prisoners had increased to over 16,000).

23. Federal courts took an active role in reforming prisons by placing the prisons under court order or consent decrees to improve the conditions of confinement. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977) (upholding district court's order for prison officials to improve inmate safety and medical care); Gates v. Collier, 501 F.2d 1291, 1322 (5th Cir. 1974) (approving district court's order to reform prison); Johnson v. Levine, 588 F.2d 1378, 1380-81 (4th Cir. 1978) (affirming district court's order for prison officials to alleviate overcrowding and move mentally disturbed inmates from their confinement area until it could be improved); *see also* Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring) (observing that courts "have emerged as a critical force behind efforts to ameliorate inhumane conditions").

24. 437 U.S. 678 (1978).

ing a district court's order to reform a prison.[25] In so doing, the Court confirmed that confinement itself is a form of punishment subject to the provisions of the Eighth Amendment.[26] The Court, however, failed to articulate a standard for determining when confinement conditions violate the Eighth Amendment. It was unnecessary to do so in *Hutto* because the prison officials did not challenge the district court's finding that the conditions constituted cruel and unusual punishment.[27]

It was not until 1981, in *Rhodes v. Chapman*,[28] that the Supreme Court considered the disputed contention that conditions at a prison, particularly double celling, constituted cruel and unusual punishment.[29] Although the Court did not find a violation of the Eighth Amendment,[30] it did conclude that prison conditions, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities, and thus violate the Eighth Amendment's ban on cruel and unusual punishment.[31] Though affirming the applicability of the Eighth Amendment to confinement conditions challenges, the Court's broad language provided little gui-

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25. Hutto v. Finney, 437 U.S. 678, 688 (1978) (upholding district court's 30-day limit on sentences of punitive isolation). In *Hutto*, the district court described the prison in question as a "dark and evil world completely alien to the free world." *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)). The administrators of the institution housed the prisoners together in 100-man barracks. *Id.* at 681 n.3. At night, some convicts, known as "creepers," would slip from their beds and crawl along the floor to stalk their victims. *Id.* In one 18-month period, there were 16 stabbings in the barracks. *Id.* Homosexual rape was so common that some inmates would spend the night clinging to the bars nearest the guard stations. *Id.* As for punitive isolation, an average of four inmates at a time were housed for an indeterminate length of time in an eight-by-ten-foot cell with no windows. *Id.* at 682. There was no furniture in the cell other than a source of water and a toilet which could only be flushed from outside the cell. *Id.*

26. *Id.* at 685.

27. *See id.* (recognizing that prison officials did not disagree with district court's conclusion that conditions at prison constituted cruel and unusual punishment).

28. 452 U.S. 337 (1981).

29. Rhodes v. Chapman, 452 U.S. 337, 339-40 (1981) (setting forth prisoners' claim that housing two inmates in cells intended for one person, known as "double celling," constituted cruel and unusual punishment). The prisoners' claim was that each cell was only 63 square feet in area, and that double celling exacerbated problems of overcrowding and close confinement. *Id.* at 341, 343. The correctional facility disputed the Eighth Amendment claims by stating that double celling had not deprived inmates of basic necessities; violence in the facility had not increased due to double celling, and availability of resources to inmates had not significantly decreased as a result of the practice. *Id.* at 342.

30. *See id.* at 352 (concluding that conditions at prison were not cruel and unusual). The Court noted that the practice of double celling was not per se a violation of the Eighth Amendment. *See id.* at 348-49 (rejecting district court's finding of constitutional violation and maintaining that at most double celling inflicted pain, but Constitution does not mandate that prisoners be free of discomfort).

31. *See id.* at 347 (stating that conditions amount to cruel and unusual punishment when they result in "unquestioned and serious deprivations of human needs"). Prison conditions that are merely restrictive or harsh do not violate the Eighth Amendment, but are considered part of the punishment inflicted on those who are incarcerated as a result of their criminal actions. *Id.*

dance for the lower courts. The standard applied by the lower courts in prison condition cases, therefore, continued to vary.[32]

Over the past fifteen years, the Supreme Court has restricted the constitutional protection afforded to prisoners.[33] This has prompted commentators to ponder whether the "hands-off" doctrine has returned.[34] The Court has implemented this restriction utilizing two basic means. First, prison officials must be shown to possess a culpable state of mind with regard to the deprivations

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32. *See infra* note 79 and accompanying text (discussing confusion in lower courts after *Rhodes* and listing cases).

Throughout this Note, *Rhodes v. Chapman* is cited for three basic propositions. First, the decision, by neither affirming nor rejecting the totality of circumstances test, provided little guidance for lower courts in evaluating the objective severity of prison conditions. *See infra* notes 64-79 and accompanying text (examining different court applications of either core conditions or totality of circumstances test in determining Eighth Amendment violations in prison facilities). Second, the decision did not definitively adopt a state-of-mind requirement in Eighth Amendment prison condition cases. *See infra* notes 58-61 and accompanying text (commenting on Court's focus on seriousness of prison conditions as opposed to intent of prison officials). Third, the decision apparently considered prison conditions to be part of the penalty a criminal must pay. *See infra* note 57 and accompanying text (noting Court's recognition that, within limits, harsh conditions of prison facilities are part of punitive nature of incarceration).

33. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 320-21, 325-26 (1986) (rejecting prisoner's Eighth Amendment claim for injuries received from correctional officer during prison riot because inmate failed to prove officers acted "maliciously and sadistically for the very purpose of causing harm") (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)); Daniels v. Williams, 474 U.S. 327, 328 (1986) (rejecting inmate's claim on grounds that Due Process Clause is not implicated by mere negligence); Davidson v. Cannon, 474 U.S. 344, 348 (1986) (denying relief to inmate for injuries received on grounds that Due Process Clause is not implicated by mere negligence); Estelle v. Gamble, 429 U.S. 97, 104, 106-07 (1976) (applying deliberate indifference standard to prisoner's claim of deprived medical needs and rejecting relief for prisoner). *But see* Hudson v. McMillian, 112 S. Ct. 995, 1002 (1992) (reversing court of appeals decision that denied relief to prisoner because he suffered no "significant injury") (quoting Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990)).

One recurring theme in Supreme Court cases restricting constitutional protection for the incarcerated is that courts should defer to the judgment of state legislatures and prison officials. *See, e.g.*, Whitley v. Albers, 475 U.S. at 322 (noting that neither judge nor jury should freely substitute its judgment for considered choice of prison officials); Rhodes v. Chapman, 452 U.S. at 352 (commenting that courts delegate duty of dealing with prison discomfort to legislatures and prison administration); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (warning that many federal courts, in name of Constitution, have become "enmeshed in minutiae of prison operations"); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (noting that resolving prison problems "require[s] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government" and that "courts are ill-equipped to deal with the . . . problems of prison administration and reform"), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 407-14 (1989).

34. *See* Ira P. Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 219 (1980) (positing that Supreme Court decision in *Bell v. Wolfish* may signal return of hands-off doctrine); James E. Robertson, *When the Supreme Court Commands, Do the Lower Federal Courts Obey? The Impact of* Rhodes v. Chapman *on Correctional Litigation*, 7 HAMLINE L. REV. 79, 100 (1984) (characterizing Supreme Court's opinion in *Rhodes v. Chapman* as expressing new hands-off doctrine). *But see* Frank A. Kaufman, *Reflections of a Federal Judge*, *in* 1 PRISONERS AND THE LAW 1-3, at 1-8 (Ira P. Robbins ed., 1985) (considering developments in prison law and predicting "full hands-off approach of the past is unlikely to occur").

and/or injuries of prisoners,[35] and second, the challenged deprivations and/or injuries must meet a standard of sufficient seriousness to reach an unconstitutional level.[36] The history of these two limitations in Eighth Amendment cases is considered below.

### *A. The Mental Element in the Eighth Amendment*

Prior to *Wilson v. Seiter*, the Supreme Court applied a state-of-mind requirement for Eighth Amendment cases outside the context of challenges to confinement conditions. In *Estelle v. Gamble*,[37] the Supreme Court addressed the Eighth Amendment implications of depriving a prisoner of adequate medical care.[38] After considering the prison officials' obligation to meet the medical needs of prisoners,[39] the Court concluded that it was "deliberate indifference" to the serious medical needs of prisoners, not negligence, that rose to the level of cruel and unusual punishment.[40] The Court reasoned that the Eighth Amendment prohibited punishments that were incompatible with "the evolving standards of decency that mark the progress of a maturing society,"[41] or that involved "the unnecessary and wanton infliction of pain."[42] In the context of medical care, the Court found that only deliberate indifference to the prisoner's needs could offend such standards of decency.[43]

In a subsequent dictum, the Supreme Court interpreted the *Estelle*

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35. *See infra* notes 37-61 and accompanying text (examining development of state-of-mind requirement in Eighth Amendment cases); *see also supra* note 17 (discussing recent Supreme Court cases requiring more than mere negligence to implicate Due Process Clause of Fourteenth Amendment).

36. *See infra* notes 62-79 and accompanying text (comparing cases that address unconstitutional levels of prison deprivations and injuries).

37. 429 U.S. 97 (1976).

38. Estelle v. Gamble, 429 U.S. 97, 100-01 (1976). The respondent, Gamble, alleged that the petitioners had subjected him to cruel and unusual punishment by improperly treating his injured back. *Id.*

39. *See id.* at 103 (finding that denial of medical care inflicts unnecessary suffering that is "inconsistent with contemporary standards of decency"). To determine what constituted "contemporary standards of decency," the Court surveyed modern legislation proscribing the unnecessary suffering of prisoners. *See id.* at 103 n.8 (providing list of state statutes as well as model legislation and proposed minimum standards regarding health care of prisoners).

40. *Id.* at 104.

41. *Id.* at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

42. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) and Palko v. Connecticut, 302 U.S. 319, 323 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969)). By finding that the Eighth Amendment is violated by the unnecessary and wanton infliction of pain *or* by punishment that is incompatible with evolving standards of decency, the Court suggested that the Eighth Amendment may be violated by reaching either threshold independently. *Id.* The second threshold, a finding of incompatibility with evolving standards of decency, does not have a state-of-mind requirement. *Id.* Thus it appears that *Estelle v. Gamble* cannot be cited for the proposition that the Eighth Amendment has an absolute state-of-mind requirement for cruel and unusual punishment determinations.

43. *Id.* at 106.

*v. Gamble* decision to mean that after incarceration, only the unnecessary and wanton infliction of pain would implicate the Eighth Amendment.[44] This dictum proved to carry considerable weight because, in 1986, the Court relied on it in *Whitley v. Albers*[45] to conclude broadly that *any* conduct not purporting to be punishment must involve more than ordinary lack of due care for the prisoner's treatment to constitute cruel and unusual punishment.[46] Furthermore, the Court found that not only is there a general requirement for an Eighth Amendment claimant to allege and prove unnecessary and wanton infliction of pain, but also that the requirement should be applied with due regard for differences in the challenged conduct.[47] The meaning of "unnecessary and wanton," according to

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44. *See* Ingraham v. Wright, 430 U.S. 651, 670 (1977) ("After incarceration, only the 'unnecessary and wanton infliction of pain,' constitutes cruel and unusual punishment forbidden by the Eighth Amendment." (citations omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976))). *Ingraham* considered whether corporal punishment administered at a public school constituted cruel and unusual punishment. *Id.* at 653. In *Ingraham*, the Court extended the holding of *Estelle* in two ways. First, it set forth the proposition that post-incarceration Eighth Amendment challenges required a showing of prison official wantonness, thus apparently abandoning *Estelle*'s other independent threshold that punishment incompatible with evolving standards of decency would violate the Eighth Amendment. Second, the interpretation extended *Estelle* to Eighth Amendment challenges beyond those of inadequate medical care. To conclude that only wanton conduct violated the Eighth Amendment, the Court in *Ingraham*, and later in Whitley v. Albers, 475 U.S. 312 (1986), made a negative inference from prior case law. *See infra* notes 46-51 and accompanying text (discussing *Whitley v. Albers*). The Supreme Court had not previously stated in any of its opinions that all conduct must be wanton to constitute cruel and unusual punishment. It had merely asserted that the Eighth Amendment prohibited the wanton infliction of pain. *See* Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (finding punishment that involves unnecessary and wanton infliction of pain repugnant to Eighth Amendment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (asserting that prohibition of wanton infliction of pain developed in American law from Bill of Rights of 1688).

In *Estelle v. Gamble*, the Supreme Court purported to find support for an Eighth Amendment state-of-mind requirement in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947). In *Resweber*, the petitioner alleged that it was cruel and unusual punishment for government officials to subject him to a second electrocution after a malfunctioning electric chair disrupted the first electrocution attempt. *Id.* at 460, 464. The Court held that there was no violation of the Eighth Amendment because the initial failure was "an unforeseeable accident" and there was no "purpose to inflict unnecessary pain nor any unnecessary pain" involved in the proposed execution. *Id.* at 464. Using this case to support an Eighth Amendment state-of-mind requirement, however, is problematic. Although "purpose to inflict unnecessary pain" suggests an intent requirement, the second part of the quotation, "nor any unnecessary pain," suggests that unnecessary pain without regard to the state of mind of the inflictor would be sufficient to constitute cruel and unusual punishment. *See* Brief for the United States as Amicus Curiae at 16-17, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376) [hereinafter Brief for the United States as Amicus Curiae] (arguing that second portion of quotation suggests truly "unnecessary" pain would be unconstitutional even if accidental). Furthermore, because the challenged action was an "unforeseeable accident," it is unclear whether simple negligence would have invoked the protection of the Eighth Amendment in this instance.

45. 475 U.S. 312 (1986).

46. Whitley v. Albers, 475 U.S. 312, 319 (1986) (following Ingraham v. Wright, 430 U.S. 651, 670 (1977)).

47. *Id.* at 320. For example, the Court commented that the deliberate indifference standard of *Estelle v. Gamble* would not adequately take into account the competing obligations of

the Court, depended on the type of conduct challenged.[48]

The challenged conduct in *Whitley* was a correctional officer's shooting of an inmate in the leg during an attempt to quell a prison riot.[49] The Court reasoned that in light of the disciplinary constraints on officials in circumstances such as these, a higher threshold than the deliberate indifference standard should apply.[50] The Court concluded, therefore, that in cases of prison officials injuring inmates while attempting to suppress prison disturbances, "unnecessary and wanton" infliction of pain means force applied "maliciously and sadistically for the very purpose of causing harm."[51] The conduct of officers would violate the Eighth Amendment in the prison riot setting only by meeting this high standard.[52]

Yet, a pressing issue remained: If inmate challenges to the post-incarceration conduct of prison officials required a showing of wantonness under the Eighth Amendment, should substandard confinement conditions be considered a product of prison official "conduct not purporting to be punishment," or part of the sentenced punishment levied by judge or statute? The distinction is essential. If confinement conditions are part of the sentence, then there is no need to inquire into the state of mind of the inflictor because a sentence is intentionally imposed and, by definition, inflicts punishment.[53] If, however, the conditions are established by conduct not purporting

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officials attempting to control prison disturbances. *Id.*; *see supra* notes 37-43 and accompanying text (explaining findings of *Estelle*).

48. *See Whitley*, 475 U.S. at 320-21 (finding that meaning of wantonness should be determined considering competing obligations of prison officials). The Court in *Whitley* effectively placed the meaning of "unnecessary and wanton" on a shifting scale between negligence and malicious intent. The more the interests and obligations of acting prison officials outweigh the harm to the prisoners, the closer the meaning of "unnecessary and wanton" moves toward malicious intent.

49. *Id.* at 314.

50. *See id.* at 320 (expressing Court's recognition that deliberate indifference standard applied previously in Eighth Amendment cases was inadequate when dealing with prison officials' reactions to prison riots). The Court argued that prison disturbances require officials to consider competing institutional concerns for the safety of prison staff and visitors, as well as for the inmates themselves. *Id.* In the prison riot setting, officials must meet safety concerns "in haste, under pressure, and . . . without the luxury of a second chance." *Id.* Considering this, the Court found that a higher standard than deliberate indifference was justified for Eighth Amendment challenges to excessive force administered during prison riots.

51. *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

52. Since handing down its decision in *Wilson*, the Supreme Court has extended the *Whitley* standard to apply in all Eighth Amendment challenges alleging that prison officials' used excessive force, not merely excessive force in the prison riot setting. *See* Hudson v. McMillian, 112 S. Ct. 995, 999 (1992) (stating that extension of *Whitley* standard to all excessive force allegations "works no innovation").

53. A "sentence" is defined as "[t]he judgment formally pronounced by the court or judge upon the defendant after his [or her] conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation." BLACK'S LAW DICTIONARY 1362 (6th ed. 1990).

to be punishment, then inmates must show some degree of intent on the part of the responsible officials before the conduct can be considered punishment and therefore brought within the purview of the Eighth Amendment.[54]

The Court in *Whitley* suggested that post-incarceration conduct rather than sentenced punishment creates poor confinement conditions, and that Eighth Amendment challenges to those conditions require a showing of wantonness akin to that of Eighth Amendment challenges brought on grounds of inadequate medical care and excessive use of force by prison officials during prison riots.[55] Yet four years earlier, with the same Supreme Court precedent available, the Court in *Rhodes v. Chapman*[56] failed to go so far. In *Rhodes*, confinement conditions were deemed to be part of the penalty that criminal offenders must pay and were not considered merely the product of prison officials' post-incarceration conduct.[57]

In addressing the inmates' Eighth Amendment challenge to confinement conditions at the prison, the Court in *Rhodes* focused on prison condition severity rather than on the culpability or state of

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54. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court confronted the issue of whether poor confinement conditions at a pre-trial detention facility violated the Constitution. *Id.* at 527. The Court considered the petitioners' allegations under the Due Process Clause rather than the Eighth Amendment because the Eighth Amendment applies only after criminal prosecution. *See id.* at 535 n.16 (" 'Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' " (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977))). The Court found that the Due Process Clause is violated if the pre-trial detainees are punished prior to conviction. *Id.* at 535. To determine if conditions at a particular facility constitute punishment, the Court held that judges must decide if conditions are imposed for the purpose of punishment or are merely incident to some other legitimate governmental purpose. *Id.* at 538. The Court declined to restrict "legitimate governmental purpose" to include only the ensuring of detainees' presence at trial via pre-trial detention. *Id.* at 540. Instead, the Court noted that effective management of a detention facility would dispel any inference of intent to punish. *Id.* The Court thus considered confinement conditions to be the product of the detention officials' conduct. The conditions could not become "punishment" without actual or inferred punitive intent. *Wolfish*, however, cannot stand for the sweeping proposition that all challenges to confinement conditions under the Eighth Amendment require a showing of a prison official's punitive intent. Unlike pre-trial detention situations, Eighth Amendment cases contain underlying sentences of incarceration that arguably include conditions of confinement as part of punishment. The Court in *Wolfish* only addressed unconstitutional punishment at the pre-trial stage, and therefore left open the issue of whether post-trial prison conditions are part of the formal sentence or are the product of prison officials' post-incarceration conduct not purporting to be punishment.

55. Justice O'Connor wrote for the majority, "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Whitley*, 475 U.S. at 319.

56. 452 U.S. 337 (1981).

57. *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("To the extent that such [confinement] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

mind of prison officials.[58] Although the Court did note that prison conditions must not involve the unnecessary and wanton infliction of pain,[59] it did not clearly make such a finding an Eighth Amendment requirement.[60] Instead, the Court decided to address Eighth Amendment claims by considering objective factors to the maximum extent.[61] Therefore, with the findings of the Court in *Rhodes* and *Whitley* appearing to be at odds, the issue of whether a state-of-mind inquiry was required for Eighth Amendment challenges to confinement conditions remained to be resolved.

### *B. Deprivations and Injuries Prohibited by the Eighth Amendment*

Because traditional Eighth Amendment standards were predicated on evaluating specific sanctions rather than condition-related deprivations and injuries, courts had to develop a standard by which to evaluate the constitutionality of prison conditions.[62] As prison case law developed, a number of tests emerged to assist courts in making such an assessment.[63]

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58. The Court was concerned with whether the degree of pain or discomfort caused by double celling in and of itself constituted cruel and unusual punishment. *Id.* at 348-49. The Court concluded that the practice did not reach that level of cruel and unusual punishment. *Id.*; *see also* Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (noting that Court in *Rhodes* considered only seriousness of deprivation and not state of mind of prison officials).

59. *Rhodes*, 452 U.S. at 347.

60. Curiously, the Court stated that the conditions at the prison fell short of being cruel and unusual because they did not inflict "unnecessary *or* wanton pain." *Id.* at 348 (emphasis added). In so doing, the Court suggested that unnecessary pain, regardless of the state of mind of the prison officials, would violate the Eighth Amendment. Some commentators, however, have argued that *Rhodes* did articulate a state-of-mind requirement for Eighth Amendment challenges to confinement conditions. *See* Gottlieb, *supra* note 20, at 2-16 (noting that by mentioning grossly-disproportionate-to-offense and wanton-infliction-of-pain standard, Court in *Rhodes* made mistake of trying to fit square peg of intent-based standards into round hole of inadequate prison conditions); Rosenzweig, *supra* note 20, at 418 (finding Court in *Rhodes* apparently extended state-of-mind requirement to prison condition cases because majority used "wanton" to modify "infliction of pain" and approved of "contemporary standard of decency" language proposed in *Estelle v. Gamble*). *But see* Wilson v. Seiter, 111 S. Ct. 2321, 2329-30 (1991) (White, J., concurring) (stating that *Rhodes* makes it "crystal clear" that Eighth Amendment challenges to confinement conditions only examine objective severity, not subjective intent of government officials).

61. *Rhodes*, 452 U.S. 337, 346 (1981) (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980) (citing Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion))).

62. *See* Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Lock *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 900-06 (1977) (positing that doctrinal understandings of cruel and unusual punishment as punishment that "shocks the conscience," punishment that is disproportionate to offense committed, and punishment that is in excess of legitimate penal aim are problematic when applied in Eighth Amendment challenges to prison conditions). Additionally, broad Supreme Court language such as "[the Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), failed to clearly direct courts in their evaluations of the constitutionality of prison conditions.

63. *See infra* notes 64-75 and accompanying text (discussing different tests applied by courts).

Over the years, courts most often applied the "totality of circumstances" test.[64] This test required courts to assess the aggregate impact of all the prison conditions in determining whether the conditions threatened the mental or physical well-being of the inmates.[65] The test did not require that courts base their findings of cruel and unusual punishment on one particularly egregious condition or deprivation; rather, the test required courts to consider conditions as a whole.[66]

The Ninth Circuit applied the "core conditions" test.[67] This test operated as a totality of circumstances test with a narrower focus. The premise of the test was that a select group of conditions—adequate food, clothing, shelter, sanitation, medical care, and personal safety—represented the core concerns of Eighth Amendment protection.[68] The Eighth Amendment was violated under this test

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64. *See, e.g.*, French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (concluding that lack of space and furnishings, unwholesome food, medical neglect, and threats to prisoner safety combined to constitute cruel and unusual punishment), *cert. denied*, 479 U.S. 817 (1986); Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980) (finding courts must look to totality of circumstances to determine extent of mental and physical effects of prison conditions on inmates); Battle v. Anderson, 564 F.2d 388, 400 (10th Cir. 1977) (upholding district court's finding that overcrowding, when considered in tandem with other circumstances at prison, constitutes cruel and unusual punishment); Gates v. Collier, 501 F.2d 1291, 1300-01 (5th Cir. 1974) (finding Eighth Amendment prohibition against cruel and unusual punishment is not limited to specific acts of individuals, but also applies to general conditions of confinement); Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970) (noting that aspects of prison life must be considered together and that all conditions in combination have cumulative impact), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The totality of circumstances test is also referred to as the "totality of conditions" test. *See* Peterkin v. Jeffes, 855 F.2d 1021, 1022 (3d Cir. 1988) (applying "totality of conditions" test); Maydun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981) (referring to Seventh Circuit's test as "totality of conditions of confinement").

65. *See* Gottlieb, *supra* note 20, at 2-18 (discussing mechanics of totality of conditions test); Robbins & Buser, *supra* note 62, at 906-14 (discussing development and definition of totality of conditions test).

66. *See* Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D.N.H. 1977) ("Even though no single condition of incarceration rises to the level of a constitutional violation, exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment.").

67. *See* Hoptowit v. Ray, 682 F.2d 1237, 1246-48 (9th Cir. 1982) (rejecting totality of conditions test and finding that specific, basic need must be deprived to violate Eighth Amendment); Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981) (finding that courts must focus on specific conditions of confinement rather than on totality of all conditions); *see also* Gottlieb, *supra* note 20, at 2-18 (reviewing Ninth Circuit opinions and referring to its analysis as adopting "core conditions" test).

68. *Hoptowit*, 682 F.2d at 1258; *Wright*, 642 F.2d at 1132-33. In Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *overruled on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1978), the Second Circuit stated that "[a]n institution's obligation under the Eighth Amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal sanitation." *Wolfish*, 573 F.2d at 125. The Ninth Circuit adopted this language as defining the scope of Eighth Amendment protection. *See* Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982) (citing Second Circuit's *Wolfish v. Levi* standard as defining basic necessities protected by Eighth Amendment); Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981) (citing *Wolfish* standard as establishing type of treatment condemned by Eighth Amendment).

when a prisoner was deprived of at least one of the core conditions.[69] It was not enough, for instance, for a prisoner merely to prove prison overcrowding. The overcrowding had to be shown to deprive an inmate of a core-area need.[70] In making its assessment, however, a court could consider whether the cumulative effect of other conditions together deprived an inmate of a core need.[71]

Finally, other courts applied a variation of the core conditions test.[72] These courts simply expanded or restricted the list of core conditions.[73] Nonetheless, as with the Ninth Circuit, these courts required that at least one of the conditions be deprived in order to violate the Eighth Amendment.[74] As with the Ninth Circuit test, these courts provided that the effect of other conditions working together could be considered by the courts in making their Eighth Amendment determinations.[75]

In *Rhodes v. Chapman*, the Supreme Court failed to articulate clearly which test, if any, was appropriate for evaluating challenged prison conditions.[76] Instead, the Court broadly noted that certain conditions "alone, or in combination, may deprive inmates of the minimal civilized measure of life's necessities."[77] Applying this standard to the facts, the Court held that "double-celling" did not violate the Eighth Amendment, considering that it neither deprived

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69. *See Hoptowit*, 682 F.2d at 1246-47 (rejecting totality of conditions test and finding that specific, basic need must be deprived to violate Eighth Amendment); *Wright*, 642 F.2d at 1133 (finding that courts must focus on specific conditions of confinement rather than on totality of all conditions).

70. *See Hoptowit*, 682 F.2d at 1249 (finding that district court had not specified particular effects of prison overcrowding and remanding for precise determination of effects on prisoner and whether those effects constituted violation of Eight Amendment); *see also* Gottlieb, *supra* note 20, at 2-18 (discussing application of core conditions test in *Hoptowit*).

71. *Hoptowit*, 682 F.2d at 1247.

72. *See infra* note 73 (providing cases applying test).

73. *Compare* Inmates of Occoquan v. Barry, 844 F.2d 828, 839 (D.C. Cir. 1988) (restricting Eighth Amendment protection to specific necessities of food, shelter, health care, or personal safety) *with* Wilson v. Seiter, 893 F.2d 861, 864-65 (6th Cir. 1990) (listing specific conditions on which to base Eighth Amendment claim as inadequate access to shower facilities, denial of medical treatment, overcrowding, threats to safety, vermin infestation, inadequate lighting, inadequate ventilation, unsanitary eating conditions, and housing inmates with known dangerous individuals), *vacated on other grounds*, 111 S. Ct. 2321 (1991) *and* Walker v. Mintzes, 771 F.2d 920, 925 (6th Cir. 1985) (referring broadly to scope of Eighth Amendment as protecting "life's necessities") (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

74. *See Wilson*, 893 F.2d at 864 (requiring that Eighth Amendment violation be based on specific condition); *Inmates of Occoquan*, 844 F.2d at 839 (noting that Eighth Amendment is satisfied if each of basic inmate needs is met).

75. *See Inmates of Occoquan*, 844 F.2d at 839 (discussing shortcomings of district court opinion and observing that it failed to channel its totality of conditions assessment toward specific deprived need); *Walker*, 771 F.2d at 925 ("In certain extreme circumstances the totality itself may amount to an eighth amendment violation, but there still must exist a specific condition on which to base the eighth amendment claim.").

76. *See* Gottlieb, *supra* note 20, at 2-17 (observing that Court in *Rhodes* neither lauded nor condemned totality of circumstances test).

77. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

prisoners of essential food, medical care, sanitation, or safety requirements nor created other intolerable conditions.[78] Subsequent to the *Rhodes* decision, the lower courts differed in their interpretations of the ruling. Some found the opinion to be an affirmance of the totality of circumstances test, while others found it to provide support for the core conditions test or its variations.[79] The proper objective standard, therefore, remained to be clarified.

## II. *WILSON V. SEITER*

### *A. The Facts of the Case*

Pearly Wilson, an inmate at Hocking Correctional Facility (HCF) in Nelsonville, Ohio, complained of prison overcrowding, excessive noise, insufficient locker and storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.[80] He brought an action under section 1983 of the Civil Rights Act of 1871[81] against Richard P. Seiter, Director of the Ohio Department of Rehabilitation, and Carl Humphreys, then warden of HCF. Wilson alleged that these con-

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78. *Id.* at 348; *see supra* note 29 (describing facts of case).

79. *Compare* Tillery v. Owens, 907 F.2d 418, 426-27 (3d Cir. 1990) (finding *Rhodes* made clear that Eighth Amendment prison condition cases are to be evaluated by totality of circumstances at prison), *cert. denied*, 112 S. Ct. 343 (1991) *and* Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981) ("We are aware that the essence of an Eighth Amendment violation consists of the totality of the conditions of confinement.") (citing *Rhodes v. Chapman*) *with* Inmates of Occoquan v. Barry, 844 F.2d 828, 839 (D.C. Cir. 1988) (finding that *Rhodes* limited totality of circumstances test to implicate Eighth Amendment only when conditions deprived inmates of life's necessities) *and* Hoptowit v. Ray, 682 F.2d 1237, 1246 n.3 (9th Cir. 1982) (finding that relatively brief statement in *Rhodes* did not create totality of circumstances standard; rather, it suggested requirement of specific conditions depriving inmates of at least one enumerated necessity). Interestingly, Justice Brennan stated in his concurring opinion in *Rhodes* that "[t]he Court today adopts the totality-of-the-circumstances test." Rhodes v. Chapman, 452 U.S. at 363 n.10 (Brennan, J., concurring).

80. Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

81. The relevant portion of section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

42 U.S.C. § 1983 (1988). Under section 1983, a prisoner may seek redress when a person acting under color of state law deprives him or her of rights guaranteed by the Constitution or federal laws. *Id.* Section 1983 imposes liability only on "persons" who deprive individuals of constitutional or federal rights. *Id.* In *Will v. Michigan Dep't of State Police*, the Supreme Court held that a state is not a person under section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 65-66 (1989). Furthermore, the Court concluded that a suit against a state official in his or her official capacity is "no different from a suit against the State itself." *Id.* at 71. A suit will be considered to be brought against an official in his or her official capacity if it seeks to impose liability on the governmental entity. *See* Kentucky v. Graham, 473 U.S. 159, 165-68 (1985) (distinguishing between personal and official capacity suits). Section 1983 ac-

finement conditions constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[82]

At trial, the parties filed cross-motions for summary judgment along with supporting affidavits.[83] Wilson's affidavits described the conditions in controversy and noted that the respondents had failed to remedy the conditions after notification.[84] The respondents' affidavits denied the existence of overcrowded conditions, inadequate heating, inadequate safety, and inadequate protection of prisoners from communicable diseases.[85] Furthermore, the respondents alleged that they had attempted to remedy certain conditions by enacting noise control regulations, installing two ventilation fans, employing an exterminator, and improving sanitation.[86] The district court granted summary judgment for the respondents, noting that the prisoners failed to demonstrate obduracy and wantonness on the part of the prison officials.[87]

The United States Court of Appeals for the Sixth Circuit affirmed

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tions may be brought against persons in their official capacities, however, only when injunctive relief is sought. *Will*, 491 U.S. at 71 n.10.

Municipalities may also be considered persons under section 1983 and, therefore, can be held liable for depriving persons of constitutional or federal rights. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978). Municipalities or local governments are not immune from section 1983 suits when the policy or custom that is the subject of a lawsuit was adopted by the officials of the governing entity. *Id.* at 690-91. A local government may not be held liable for the torts of its employees under section 1983, unless the employees acted pursuant to the entity's policy or custom. *Id.* at 694.

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Prison personnel receive this qualified immunity. *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978) (refusing absolute immunity for state prison officials but granting qualified immunity).

For an overview of the mechanics of section 1983 suits, see *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990*, 79 GEO. L.J. 1253, 1281-94 (1991) and Sheldon Nahmod, *Government Liability Under Section 1983: The Present Is Prologue*, 21 URB. LAW. 1 (1989).

82. *Wilson*, 111 S. Ct. at 2322-23. For an explanation of the manner in which prison conditions can violate the Fourteenth Amendment, see *supra* note 17 (discussing development of Fourteenth Amendment in prisoner suits).

83. *Wilson*, 111 S. Ct. at 2323.

84. *Id.*; *see* Brief of Petitioner at 4-6 n.3, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376) [hereinafter Brief of Petitioner] (summarizing allegations of petitioner regarding ventilation, sanitation, overcrowding, lack of heat, and safety and protection from communicable disease). Inmate Wilson alleged that he sent a three-page letter complaining of the confinement conditions to respondents Seiter and Humphreys. *Id.* at 5-6. According to Wilson, Seiter never responded to the letter, and Humphreys responded but failed to take any corrective action other than to forward the letter to the HCF Unit Manager and his staff. *Id.*

85. *See* Brief of Petitioner, *supra* note 84, at 4-6 n.3.

86. Brief of Petitioner, *supra* note 84, at 6 (providing specific details of prison officials' alleged attempts to remedy conditions); *see* Wilson v. Seiter, 111 S. Ct. 2321 (1991) (stating that prison officials denied existence of some alleged conditions and described efforts to remedy others).

87. Wilson v. Seiter, 893 F.2d 861, 863 (6th Cir. 1990) (reviewing trial court's basis for accepting respondents' motion for summary judgment), *vacated*, 111 S. Ct. 2321 (1991).

the lower court's decision, albeit using different reasoning. The Sixth Circuit held that the challenged conditions were not serious enough to establish an Eighth Amendment violation,[88] and that the petitioner failed to establish that the respondents acted with "persistent malicious cruelty," as required by *Whitley v. Albers*.[89] The court of appeals therefore rejected the inmate's claim by applying the stringent state-of-mind requirement of *Whitley*, a requirement that had previously been applied by the Supreme Court only in the context of prisoner challenges alleging use of excessive force by officers in quelling prison disturbances.[90]

### *B. The Holding and Reasoning in* Wilson v. Seiter

#### *1. The state-of-mind requirement*

Justice Scalia, writing for the Court and joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Souter, concluded that poor prison conditions violate the Eighth Amendment's ban on cruel and unusual punishment only when the responsible officials imposing the conditions have a culpable state of mind.[91] Furthermore, the Court concluded that "deliberate indifference" is the level of culpability required to be shown on the part of prison officials to violate the Eighth Amendment in prison condition cases.[92]

##### *a. The derivation of the requirement*

The Court supported its state-of-mind requirement for prison condition cases with two basic arguments. First, the majority noted

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88. *Id.* at 865. The Sixth Circuit found that even if the allegations of inadequate cooling, housing with mentally ill inmates, and overcrowding were true, they failed to establish violative conditions. *Id.* This conclusion was based in large part on the court's finding that exposure to excessive heat was only "occasional," and overcrowding was not "constant." *Id.*

89. *Id.* at 867. The court of appeals referred to the *Whitley* standard as prohibiting only actions of "obduracy and wantonness . . . marked by persistent malicious cruelty." *Id.* The Supreme Court in *Wilson*, however, analyzed the lower court's use of the standard by concluding that the above quotation and consistent reference to the "*Whitley* standard" meant that the court of appeals believed the criterion for liability to be whether the respondents acted "maliciously and sadistically for the very purpose of causing harm." Wilson v. Seiter, 111 S. Ct. 2321, 2328 (1991) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). *See supra* notes 45-51 and accompanying text (describing holding and facts of *Whitley*).

90. *See supra* notes 45-51 and accompanying text (discussing facts and holding of *Whitley*).

91. The Court considered this the "subjective component" of an Eighth Amendment prison claim and referred to it as an inquiry into whether the officials acted with a "sufficiently culpable state of mind." *See Wilson*, 111 S. Ct. at 2324 (citing *Whitley*, 475 U.S. at 319, as requiring that it is obduracy and wantonness, not inadvertence or error in good faith that violates Eighth Amendment with respect to conduct that establishes confinement conditions).

92. *See infra* notes 113-21 and accompanying text (discussing Court's derivation of "deliberate indifference" standard).

that prior case law mandates the requirement.[93] Second, the majority noted that an intent requirement is inherent in the meaning of the word "punishment."[94]

The majority's use of prior case law turned largely on the assumption that confinement conditions are to be treated as part of prison officials' *conduct* not purporting to be punishment, rather than as part of a prisoner's specific sentence.[95] As discussed earlier,[96] the importance of this distinction is clear. The Eighth Amendment is implicated only by cruel and unusual *punishment*. If confinement conditions are attributed to post-incarceration conduct *not* purporting to be punishment, then some further inquiry is necessary to bring that conduct within the purview of the Eighth Amendment. The Court noted that the inquiry is whether the conduct constitutes the "unnecessary and wanton infliction of pain."[97] Prison official conduct violates the Eighth Amendment only when it meets this threshold test.

If, however, the confinement conditions are considered part of the penalty imposed by a judge or a statute, there is no need to inquire whether the conditions are intended to be punishment. A sentence is intentionally inflicted on a convict as punishment, and the only question remaining is whether the resultant conditions are cruel or unusual.[98] Thus, by categorizing confinement conditions as

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93. *See Wilson*, 111 S. Ct. at 2323-24 (referring to Whitley v. Albers, 475 U.S. 312 (1986); Rhodes v. Chapman, 452 U.S. 357 (1981); Estelle v. Gamble, 429 U.S. 97 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1974)); *see also supra* notes 37-61 and accompanying text (discussing Supreme Court decisions in relation to Eighth Amendment state-of-mind requirement).

94. *See infra* notes 105-07 and accompanying text (discussing Court's analysis of meaning of "punishment").

95. *See Wilson*, 111 S. Ct. at 2326 (finding that because prison conditions do not constitute punishment unless deliberately imposed, courts only need to determine what state-of-mind requirement applies); *see also id.* at 2325 (arguing intent requirement should be applied to Eighth Amendment challenges to short- and long-term conditions and stating that if pain inflicted is not "formally meted out *as punishment* by the statute or the sentencing judge," some mental element must be attributed to inflicting officer before it can qualify as punishment); *infra* notes 100-03 and accompanying text (discussing Court's use of cases regarding conduct not purporting to be punishment).

96. *See supra* notes 53-54 and accompanying text (discussing implications of attributing confinement conditions to formal sentence or to post-incarceration conduct of prison officials).

97. *See Wilson*, 111 S. Ct. at 2324 (" 'After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " (quoting *Whitley*, 475 U.S. at 319)).

98. Justice White took this position in his concurring opinion. He found that the majority's reasoning disregarded previous decisions in which the Court made clear that conditions were part of the punishment itself, even though the conditions were not specifically meted out by a statute or judge. *Wilson*, 111 S. Ct. at 2328 (White, J., concurring). Referring to one such previous decision, Justice White found that *Rhodes* made it "crystal clear" that Eighth Amendment challenges to conditions of confinement were to be treated like Eighth Amendment challenges to punishment, and that this was to be done by examining the objective

conduct not purporting to be punishment, the majority preserved the need to inquire into the state of mind of prison officials. More specifically, the majority preserved the need to inquire whether prison officials impose harsh confinement conditions wantonly.[99]

With confinement conditions classified as conduct and not as punishment, the Court supported the state-of-mind requirement for prison condition challenges using Eighth Amendment cases that addressed other types of conduct not purporting to be punishment.[100] This did not prove to be a difficult task for the Court. The Court noted that previous cases had stated that the Eighth Amendment prohibits the "wanton" infliction of pain,[101] a rather uncontroversial proposition, and that *Whitley* had held that conduct not purporting to be punishment *must* be wanton to violate the Eighth Amendment.[102] On the strength of these cases, the Court concluded that an Eighth Amendment state-of-mind requirement exists for prison condition challenges that is analogous to the Eighth Amendment

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severity of the conditions rather than the subjective intent of the inflictor. *Id.* at 2329-30; *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment standards.").

99. It is less clear, however, how the majority arrived at its classification of confinement conditions. The majority apparently began its analysis of the *Wilson* case in the conduct rather than punishment posture. At the beginning of the opinion, the Court commented that it had first considered in *Estelle v. Gamble* whether the provisions of the Eighth Amendment could be applied to deprivations not specifically part of the sentence but suffered during imprisonment. *Wilson*, 111 S. Ct. at 2323. The Court also quoted dicta from *Whitley v. Albers* that attributed confinement conditions to conduct, but failed to develop and expressly rely on that dicta. *See id.* at 2324 (quoting passage from Whitley v. Albers, 475 U.S. 312, 319 (1986) describing protection of Eighth Amendment with regard to conduct that occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring control in prison). In perhaps the most revealing statement on the matter, the Court argued in a footnote that specific acts or omissions cannot be distinguished from confinement conditions because the specific acts or omissions are conditions of *that* prisoner's confinement. *Id.* at 2324 n.1. The Court continued by stating that there is no basis for distinguishing confinement conditions from prison officials' conduct, much less for arguing that one is punishment and the other is not. *Id.*; *see also id.* at 2326-27 (noting that prisoner's medical care is as much condition of confinement as food prisoner is fed, clothes prisoner is issued, temperature prisoner is subjected to in cell, and protection prisoner is afforded against other inmates).

100. *See id.* at 2323-24 (discussing Whitley v. Albers, 475 U.S. 312 (1986); Estelle v. Gamble, 429 U.S. 97 (1976); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), and finding that these cases, along with others, mandate inquiry into state of mind of prison officials in Eighth Amendment cases); *see also supra* notes 37-55 and accompanying text (discussing above-cited cases).

101. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991) (finding that *Estelle*, 429 U.S. at 104, interpreted Eighth Amendment to prohibit "unnecessary and wanton infliction of pain"); *id.* at 2323 (finding that *Resweber*, 329 U.S. at 463, interpreted Eighth Amendment to prohibit "wanton infliction of pain"); *id.* at 2324 (finding that Rhodes v. Chapman, 452 U.S. 337, 346 (1981), held "the unnecessary and wanton infliction of pain" violates Eighth Amendment).

102. *Id.* at 2324 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986), that "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than an ordinary lack of due care for the prisoner's interest or safety . . . . It is obduracy and wantonness . . . that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.").

state-of-mind analysis used in improper medical treatment/excessive force claims arising from prison riot situations.[103]

The Court also supported its state-of-mind requirement by finding that there is an intent requirement implicit in the Eighth Amendment.[104] The Court based this finding on its definition of "punishment."[105] According to the Court, if punishment by definition requires "intent to inflict," then the cruel and unusual punishment proscribed by the Eighth Amendment likewise requires intentional infliction.[106] With this argument, the Court made a very broad and powerful statement: "If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as an Eighth Amendment violation]."[107]

The Court's finding that there is a state-of-mind requirement for Eighth Amendment challenges to prison conditions is troubling for a number of reasons. First, by focusing on the intent of the inflictor rather than on the suffering of the victim, the Court abandons the important Eighth Amendment purpose of protecting the convicted from excessive suffering.[108] This goal would be better served by focusing on the effect of the punishment on the prisoner.[109] Second,

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103. *Id.* (finding that *Whitley*, *Estelle*, and *Resweber* mandate inquiry into prison official's state of mind when it is claimed that official has inflicted cruel and unusual punishment); *id.* at 2326 (finding that cited cases require that offending conduct be wanton); *see also supra* notes 37-55 and accompanying text (discussing cases cited above).

104. Justice Scalia wrote, "The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself . . . ." *Id.* at 2325.

105. *See Wilson*, 111 S. Ct. at 2326 ("An intent requirement is either implicit in the word 'punishment' or is not . . . ."). To support that intent is implicit in punishment, Justice Scalia quoted the following passage by Judge Posner:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, 1866, or 1985.

*Id.* at 2325 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)); *see also* Graham v. Connor, 490 U.S. 386, 398 (1989) (finding terms "cruel" and "unusual" suggest some inquiry into subjective state of mind); Bell v. Wolfish, 441 U.S. 520, 537-39 (1979) (contending there must be punitive intent to constitute punishment).

106. *See supra* note 105 (providing Court's interpretation of meaning of "punishment"); *Wilson*, 111 S. Ct. 2321, 2325 (1991) (finding that intent requirement is derived from Eighth Amendment's ban of cruel and unusual "punishment").

107. *Wilson*, 111 S. Ct. at 2325.

108. The framers of the Eighth Amendment intended to protect the convicted from torturous and barbarous methods of punishment. *See generally* Ingraham v. Wright, 430 U.S. 651, 664 (1977) ("An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."); Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840-44 (1969) (tracing history of Eighth Amendment and concluding that Framers intended to proscribe methods of punishment).

109. The proposition that a cruel and unusual punishment determination should be made

as Justice White argues in his concurring opinion, it is difficult to attribute poor confinement conditions to the intent of any one defendant or group of defendants.[110] Confinement conditions of this type tend to aggregate over time, so that various officials will be involved in the creation of poor conditions.[111] Furthermore, officials may disprove a showing of intent by arguing that substandard conditions did not arise as a result of their intent, but instead were caused by insufficient funding from the state legislature.[112] Thus from a pragmatic point of view, the intent requirement will likely be difficult to prove.

*b. The derivation of the standard*

After determining that the Eighth Amendment requires a state-of-mind inquiry, the Court proceeded to address the appropriate standard of culpability required in prison conditions cases. The Court commented that case precedent established that offending conduct must be wanton,[113] and reiterated the *Whitley* holding that the meaning of "wanton" varies with the type of conduct challenged.[114] Considering this shifting meaning of "wanton," the Court concluded that the very high "malicious and sadistic" standard prescribed by

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by examining the inflictor's state of mind has not escaped contention. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 585-88 (1979) (Stevens, J., dissenting) (finding there is no intent requirement in punishment and inference of punishment may be drawn from severity of harm to individual); Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting) (asserting constitutional standard should turn on character of punishment rather than motivation of person inflicting pain); Shrader v. White, 761 F.2d 975, 979 (4th Cir. 1985) (contending that it is effect on inmate population that determines constitutional violations); Spain v. Procunier, 600 F.2d 189, 197 (11th Cir. 1979) (finding that if resulting pain is cruel and unusual, then Eighth Amendment is violated regardless of intent or purpose of inflictor). Justice Brennan stated in his concurring opinion in Rhodes v. Chapman, 452 U.S. 337 (1981):

> In determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the "touchstone is the effect upon the imprisoned." . . . When "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the court must conclude that the conditions violate the Constitution.

*Id.* at 364 (Brennan, J., concurring) (citation omitted) (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977)).

110. *See infra* notes 136-52 and accompanying text (discussing reasoning of concurring opinion).

111. *See infra* notes 148-50 and accompanying text (relating concern of concurrence and of another commentator that attributing intent to prison officials for poor confinement conditions is problematic).

112. *See infra* notes 151-52 and accompanying text (discussing concurrence's concern over funding issue); *see also infra* notes 211-25 and accompanying text (discussing possibility of funding defense).

113. Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991).

114. *Id.* (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986) to support conclusion that wantonness does not have fixed meaning but must be determined based on consideration of circumstances).

*Whitley* did not apply.[115] Instead, the Court found the "deliberate indifference" standard articulated in *Estelle v. Gamble* to be the appropriate level of wantonness required to be proved in Eighth Amendment challenges to confinement conditions.[116] The Court reasoned that the standards for addressing inadequate medical care and harmful confinement conditions should be the same because the two types of challenged conduct are not readily distinguishable.[117] The Court then remanded the issue of whether the prison officials were deliberately indifferent to the conditions at Hacking Correctional Facility.[118]

Even if one disagrees that the Eighth Amendment imposes an intent requirement in challenges to prison conditions, it is difficult, in light of other more stringent intent tests, to disagree with the Court's holding that "deliberate indifference" is the correct intent standard to apply. In fact, counsel for inmate Wilson argued that if a state-of-mind inquiry is relevant at all in prison condition cases, then deliberate indifference should be the standard.[119] The Court could have chosen, as did the Sixth Circuit,[120] to apply *Whitley*'s "malicious and sadistic" standard.[121] This standard requires a much higher showing of intent than does the deliberate indifference standard and would create a difficult burden for prisoners to carry. The Court's conclusion that deliberate indifference is the correct intent standard is therefore a victory in some sense for Wilson and for other present and future inmates.

### *c. The creation of a possible affirmative defense*

In what may turn out to be a heavily quoted passage, the Court stated that once it is established that challenged conduct is sufficiently harmful, then "whether [conduct] can be characterized as

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115. *Id.*; *see supra* notes 45-51 and accompanying text (discussing *Whitley* standard). The Court found that unlike the facts in *Wilson*, the riot situation in *Whitley* presented an emergency. *See Wilson*, 111 S. Ct. at 2326 (describing need to act in haste during prison disturbance to protect safety of prison staff and inmates). In such an emergency situation, wantonness is acting "maliciously and sadistically for the very purpose of causing harm." *See id.* (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).

116. *Id.*; *see supra* notes 37-43 and accompanying text (discussing facts and holding of *Estelle*).

117. *See Wilson*, 111 S. Ct. at 2327 (noting that prisoner's medical care is just as much condition of confinement as daily physical conditions).

118. *Id.* at 2328.

119. Brief of Petitioner, *supra* note 84, at 29-30. Counsel for petitioner also argued that if deliberate indifference is the appropriate standard, then the standard would be met merely by the existence of continuing harsh prison conditions. *Id.* at 25.

120. Wilson v. Seiter, 893 F.2d 861, 867 (6th Cir. 1990), *vacated*, 111 S. Ct. 2321 (1991).

121. *See supra* notes 45-51 and accompanying text (discussing *Whitley* decision).

'wanton' depends upon the constraints facing the *official*."[122] By predicating wantonness on the problems and difficulties facing prison officials, the Court in *Wilson* created an apparent affirmative defense to the state-of-mind requirement. For example, the Court left open the possibility that prison officials could argue in their defense that harsh confinement conditions are due not to wanton conduct, but rather to constraints such as lack of funding,[123] or rapid prison overcrowding. The Court failed to elaborate on the mechanics of such a defense, however, leaving the issue unresolved as to which constraints preclude a finding of wantonness.[124]

### 2. *Unconstitutional conditions*

After handing down the Eighth Amendment state-of-mind requirement for cruel and unusual punishment determinations, the Court proceeded to dismantle the traditional "totality of circumstances" test.[125] The *Wilson* majority concluded that *Rhodes v. Chapman* did not articulate such a broad test.[126] Instead, the Court held that conditions are not cruel and unusual unless they deprive a prisoner of "a single, identifiable human need such as food, warmth, or exercise."[127] Conditions may work in combination to deprive such a need, but overall conditions in and of themselves cannot constitute

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122. *Wilson*, 111 S. Ct. at 2326 (emphasis in original). The Court apparently derived this proposition from *Whitley v. Albers*, which stated that the requirement to prove the unnecessary and wanton infliction of pain should be applied with due regard for differences in the kind of conduct challenged under the Eighth Amendment. *See id.* (stating that *Whitley* teaches that wantonness depends on constraints facing prison officials); *see also supra* notes 46-51 and accompanying text (discussing *Whitley* case). These propositions, however, are not the same. The Court in *Whitley* sought to determine the *level* of wantonness required under the Eighth Amendment by considering the type of conduct challenged, and not, as the Court posited in *Wilson*, whether wantonness existed at all considering the constraints on the officials.

123. *Wilson*, 111 S. Ct. at 2325 (noting that United States, as amicus curiae, suggested good faith efforts defense based on fiscal constraints). The Court did not resolve the validity of an affirmative defense derived from funding limits because the respondents did not raise the defense. *Id.*

124. *See infra* notes 211-25 and accompanying text (discussing implications of Court's finding in *Wilson* that determination of wantonness on part of prison officials depends on constraints facing officials).

125. *See Wilson*, 111 S. Ct. at 2327 ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment . . . ." (quoting Brief of Petitioner, *supra* note 84, at 36)). For a discussion of the totality of circumstances test, see *supra* notes 65-66 and accompanying text (explaining mechanics of test).

126. *Wilson*, 111 S. Ct. at 2327. The Court in *Rhodes v. Chapman* found that conditions of confinement, "alone, or in combination" may rise to the level of cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

127. *Wilson*, 111 S. Ct. at 2327. In an opinion subsequent to *Wilson*, the Supreme Court commented that "[w]ith respect to the objective component of an Eighth Amendment violation, *Wilson* announced no new rule." Hudson v. McMillian, 112 S. Ct. 995, 999 (1992). Considering the confusion in the courts created by the holding in *Rhodes v. Chapman*, see *supra* notes 76-79 and accompanying text (discussing *Rhodes* opinion and lack of direction it provided courts), the Supreme Court's clarification of the objective criteria set forth in *Rhodes* does operate as a new rule.

cruel and unusual punishment.[128]

The Court expressed no opinion as to the Sixth Circuit's assessment of the prison conditions at HCF and failed to affirm or reject the lower court's finding that even if proved, inadequate cooling, housing with mentally ill inmates, and overcrowding do not involve the serious deprivation required by *Rhodes*.[129] The Court, however, did reject petitioner's argument that because each condition must be considered as part of the overall conditions, the Sixth Circuit erred by independently dismissing the inadequate cooling, housing with mentally ill inmates, and overcrowding claims.[130] The Court concluded that because *Rhodes* does not stand for the broad proposition that overall conditions can violate the Eighth Amendment, individual claims can fail the test in isolation.[131]

By handing down this "single identifiable human need[s]" test for evaluating the constitutionality of prison conditions, the Court effectively adopted the core conditions test.[132] Both tests require that challenged prison conditions deprive an inmate of at least one basic human need. In the core conditions test, the needs are described as adequate food, clothing, shelter, sanitation, medical care, and personal safety.[133] In the single identifiable human needs test, the needs *include* adequate food, warmth, and exercise.[134] The Court in *Wilson* left the list of needs open for expansion.[135] Arguably, the latter test should expand to include core-area needs because the needs traditionally included in that test are both basic and "identifiable." In their applications, therefore, the two tests should be virtually indistinguishable.

### C. *The Concurrence*

Justice White, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, concurred in the judgment but disputed the find-

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128. *See Wilson*, 111 S. Ct. at 2327 (noting that just because some conditions interact does not mean that all prison conditions are "a seamless web for Eighth Amendment purposes").

129. *Id.*; *see also supra* notes 76-79 and accompanying text (discussing conditions prohibited by *Rhodes v. Chapman*).

130. *Wilson*, 111 S. Ct. at 2327.

131. *Id.*

132. This is more evident considering that the Court in *Wilson* cited the Ninth Circuit opinions that formulated the core conditions test as defining the proper scope of Eighth Amendment protection set forth in *Rhodes v. Chapman*. *See Wilson*, 111 S. Ct. at 2327 (citing Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982) and Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981)).

133. *See supra* notes 67-69 and accompanying text (discussing core conditions test).

134. *Wilson*, 111 S. Ct. at 2327.

135. *See id.* (making noninclusive list by referring to it as including needs "such as" food, warmth, or exercise).

ings of the majority.[136] In his concurrence, Justice White first rejected the majority's classification of poor confinement conditions as the infliction of pain not formally meted out as punishment.[137] He stated that *Hutto v. Finney* and *Rhodes v. Chapman* provided that confinement conditions were part of the punishment.[138] With confinement conditions being part of punishment, there only remained the necessity to inquire into the objective severity of the conditions, and not into the state of mind of prison officials.[139] He noted that unlike Eighth Amendment challenges to conduct not purporting to be punishment, such as specific acts or omissions directed at individual prisoners, the element of intent had not previously been required in causes of action alleging unconstitutional confinement conditions.[140]

Justice White also rejected the Court's finding that *Whitley v. Albers* established a state-of-mind requirement for Eighth Amendment challenges to confinement conditions.[141] In fact, he noted that *Whitley* expressly supported the application of an objective standard for confinement condition challenges.[142] He made this conclusion by observing that the Court in *Whitley* stated that there does not have to be an express intent to inflict unnecessary pain to violate the Eighth Amendment, and that harsh prison conditions may constitute cruel and unusual punishment because such conditions are part of the penalty for inmates' offenses.[143] Although not elaborating on the *Whitley* statement, Justice White apparently considered the statement to be a confirmation that harsh confinement conditions are punishment rather than conduct and therefore require only an objective showing of severity to violate the Eighth Amendment.[144]

Furthermore, Justice White disputed the majority's reliance on the dictum in *Whitley* which stated that inadvertence and error in

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136. *Id.* at 2328-31 (White, J., concurring).

137. *See id.* at 2328 (White, J., concurring) (stating that Court's classification disregards prior decisions that involved challenges to conditions of confinement).

138. *See id.* at 2328, 2329-30 (White, J., concurring) (finding that Hutto v. Finney, 437 U.S. 678, 685 (1978) "made clear that conditions of confinement are part of punishment that is subject to Eighth Amendment scrutiny" and that Rhodes v. Chapman, 452 U.S. 337, 348 (1981) made "crystal clear" that conditions of confinement challenges are to be treated like Eighth Amendment challenges to formally imposed punishment).

139. *See id.* at 2330 (White, J., concurring) (providing that appropriate standard of review for challenges to punishment is inquiry into objective severity of conditions only).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. This analysis becomes clear later in the opinion when Justice White refuted the majority's contention that *Whitley* established confinement conditions as conduct not purporting to be punishment. *See infra* notes 145-46 and accompanying text (discussing Justice White's interpretation of *Whitley*).

good faith do not characterize conduct prohibited by the Eighth Amendment, even if the conduct occurred in connection with the establishment of confinement conditions.[145] Rather than interpreting this dictum as firmly establishing conditions of confinement as conduct and not punishment, he argued that "conduct," as used by the Court in the *Whitley* dictum, referred only to conduct not purporting to be punishment and not to the harsh conditions of confinement referred to earlier in the opinion.[146] Under this interpretation, confinement conditions could be considered a part of punishment rather than a product of post-incarceration conduct by prison officials. This precluded the need to inquire into the state of mind of prison officials to determine the existence of Eighth Amendment violations.

Finally, Justice White noted two problems that might arise in attaching a state-of-mind requirement to Eighth Amendment challenges to confinement conditions.[147] First, because confinement conditions are typically the product of numerous prison officials' actions over long periods of time,[148] Justice White warned that it would be difficult to identify the party or parties whose intent should be examined.[149] Intent in this context is therefore not very meaningful.[150] Second, he warned that prison officials may be able to defeat prisoners' actions by arguing that poor conditions arose as a result of insufficient funding by a state legislature rather than by any deliberate indifference on their part.[151] Considering these problems, Justice White feared that the deliberate indifference standard would result in a failure to address serious deprivations of pris-

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145. *See Wilson*, 111 S. Ct. at 2330 (White, J., concurring) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). The relevant portion of the text in *Whitley* is as follows:

> To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety .... It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

*Whitley*, 475 U.S. at 319 (citations omitted).

146. *Wilson*, 111 S. Ct. at 2330 (White, J., concurring).

147. *See id.* 2330-31 (White, J., concurring) (discussing situations in which Court's intent requirement may prove impossible to apply).

148. *See id.* at 2330 (White, J., concurring) (noting that prison conditions are often result of cumulative actions and inactions by numerous officials inside and outside prisons).

149. *Id.*

150. *Id.* As one commentator found, it is difficult to attribute the totality of prison conditions to any individual's deliberate choice. *See* Rosenzweig, *supra* note 20, at 422 (arguing that even if intent is inferred by objective conditions, it is not clear whose conduct and state of mind is at issue).

151. *Wilson*, 111 S. Ct. at 2330-31 (White, J., concurring).

oners' basic human needs.[152]

## III. THE IMPLICATIONS

The reach of *Wilson v. Seiter* will be defined to a great extent through the development of three factors. First, courts' definitions of the "deliberate indifference" standard will play a central role in *Wilson* analysis; second, determinations as to which "constraints" on prison officials will preclude a finding of wantonness will be an important limiting factor; and third, interpretations of the scope of "identifiable human needs" will delineate the breadth of the opinion. Each of these factors and their impacts on prison litigation are considered below.[153]

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152. *See id.* at 2331 (White, J., concurring) (expressing concern that basic needs of prisoners "will go unredressed due to an unnecessary and meaningless search for 'deliberate indifference' ").

153. The recent Supreme Court decision in Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992), may also directly affect the impact of *Wilson*. In *Rufo*, the petitioner, who was the county sheriff, filed a motion to modify a 1973 consent decree that required the building of a new jail for pre-trial detainees and the housing of inmates in single occupancy cells. Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 756 (1992). In his proposed modification, Rufo sought to permit "double bunking" in 197 of the jail's 453 cells. *Id.* He argued that changes in the law and in fact mandated the modifications. *Id.* According to Rufo, the asserted change in law was that the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979), held that double celling [bunking] was not unconstitutional per se. *Id.* The asserted change in fact was the increase in the pre-trial detainee population. *Id.*

In analyzing the case, the Supreme Court was required to determine whether modification requests should be reviewed under a "grievous wrong" standard or a "flexible" standard. The "grievous wrong" standard provides that a consent decree may be modified when there is "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions . . . ." *Id.* at 757 (quoting United States v. Swift, 286 U.S. 106, 119 (1932)). The "flexible" standard, however, provides that a consent decree may be modified "if the circumstances, whether of law or fact, obtained at the time of issuance have changed, or new ones have since arisen." *Id.* at 758 (quoting Railway Employees v. Wright, 364 U.S. 642, 647 (1961)). The Court held that the modification requests of consent decrees in institutional reform litigation should be reviewed under a flexible standard, and that the party seeking the modification has the initial burden of meeting that standard. *Id.* at 760. The requesting party may meet this burden by showing either a significant change in factual conditions or in law. *Id.* Furthermore, the proposed change must be suitably tailored to the changed circumstance. *Id.* The Court noted, however, that to base the modification of a decree on a subsequent decision that clarifies the law, the parties must have grounded their original agreement on a misunderstanding of the governing law. *Id.* at 763. The Court remanded the case for further proceedings consistent with the opinion. *Id.* at 765.

The effect of this decision on *Wilson* is significant for a number of reasons. First, *Rufo* may give *Wilson* a retroactive effect. For instance, prison administrators operating under pre-*Wilson* consent decrees that require improvements in unconstitutional prison conditions may request modifications in the decrees on grounds that *Wilson* is a significant change in the law. The administrators may argue, for example, that the prison conditions were originally deemed unconstitutional on the basis of a "totality of circumstances" test, a test that is no longer applicable for defining the scope of Eighth Amendment protection. Years of prison reform could conceivably be negated under such a theory. Second, from a prospective point of view, the availability of the flexible standard may encourage numerous requests to modify post-*Wilson* consent decrees. Such requests could frustrate and delay the positive effects of the original decrees. Moreover, the subsequent modifications, if granted, could provide a less effective remedy to harsh prison conditions than the original plan. Perhaps most significantly,

### A. *Defining "Deliberate Indifference"*

Confusion abounds when attempts are made to distinguish degrees of culpability between the two extremes of negligence and intentional conduct.[154] Nonetheless, this is precisely the task of the courts in interpreting the meaning of "deliberate indifference," a task that will largely determine the impact of *Wilson*. The term "deliberate indifference" is confusing and has a number of possible meanings.[155] It will be up to the courts to position deliberate indifference on the culpability continuum between negligence and intentional conduct.[156]

The impact of the deliberate indifference standard on prisoners' rights will be directly related to where the courts place the term on

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*Rufo* probably signals the beginning of a new era in prison litigation. The case shifts the battleground of prison litigation from institutional reformation methodology to the dismantling of previously imposed prison reforms. This result is readily apparent in light of the Justice Department's recent announcement that the Department will help some states modify court-imposed consent decrees that require prison reforms. *See* Sharon LaFraniere, *U.S. Shifts on Prison Crowding*, WASH. POST, Jan. 15, 1992, at A1 (discussing Justice Department's new policy to attack decrees that are overly broad, particularly with regard to those specifying prisoners' diets, exercise, and visitation rights and prison population caps).

154. *See* Daniels v. Williams, 474 U.S. 327, 334 (1986) (noting concern expressed by party that meanings of terms such as "willful, wanton, reckless or gross negligence" have "left the finest scholars puzzled" and conceding that meaning of these terms is elusive); *see also* Germany v. Vance, 868 F.2d 9, 18 n.10 (1st Cir. 1989) (observing that distinction between negligence, reckless or callous indifference, and intentional conduct can be elusive).

155. *See* Marsh v. Arn, 937 F.2d 1056, 1066 (6th Cir. 1991) (noting that deliberate indifference is "not easily defined" and that there is "degree of inherent conflict between the two words"); Berry v. City of Muskogee, 900 F.2d 1489, 1495 (10th Cir. 1990) (noting that deliberate indifference is not "self-defining" and that courts have struggled to give it practical meaning); Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (finding that deliberate indifference is oxymoron that "evades rather than expresses precise meaning"), *cert. denied*, 479 U.S. 816 (1986). *But see* Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976) (asserting that courts of appeals are in agreement with regard to deliberate indifference standard although their terminology of what is sufficient varies).

156. The Restatement of Torts clarifies the degrees of culpability that exist on a continuum from negligence to intentional conduct. The Restatement notes that negligence becomes recklessness when the actor does or should realize that the risk of the conduct is out of proportion with the utility of the conduct. RESTATEMENT (SECOND) OF TORTS § 282 cmt. e (1965). "As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests." *Id.* Therefore, where there is great disproportion between utility and risk, there is a tendency to assign conduct a legal interpretation of intention to cause the harm. *Id.*

In Smith v. Wade, 461 U.S. 30 (1983), the Supreme Court was faced with a similar task of charting the area between negligence and intentional conduct to determine the culpability threshold for allowing punitive damages in section 1983 cases. Some jurisdictions allowed punitive damages in response to a showing of mere negligent conduct by the defendant. *See id.* at 61-62 (Rehnquist, J., dissenting) (providing cases). Others required a showing of intent before punitive damages would be awarded. *See id.* at 60 & n.3, 78 n.12 (Rehnquist, J., dissenting) (providing cases). The majority of the Court concluded that reckless or callous disregard for the plaintiff's rights was sufficient to allow a jury to consider awarding punitive damages. *Id.* at 51. Justice Rehnquist dissented, arguing that there must be some degree of bad faith or improper motive on the part of the defendant to justify the awarding of punitive damages. *Id.* at 56 (Rehnquist, J., dissenting).

the culpability continuum.[157] If the standard is placed closer to intentional conduct, then the adverse impact on prisoners' rights will be greater because proving intent is a difficult task. If the standard is placed closer to negligence, the adverse impact on prisoners' rights will be less. The most likely interpretations of the term in the context of culpable prison officials will be derived for the most part from current and past Eighth Amendment case law, and a number of these constructions are considered below.[158]

### *1. Possible interpretations*

#### *a. Knowledge and a failure to act*

It may be that deliberate indifference means prison officials violate the Eighth Amendment when they know of harmful confinement conditions but fail to act on that knowledge to remedy the situations.[159] Indeed, a number of lower federal courts have interpreted the standard in this way.[160] Rather than calling for a strong

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157. As an illustration, consider Davidson v. Cannon, 474 U.S. 344 (1986). In this case, the Supreme Court addressed the level of culpability required to violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 346. The Court denied relief to an injured inmate, reasoning that prison official negligence cannot rise to the level of a due process violation. *Id.* at 347-48. Justice Blackmun disagreed, however, arguing that when a state strips an inmate of the ability for self-protection, a prison official's negligence in protecting the inmate can amount to a deprivation of liberty. *Id.* at 354 (Blackmun, J., dissenting). *Davidson* thus illustrates how requiring differing levels of culpability can directly affect the constitutional rights of prisoners.

158. A prison official is not the only possible defendant in prison condition cases brought by inmates under 42 U.S.C. § 1983. *See supra* note 81 (providing text of section 1983). An inmate can seek redress under section 1983 from prison guards, municipalities, or governing officials in their personal capacities. *See supra* note 81 (discussing section 1983 suits and parties that can be held liable under statute). Additionally, prisoners can seek injunctive relief under section 1983 from state officials in their official capacities. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (allowing section 1983 suits against state officials for injunctive relief).

For the purposes of clarity and economy, Parts III and IV of this Note will consider the defending parties to be prison officials. This assumption comports with typical confinement conditions cases, which often name prison officials as defendants. *See, e.g.*, Moore v. Winebrenner, 927 F.2d 1312 (4th Cir.) (litigating conditions claim against former warden of prison), *cert. denied*, 112 S. Ct. 97 (1991); Kelley v. McGinnis, 899 F.2d 612 (7th Cir. 1990) (analyzing poor conditions charge brought against director of Department of Corrections and other prison employees); Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990) (naming group of wardens, prison administrators, and employees as defendants in confinement conditions lawsuit).

159. *See* Brief for the United States as Amicus Curiae, *supra* note 44, at 22-23 (proposing that knowledge of conditions and failure to act should satisfy deliberate indifference standard).

160. *See, e.g.*, Simmons v. City of Philadelphia, 947 F.2d 1042, 1064 (3d Cir. 1991) (concluding that prison officials must be aware of incidences of suicide in lockups before liability for failure to prevent suicide under section 1983 can be established); Williams v. Griffin, 952 F.2d 820, 826 (4th Cir. 1991) ("To demonstrate deliberate indifference, [a defendant] must show that the Prison Officials had knowledge of the conditions that are the subject of the complaint."); Alberti v. Sheriff of Harris County, 937 F.2d 984, 998 (5th Cir. 1991) (interpreting deliberate indifference to mean awareness of objectively cruel conditions and failure to

showing of intent, this interpretation requires only a showing of a prison official's actual knowledge of serious harm and subsequent failure to act on the harm.[161] Knowledge may also be inferred under this interpretation if the confinement information was sufficiently obvious to prison officials.[162]

In this formulation, deliberate indifference is not far removed from administrative negligence.[163] The analysis shifts away from intent and focuses only on what the prison officials knew and what they should have done to address the problem.[164] A prisoner, for instance, could meet the state-of-mind requirement under this for-

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remedy them); Henderson v. DeRobertis, 940 F.2d 1055, 1060 (7th Cir. 1991) ("[D]efendants acted with deliberate indifference if they possessed actual knowledge of impending harm, easily preventable, so that a conscious, culpable refusal to prevent the harm could be inferred from their failure to prevent it."); Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (providing that to establish deliberate indifference, inmates' decedent must meet three elements: (1) defendants had actual knowledge of specific harm or risk that was so pervasive that knowledge can be inferred; (2) defendants failed to take reasonable measures to avert harm; and (3) defendants' failure to take such measures in light of their actual or inferred knowledge justifies liability for attendant consequences of conduct, even though unintended); Popham v. City of Talladega, 908 F.2d 1561, 1564 (11th Cir. 1990) (affirming dismissal of section 1983 action because prison officials did not know of inmate's tendency toward suicide); Stevenson v. Koskey, 877 F.2d 1435, 1441 (9th Cir. 1989) (reversing trial court finding of section 1983 liability because there was no evidence that parole officer actually knew corrections officer intended to commit constitutional violation); Murphy v. United States, 653 F.2d 637, 644-45 (D.C. Cir. 1981) (finding deliberate indifference can be inferred from evidence that danger was sufficiently obvious to apprise officials and officials nevertheless failed to act); Arce v. Miles, No. 85 Civ. 5810 (SWK), 1991 WL 123952, at *10 (S.D.N.Y. June 28, 1991) (finding deliberate indifference standard met where prison officials supplied ear plugs to workers and guards to protect them from noisy work conditions yet failed to supply inmates with ear plugs).

161. A failure to act is sufficient to render a prison official liable in a deliberate indifference action because prison officials have special duty to take care of imprisoned and therefore largely powerless persons. *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (recognizing duty of care of officials who oversee incarcerated individuals).

162. *See, e.g.*, Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (proposing as part of three-part test stated in note 160, *supra*, that deliberate indifference requires knowledge which can be inferred if risk is pervasive or substantial); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir.) (stating that deliberate indifference may exist in presence of "acts or omissions so dangerous . . . that a defendant's 'knowledge of [a large] . . . risk can be inferred' ") (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)), *cert. denied*, 488 U.S. 823 (1988); Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir.) (finding that deliberate indifference may be inferred if risk of harm is pervasive and serious problem of substantial dimensions), *cert. denied*, 484 U.S. 935 (1987); Murphy v. United States, 653 F.2d 637, 644-45 (D.C. Cir. 1981) (finding that deliberate indifference can be inferred if danger is sufficiently obvious to apprise officials).

163. As the First Circuit stated, "When a supervisory official is placed on actual notice of a prisoner's need[s] . . . 'administrative negligence can rise to the level of deliberate indifference. . . .' " Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1981) (quoting West v. Rowe, 448 F. Supp. 58, 60 (N.D. Ill. 1978)), *quoted in* Davidson v. Cannon, 474 U.S. 344, 357 (1986) (Blackmun, J., dissenting).

164. *See* Williams v. Griffin, 952 F.2d 820, 826 (4th Cir. 1991) (finding that failure of prison officials to remedy conditions identified in inspection reports provided sufficient basis for claim that officials had actual knowledge of conditions); LaFaut v. Smith, 834 F.2d 389, 392-93 (4th Cir. 1987) (focusing on what prison officials knew and should have done to modify and prepare room for handicapped prisoner rather than on intent of prison officials).

mulation by presenting evidence that he or she notified officials orally or in writing of the conditions and that the officials failed to act on the notification.[165] Thus, a prisoner could prove deliberate indifference without necessarily proving the subjective motivations of the prison officials.

This formulation of deliberate indifference dilutes the implicit Eighth Amendment intent requirement found by the Court in *Wilson*.[166] That is, the inquiry into the prison official's state of mind is minimized. On the continuum between negligence and intentional conduct, therefore, deliberate indifference as knowledge plus failure to act appears to be positioned closer to negligence than to intentional conduct. Under this formulation, the impact of the standard on the rights of prisoners would likely be slight.[167]

An issue related to this interpretation of deliberate indifference, and indeed to any interpretation that requires a showing of an official's failure to act in response to a notification of harmful conditions, is whether prison officials could conceivably negate the failure to act element by making a minimal effort to remedy inadequacies.[168] Some action, however, has not necessarily sufficed in the courts to date.[169] The officials' remedial actions must be "significant" according to some courts and "reasonable" according to

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165. *See* McGill v. Duckworth, 944 F.2d 344, 349 (7th Cir. 1991) ("A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety."); Goka v. Bobbitt, 862 F.2d 646, 647-48, 652 (7th Cir. 1988) (finding officials had knowledge of danger due in part to oral and written requests for protection from prisoner and that proof of knowledge should therefore have precluded district court's granting of summary judgment for defendant); Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (holding prisoners' allegations of harm sufficient to state claim where repeated complaints about confinement conditions had not produced results), *vacated on other grounds*, 858 F.2d 1101 (5th Cir. 1988). *But see* Davidson v. Cannon, 474 U.S. 344, 347-48 (1986) (denying relief under Fourteenth Amendment to prisoner injured by inmate after prisoner sent note asking for protection to prison official and official failed to respond, finding that official's failure to act on note was lack of due care but not abusive governmental conduct).

166. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (finding intent requirement implicit in word "punishment" in Eighth Amendment's Cruel and Unusual Punishment Clause).

167. *See* Brief for the United States as Amicus Curiae, *supra* note 44, at 22-25, 26 n.27 (predicting that if deliberate indifference is interpreted as knowledge and omission to act, it is unlikely that outcome of more serious prison cases would change).

168. *See Wilson*, 111 S. Ct. at 2331 (White, J., concurring) ("[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because officials managing the institution have exhibited a conscientious concern for ameliorating its problems and have made efforts (albeit unsuccessful) to that end." (quoting Brief for the United States as Amicus Curiae, *supra* note 44, at 19)).

169. *See* LaFaut v. Smith, 834 F.2d 389, 392 (4th Cir. 1987) (reversing district court's dismissal of section 1983 action against prison officials who delayed "significant attempt" to modify toilet facilities for handicapped inmate); *see also* Brief for the United States as Amicus Curiae, *supra* note 44, at 17-19 (arguing that some action by prison officials in response to deficient conditions should not preclude Eighth Amendment violation).

others.[170]

*b. Inexcusable lack of knowledge*

Actual knowledge of substandard conditions may not be required to establish deliberate indifference on the part of prison officials. This is possible in at least two scenarios. First, prison officials may purposely shield themselves from knowledge of severe conditions.[171] Such purposeful shielding may be used to infer knowledge and will likely give rise to a deliberate indifference determination.[172] Second, a prison official's lack of knowledge of harmful conditions may be so offensive that it also rises to the level of deliberate indifference.[173] In this instance, the official's unawareness of harm is troubling because lack of knowledge itself may indicate outrageous insensitivity and flagrant indifference.[174] In this scenario, courts frame the deliberate indifference standard in language reminiscent of negligence, stating namely that officials either "knew or should have known" of the harm.[175] Under this interpretation, the deliberate indifference standard is significantly removed from the Eighth

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170. *Compare* Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (noting that failure by prison officials to take "significant steps" is element of deliberate indifference) *with* Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (finding deliberate indifference may not exist where defendant takes reasonable measures to avoid known or inferred harm) *and* Vosburg v. Solem, 845 F.2d 763, 767 (8th Cir.) (upholding liability of prison officials who failed to respond reasonably to risk of inmate assault), *cert. denied*, 488 U.S. 928 (1988).

171. *See* Brief for the United States as Amicus Curiae, *supra* note 44, at 23 (suggesting that actual knowledge need not be shown for deliberate indifference when officials shield themselves from information).

172. *See* McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991) ("Suspecting that something is true but shutting your eyes for fear of what you will learn satisfies scienter requirements . . . [because] [b]eing an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent.") (citations omitted).

173. The court in Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987), found deliberate indifference on such an occasion in the context of prison safety:

> Deliberate indifference occurs if there is an obvious unreasonable risk of violent harm to a prisoner . . . which is known to be present or should have been known, and the District through its employees who knew or should have known of the risk were outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm to the prisoner . . . .

*Id.* at 1058 (quoting Murphy v. United States, 653 F.2d 639, 644-45 (D.C. Cir. 1981)).

174. *See supra* note 173 (providing language of court discussing meaning of deliberate indifference).

175. *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10-11 (1st Cir. 1991) ("The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known, of the detainee's suicidal tendencies."); Colburn v. Upper Darby Township, 946 F.2d 1017, 1024 (3d Cir. 1991) (maintaining that liability exists where custodial official knew or should have known of strong likelihood of prison suicide); Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (stating deliberate indifference occurs when unreasonable risk is or should have been known by officials); Wade v. Haynes, 663 F.2d 778, 781 (8th Cir. 1981) (affirming section 1983 judgment against prison guard because there was sufficient evidence officer knew or should have known of threat to prisoner), *aff'd*, 461 U.S. 30 (1983).

Amendment intent requirement found by the Court in *Wilson*. Once again, the term is placed closer to negligence than to intentional conduct on the culpability continuum. Thus, the impact of the standard handed down in *Wilson* is cushioned under this formulation to the benefit of the prisoner.

To be sure, simple negligence will not suffice in an Eighth Amendment challenge to prison conditions.[176] Courts will probably limit findings of deliberate indifference when prison officials actually lack knowledge of harmful conditions to circumstances when prison officials deliberately shield themselves from knowledge or are disturbingly unaware of the harmful conditions.

*c. Recklessness*

A number of courts have equated deliberate indifference with recklessness.[177] Unfortunately, this equation is of little help in understanding the potential impact of the deliberate indifference standard. Recklessness is as amorphous a concept as deliberate indifference.[178] It is comprised of varying levels and degrees.[179] In-

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176. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 319 (1986) (holding that violations of Eighth Amendment require more than ordinary lack of care); Colburn v. Upper Darby Township, 946 F.2d 1017, 1025 (3d Cir. 1991) (defining "should have known" standard as more than negligence but less than subjective appreciation of risk); Givens v. Jones, 900 F.2d 1229, 1232 (8th Cir. 1990) (asserting that Eighth Amendment violations require more than "mere acts of negligence on part of prison officials and employees"); Birrell v. Brown, 867 F.2d 956, 958 (6th Cir. 1989) (stating Eighth Amendment challenges require showing greater than "mere negligence or oversight").

177. *See, e.g.*, Davidson v. Cannon, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting) (stating that prisoners must prove recklessness or deliberate indifference in Eighth Amendment cruel and unusual punishment claims); Davidson v. Cannon, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting) (equating recklessness with deliberate indifference); Desrosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) ("[R]equisite state of mind . . . can aptly be described as 'recklessness,' it is recklessness not in the tort-law sense but in the appreciably stricter criminal-law sense, requiring actual knowledge of impending harm, easily preventable.") (citations omitted); Marsh v. Arn, 937 F.2d 1056, 1069-70 (6th Cir. 1991) (rejecting simple negligence as standard for deliberate indifference and adopting "fairly high threshold of liability"); Salazar v. City of Chicago, 940 F.2d 233, 238 (7th Cir. 1991) (defining deliberate indifference as "intentional or criminally reckless conduct"); Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (applying deliberate indifference or reckless disregard as standard for inmate's Eighth Amendment challenge to conditions of confinement); Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) (stating that medical care provided to prisoners only violates Eighth Amendment when it is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness") (quoting Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986)); Miltier v. Beorn, 896 F.2d 848, 851-52 (4th Cir. 1990) (providing that deliberate indifference to inmates' medical needs may be demonstrated by actual intent or reckless disregard); Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988) (stating that deliberate indifference standard is met where prison officials "act with reckless indifference" toward known risk of inmate suicide), *cert. denied*, 489 U.S. 1065 (1989).

178. *See* Germany v. Vance, 868 F.2d 9, 18 n.10 (1st Cir. 1989) (referring to recklessness as "gray area" between negligence and intentional conduct and discussing possible levels of recklessness).

179. *See* Berry v. City of Muskogee, 900 F.2d 1489, 1495-96 & n.7 (10th Cir. 1990) (finding difference between tort recklessness and varying levels of criminal recklessness); *Germany*,

deed, "recklessness" has been defined as willfulness, wantonness, carelessness, or negligence.[180] The impact of interpreting deliberate indifference as recklessness, therefore, will depend on a specific court's proscribed level and degree of recklessness. Two major levels of recklessness found by courts to define deliberate indifference are considered below.

The Seventh Circuit and courts thereunder have concluded in a number of decisions that conduct only reaches the level of deliberate indifference when it is criminally reckless.[181] To be deliberately indifferent in this formulation, prison officials must know of the high degree of risk in their actions or inactions, rather than merely acting

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868 F.2d at 18 n.10 (observing that tortious recklessness may be gross negligence or lesser form of intentional conduct).

180. Blacks Law Dictionary defines "reckless" as follows:

> Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.

BLACK'S LAW DICTIONARY 1270 (6th ed. 1990).

181. *See, e.g.*, Henderson v. DeRobertis, 940 F.2d 1055, 1060 (7th Cir. 1991) (defining deliberate indifference as criminal recklessness in inmates' Eighth Amendment challenge to cold prison conditions); Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990) (maintaining that prisoner must prove officials acted deliberately or recklessly in criminal sense to meet deliberate indifference standard); Goka v. Bobbitt, 862 F.2d 646, 650 (7th Cir. 1988) (finding actions of prison officials must be deliberate or reckless in criminal sense); Walsh v. Mellas, 837 F.2d 789, 794 (7th Cir.) (rejecting application of recklessness in sense of tort law and finding that deliberate indifference is recklessness in criminal sense), *cert. denied*, 486 U.S. 1061 (1988); Shockley v. Jones, 823 F.2d 1068, 1072 (7th Cir. 1987) (establishing that Eighth Amendment is violated only by pain inflicted deliberately or recklessly in criminal sense); Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985) (finding Eighth Amendment can be violated only by deliberate or reckless conduct in criminal sense), *cert. denied*, 479 U.S. 816 (1986); Thomas v. Cabanaw, No. S90-123 (RDP), 1991 WL 183868, at *8 (N.D. Ind. Aug. 23, 1991) (providing that inmate challenging deficiencies in personal safety at prison must prove prison officials acted recklessly in criminal sense to establish deliberate indifference); Kimble v. O'Leary, No. 89 C. 2033, 1990 WL 129520, at *2 (N.D. Ill. Sept. 4, 1990) (finding criminal recklessness defines deliberate indifference in challenges to inadequacies in inmate safety). Criminal recklessness has been defined as follows:

> A person acts recklessly with respect to a material element of an offense when [s]he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from [her] conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to [her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (Official Draft 1962). Despite its use of criminal recklessness to define the general deliberate indifference standard, the Seventh Circuit however has applied the repeated negligent acts or systematic deficiencies formulation of deliberate indifference, see *infra* notes 195-202 and accompanying text (discussing formulation), in class action suits seeking injunctive relief for inadequate medical care situations. *See, e.g.*, Murphy v. Lane, 833 F.2d 106, 108 (7th Cir. 1987) (stating that deliberate indifference may be indicated by repeated negligent acts or systematic deficiencies); French v. Owens, 777 F.2d 1250, 1254 (7th Cir. 1985) (applying deliberate indifference as repeated negligent acts or systematic deficiencies test), *cert. denied*, 479 U.S. 817 (1986); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) (determining that repeated acts of negligent medical care constitute deliberate indifference), *cert. denied*, 486 U.S. 1217 (1984).

or failing to act in a highly risky manner without knowing or unreasonably not knowing of the risk.[182] In the context of criminal recklessness, knowledge of risk can be inferred by the extreme dangerousness of an act.[183] Considering that such awareness of high risk must be present when the prison official deliberately acts or fails to act, this form of recklessness or deliberate indifference takes on characteristics more akin to intentional conduct than to negligence.

Criminal recklessness, however, exists in varying degrees.[184] One Seventh Circuit decision, *Duckworth v. Franzen*,[185] equated deliberate indifference with the highest degree of criminal recklessness, that which is appropriate for second degree murder.[186] The court noted that conduct that is wrongful, deliberate, and very dangerous manifests such recklessness.[187] Deliberate indifference in this sense

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182. *See* Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985) (defining criminal recklessness as "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it."), *cert. denied*, 479 U.S. 816 (1986), *quoted with approval in* Santiago v. Lane, 894 F.2d 218, 221 n.7 (7th Cir. 1990).

183. *See* Goka v. Bobbitt, 862 F.2d 646, 650 (7th Cir. 1988) (stating that criminal recklessness " 'implies an act so dangerous that the defendant's knowledge of the risk can be inferred . . . .' ") (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)); Walsh v. Mellas, 837 F.2d 789, 794 (7th Cir.) (noting that criminally reckless acts import danger so great that knowledge of danger can be inferred), *cert. denied*, 486 U.S. 1061 (1988).

184. *See* Berry v. City of Muskogee, 900 F.2d 1489, 1495 & n.7 (10th Cir. 1990) (discussing varying levels of criminal recklessness from reckless endangerment to second degree murder).

185. 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986).

186. *See* Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). In *Duckworth*, the Seventh Circuit endorsed criminal recklessness as the deliberate indifference standard. *Id.* The court described criminal recklessness by presenting the example of a defendant choking his victim and intending to seriously injure him but killing him instead. *Id.* at 652. In this circumstance, the homicide is downgraded from first degree murder to second degree murder. *Id.* The court continued by stating, "As this example suggests, recklessness in the criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred." *Id.*

It is unclear whether the subsequent Seventh Circuit cases that cited *Duckworth* approvingly and purported to apply deliberate indifference as criminal recklessness intended to impose such a high standard. None of the subsequent decisions definitively supported a second degree murder level of criminal recklessness. One case, however, in describing the deliberate indifference standard with regard to medical needs, cited as an example of deliberate indifference a doctor injecting a prisoner with penicillin after the inmate informed the doctor he was allergic to it. Walsh v. Mellas, 837 F.2d 789, 795 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *see also* Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.) (holding that prison doctor inflicted cruel and unusual punishment on inmate when he gave inmate penicillin shot after inmate informed him he was allergic to penicillin), *vacated and remanded on other grounds sub nom.* Cannon v. Thomas, 419 U.S. 813 (1974). This example would appear to comport with the second degree murder level of criminal recklessness. *Cf.* Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (finding pertinent degree of recklessness for Due Process Clause case to be when actor does not care whether other person lives or dies despite knowing that there is significant risk of death).

187. *Duckworth*, 780 F.2d at 652. The Model Penal Code defines criminally reckless murder as homicide that "is committed recklessly under circumstances manifesting an extreme

is indistinguishable from intentional conduct on the culpability continuum. The impact of such a formulation is to greatly restrict a prisoner's ability to successfully challenge the conditions of confinement under the Eighth Amendment. The Supreme Court has nevertheless cited *Duckworth*'s formulation of deliberate indifference approvingly.[188]

Other courts have interpreted deliberate indifference in Eighth Amendment cases to be closer to tortious recklessness.[189] Tortious recklessness may be a heightened form of negligence such as gross negligence, or a lower form of intent.[190] Recently, the Supreme Court suggested that gross negligence is insufficient to establish deliberate indifference.[191] Thus, recklessness for the purpose of defin-

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indifference to the value of human life." MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1962).

188. *See* Whitley v. Albers, 475 U.S. 312, 321 (1986) (citing *Duckworth*'s equation of deliberate indifference to criminal recklessness for proposition that inferences may be drawn to determine if official's infliction of harm was tantamount to knowing willingness that harm would occur).

189. *See, e.g.*, Wright v. Jones, 907 F.2d 848, 851 (8th Cir. 1990) (affirming reckless disregard standard as elaboration of deliberate indifference); Berry v. City of Muskogee, 900 F.2d 1489, 1496 (10th Cir. 1990) (holding that deliberate indifference occurs if prison official or municipality "disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights"); Ayers v. Coughlin, 780 F.2d 205, 209 (2d Cir. 1985) (finding inmate has viable Eighth Amendment issue if prison official acted intentionally or with reckless disregard of inmate's right to be free from risk of harm); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984) (finding reckless disregard of prisoner's rights may be shown when pervasive risk of harm exists and prison officials fail to respond to that risk). The court in *Berry* derived its definition of recklessness from tort law, citing PROSSER & KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (defining reckless conduct to be conduct "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences"). *Berry*, 900 F.2d at 1496. Subsequently, the court rejected the high degree of criminal recklessness required by the Seventh Circuit in *Duckworth*. *See id.* (finding proof required by *Duckworth* test is "too high a standard," given Supreme Court's distinction between *Estelle* and *Whitley*).

190. *See* Germany v. Vance, 868 F.2d 9, 18 n.10 (1st Cir. 1989) (noting that recklessness can be akin to gross negligence or to lesser form of intent and choosing latter as proper interpretation for Due Process purposes); Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (asserting that courts sometimes treat reckless infliction of injuries as equivalent to intentional conduct); *see also* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (observing that one common understanding of recklessness in tort law equates it with gross negligence), *cert. denied*, 479 U.S. 816 (1988). The Restatement of Torts states that there are two types of reckless conduct. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1977). In one type, the actor knows or has reason to know of the high degree of risks in the action. *Id.* In the other type, the actor does not realize or appreciate the high degree of risks in the actions, but a reasonable person would have. *Id.* The latter formulation is based on reasonableness and is similar to recklessness in the gross negligence sense.

191. In Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court held that for the purpose of determining a municipality's section 1983 liability for failing to properly train police officers, it must be shown that the municipality's failure to act stemmed from deliberate indifference on the part of governmental officials to the rights of those who come in contact with the police. *Id.* at 388-89 & n.7. The Court commented that some lower courts applied gross negligence as the proper standard in failure to train cases, but that the more common rule was to apply the deliberate indifference standard. *Id.* at 388 n.7. The Court, therefore, considered the two standards to be different. Accordingly, recklessness as gross negligence would

ing Eighth Amendment deliberate indifference will likely be required by courts to be of a form closer to intent than to negligence.[192] In this formulation, as with criminal recklessness, prison officials would have to appreciate the high degree of risk engendered by their actions or inactions rather than merely act or fail to act in a high-risk manner before liability would attach.[193]

If courts choose to interpret deliberate indifference as criminal or tortious recklessness, they place the standard closer to intent than to negligence on the culpability continuum.[194] Accordingly, it will be more difficult for prisoners to successfully challenge their confinement conditions than if the standard had more closely approximated negligence. If courts choose to interpret deliberate indifference as a high degree of criminal recklessness, the deliberate indifference standard will be very difficult for prisoners to meet, much to the detriment of their rights.

*d. Repeated negligent acts or systematic and gross deficiencies*

A number of lower court cases since *Estelle v. Gamble* have interpreted the deliberate indifference standard to be met by evidence of repeated negligent acts that disclose a pattern of prison officials' conduct, or by proof of systematic and gross deficiencies in prison staffing, facilities, equipment, or procedures that effectively deny inmates adequate care.[195] The first part of this interpretation returns

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not be equivalent to deliberate indifference. This suggestion conflicts with a number of federal court decisions that equate deliberate indifference with gross negligence. *See, e.g.*, Benson v. Cady, 761 F.2d 335, 339-40 (7th Cir. 1985) (noting deliberate indifference may be reckless disregard or gross negligence); Gibralter v. City of New York, 612 F. Supp. 125, 133 (E.D.N.Y. 1985) (finding that inmate has burden of proving defendants acted with gross negligence or deliberate indifference); Spell v. McDaniel, 591 F. Supp. 1090, 1110 (E.D.N.C. 1984) (stating that liability attaches to officials when their action or inaction amounts to gross negligence or deliberate indifference).

192. *See Berry*, 900 F.2d at 1495-96 (citing *Canton* and maintaining that deliberate indifference requires greater degree of fault than gross negligence). In *Berry*, the Tenth Circuit propounded a degree of recklessness more closely related to intent. *See id.* at 1496 (holding that officials act with deliberate indifference if their conduct disregards known or obvious risks that are very likely to result in violation of prisoners' rights); *see also supra* note 190 (delineating different degrees of recklessness).

193. *See supra* notes 177-92 and accompanying text (discussing criminal and tortious degrees of recklessness).

194. *See* Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1988) (en banc) (" 'Recklessness' is a proxy for intent . . . ."); *see also supra* notes 154-58 and accompanying text (discussing distinctions in degrees of culpability between negligence and intentional conduct).

195. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1506 (11th Cir. 1991) (stating that HIV-positive inmates may establish prison officials' deliberate indifference to inmate medical needs by showing systemic and gross deficiencies or repeated negligent acts in provision of medical services); DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990) (finding inmates challenging exposure to tuberculosis may establish deliberate indifference by evidence of repeated negligent acts or systematic deficiencies); Murphy v. Lane, 833 F.2d 106, 108 (7th Cir. 1987) (stating that deliberate indifference may be indicated by repeated negligent acts or systematic deficiencies); French v. Owens, 777 F.2d 1250, 1254 (7th Cir. 1985) (upholding deliberate

courts' attention to prison officials' negligence—this time, however, negligence is viewed in the aggregate. In some sense, it is a "totality-of-negligence" standard. The number of acts of negligence necessary to give rise to a determination of deliberate indifference is open for debate,[196] and the outcome of this debate will be a factor in determining the impact of this interpretation on confinement condition cases.

The second part of this interpretation—proof of systematic deficiencies within the prison environment—is indeed curious. The criterion appears to disregard the state-of-mind requirement entirely and to revisit instead the totality of circumstances test.[197] Deliberate indifference is consequently framed in language regarding objective conditions rather than prison official culpability,[198] and the standard is therefore no longer positioned on the culpability continuum at all.[199] Conceivably, a lower court could find prison officials

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indifference in inadequate medical care case as repeated negligent acts or systematic deficiencies standard), *cert. denied*, 479 U.S. 817 (1986); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) (determining meaning of deliberate indifference in inadequate medical care context), *cert. denied*, 486 U.S. 1217 (1984); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (discussing meaning of deliberate indifference in prisoner class action suits); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (finding series of incidents closely related in time amounts to deliberate indifference and noting systematic deficiencies make suffering inevitable); Gilland v. Owens, 718 F. Supp. 665, 684 (W.D. Tenn. 1989) (upholding interpretation of repeated negligent acts and systematic deficiencies as deliberate indifference); Fisher v. Koehler, 692 F. Supp. 1519, 1561-62 (S.D.N.Y. 1988) (finding systematic deficiencies at prison established deliberate indifference in case challenging overall conditions of inmate safety), *aff'd*, 902 F.2d 2 (2d Cir. 1990). Some courts discussing this formulation refer to "systemic" rather than "systematic" deficiencies. *Harris*, 941 F.2d at 1505; *Ramos*, 639 F.2d at 575.

196. Terms such as "repeated" or "series" of negligent acts showing a "pattern" of prison official conduct, see cases cited *supra* note 195, provide clues as to the number of negligent acts deemed necessary to meet the standard, but they are far from definitive. Apparently, at least two negligent acts will suffice, but most likely more are required. When considering whether the "repeated" or "series" of negligent acts rises to the level of deliberate indifference, the amount of time between the acts is likely to be a factor. *See* Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (noting that acts must be "closely related in time").

197. *See supra* notes 65-66 and accompanying text (discussing totality of circumstances test).

198. *Cf.* Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (finding prison's resources and personnel so overtaxed that prisoners' suffering was serious and inevitable), *cert. denied*, 468 U.S. 1217 (1984). This case interpreted the deliberate indifference standard in another portion of the opinion regarding inadequate medical care. *Id.* at 272. The case did not apply the standard to challenges of confinement conditions.

199. A passage from *Fisher v. Koehler* can be used to illustrate how far removed this understanding is from subjective prison official culpability. After concluding that systematic deficiencies at a prison constituted deliberate indifference, the court in *Fisher* stated:

> This finding should not be interpreted as casting any cloud on the obvious sincerity and competence of Commissioner Koehler, then-Warden Garvey, and many of the other officials from whom we heard testimony. A finding of "deliberate indifference" from evidence of systematic deficiencies in prison conditions is not inconsistent with findings that individual officials or staff members at an institution attempt in good faith to do a good job.

Fisher v. Koehler, 692 F. Supp. 1519, 1562 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990).

deliberately indifferent, as required by the Court in *Wilson*, without inquiring into the state of mind of the officials. This result brings the law back to at least the pre-*Wilson* stage. Under an interpretation approximating a totality of circumstances test, the decision in *Wilson* would have little or no impact on a prisoner's cause of action challenging confinement conditions.

There are, however, potential problems with arguing in a confinement condition case that deliberate indifference should be interpreted according to this formulation. First, previous cases interpreting the standard by examining repeated negligent acts or deficiencies in staffing, facilities, equipment, and procedures have arisen almost exclusively in the context of class action suits seeking injunctive relief.[200] Furthermore, most of the cases applying the formulation have involved inadequate medical care claims.[201] It may be contended, therefore, that the formulation should not apply in cases that do not match these characteristics.[202]

### 2. *Predicting the correct formulation*

It is difficult to predict at this point which, if any, of the aforementioned formulations of deliberate indifference will emerge as the "correct" interpretation. To date there are no steadfast rules for applying any particular formulation. There are, however, a few trends that may give some indication as to future developments. The trends relate to the location in which an action is brought, the type of conduct challenged, and the nature of the relief sought.

For example, the Seventh Circuit regularly equates deliberate in-

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200. *See supra* note 195 (providing cases). *But see* Kelley v. McGinnis, 899 F.2d 612, 614 (7th Cir. 1990). In *Kelley*, the inmate plaintiff brought an Eighth Amendment claim alleging that prison administrators were deliberately indifferent in treating his chronic foot problem. *Id.* at 614. The inmate alleged deliberate indifference under two theories: first, that prison doctors intentionally aggravated his medical condition, and second, that the doctors were guilty of repeated, long-term negligent treatment. *Id.* at 616. The Seventh Circuit questioned the repeated negligent acts theory by noting that it had only found deliberate indifference under the theory in class action suits. *See id.* at 617 (citing *Wellman*, 715 F.2d at 272). The court proceeded, however, to give a luke-warm affirmation of the theory in this context, finding that relief should not be foreclosed in this single plaintiff case, at least not at the summary judgment stage, under the repeated acts theory. *Id.*

201. *See supra* note 195 (providing cases).

202. To conclude, however, that this interpretation of deliberate indifference should apply in the context of inadequate medical care but not in the context of poor confinement conditions would be to promulgate a double standard. After all, the Court in *Wilson* extended the deliberate indifference standard to confinement condition cases partly because the wrongs in those cases, i.e. pain and suffering, could not be distinguished from the wrongs in inadequate medical care cases. *See supra* note 119 and accompanying text (discussing Court's derivation of deliberate indifference standard). Arguably, therefore, the repeated negligent acts or systematic deficiencies interpretation of deliberate indifference should apply to Eighth Amendment challenges in both medical care and confinement conditions cases.

difference in nonclass action suits with criminal recklessness.[203] Prisoners challenging conditions of confinement in this circuit should be prepared to meet this rigorous standard. On the other hand, both the Eighth and Tenth Circuits have specifically rejected this approach and will likely apply a less rigorous standard.[204] Most importantly, however, the Supreme Court appears to approve of the Seventh Circuit's formulation. In two relatively recent major prison cases, the Court has approvingly cited the Seventh Circuit decision that originated the criminal recklessness interpretation.[205] Considering this sanction of the Seventh Circuit's formulation and the Court's consistent deference to prison administrators over the past fifteen years,[206] it appears likely that the Court will adopt the stringent criminal recklessness standard if an opportunity is presented.

As for the type of conduct challenged and the relief sought, courts most often tend to apply the repeated negligent acts or systematic deficiencies formulation in Eighth Amendment class action challenges seeking injunctive relief to inadequate medical care.[207] Furthermore, courts tend to apply the recklessness or knowledge plus a failure to act formulation in challenges seeking damages for inadequate prison safety conditions.[208] Beyond these two trends, however, a consistent pattern has yet to emerge. For example, courts

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203. *See supra* note 181 and accompanying text (providing Seventh Circuit cases interpreting deliberate indifference standard).

204. *See* DeGidio v. Pung, 920 F.2d 525, 532-33 (8th Cir. 1990) (following *Berry v. City of Muskogee* and rejecting criminal recklessness interpretation of deliberate indifference while accepting deliberate indifference as either recklessness or repeated negligent acts); Berry v. City of Muskogee, 900 F.2d 1489, 1495, 1498 (10th Cir. 1990) (rejecting *Duckworth*'s criminal recklessness standard and applying deliberate indifference in form akin to knowledge plus failure to act).

205. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991) (quoting and agreeing with Seventh Circuit's discussion in Duckworth v. Franzen, 780 F.2d 645 (1985) of conduct proscribed by Eighth Amendment); Whitley v. Albers, 475 U.S. 312, 321 (1986) (sanctioning *Duckworth*'s equation of deliberate indifference with criminal recklessness).

206. *See supra* note 33 (providing Supreme Court cases rejecting prisoners' challenge to prison officials' actions). *But see* Hudson v. McMillian, 112 S. Ct. 995, 1002 (1992) (reversing court of appeals decision that denied relief to prisoner because he suffered no "significant injury") (quoting Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990)).

207. *See supra* note 195 (providing cases applying deliberate indifference standard as repeated negligent acts or systematic deficiencies test in Eighth Amendment challenges to inadequate medical care).

208. *See, e.g.*, Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (applying deliberate indifference in form similar to knowledge plus failure to act in case challenging prisoner's conditions of personal safety); Vosburg v. Solem, 845 F.2d 763, 765-66 (8th Cir.) (upholding jury instruction that stated deliberate indifference may be shown by prison officials' acting with reckless disregard to inmate's risk of being assaulted), *cert. denied*, 488 U.S. 928 (1988); Murphy v. United States, 653 F.2d 637, 644-45 (D.C. Cir. 1981) (finding deliberate indifference can be inferred from evidence that danger to inmate's safety was sufficiently obvious to apprise officials who failed to act); Thomas v. Cabanaw, No. S90-123 (RDP), 1991 WL 183868, at *8 (N.D. Ind. Aug. 23, 1991) (providing that inmate challenging deficiencies in personal safety at prison must prove prison officials acted recklessly in criminal sense to establish deliberate indifference).

evaluating the constitutionality of confinement conditions relating to inmate health, hygiene, or shelter have applied varying interpretations of the deliberate indifference test.[209] A possibility exists that courts will follow the Supreme Court's analysis in *Wilson* and equate challenges to inadequate medical care with challenges to confinement conditions.[210] If this is done, courts may regularly apply the repeated negligent acts or systematic deficiencies interpretation to confinement condition cases.

### *B. Determining Which "Constraints" On Prison Officials Will Preclude a Finding of Wantonness*

The Court in *Wilson* stated that whether conduct can be characterized as wanton depends on the constraints facing prison officials.[211] Because conduct must be wanton to violate the Eighth Amendment, recognition of the types of constraints that will preclude a wantonness finding is crucial to understanding the impact of the decision.[212] It is unclear, however, exactly what kinds of preclusive constraints the majority envisioned. As a result, it will be largely up to the lower courts to make this determination and to thereby define the impact of the decision.

One constraint that prison officials are likely to present as a defense after *Wilson* is a lack of funding.[213] For example, a prison official may attempt to refute charges of deliberate indifference to harmful prison conditions by affirmatively showing inability to receive sufficient funding from the state legislature to remedy the conditions, despite repeated efforts to obtain such funding.[214] The

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209. *See, e.g.*, Alberti v. Sheriff of Harris County, 937 F.2d 984, 998-99 (5th Cir. 1991) (interpreting deliberate indifference in challenge to overcrowded conditions as knowledge plus failure to remedy conditions); Henderson v. DeRobertis, 940 F.2d 1055, 1060 (7th Cir. 1991) (defining deliberate indifference as criminal recklessness in inmate's challenge to cold prison conditions); Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (equating deliberate indifference with reckless disregard in inmate's Eighth Amendment challenge to noise and fumes at prison); Fisher v. Koehler, 692 F. Supp. 1519, 1561-62 (S.D.N.Y. 1988) (finding systemic deficiencies at prison established deliberate indifference in case challenging overall safety of inmates in prison shelter), *aff'd*, 902 F.2d 2 (2d Cir. 1990).

210. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (finding no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement).

211. *Id.* at 2326; *see supra* notes 122-24 and accompanying text (discussing Court's finding that constraints on officials are relevant to wantonness determination).

212. *See Wilson*, 111 S. Ct. at 2326 (stating that previous cases held that offending conduct must be wanton).

213. The concurring opinion in *Wilson* raises this concern. *See id.* at 2330-31 (White, J., concurring) (stating that majority decision leaves open possibility that prison officials could simply show lack of funds from state legislature to disprove deliberate indifference).

214. *See id.* at 2326 (noting suggestion by United States as amicus curiae that state-of-mind requirement might give rise to lack of funding defense). *Cf.* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) ("[C]onscientious prison officials are '[caught]

efforts to obtain funding, under this defense, would demonstrate in theory the prison official's innocent state of mind and therefore preclude a finding of an Eighth Amendment violation. In this situation, it is a prison official's inability to obtain funding that precludes a finding of wantonness, and insufficient funding ultimately excuses the harmful confinement conditions.

The Court appeared to leave the validity of this fiscal constraint defense open by finding that such constraints cannot change the meaning of cruel and unusual punishment,[215] although the Court refused to address the issue fully because the prison officials had not advanced the defense.[216] The mere fact that the Court flirted with the validity of the defense is both surprising and troubling, however. It is surprising because there are a substantial number of circuit and district court cases that have specifically rejected a fiscal constraint defense in Eighth Amendment cases;[217] this body of law is now

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in the middle,' as state legislatures refuse 'to spend sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards.' " (quoting Johnson v. Levine, 450 F. Supp. 648, 654 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978))).

215. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (observing that whether intent is implicit in "punishment" cannot depend on availability of fiscal constraint defense or other "policy considerations").

216. *Id.* The Court also noted that, to its knowledge, no other prison officials have sought to use the funding defense to avoid the holding of *Estelle v. Gamble*. *Id.*; *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding prison officials must be deliberately indifferent to inmate's serious medical needs to violate Eighth Amendment).

217. *See, e.g.*, Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement . . . ." (citations omitted)); Ramos v. Lamm, 639 F.2d 559, 578 (10th Cir. 1980) (disallowing funding problems as excuse for unconstitutional confinement conditions caused by understaffing of prison), *cert. denied*, 450 U.S. 1041 (1981); Battle v. Anderson, 564 F.2d 388, 396 (10th Cir. 1977) (providing that lack of financing is not defense for failure to provide minimum constitutional standards in Oklahoma's prisons); Williams v. Edwards, 547 F.2d 1206, 1213 (5th Cir. 1977) (concluding that neither lack of funds nor lack of authority over funds will justify operating prison in unconstitutional manner); Gates v. Collier, 501 F.2d 1291, 1319 (5th Cir. 1974) (asserting that unconstitutional prison conditions have not been excused by fund shortages and inability of federal district courts to compel appropriations by state legislature). In one decision a district court, realizing the constraints on prison officials, all but apologized for finding that prison conditions violated the Eighth Amendment due to problems aggravated by understaffing and an aging physical plant:

> Given the most generous application of judicial restraint [the overcrowding] raise[s] serious Eighth Amendment problems. In the context of the physical plant and the limits on staffing this overcrowding constitutes a violation of the Eighth Amendment of the Constitution of the United States. This Court reaches this conclusion with the greatest reluctance but the facts compel the conclusion.

Hendrix v. Faulkner, 525 F. Supp. 435, 527 (N.D. Ind. 1981), *aff'd in part and vacated in part sub nom. and quoted with approval in* Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). In one of the earliest decisions to find confinement conditions unconstitutional, the court in *Holt v. Sarver* rejected the proposition that constraints on prison officials should excuse poor prison conditions:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate the existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is

called into question.[218] The Court's mention of the fiscal constraint defense is troubling because if the defense is deemed to be valid, the impact of *Wilson* on prisoners across the country will be great. Because adequate prison funding is consistently problematic,[219] it is likely that the defense will be raised frequently and successfully. Thus, the rights of prisoners not to live in squalor may be lost as a result of the fiscal problems facing our nation's prisons.[220]

In addition to funding constraints and the problems directly associated with them such as aging facilities and understaffing,[221] the issue of whether rapid prison overcrowding will constitute a con-

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going to have to be a system that is countenanced by the Constitution of the United States.

Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

218. The Supreme Court's dicta in Rufo v. Inmates of Suffolk County, 112 S. Ct. 748 (1992) would appear at first glance to resolve the funding issue. The Court stated, "Financial constraints may not be used to justify the creation or perpetuation of constitutional violations . . . ." *Id.* at 764. This statement, however, merely begs the question. To have any meaning, the statement first requires the existence of a constitutional violation. Under *Wilson v. Seiter*, the constitutional violation does not exist unless prison officials act with "deliberate indifference." Wilson v. Seiter, 111 S. Ct. 2321, 2326-27 (1991) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). Thus, it is still unclear whether a legitimate funding constraint could preclude a finding of deliberate indifference and hence a constitutional violation. The Supreme Court's dicta in *Rufo* would only become relevant in a case where a constitutional violation is first established.

219. In recent years, prison funding problems have not necessarily stemmed from legislators' reluctance to allocate money for prison upkeep, improvements, and construction. The problems have stemmed from the failure of funding to keep up with prison population growth. *See, e.g.*, Jeffrey Hoff, *Prison Overcrowding Poses Tough Issues*, N.Y. TIMES, Feb. 24, 1991, § 12NJ, at 1 (reporting that by end of 1991, state of New Jersey will have shortage of 7000 prison beds despite increase in Department of Corrections' budget from $92 million in 1980 to $599 million in 1991); Rick Pearson, *State Building Prisons, But Not Fast Enough*, CHI. TRIB., Jan. 17, 1990, at C1 (explaining that despite aggressive 14-year prison construction program there are 24,869 inmates in Illinois state penitentiary system designed to hold 18,760); Todd Spangler, *Lawmakers Mull Prison Alternatives*, WASH. TIMES, Feb. 4, 1992, at B1, B3 (reporting that unchecked growth in prison population and approximate cost of $20,000 per year to support each inmate has forced Maryland state legislators to consider alternatives to $200 million plan for new prison); *see also* SHELDON KRANTZ & LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 502 (4th ed. 1991) (noting that State and Federal Governments have rapidly increased prison and jail construction to provide space for prisoners yet have failed to eliminate overcrowding). In the federal system, despite a $2.4 billion expansion budget for fiscal years 1989-1991, the Bureau of Prisons reported that its facilities were operating at 60% over capacity as of January 1991. UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL PRISONS: REVISED DESIGN STANDARDS COULD SAVE EXPANSION FUNDS 2 (Mar. 1991). Problems in prison funding are vividly illustrated by the growing number of prisoners and the cost of their housing. For example, from 1980 to 1990 the total number of prisoners in the United States increased by 441,422, an increase of 134%. PRISONERS IN 1990, *supra* note 1, at 1. The average cost of operating the federal prisons in the fiscal year of 1990 was $17,909 per inmate. BUREAU OF PRISONS, FACTS ON FEDERAL BUREAU OF PRISONS (1990). It is not surprising, therefore, that Justice Brennan commented, "The problems of administering prisons within constitutional standards are indeed complex and intractable, but at their core is a lack of resources allocated to prisons." Rhodes v. Chapman, 452 U.S. 337, 357 (1981) (Brennan, J., concurring) (citations omitted).

220. The political debate over prison funding is illuminated by the cases cited at *supra* note 217.

221. *See* Birrell v. Brown, 867 F.2d 956, 958-59 (6th Cir. 1989) (relating poor conditions to understaffing problem); Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (finding

straint on officials that may preclude a finding of wantonness also arises. For instance, prison officials may argue that poor conditions at a prison are not due to their deliberate indifference, but rather are due to rapid overcrowding that is beyond their control.[222] As with the insufficient funding defense, if this defense is successful, the impact of *Wilson* on prisoners will be grave. Because prisons are consistently overcrowded,[223] this defense could be raised frequently and successfully and would exacerbate the difficulties prisoners experience in securing their constitutional rights.

No matter what the particular constraint on an official may be, the required severity of the constraint is also open to interpretation. The inquiry is therefore not limited to determining *what* kinds of constraints preclude a finding of wantonness, but also includes what level of encumbrance created by a constraint precludes a wantonness finding.[224] The courts must determine the proper threshold as to whether the degree of restriction must be severe, serious, slightly encumbering, or something else to vindicate the prison officials. For instance, if a prison official argues she was not deliberately indif-

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unnecessary suffering of inmates due to overtaxed physical and personnel resources), *cert. denied*, 468 U.S. 1217 (1984).

222. Bell v. Wolfish, 441 U.S. 520 (1979), provides an illustration of how quickly a prison can become overcrowded. The facility in *Wolfish* was a pre-trial custodial detention center constructed in New York City in 1975. *Id.* at 524. The facility was designed to house 449 inmates, a 50% increase over the previous facility. *Id.* at 525. Yet before the facility opened, the number of persons committed for pre-trial hearings rose at an "unprecedented" rate. *Id.* The unexpected flow of inmates caused the facility to rise above its planned capacity shortly after opening, resulting in the replacement of single bunk cells with double bunks. *Id.* Within four months of the facility's opening, detainees and sentenced prisoners filed a class action suit challenging, inter alia, the overcrowded conditions of the facility. *Id.* at 526. Also, consider *Rhodes v. Chapman* in which the prison opened for use in 1972 and by 1975 an increase in the prison population forced officials to begin "double celling" the inmates. Rhodes v. Chapman, 452 U.S. 337, 341 (1981); *see also supra* note 29 (discussing double celling issue in *Rhodes*). The Court in *Rhodes* held that double celling is not a per se violation of the Eighth Amendment. *Rhodes*, 452 U.S. at 348-49. Nonetheless, double celling often forms the basis of Eighth Amendment claims brought by inmates challenging overcrowded conditions. *See, e.g.*, Tillery v. Owens, 907 F.2d 418, 428 (3d Cir. 1990) (upholding district court's determination that double celling violated Eighth Amendment); French v. Owens, 777 F.2d 1250, 1251-53 (7th Cir. 1985) (summarizing living environment experienced by double-celled prisoners and upholding district court's complete ban on double celling at prison where narrowly cramped cells are feature of severely overcrowded, unsafe, and unsanitary conditions), *cert. denied*, 479 U.S. 817 (1986); Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984) (noting district court's conclusion that double celling "engendered violence, tension and psychiatric problems," and concluding that conditions supported court's preliminary injunction prohibiting double celling at prison). Indeed, the petitioner in *Wilson v. Seiter* alleged overcrowded conditions at the prison by noting the number of "double-bunked" cells. *See* Brief of Petitioner, *supra* note 84, at 5 (observing that of 143 beds in prison, all but 28 were double-bunked).

223. *See supra* notes 1-10 and accompanying text (discussing problem of overcrowded prisons).

224. *Cf.* Whitley v. Albers, 475 U.S. 312, 318-22 (1986) (establishing level of prison official culpability required to violate Eighth Amendment as function of competing obligations and interests of officials).

ferent toward poor confinement conditions because the conditions were caused by rapid overcrowding, then a court's inquiry turns to how the overcrowding hindered the official. If the level of hindrance caused by the constraint reaches the required threshold, then the prison official did not act wantonly and the Eighth Amendment is not violated.[225]

The level at which courts set this threshold, therefore, will significantly determine the impact of *Wilson*. A low threshold requiring only a showing that the constraint reasonably encumbered the official would enable prison officials to successfully argue the defense with relative ease. A high threshold, on the other hand, requiring a showing that the constraint created no reasonable alternative for the official would create a substantial barrier to successful pleading of the defense. The latter construction, therefore, would significantly diminish the impact on prisoners of *Wilson*'s constraint defense. It would lessen the possibility that a prison official could preclude an Eighth Amendment violation by utilizing such a defense.

### *C. Interpreting the Scope of "Identifiable Human Needs"*

After rejecting the totality of circumstances test, the Court in *Wilson* held that some conditions could violate the Eighth Amendment in combination when each would not do so alone,[226] but only if the conditions have a mutually enforcing effect that deprives a prisoner of at least a single identifiable human need such as food, warmth, or exercise.[227] The idea that the conditions must deprive prisoners of a single identifiable human need is not new, however. The "core conditions" test and its variations are similar to the single identifiable human needs test and have been applied by a number of courts.[228] As previously noted, the core conditions test and the single identifiable human needs test effectively achieve the same results in their applications.[229]

The impact of the Court's decision to reject the totality of circumstances test and replace it with the single identifiable human needs

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225. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (stating that whether conduct can be considered wanton depends upon constraints facing official and not on conduct's effect on prisoners).

226. *Id.* at 2327 (dismissing petitioner's contention that each prison condition challenged must be considered as part of overall prison conditions).

227. *Id.*; *see supra* notes 125-31 and accompanying text (discussing Court's rejection of totality of circumstances test and articulation of alternative single identifiable human needs test).

228. *See supra* notes 67-75 and accompanying text (providing cases and discussing core conditions test and its variations).

229. *See supra* notes 132-35 and accompanying text (discussing similarities of tests).

test is unclear for two reasons. First, considering that the latter test is similar to the core conditions test, the impact of the decision may be nominal. There is some contention that the outcomes of the core conditions and totality of circumstances tests are generally consistent, because most cases involve core-area violations.[230] The core conditions test, however, may only protect inmates against physical and not psychological harm.[231] If this is so, the impact of *Wilson* will be to restrict Eighth Amendment protection.

Second, the majority opinion in *Wilson* did not clearly indicate which needs are "identifiable human need[s];" the opinion only proscribed conditions that deprive inmates of needs such as food, warmth, or exercise.[232] Beyond these three, it is uncertain what additional inmate needs, if any, are constitutionally required to be met.[233] The possible range of needs and conditions depriving such needs encompassed within the standard could vary considerably. Previous decisions, for example, that rejected the totality of circumstances test have come up with substantially different conclusions as to which specific conditions can create deprivations that violate the Eighth Amendment.[234] Responsibility for defining the precise

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230. *See* Gottlieb, *supra* note 20, at 2-19 (finding that despite its conservative language, approach of core conditions test is generally consistent with outcomes reached after application of totality of conditions test).

231. Gottlieb points out that when a core condition is not met, the deprivation can produce physical pain for prisoners. *Id.* at 2-19. He states, "Indeed, the core conditions that are protected by the Eighth Amendment are those conditions generally encompassed in cruelty-to-animal regulations." *Id.* Gottlieb finds support for his notion that the Eighth Amendment should protect against confinement conditions that cause acute psychological harm in Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion). Gottlieb, *supra* note 20, at 2-19. In *Trop*, the Supreme Court struck down a law that denationalized soldiers who deserted from the armed forces on Eighth Amendment grounds. *Trop*, 356 U.S. at 99-104.

232. Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991).

233. The Court may have provided some indication of which other deprived needs are violative of the Eighth Amendment by citing several lower court decisions with approval. *See id.* (commenting that courts in Wellman v. Faulkner, 715 F.2d 269, 275 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984), Hoptowit v. Ray, 682 F.2d 1237, 1246-47 (9th Cir. 1982), and Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981), understood that *Rhodes v. Chapman* established broad proposition that overall conditions can violate Eighth Amendment); *see also infra* note 234 (discussing courts' findings in *Wellman*, *Hoptowit*, and *Wright*).

234. In *Wright* and *Hoptowit*, the Ninth Circuit found the Eighth Amendment violated if prison conditions deprived the inmate of adequate food, clothing, shelter, sanitation, medical care, and personal safety. *Wright*, 642 F.2d at 1132-33; *Hoptowit*, 682 F.2d at 1246; *see supra* notes 67-71 and accompanying text (discussing core conditions test and Ninth Circuit decisions). In *Wilson v. Seiter*, the Sixth Circuit expanded this list, finding the following conditions to violate the Eighth Amendment: denial of adequate access to shower facilities, denial of medical treatment, overcrowding, threats to safety, vermin infestation, inadequate lighting, inadequate ventilation, unsanitary eating conditions, and housing of inmates with known dangerous individuals. *See* Wilson v. Seiter, 893 F.2d 861, 864-65 (6th Cir. 1990) (deriving list from courts of appeals and Supreme Court precedent), *vacated on other grounds*, 111 S. Ct. 2321 (1991). The Sixth Circuit's list of relevant conditions overlaps with and clarifies several of the Ninth Circuit's protected criteria. For example, vermin infestation fits into the broad category of inadequate sanitation, and inadequate ventilation fits into the category of inadequate shelter. But the Sixth Circuit's list of relevant prison conditions is more than mere clarification;

scope of Eighth Amendment protection in confinement conditions cases has therefore been relegated to future courts. Obviously, the longer the list of identifiable human needs and specified proscribed conditions, the greater the protection afforded to prison inmates.

## IV. RECOMMENDATIONS

Considering the current and projected prison population, the number of jurisdictions with major prisons already under court order or consent decree to improve conditions, the prison overcrowding problem facing the nation,[235] and the political powerlessness of prisoners,[236] the ambiguities and issues left to be resolved after *Wilson v. Seiter* should be construed so as not to further narrow the constitutional safeguards afforded prisoners. By doing this, courts around the nation can prevent an already volatile situation from worsening.

First, courts should attempt to avoid defining "deliberate indifference" as a high degree of tortious or criminal recklessness in the context of prisoners' Eighth Amendment challenges to confinement conditions.[237] Applying a standard of that type would require the difficult and problematic task of examining the intent of prison officials who may or may not have been responsible for substandard

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the list is expansive. For instance, overcrowding is a separate category. *Wilson*, 893 F.2d at 864; *see also* Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (analyzing overcrowding as separate violation of Eighth Amendment and upholding district court's decision that prison was unconstitutionally overcrowded in light of factors such as understaffing, aging facilities, and vermin infestation), *cert. denied*, 468 U.S. 1217 (1984). It is conceivable that under the Ninth Circuit's standard, an overcrowded prison that provides adequate food, shelter, sanitation, medical care, and personal safety would not violate the Eighth Amendment. Likewise, a prison having adequate shelter but failing to provide adequate access to showers would not be in violation under the Ninth Circuit standard. The Sixth Circuit's formulation, therefore, more fully protects prisoners. Furthermore, the Sixth Circuit did not portray its listing of violative conditions as exhaustive and instead purported only to be applying precedent. *See Wilson*, 893 F.2d at 865 (analyzing applicable cases and applying precedent to facts in case). More violative conditions could conceivably be developed.

235. *See supra* notes 1-10 and accompanying text (discussing and providing statistics on present and future prison populations, overcrowded conditions, and jurisdictions under court orders or consent decrees to correct overcrowded conditions).

236. Justice Brennan recognized the political problems of prisoners and discussed the tensions between prisoners, prison officials, state legislatures, and the Constitution in his concurring opinion in Rhodes v. Chapman, 452 U.S. 337, 357-61 (1991) (Brennan, J., concurring). Justice Brennan noted that prisoners are " 'voteless, politically unpopular, and socially threatening.' " *Id.* at 358 (Brennan, J., concurring) (quoting Morris, *The Snail's Pace of Prison Reform*, *in* PROCEEDINGS OF THE 100TH CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASS'N, 36, 42 (1970)). Furthermore, Justice Brennan asserted that problems in some instances intensify due to the attitudes of politicians and officials, which "sad experience" shows are sometimes insensitive to constitutional requirements. *Id.* at 358 n.7 (Brennan, J., concurring). *But see id.* at 352 (warning that courts cannot presume in their oversight responsibility that legislatures and prison officials are insensitive to requirements of Constitution).

237. *See supra* notes 177-94 and accompanying text (discussing possible interpretations of recklessness).

confinement conditions that often develop over a period of time.[238] Instead, courts should interpret deliberate indifference as: (1) knowledge and a failure to act; (2) inexcusable lack of knowledge; or (3) repeated negligent acts that disclose a pattern of prison official conduct, or systematic and gross deficiencies in prison staffing, facilities, equipment, or procedures.[239] These formulations require a lesser showing of intent and could therefore be demonstrated more easily by inmates seeking relief.[240] The third formulation, repeated negligent acts or systematic and gross deficiencies, is preferable to the others because the second part of the formulation does not require a state-of-mind inquiry at all.[241] A court's inquiry into deliberate indifference under this formulation would therefore resemble an objective analysis of the challenged conditions.

Second, lower courts should uphold the body of law that prohibits prison officials from bringing a lack of funding defense to preclude a finding of wantonness,[242] despite contradictory insinuations by the Court in *Wilson*.[243] With the difficulties that legislatures face with growing prison populations and the high cost of providing for prisoners,[244] a lack of funding defense, if allowed, would probably be raised often and successfully. The deliberate indifference standard would therefore become a substantial barrier to prisoners attempting to secure their constitutional rights in these circumstances.

Third, courts should refuse to ratify or endorse prison officials' deliberate indifference to poor confinement conditions based solely on grounds that a prison became rapidly overcrowded and the conditions were therefore beyond the control of the officials. As with

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238. *See* Rosenzweig, *supra* note 20, at 422 (observing that when courts infer intent from objective criteria, it is unclear whose state of mind is at issue and that more precise test for attributing subjective responsibility should be developed); *see also Wilson*, 111 S. Ct. at 2330 (White, J., concurring) (finding intent not meaningful when conditions of confinement can be attributed to cumulative actions of numerous officials over period of time).

239. *See supra* notes 159-76, 195-202 and accompanying text (discussing possible interpretations of deliberate indifference standard and level of culpability required in each interpretation).

240. *See supra* notes 167, 175-76, 198-99 and accompanying text (placing interpretations of deliberate indifference on culpability continuum closer to negligence than intent).

241. *See supra* text accompanying notes 197-99 (discussing systematic and gross deficiencies interpretation of deliberate indifference standard and recognizing objective propensities of interpretation).

242. *See supra* note 217 (listing cases that have rejected lack of funding defense).

243. *See supra* notes 215-16 and accompanying text (discussing Court's treatment of "cost defense" in *Wilson*). The Court posited that it could not understand how fiscal constraints could change the meaning of cruel and unusual punishment, thereby suggesting that the lack of funding defense would be valid. Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991). The Court refrained from fully addressing the "cost defense" issue, however, because prison officials had not raised such a defense. *Id.*

244. *See supra* note 219 (pointing out that because of prison growth and incarceration costs, state legislatures are having difficulty funding prisons adequately).

the funding defense, an overcrowding defense could be raised often and successfully, especially considering the current and projected overcapacity operating rates of prisons in the United States.[245] Consequently, if this defense is sanctioned, prisoners living in overcrowded conditions could be left without an Eighth Amendment remedy. If courts nevertheless choose to allow either the lack of funding defense or the rapid overcrowding defense, it is recommended that the courts restrict these defenses if prison officials have *any* feasible options available to alleviate either the funding or overcrowding problem.[246]

Fourth, because conditions must deprive inmates of "a single, identifiable need" to violate the Eighth Amendment, courts should create an expansive list of such needs. Specifically, the list of needs should at the very least include adequate food, clothing, shelter, exercise, sanitation, medical care, and personal safety.[247] Moreover, courts should fortify the rights predicated on these needs by creating a rebuttable presumption that certain conditions of confinement—such as overcrowding, inadequate access to shower facilities, vermin infestation, inadequate lighting, inadequate ventilation, and unsanitary eating conditions—specifically deprive inmates of identifiable needs.[248] With a comprehensive list of needs supplemented by clearly identifiable violative conditions, prisoners would be able to receive adequate Eighth Amendment protection with regard to objective conditions of confinement.

Fifth, as a practical matter, prisoners and attorneys challenging confinement conditions after *Wilson* should refocus their case preparation and arguments to meet both the subjective and objective

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245. *See* PRISONERS IN 1990, *supra* note 1, at 1 (noting that prison population reached 771,243 and that prisons were operating between 18% to 29% over capacity at 1990 year-end). Despite a plan to expand the prison system the Federal Bureau of Prisons expects federal prisons to operate at 30% over capacity in 1995 due to increases in inmate population. GAO, PRISON CROWDING, *supra* note 2, at 17.

246. Subsequent to *Wilson v. Seiter*, the Fifth Circuit adopted a similar analysis in Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir. 1991). The court in *Alberti* rejected prison officials' argument that overcrowded conditions were beyond their control by noting that the officials could have temporarily housed inmates in a military-style tent city until the problem was corrected. *Id.* at 999; *see supra* note 4 (identifying newspaper story reporting that Massachusetts governor was considering placing inmates on ship to relieve prison overcrowding).

247. This list combines the needs articulated in Bell v. Wolfish, 441 U.S. 520 (1978), with those mentioned in Wilson v. Seiter, 111 S. Ct. 2321 (1991). In *Bell v. Wolfish*, the Court quoted with approval the Second Circuit's statement that "[a]n institution's obligation under the Eighth Amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal sanitation." *Wolfish*, 441 U.S. at 529 n.11 (quoting Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978)). In *Wilson*, the Court named food, warmth, and exercise as identifiable human needs. *Wilson*, 111 S. Ct. at 2327.

248. The Sixth Circuit in *Wilson v. Seiter* listed these conditions, among others, as violative of the Eighth Amendment. Wilson v. Seiter, 893 F.2d 861, 864 (6th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2321 (1991).

components of the Eighth Amendment cruel and unusual punishment test. Most importantly, they should broaden their discovery to target evidence and facts that indicate the state of mind of the prison officials toward the deficient conditions. Considering the current flexibility of the deliberate indifference standard, prisoner plaintiffs should be prepared to prove a high level of prison official culpability, one that is closely related to intent.

Finally, also as a practical matter, prisoners and their attorneys should not let the objective conditions of confinement "speak for themselves" in proving deprivation of identifiable human needs. Rather, the plaintiffs should carefully demonstrate how harsh confinement conditions result in the deprivation of at least one of the identifiable human needs. After *Wilson*, only facts of confinement conditions framed in terms of deprived needs will constitute a successful Eighth Amendment claim.[249]

## CONCLUSION

In *Wilson v. Seiter*, the Supreme Court handed down a two-part test to determine whether prison conditions violate the Eighth Amendment. First, the conditions must deprive the prisoner of a single identifiable human need.[250] Second, prison officials must be deliberately indifferent to the conditions that deprive the prisoner of that need.[251] This two-part test restricts the constitutional rights of prisoners to be free from cruel and unusual punishment by qualifying the traditional objective component of Eighth Amendment analysis and by adding a subjective component. The impact of the test on prisoners' rights, however, remains to be developed by the lower courts and will depend on how those courts define deliberate indifference, the defenses available to prison officials, and the identifiable human needs that must be deprived to trigger constitutional protection. With the complex problems facing our nation's prisons, the courts should construe the ambiguities of *Wilson v. Seiter* in favor of prisoners' constitutional rights.

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249. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991) ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." (quoting Brief of Petitioner, *supra* note 84, at 36)).

250. *Id.*

251. *Id.*