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Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard

Richard D. Nobleman
University of the Pacific; McGeorge School of Law

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INTRODUCTION

It is no secret that this country's prisons are facing a crisis. In recent years the number of inmates under the jurisdiction of federal and state correctional authorities has reached successive highs, capping over a decade of dramatic growth.[1] Despite states' increased spending on prison construction and other efforts,[2] most state prison systems are operating over capacity.[3] Seeking relief from often severe prison conditions, prisoners have inundated the

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1. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990, BULLETIN 1 (May 1991) (table 1) (reporting that the 1990 year-end United States total was 771,243 prisoners, up 133.8% from 1980, in which 329,821 prisoners were reported). California alone had 97,309 inmates in 1990, up 94.0% from 1985. *Id.* at 4 (table 4).

2. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT, 1988, BULLETIN 5 (July 1990) (table 5) (reporting that the percentage of total capital outlays by state governments for prison construction rose from 7.7% in 1977 to 12.9% in 1988); Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14 (describing the advantages and disadvantages of prison privatization); Ted Gest et al., *Why More Criminals Are Doing Time Beyond Bars*, U.S. NEWS & WORLD REPORT, Feb. 26, 1990, at 23 (explaining alternatives to prison incarceration such as intensive probation, day-reporting centers, and fines).

3. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990, BULLETIN 6 (May 1991) (table 8) (reporting 42 jurisdictions and the federal prison system operating at 100% or more of their lowest capacity, and 34 of these with populations equal to or exceeding their highest reported capacities); *id.* (reporting California as being at 185% of full capacity); Anthony DePalma, *Jails Face New Crisis As Inmates Grow Old*, N.Y. TIMES, May 28, 1990, § 1, at 23 (discussing the effects of the exploding population of aging inmates on prisons including need for expensive medical care); Barbara Flicker, *To Jail or Not to Jail? (The Drug War)*, A.B.A. J., Feb. 1990, at 64, 64-66 (providing statistics from a survey of 68 jails around the country from January 1988 to January 1989, and concluding that the average jail was 37.7% over capacity); Debra C. Moss, *Drug Cases Clog the Courts; Civil Suits Suffer; Prisons Overcrowded in 43 States*, A.B.A. J., April 1990, at 34, 34 (discussing the strain on America's justice system due to drug prosecutions, and citing statistics stating that prisons are overcrowded in 43 states). *See generally* Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125 (1989) (discussing the ambiguity and political motivations behind prison crowding statistics).

judicial system with complaints.[4] As of January 1, 1990, forty-one states and the District of Columbia had some or all of their prisons operating under court order due to unconstitutional conditions of confinement.[5] Some courts have even released inmates due to prison officials' failure to ameliorate constitutional violations.[6]

Whether a court finds that prison conditions violate the Constitution often depends on the legal standard it employs.[7] In *Wilson v. Seiter*,[8] the latest in an evolution of prison cases, the Supreme Court of the United States set forth the current standard for determining the constitutionality of prison conditions.[9] It decided that prison conditions are unconstitutional only if prison officials display "deliberate indifference" to a prisoner's human need.[10] Thus, the *Wilson* standard governs prisoners' ability to

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4. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS -- 1990, at 528 (1991) (table 5.55) (reporting a rise in civil rights petitions by state prisoners from 7,752 in 1977 to 25,039 in 1989); *see also* Stephanie Chavez, *Rights Group Cites Prison Cruelty*, N.Y. TIMES, Nov. 14, 1991, at A3 (describing a human rights group's citation of questionable disciplinary practices in "maximum-maximum" prison facilities and recommendation of reforms); Linda Greenhouse, *Washington Talk; "Pauper" Cases Reshape High Court's Caseload*, N.Y. TIMES, Jan. 28, 1991, at A16 (explaining how the dramatic increase in prisoner petitions is reshaping the United States Supreme Court's caseload).

5. SHELDON KRANTZ & LYNN S. BRANHAM, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS AND PRISONERS' RIGHTS 502 (4th ed. 1991) (citing THE NATIONAL PRISON PROJECT, STATUS REPORT: THE COURTS AND THE PRISONS (1990)); *see, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1218 (5th Cir. 1977); Palmigiano v. DiPrete, 700 F. Supp. 1180, 1199 (D. R.I. 1988) (ordering authorities to develop a plan to eliminate prison crowding).

6. *See, e.g.*, Duran v. Elrod, 713 F.2d 292, 298 (7th Cir. 1983) (affirming order directing the release of pretrial detainees incarcerated solely because they could not pay low bonds), *cert. denied*, 465 U.S. 1108 (1984); *see also* Lee Hockstader, *D.C. Ordered to Cut Prison Population; Judge Says 300 at Central Must Go*, WASH. POST, Aug. 2, 1988, § 1, at A1 (describing a federal court order reducing the number of acceptable inmates at a District of Columbia prison due to unconstitutional conditions); Robert Suro, *As Inmates Are Freed, Houston Feels Insecure*, N.Y. TIMES, Oct. 1, 1990, at A16 (reporting increasing sales in burglar alarms and guns and loss of faith in the criminal justice system after inmates were released early under a federal court order).

7. *See, e.g.*, Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991) (requiring prison officials' deliberate indifference to prison conditions for an Eighth Amendment violation); Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (requiring officials' malicious and sadistic use of force in maintaining prison security for an Eighth Amendment violation); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (requiring officials' deliberate indifference to prisoners' serious medical needs for an Eighth Amendment violation).

8. 111 S. Ct. 2321 (1991).

9. *See Wilson*, 111 S. Ct. at 2327 (requiring prison officials' deliberate indifference to prison conditions for an Eighth Amendment violation).

10. *Id.*

obtain judicial relief from harsh prison conditions. This Note evaluates the historical and practical significance of the Supreme Court's choice of the deliberate indifference standard.

Part I of this Note briefly reviews the history of prison reform and the advances prisons have made since the conception of such reform.[11] It also discusses courts' gradual involvement in prison reform in the 1960s to protect prisoners' constitutional rights.[12] Part II describes the United States Supreme Court's traditional standard for determining whether punishments are cruel and unusual under the Eighth Amendment,[13] and Part III traces the transformation of that standard through the Court's prison conditions cases.[14] The Supreme Court's decision in *Wilson v. Seiter* is discussed in Part IV.[15] Finally, Part V analyzes the *Wilson* opinion and considers its ramifications.[16]

I. A BRIEF HISTORY OF PRISON REFORM

A. Institutional Reform of Prisons

Incarceration in prisons has not always been imposed as a means of punishment. Until the 1700s, punishment for criminals commonly consisted of public branding, mutilation, whipping, and hanging.[17] Imprisonment in workhouses functioned primarily to detain vagrants, debtors, minor offenders, and criminals awaiting trial or punishment.[18] Conditions were squalid and overcrowded,

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11. *See infra* notes 17-34 and accompanying text.
12. *See infra* notes 35-70 and accompanying text.
13. *See infra* notes 71-85 and accompanying text.
14. *See infra* notes 86-161 and accompanying text.
15. *See infra* notes 162-204 and accompanying text.
16. *See infra* notes 205-62 and accompanying text.
17. RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION 21 (1973); ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830-1930, at 8 (1981).
18. *See* CALVERT R. DODGE, A NATION WITHOUT PRISONS 3-4 (1975); GOLDFARB & SINGER, *supra* note 17, at 20; BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 2 (1977) (describing early detention facilities).

and children, criminals, lepers, and the insane were all kept together.[19]

In the late 1700s, dissatisfaction with capital and corporal punishment was widespread, and a desire for more humanitarian treatment of criminals increased.[20] Institutions called penitentiaries were created in New York and Pennsylvania to reform criminals (make them feel *penitent*) by eliminating harmful influences, emphasizing hard work, and providing an opportunity for introspection and religious study.[21] Despite these goals, prisons achieved disappointing results.[22] They became overcrowded and oppressive, and the prison experience impaired prisoners' ability to function in the free world.[23] Prisons rapidly deteriorated into purely custodial institutions.[24]

A new wave of optimism about rehabilitation began after the Civil War.[25] Prisoners were given vocational training and education, they were segregated based on progress and deportment, and they received indeterminate sentences and early release on parole if they improved.[26] But the grading system developed into a reward for conformity, the prison routine became a repressive regimen, and overcrowding prevented individualized treatment.[27]

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19. VERNON FOX, CORRECTIONAL INSTITUTIONS 10 (1983); GOLDFARB & SINGER, *supra* note 17, at 20; *see id.* ("The detention facilities were terrible places -- overcrowded, dark, dirty, models of idleness and vice, without ventilation and with the scantiest of facilities.").

20. *See* DODGE, *supra* note 18, at 4; FREEDMAN, *supra* note 17, at 8; GOLDFARB & SINGER, *supra* note 17, at 27; MCKELVEY, *supra* note 18, at 7-8 (discussing the development of prisons in Pennsylvania and New York).

21. DODGE, *supra* note 18, at 4-5; TORSTEN ERIKSSON, THE REFORMERS: AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 45-46 (Catherine Djurklou trans. 1976); FREEDMAN, *supra* note 17, at 8-9; GOLDFARB & SINGER, *supra* note 17, at 23-24.

22. DODGE, *supra* note 18, at 5; GOLDFARB & SINGER, *supra* note 17, at 45.

23. DODGE, *supra* note 18, at 5; *see* FOX, *supra* note 19, at 14 (stating that overcrowding had become a problem by the middle of the nineteenth century); GOLDFARB & SINGER, *supra* note 17, at 44-45 (maintaining that the reformist plan has failed and that the idea that an incarcerated man will emerge normal and adjusted is preposterous).

24. FREEDMAN, *supra* note 17, at 10.

25. DAVID FOGEL, "...WE ARE THE LIVING PROOF...": THE JUSTICE MODEL FOR CORRECTIONS 30 (1979).

26. *Id.* at 34-35.

27. *Id.* at 35.

While the rehabilitative ideal persisted as the chief goal of punishment during much of the present century,[28] it began to decline in the 1970s.[29] Dissatisfaction with rehabilitation focused on concerns about judges' broad sentencing discretion and widely disparate sentences, a desire to counter the capricious uses of state power, and the lack of success with rehabilitative efforts.[30] A retributive theory of punishment gradually gained acceptance under which criminals were punished because it was their "just deserts" for having engaged in wrongful conduct.[31] Funds to rehabilitate prisoners have subsequently shrunk, legislators have lengthened sentences, and prison populations have doubled.[32] Prisoners are packed into crumbling, understaffed, vermin-infested institutions rife with rape and gang violence.[33] Out of necessity, prisoners have turned to the courts for relief.[34]

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28. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 5 (1981); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, CRIMINAL LAW 28-29 (2d ed. 1986).

29. *See* LAFAVE & SCOTT, *supra* note 28, at 28 (summarizing the reasons for the decline of the rehabilitative ideal). *See generally* ALLEN, *supra* note 28 (tracing the rise and fall of the rehabilitative ideal); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1018-32 (1991) (reviewing the judicial, legislative, and scholarly critiques of the rehabilitative model).

30. LAFAVE & SCOTT, *supra* note 28, at 29.

31. *See id.* at 25-26, 29 (describing the retributive theory and recognizing its increasing acceptance as a justification for punishment).

32. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990, BULLETIN 1 (May 1991) (table 1) (reporting that the 1990 year-end United States total was 771,243 prisoners, up 133.8% from 1980, in which 329,821 prisoners were reported); Vitiello, *supra* note 29, at 1029-31 (describing sentencing reforms); *For the Record*, WASH. POST, Mar. 8, 1990, at A26 (stating that overcrowded prisons preclude prisoners from developing skills); *Imprisonment Inequities*, BOSTON GLOBE, Mar. 3, 1990, at 18 (reporting that prisoners have little hope of learning skills after incarceration).

33. *See, e.g.*, Sandra J. Boodman, *Prison Medical Crisis; Overcrowding Created by the War on Drugs Poses a Public Health Emergency*, WASH. POST, July 7, 1992, at 25 (reporting that the war on drugs has led to an unprecedented growth in prison populations, straining medical services and exposing inmates to life-threatening diseases); Sharon LaFraniere, *In Maine, Prison Crowding Leaves Grisly Legacy*, WASH. POST., Feb. 21, 1992, § 1, at A1 (describing prison violence and overcrowding in Maine); Stuart J. Taylor, *Commentary: Taking Issue*, RECORDER, June 21, 1991, at 4 (describing conditions in the Pennsylvania State Correctional Institution at Pittsburgh).

34. *See supra* note 4 and accompanying text (discussing the dramatic rise in prisoner petitions to courts).

B. The Role of the Courts in Prison Reform

Traditionally, courts refused to hear prisoners' suits regarding prison administration or conditions on the grounds that review of the internal management of prison systems was not within their jurisdiction.[35] Several rationales supported this so-called "hands-off" doctrine.[36] Early courts justified the doctrine by classifying prisoners as slaves of the state who had forfeited their rights.[37] Later courts grounded their unwillingness to involve themselves in prison administration primarily upon principles of separation of powers,[38] federalism,[39] and lack of expertise regarding

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35. *See, e.g.*, Startti v. Beto, 405 F.2d 858, 859 (5th Cir.), *cert. denied*, 395 U.S. 929 (1969); Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) (refusing to hear prisoners' suits on jurisdictional grounds). *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 n.12 (1963) (collecting earlier cases, generally criticizing the courts' refusal to hear prisoners' cases, and suggesting guidelines for judicial review of the prison system). Courts have permitted suits against individual jailers. *See, e.g.*, State of Indiana *ex rel.* Tyler v. Gobin, 94 F. 48, 49-50 (C.C.D. Ind. 1899); Hill v. Gentry, 280 F.2d 88, 89 (8th Cir.), *cert. denied*, 364 U.S. 875 (1960); Magenheimer v. State *ex rel.* Dalton, 90 N.E.2d 813, 817 (Ind. Ct. App. 1950) (in banc); Smith v. Miller, 40 N.W.2d 597, 598 (Iowa Sup. Ct. 1950); O'Dell v. Goodsell, 30 N.W.2d 906, 909 (Neb. Sup. Ct. 1948).

36. *See generally* Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795 (discussing courts' justifications for the hands-off doctrine and documenting its decline). Evidently, this phrase first appeared in a document prepared for the Federal Bureau of Prisons. *See* FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961).

37. Haas, *supra* note 36, at 797 (citing Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 794-96 (1872)).

38. *See, e.g.*, United States v. Marchese, 341 F.2d 782, 789 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965); Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), *cert. denied*, 350 U.S. 971 (1956); Williams v. Steele, 194 F.2d 32, 34 (8th Cir.), *cert. denied*, 344 U.S. 822 (1952); Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949); Heft v. Parker, 258 F. Supp. 507, 508 (M.D. Pa. 1966); Lewis v. Gladden, 230 F. Supp. 786, 788 (D. Or. 1964); Sigmon v. United States, 110 F. Supp. 906, 908 (W.D. Va. 1953), *questioned in* United States v. Muniz, 374 U.S. 150, 153 (1963) (refusing to hear prisoners' cases on the ground that the federal prison system is operated by the attorney general, part of the executive branch of the government, not by the judiciary).

39. *See, e.g.*, Shobe v. California, 362 F.2d 545, 546 (9th Cir.) (per curiam), *cert. denied*, 385 U.S. 887 (1966); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957); Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950) (refusing to hear prisoners' cases on the ground that a federal court has no power to control the internal discipline of state prisons).

penology.[40] Courts also feared that judicial intervention would seriously undermine prison discipline[41] and that judicial review would inundate the courts with prisoner petitions.[42]

The hands-off doctrine began to decline during the late 1960s, however, when courts found prison practices so unreasonable and exceptional that judicial involvement was necessary to protect prisoners' constitutional rights.[43] In addition, news coverage of the violent prison riots in Attica, New York, and San Quentin, California, increased public awareness of prisoners' conditions, and eventually encouraged a change in judicial attitudes.[44] Prisons were run down, and the resources needed to improve them were scant.[45] Further, the broad challenges to social and economic

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40. *See, e.g.*, Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951); Fussa v. Taylor, 168 F. Supp. 302, 303-04 (M.D. Pa. 1958); Peretz v. Humphrey, 86 F. Supp. 706, 707 (M.D. Pa. 1949) (stating that it is not within the province of the courts to superintend the treatment of prisoners); *see also* Pell v. Procunier, 417 U.S. 817, 827 (1974) (noting that the expertise of prison officials should be deferred to regarding prison security); Procunier v. Martinez, 416 U.S. 396, 405 (1974) (commenting on courts' inexpertise in dealing with prison administration problems).

41. *See, e.g.*, Winston v. United States, 305 F.2d 253, 277 (2d Cir. 1962), *aff'd*, United States v. Muniz, 374 U.S. 150 (1963); Golub v. Krimsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960); Sigmon v. United States, 110 F. Supp. 906, 910 (W.D. Va. 1953), *questioned in* United States v. Muniz, 374 U.S. 150, 153 (1963); Siegel v. Ragen, 88 F. Supp. 996, 999 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950) (refusing to hear prisoners' cases on the grounds that it would undermine prison discipline).

42. *See, e.g.*, Barnett v. Rodgers, 410 F.2d 995, 1004 (D.C. Cir. 1969) (Tamm, J., concurring); Roberts v. Pepersack, 256 F. Supp. 415, 433 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967) (refusing to hear prisoners' cases on the grounds that it would inundate the courts with prisoner petitions).

43. *See, e.g.*, Martinez v. Mancusi, 443 F.2d 921, 923-24 (2d Cir. 1970) (upholding cause of action against warden for ordering prisoner recuperating from surgery to be moved contrary to physician's orders), *cert. denied*, 401 U.S. 983, (1971); Cates v. Ciccone, 422 F.2d 926, 927-28 (8th Cir. 1970) (recognizing cause of action but finding that petitioner's allegations of cruel and unusual punishment did not rise to the level of "unusual and exceptional circumstances"); Jackson v. Bishop, 404 F.2d 571, 577-79 (8th Cir. 1968) (upholding cause of action and prohibiting use of the whipping strap); Queen v. South Carolina Dep't of Corrections, 307 F. Supp. 841, 844-45, 848 (D. S.C. 1970) (recognizing a cause of action against prison officials but finding plaintiff's claims of arbitrary and discriminatory treatment did not warrant relief).

44. *See* Gary Wood, Note, *Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions*, 23 HASTINGS L.J. 1111, 1112-13 (1972) (stating that media coverage of outspoken inmates and prison violence initiated a change in judicial attitudes regarding prison confinement).

45. Bogard v. Cook, 586 F.2d 399, 402 (5th Cir. 1978) (describing oppressive conditions in the Mississippi State Penitentiary), *cert. denied*, 444 U.S. 883 (1979); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 679-84 (D. Mass. 1973) (describing the unsanitary and inadequate conditions in the Suffolk County Jail), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, Hall v.

policies coupled with protest activism that occurred during the 1960s helped spur reform.[46] Other factors that increased judicial involvement included the increasing prison population of middle-class draft evaders who had the resources to challenge prison policies, civil rights lawyers who broadened their work to include prisoners' cases, and an abiding interest in the academic and professional communities in rehabilitating prisoners and treating them with dignity.[47]

Courts began striking down as unconstitutional specific prison practices such as the use of corporal punishment,[48] failure to provide a work assignment compatible with an inmate's health,[49] and imposition of austere sleeping and living conditions.[50] In 1970 judicial review expanded beyond discrete prison practices in the watershed case of *Holt v. Sarver,*[51] where a federal district court found Arkansas' entire prison system unconstitutional.[52]

The court in *Holt* stated that "[f]or the ordinary convict a sentence to the Arkansas Penitentiary amounts to a banishment from civilized society to a dark and evil world completely alien to the free world."[53] Prisoners in Arkansas were required to work in agricultural fields ten hours a day, six days a week, tending crops

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Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

46. RONALD BERKMAN, OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT 41 (1979).

47. *Id.* at 41-42.

48. *See* Jackson v. Bishop, 404 F.2d 571, 581 (8th Cir. 1968) (prohibiting infliction of corporal punishment, including use of the whipping strap, as a disciplinary measure).

49. *See* Black v. Ciccone, 324 F. Supp. 129, 131-33 (W.D. Mo. 1970) (holding that job assignment in barber shop was incompatible with inmate's hip disease and violated the Eighth Amendment).

50. *See* Hancock v. Avery, 301 F. Supp. 786, 791-92 (M.D. Tenn. 1969). The inmate was forced to sleep in the nude on a bare concrete floor without adequate light or ventilation and was required to live and eat under animal-like conditions. *Id.*

51. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and cause remanded,* 442 F.2d 304 (8th Cir. 1971), *on remand,* Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and rev'd in part,* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974), *on remand,* Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark 1976), *aff'd,* 548 F.2d 740 (8th Cir. 1977), *aff'd,* Hutto v. Finney, 437 U.S. 678 (1978).

52. *Sarver,* 309 F. Supp. at 384-85. Other cases involved in the Arkansas prison litigation include: Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated,* 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

53. *Sarver,* 309 F. Supp. at 381.

by hand and with mule-drawn tools, and without adequate clothing or shoes.[54] Inmates were whipped with wooden-handled leather straps and tortured with electrical shocks.[55] They were guarded by armed inmates called "trusties," who were authorized to use deadly force against escapees.[56] Homosexual rape was so prevalent that, instead of sleeping, inmates would cling to the bars nearest the guards' station.[57] An average of four, but as many as eleven, prisoners were squeezed into eight-by-ten-foot cells without windows or furniture, except a toilet that could be flushed only from outside the cell.[58]

The Arkansas cases provided a starting point for lower courts and commentators to delineate the scope and purpose of the Eighth Amendment in the context of prison conditions.[59] A decade of cases followed, declaring prison and jail conditions unconstitutional and frequently ordering massive structural reform.[60]

The Supreme Court of the United States's first prison conditions cases continued in this reformist vein.[61] In 1976 the Supreme Court validated the availability of a cause of action under 42 U.S.C. § 1983 when prison personnel were deliberately indifferent to a prisoner's serious medical needs.[62] Two years later

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54. Hutto v. Finney, 437 U.S. 678, 681 n.3 (1978) (citing *Talley*, 247 F. Supp. at 688, and *Sarver*, 309 F. Supp. at 370).

55. *Id.* at 682 nn.4-5 (citing *Talley*, 247 F. Supp. at 687, and *Jackson*, 268 F. Supp. at 812).

56. *Id.* at 682 n.6 (citing *Sarver*, 309 F. Supp. at 374).

57. *Id.* at 681-82 n.3 (citing *Sarver*, 309 F. Supp. at 377).

58. *Id.* at 682 (citing Holt v. Sarver, 300 F. Supp. 825, 831-32 (E.D. Ark. 1969)).

59. *See* Rod Smolla, *Prison Overcrowding and the Courts: A Roadmap for the 1980s*, 1984 U. ILL. L. REV. 389, 398-400; Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 372 (1977); Samuel H. Pillsbury, Note, *Creatures, Persons, and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1099, 1102-03; Ronald H. Rosenberg, Comment, *Constitutional Law -- The Eighth Amendment and Prison Reform*, 51 N.C. L. REV. 1539, 1542-43 (1973) (discussing the *Holt* decision).

60. *See* Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring) (listing cases in 24 states that had declared individual prisons or entire prison systems unconstitutional under the Eighth and Fourteenth Amendments).

61. *See infra* notes 62-63 and accompanying text.

62. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). The Court decided in this case, however, that the prisoner's complaint did not state a cause of action against the prison's medical director. *Id.* at 108.

the Supreme Court upheld the injunctions imposed on the Arkansas prisons in the *Holt* litigation.[63]

However, the Supreme Court subsequently stepped back from its role as reformer in two separate cases by refusing to declare the practice of confining two prisoners in a single cell unconstitutional.[64] The acceptability of prison conditions, the Supreme Court declared, is properly determined by state legislatures and prison administrations; courts should reserve only an oversight responsibility in scrutinizing claims of unconstitutional conditions.[65] More recently, in the case of *Whitley v. Albers*[66] the Court held that shooting a prisoner in the course of a riot did not constitute cruel and unusual punishment since the shooting was not a wanton infliction of pain.[67] The *Whitley* Court concluded that prison administrators are to be accorded ample deference in matters of prison security and discipline.[68]

Thus, while modern courts have rejected the absolute deference to prison officials characteristic of the hands-off era, they have also opposed unbridled judicial involvement in prison reform. While judicial prison reform gained momentum during the late 1960s and '70s, in the 1980s the Supreme Court began to define the limits of the courts' role in prison reform.[69] The Court indicated that it favored deferring to the discretion of prison officials.[70]

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63. Hutto v. Finney, 437 U.S. 678, 688-89 (1978) (affirming the district court's placement of a limit of 30 days of confinement in punitive isolation, and award of attorneys' fees to be paid out of Department of Corrections funds based upon bad faith in failing to cure previously identified violations).

64. *See* Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981) (refusing to find double-celling violative of the Eighth Amendment); Bell v. Wolfish, 441 U.S. 520, 542-43 (1979) (refusing to find double-celling violative of the Fifth Amendment Due Process Clause).

65. *Rhodes*, 452 U.S. at 349, 352.

66. 475 U.S. 312 (1986).

67. *Whitley*, 475 U.S. at 319, 324.

68. *Id.* at 321-22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

69. *See infra* notes 111-25 and accompanying text (discussing *Rhodes*); *infra* notes 126-37 and accompanying text (discussing *Whitley*).

70. *See Whitley*, 475 U.S. at 321-22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)); *Rhodes*, 452 U.S. at 349, 352 (deferring to prison administrators).

II. THE EIGHTH AMENDMENT STANDARD

Prisoners have relied primarily upon the Eighth Amendment in their claims regarding prison conditions.[71] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment" and was made applicable to the states through the Fourteenth Amendment in 1962.[72]

In early cases interpreting the Eighth Amendment, the Supreme Court looked to what was "cruel and unusual" during the time of the Constitution's framers.[73] It concluded that the primary purpose of the amendment was to prohibit sentences mandating barbarous physical punishments and tortures, such as public dissection and burning alive.[74] These punishments were forbidden because they were unnecessarily cruel.[75] However, it was not death itself that made these punishments cruel, but rather that they involved torture or a lingering death.[76]

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71. *See, e.g.*, Wilson v. Seiter, 111 S. Ct. 2321, 2322-23 (1991); Whitley v. Albers, 475 U.S. 312, 317 (1986); Rhodes v. Chapman, 452 U.S. 337, 339 (1981); Estelle v. Gamble, 429 U.S. 97, 101 (1976) (alleging Eighth Amendment violations).

72. U.S. CONST. amend. VIII; Robinson v. California, 370 U.S. 660, 666-67 (1962).

73. *See In re* Kemmler, 136 U.S. 436, 447 (1890) (relying upon Blackstone); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (relying upon Blackstone and Archbold). *See generally* Harmelin v. Michigan, 111 S. Ct. 2680, 2686-99 (1991) (opinion of Scalia, J., in which Rehnquist, C.J., joined); Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (tracing the history of the cruel and unusual punishment provision of the Eighth Amendment). Courts have generally refused to acknowledge a meaningful distinction between the words "cruel" and "unusual" in the Eighth Amendment. *See* Furman v. Georgia, 408 U.S. 238, 379 (1972) (Burger, C.J., dissenting) ("The term 'unusual' cannot be read as limiting the ban on 'cruel' punishments or as somehow expanding the meaning of the term 'cruel.'"); Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion of Warren, C.J., in which Black, Douglas, and Whittaker, JJ., joined) ("On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn."); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) ("We choose to draw no significant distinction between the word 'cruel' and the word 'unusual' in the Eighth Amendment."). *But see Furman*, 408 U.S at 249 (Douglas, J., concurring); *id.* at 309 (Stewart, J., concurring) (suggesting that the term "unusual" does have significance).

74. *See Kemmler*, 136 U.S. at 447-49 (prohibiting torture and inhuman and barbarous punishments but upholding electrocution); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (prohibiting torture and unnecessary cruelty but upholding the firing squad).

75. *Wilkerson*, 99 U.S. at 136.

76. *Kemmler*, 136 U.S. at 447.

Reliance on the framers' intent was quickly supplemented, in *Weems v. United States*,[77] with the more flexible requirement that punishments be compatible with society's evolving standards of decency.[78] Under this standard, the state must respect human dignity and remain within civilized standards in imposing punishments.[79] The Supreme Court has determined that society's standards of decency prohibit punishments that involve unnecessary and wanton infliction of pain,[80] and punishments that are grossly disproportionate to the severity of the crime.[81]

One early case that illustrated the meaning of unnecessary and wanton pain was *Louisiana ex rel. Francis v. Resweber*.[82] In *Resweber*, the Court held that it was not unconstitutional to subject a prisoner to a second electrocution after the first failed to execute

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77. 217 U.S. 349 (1910).

78. *Id.* at 378 (stating that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice"). A later Court interpreting *Weems* stated that "[t]he 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) (plurality opinion of Warren, C.J., in which Black, Douglas, and Whittaker, JJ., joined). *But see* Harmelin v. Michigan, 111 S. Ct. 2680, 2686-96 (1991) (opinion of Scalia, J., in which Rehnquist, C.J., joined) (analyzing the case in terms of original intent); John C. Shawde, Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357, 371 (1984) (arguing that evolving standards are unknowable standards).

The Court has stated that in determining whether a punishment violates societal values, judges should look primarily to objective indicators and must not rely upon their own subjective views. Rummel v. Estelle, 445 U.S. 263, 274-75 (1980) (plurality opinion of White, Stewart, Blackmun, and Stevens, JJ.) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). For example, in a decision determining whether capital punishment for certain crimes violated societal values, the Court looked to history, the actions of state legislatures, and jury sentences. *See Gregg*, 428 U.S. at 176-87 (opinion of Stewart, Powell, and Stevens, JJ.).

79. *Trop*, 356 U.S. at 100 (plurality opinion of Warren, C.J., in which Black, Douglas, and Whittaker, JJ. joined).

80. The Court further described unnecessary and wanton pain as "pain that lacks penological justification." *Gregg*, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, JJ.).

81. *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, and Stevens, JJ.). The "grossly disproportionate" test originated in *Weems v. United States* where the court held that a 15-year sentence of hard labor was disproportionate to the offense of falsifying a public record. Weems v. United States, 217 U.S. 349, 380 (1910); *see* Solem v. Helm, 463 U.S. 277, 295-303 (1983) (reaffirming the Eighth Amendment's proscription of sentences disproportionate to the crime committed, and holding the life imprisonment without parole was significantly disproportionate to the crime of uttering a "no account" check for $100). *But see* Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) (opinion of Scalia, J., in which Rehnquist, C.J., joined) (stating that the Eighth Amendment contains no proportionality guarantee).

82. 329 U.S. 459 (1947).

him due to a malfunction in the electric chair.[83] According to the *Resweber* Court, an unforeseeable accident is not cruel because there is no purposeful or wanton infliction of unnecessary pain.[84] The Court declared that the result would not differ had the prisoner experienced the pain in any other occurrence, such as a fire in the cell block.[85] This dictum was the Supreme Court's first indication that the Eighth Amendment applied to prison conditions.

III. THE UNITED STATES SUPREME COURT'S PRISON CONDITIONS CASES

The Supreme Court has consistently limited application of the Eighth Amendment to criminal cases after a person has been convicted.[86] In contrast to its recent review of prison conditions suits, the Court previously reviewed only cases where criminal sentences, or the means of carrying out those sentences, were challenged under the Eighth Amendment.[87] For example, the

83. *Resweber*, 329 U.S. at 463 (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined).

84. *Id.* at 463-64 (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined).

85. *Id.* at 464 (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined).

86. Ingraham v. Wright, 430 U.S. 651, 664 (1977); *id.* at 671 n.40 ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."); *see* Negrich v. Hohn, 246 F. Supp. 173, 176 (W.D. Pa. 1965) (stating that "punishment" in the Eighth Amendment refers to "a penalty inflicted by a judicial tribunal in accordance with law in retribution for criminal conduct"), *aff'd*, 379 F.2d 213 (3d Cir. 1967); Hill v. State, 168 S.E.2d 327, 330 (Ga. Ct. App. 1969) (holding that maltreatment and abuse of a person during pretrial detention by custodial officials is not within the Eighth Amendment because its provisions "have relation to punishment imposed by sentences on conviction for criminal offenses").

87. *See infra* notes 88-90 and accompanying text.

Supreme Court reviewed public shooting[88] and electrocution[89] as means of execution, as well as the death sentence itself.[90]

When lower courts abandoned the hands-off doctrine, their interpretation of the Eighth Amendment expanded to include prisoners' suits involving both the circumstances of the prison environment and the conduct of prison officials.[91] The Supreme Court subsequently followed suit and, in a series of opinions, examined the constitutionality of depriving prisoners of their medical needs,[92] housing two prisoners in a single cell,[93] and injuring inmates in a prison disturbance.[94] These cases raised two central questions. First, what was the proper Eighth Amendment standard for evaluating the constitutionality of prison conditions?[95] Second, when inmates alleged multiple unconstitutional conditions,

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88. *See* Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (holding that public shooting was not a cruel and unusual punishment).

89. *See In re* Kemmler, 136 U.S. 436, 449 (1890) (holding that electrocution was not a cruel and unusual punishment).

90. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (holding that the death sentence was not a cruel and unusual punishment per se). Other Eighth Amendment cases include: Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion of Warren, C.J., in which Black, Douglas, and Whittaker, JJ., joined) (holding that denationalization is a cruel and unusual punishment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined) (holding that a second electrocution after the first failed to execute prisoner due to a malfunction was not a cruel and unusual punishment).

91. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 581 (8th Cir. 1968) (granting injunctive relief and prohibiting the use of the strap as punishment); Pugh v. Locke, 406 F. Supp. 318, 328-31 (M.D. Ala. 1976) (interpreting conditions of confinement as subject to Eighth Amendment scrutiny and ordering prison officials to satisfy specified minimum standards), *aff'd and remanded*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, Alabama v. Pugh, 438 U.S. 781 (1978); Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971) (approving injunctive relief against prison officials to protect prisoners from unconstitutional practices), *opinion supplemented by* 354 F. Supp. 1302 (E.D. Va. 1973); Holt v. Sarver, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970) (interpreting the Eighth Amendment to apply to prison conditions and practices as well as punishment directed at prisoners as individuals), *aff'd and cause remanded*, 442 F.2d 304 (8th Cir. 1971); *see also supra* notes 48-58 and accompanying text (describing examples of unconstitutional prison practices).

92. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

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

94. Whitley v. Albers, 475 U.S. 312, 319 (1986); *see* 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 Eighth Amendment standards.").

95. *See infra* notes 97-137 and accompanying text (discussing various interpretations of the standard).

should courts consider the cumulative effects of some or all prison conditions or should they review each condition individually?[96] A discussion of these questions follows.

A. Transformation of the Eighth Amendment Standard

The Supreme Court decided its first prison conditions case, *Estelle v. Gamble*, in 1976.[97] *Estelle* involved a single condition: the adequacy of a prisoner's medical treatment.[98] In *Estelle*, an inmate of the Texas Department of Corrections hurt his back when a bale of cotton fell on him while he was unloading a truck.[99] The inmate brought a civil rights suit under 42 U.S.C. § 1983 claiming that the prison doctors failed to diagnose or treat his back injury adequately.[100] The district court dismissed his complaint for failure to state a claim upon which relief could be granted.[101] The Court of Appeals for the Fifth Circuit reversed and remanded with instructions to reinstate the complaint, holding that the alleged insufficiency of medical treatment stated a valid claim.[102] The Supreme Court reversed the court of appeals's decision with respect to the prison's medical director and remanded for an evaluation of the other defendants, holding that only deliberate indifference by prison personnel to a prisoner's serious injury constitutes cruel and unusual punishment.[103]

The *Estelle* Court asserted that the government has an obligation to provide medical care for prisoners.[104] Recognizing the concerns of its early Eighth Amendment cases,[105] the Court

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96. *See infra* notes 138-55 and accompanying text (discussing courts' various approaches to cases involving multiple conditions).

97. 429 U.S. 97 (1976). The Court's statement in *Resweber* that accidents or occurrences in prison were not cruel was merely dictum. *See supra* notes 84-85 and accompanying text (discussing the *Resweber* decision).

98. *Estelle*, 429 U.S. at 105-06.

99. *Id.* at 99.

100. *Id.* at 107.

101. *Id.* at 99.

102. *Id.*

103. *Id.* at 106-08.

104. *Id.* at 103.

105. *Id.* (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)).

observed that denial of medical needs may result in torture or at least pain and suffering without any penological purpose.[106] However, relying on *Resweber*, the *Estelle* Court found that suffering resulting from an accident is not a wanton infliction of unnecessary pain.[107] The Court in *Estelle* noted modern legislation codifying the common law view that the public must care for prisoners because they cannot care for themselves[108] and concluded that society's contemporary standards of decency require a prisoner to show that prison officials were deliberately indifferent to the prisoner's serious medical needs to establish an Eighth Amendment violation.[109] Thus, the Court fashioned a standard that revolves around prison officials' state of mind.[110]

In 1981 the Supreme Court considered for the first time a genuine issue regarding whether general conditions of confinement in prisons constituted cruel and unusual punishment.[111] The Court in *Rhodes v. Chapman*[112] held that the practice of housing two inmates in a single cell was not unconstitutional.[113] *Rhodes* involved two inmates of an Ohio prison, suing on behalf of all others similarly situated, who claimed that double-celling

106. *Id.*

107. *Id.* at 105.

108. *Id.* at 103-04; *see id.* at 103 n.8 (listing state statutes codifying the common law view that the public is required to care for prisoners).

109. *Id.* at 106. The Court stated that the indifference may be manifested by prison doctors' response to a prisoner's needs, or by prison guards' intentional denial of or interference with medical care. *Id.* at 104-05. The facts of the prisoner's complaint in this case, however, did not suggest such indifference on the part of the prison doctors. *Id.* at 107-08. The Court noted that the prisoner had been seen by medical personnel 17 times in a three-month period, and that the doctors' failure to administer an X-ray or additional diagnostic techniques was a matter of medical judgment. *Id.* at 107. The Court remanded the case for a determination of whether a there was a cause of action against other prison officials. *Id.* at 108.

110. *See id.* at 106 (requiring deliberate indifference to prisoners' serious medical needs).

111. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981). A genuine issue regarding whether prison conditions constituted cruel and unusual punishment did not arise in the Court's previous prison conditions cases of *Estelle v. Gamble* or *Hutto v. Finney*. *See* Estelle v. Gamble, 429 U.S. 97, 98 (1976) (reviewing the district court's *sua sponte* dismissal of a prisoner's complaint on summary judgment); Hutto v. Finney, 437 U.S. 678, 685 (1978) (where it was not disputed that the conditions in the Arkansas prisons constituted cruel and unusual punishment).

112. 452 U.S. 337 (1981).

113. *Rhodes*, 452 U.S. at 348.

constituted cruel and unusual punishment.[114] The prison housed 38% more inmates than its design capacity allowed, and more than half of those inmates were double-celled in 63-square-foot cells.[115]

The federal district court, relying upon objective studies recommending cells with at least 50 to 55 square feet per prisoner, concluded that double celling was cruel and unusual punishment because the inmates were serving long terms of imprisonment, they were spending most of their time in their cells, and they would continue to be double-celled because it was a permanent practice.[116] The United States Court of Appeals for the Sixth Circuit affirmed,[117] but the Supreme Court reversed, holding that the district court's considerations were insufficient to support its conclusion.[118]

In evaluating whether the prison conditions were cruel and unusual, the Supreme Court restated its view that society's evolving standards of decency prohibit punishments that inflict unnecessary and wanton pain, and punishments that are grossly disproportionate to the severity of the crime.[119] After examining the objective factors the district court had relied upon, the *Rhodes* Court concluded that double-celling did not increase violence or lead to deprivations of basic food, medical care, or sanitation, and therefore did not inflict the requisite pain or grossly disproportionate punishment.[120] According to the Court, the Constitution does not require comfortable prisons or direct that prisoners be free from discomfort.[121]

The Court's analysis in *Rhodes* differed from that of *Estelle* in that it did not consider the state of mind of the prison officials, but

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114. *Id.* at 340.

115. *Id.* at 341-43.

116. Chapman v. Rhodes, 434 F. Supp. 1007, 1020-21 (S.D. Oh. 1977), *aff'd without opinion*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, Rhodes v. Chapman, 452 U.S. 337 (1981).

117. Chapman v. Rhodes, 624 F.2d 1099 (6th Cir. 1980) (without opinion), *rev'd*, Rhodes v. Chapman, 452 U.S. 337 (1981).

118. Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

119. *Id.* at 347.

120. *Id.* at 348.

121. *Id.* at 349.

rather only the conditions of the prison.[122] As a result of the Court's focus on objective conditions, many lower courts inferred that the Eighth Amendment required no mental element when general prison conditions were at issue.[123] Other courts, however, continued to believe that the deliberate indifference standard of *Estelle* applied in all prison conditions cases.[124] Thus, the *Rhodes* decision created much ambiguity in prison conditions analysis under the Eighth Amendment.[125]

Five years later, in *Whitley v. Albers*,[126] the Supreme Court failed to resolve the uncertainty. The *Whitley* opinion did, however, reformulate the unnecessary and wanton pain standard by interpreting it to require different culpable states of mind on the part of prison officials depending on the type of prison conduct involved.[127]

In *Whitley*, a prison officer was taken hostage in an upper-tier cell during an inmate riot in the Oregon State Penitentiary.[128] Prison officials devised a plan to free the hostage, in which one officer would climb the stairs toward the cell, and another would shoot low at any prisoners who followed him.[129] During the

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122. *See id.* at 348 (ruling that the objective prison conditions did not constitute unnecessary and wanton pain).

123. *See, e.g.*, Tillery v. Owens, 907 F.2d 418, 426 (3d Cir. 1990) (failing to consider a mental element in its Eighth Amendment analysis); Foulds v. Corley, 833 F.2d 52, 54-55 (5th Cir. 1987) (declining to adopt a "malicious and sadistic" intent standard); Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam) (interpreting *Rhodes* not to require intent in a cause of action alleging unconstitutional conditions of confinement), *reinstated in part en banc*, 858 F.2d 1101, 1103 (5th Cir. 1988); French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (holding that conditions constituted cruel and unusual punishment without considering a mental element), *cert. denied*, 479 U.S. 817 (1986); Hoptowit v. Spellman, 753 F.2d 779, 783-84 (9th Cir. 1985) (holding that conditions constituted cruel and unusual punishment without considering a mental element).

124. *See, e.g.*, Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990); Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988); Morgan v. Dist. of Columbia, 824 F.2d 1049, 1057-58 (1987); LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987); Riley v. Jeffes, 777 F.2d 143, 147 & n.8 (3d Cir. 1985) (applying the deliberate indifference standard).

125. *See infra* notes 139-55 and accompanying text (discussing further conflicting lower court interpretations of the objective standard).

126. 475 U.S. 312 (1986).

127. *Whitley*, 475 U.S. at 319. The Court attempted to clarify the unnecessary and wanton standard by describing it as "wanton and obdurate." *Id.* at 320.

128. *Id.* at 314-15.

129. *Id.* at 316.

execution of the plan, several inmates were wounded by gunshots.[130] A prisoner who was shot in the knee sued the assistant superintendent of the prison, among others, pursuant to 42 U.S.C. § 1983 claiming the officers' conduct violated the Eighth Amendment.[131]

The *Whitley* Court held that the shooting did not constitute cruel and unusual punishment.[132] According to the Court, since restoring order during a prison disturbance threatens the safety of both inmates and prison officials, unnecessary and wanton pain in this context means that force may not be applied "maliciously and sadistically," but must be used in a good-faith effort to restore order.[133] The Court in *Whitley* rejected the deliberate indifference standard of *Estelle*, maintaining that it did not adequately reflect the importance of safety risks to prison personnel or the pressure of the situation confronting prison officials.[134]

Whitley established the framework for analyzing whether prison personnel's conduct violates the cruel and unusual punishment provision of the Eighth Amendment. The general unnecessary and wanton pain standard controls, but it is defined more specifically depending on the particular prison conduct involved and the importance of competing governmental interests.[135] Under the *Whitley* standard, prison officials violate the Eighth Amendment if they are deliberately indifferent to prisoners' serious medical needs (as in *Estelle*), or if they are malicious and sadistic in the enforcement of prison security (as in *Whitley*).[136] However, the *Whitley* framework purported to classify only prison conduct.[137] It failed to resolve the ambiguity that the *Rhodes* decision created

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130. *Id.*

131. *Id.* at 317.

132. *Id.* at 326.

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

134. *Id.* at 320. The Court stated that "in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 319.

regarding what state of mind, if any, applies when general conditions of confinement are at issue and not a particular official's conduct.

B. Application of the Eighth Amendment Standard to Prison Conditions

The second problem peculiar to prison condition cases is how to apply the Eighth Amendment standard when multiple conditions of confinement are involved, as opposed to a single condition of confinement or an official's conduct. For example, prisoners may complain that conditions such as overcrowding, insufficient exercise, inadequate sanitation, poor ventilation, or lack of heat, produce cruel and unusual punishment in combination.[138]

Courts usually analyze these cases in one of three ways. First, some courts ask whether each specific condition is cruel and unusual.[139] This analysis has been labeled "discrete adjudication."[140] Second, other courts look to the "totality of the conditions" and ask whether all the conditions, when combined, constitute cruel and unusual punishment.[141] The third analysis, a

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138. *See generally* Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke*, 29 STAN. L. REV. 893, 909-14 (1977) (discussing the most common conditions of confinement subject to litigation).

139. *See, e.g.*, Bellamy v. Bradley, 729 F.2d 416, 418-21 (6th Cir.) (analyzing specific conduct by prison officials and rejecting applicability of their cumulative effect), *cert. denied*, 469 U.S. 845 (1984); Hite v. Leeke, 564 F.2d 670, 673 (4th Cir. 1977) (holding that the totality of conditions approach was inappropriate where overcrowding was not combined with unsanitary conditions or physical danger); Carver v. Knox County, 753 F. Supp. 1398, 1400 (E.D. Tenn. 1990) (requiring a specific condition on which to base an Eighth Amendment claim and rejecting the totality of conditions approach); *cf.* Bell v. Wolfish, 441 U.S. 520, 541-60 (1979) (illustrating the discrete adjudication approach in the Fifth Amendment due process context by considering conditions individually).

140. *See* Groseclose v. Dutton, 609 F. Supp. 1432, 1441 (M.D. Tenn. 1985); Dawson v. Kendrick, 527 F. Supp. 1252, 1285 (S.D. W. Va. 1981) (discussing the "discrete adjudication" method of analysis); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 628-30 (1981) (calling this analysis "discrete adjudication" for the first time).

141. *See, e.g.*, Walker v. Mintzes, 771 F.2d 920, 925 (6th Cir. 1985) (requiring consideration of the totality of circumstances and a specific unconstitutional condition for a valid Eighth Amendment claim); Miller v. Carson, 563 F.2d 741, 751 (5th Cir. 1977) (finding that the totality of circumstances violated the Eighth Amendment); Smith v. Sullivan, 553 F.2d 373, 378 (5th Cir. 1977) (adopting the totality of conditions test and not requiring a specific deprivation); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (adopting the totality of conditions test and not requiring a specific

hybrid of the previous two, takes the point of view that certain related conditions may be considered in combination, while others must be considered alone.[142] For example, a court may consider the lack of sufficient blankets for prisoners and inadequate heating in combination because the two conditions are related, while in another case the court will consider insufficient blankets and poor sanitation separately because they are unrelated.

The Supreme Court's past cases have not explicitly distinguished between these analyses. In its 1978 case of *Hutto v. Finney*,[143] the Court seemed to adopt the totality of the conditions test.[144] In *Hutto*, a federal district court's finding that the conditions in the Arkansas prison system were cruel and unusual was not disputed.[145] The Supreme Court in *Hutto* did, however, briefly review the factors that the district court considered in

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deprivation); Kitt v. Ferguson, 750 F. Supp. 1014, 1019 (D. Neb. 1990) (adopting the totality of circumstances test but not finding a constitutional violation), *aff'd without opinion*, 950 F.2d 725 (8th Cir. 1991); Reece v. Gragg, 650 F. Supp. 1297, 1303-04 (D. Kan. 1986) (finding the totality of circumstances unconstitutional); Miles v. Bell, 621 F. Supp. 51, 58 & n.10 (D. Conn. 1985) (considering conditions individually and in their totality); Grubbs v. Bradley, 552 F. Supp. 1052, 1122 (M.D. Tenn. 1982) (considering the totality of conditions but requiring a specific unconstitutional condition for an Eighth Amendment violation); Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D. N.H. 1977) (stating that the cumulative effect of prison conditions may be cruel and unusual without a single unconstitutional condition); Vest v. Lubbock County Comm'rs Court, 444 F. Supp. 824, 831 (N.D. Tex. 1977) (stating that the sum total of prison conditions may be cruel and unusual without an individual unconstitutional condition); Barnes v. Government of Virgin Islands, 415 F. Supp. 1218, 1225 (D. V.I. 1976) (stating that the cumulative effect of prison conditions may be cruel and unusual without a single unconstitutional condition).

142. *See, e.g.*, Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986) (stating that related conditions are those that combine to create a cruel and unusual punishment), *cert. denied*, 481 U.S. 1069 (1987); Ruiz v. Estelle, 679 F.2d 1115, 1140 n.98 (5th Cir.) (combining conditions of confinement in some circumstances), *amended in part, vacated in part, reh'g denied in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982) (requiring joint consideration of related conditions); Dawson v. Kendrick, 527 F. Supp. 1252, 1285 (S.D. W. Va. 1981) (considering some conditions individually and some in combination). This test will be referred to as the "combination of conditions" test.

143. 437 U.S. 678 (1978).

144. *Hutto*, 437 U.S. at 687-88; *see infra* note 148 and accompanying text (discussing the *Hutto* Court's holding). *Hutto* was the culmination of the litigation surrounding the Arkansas prison system described above in *Holt v. Sarver*. *See supra* notes 53-60 and accompanying text (discussing *Holt v. Sarver*).

145. *Hutto*, 437 U.S. at 680. Prison officials contested only the district court's decision to limit punitive isolation to 30 days, and its award of attorneys' fees in response to the officials' failure to remedy the constitutional violations. *Id.*

finding a constitutional violation.[146] These factors included the inmates' inadequate diet, overcrowding, widespread violence, unprofessional security personnel, and the length of time inmates spent in isolation.[147] The Supreme Court appeared to accept the totality of conditions test because it stated that "taken as a whole" it found no error in the district court's determination that conditions in the isolation cells were unconstitutional and that the court's order was supported by the "interdependence" of the conditions.[148]

More recently, in *Rhodes v. Chapman*,[149] the Court stated that conditions of confinement could be unconstitutional "alone or in combination."[150] This phrase could encompass all three possible approaches mentioned above.[151] The *Rhodes* Court refused, however, to hold that double-celling in combination with any other conditions was unconstitutional.[152]

Since the *Rhodes* decision, lower courts have generally applied either the totality of conditions test or the combination of conditions test.[153] But even courts that applied the totality of conditions test interpreted it in different ways. Some courts held that the totality of the conditions can constitute cruel and unusual punishment even if no single condition is unconstitutional,[154]

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146. *Id.* at 687.

147. Finney v. Hutto, 410 F. Supp. 251, 277-78 (E.D. Ark. 1976).

148. *Hutto*, 437 U.S. at 687-88.

149. 452 U.S. 337 (1981).

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

151. *See supra* notes 139-42 and accompanying text (describing the differing analyses of multiple conditions of confinement). Justice Brennan, in his concurring opinion, interpreted the Court's statement as adopting the "totality of the conditions" test to which he subscribed because he believed the cumulative effect of conditions may be cruel and unusual. *Rhodes*, 452 U.S. at 363 & n.10 (Brennan, J., concurring in the judgment) (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D. N.H. 1977)).

152. *Rhodes*, 452 U.S. at 348.

153. *See supra* notes 141-42 (citing cases applying the totality of conditions and combination of conditions tests).

154. *See, e.g.*, Miller v. Carson, 563 F.2d 741, 751 & n.12 (5th Cir. 1977); Smith v. Sullivan, 553 F.2d 373, 378 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974); Kitt v. Ferguson, 750 F. Supp. 1014, 1019 (D. Neb. 1990); Reece v. Gragg, 650 F. Supp. 1297, 1303-04 (D. Kan. 1986); Miles v. Bell, 621 F. Supp. 51, 58 n.10 (D. Conn. 1985); Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D. N.H. 1977); Vest v. Lubbock County Comm'rs Court, 444 F. Supp. 824, 831 (N.D. Tex. 1977); Barnes v. Gov't of Virgin Islands, 415 F. Supp. 1218, 1225 (D. V.I. 1976) (not

while other courts required at least one specific condition to be unconstitutional.[155] Thus, the precise analysis required in cases alleging multiple unconstitutional conditions was uncertain.

To recapitulate, the Supreme Court's prison cases before *Wilson v. Seiter*[156] exhibited two ambiguities. First, did the Eighth Amendment contain a state of mind requirement for prison conditions cases? *Whitley* clarified the constitutional analysis where unconstitutional conduct was alleged, stating that conduct that inflicts "unnecessary or wanton pain" is cruel and unusual punishment.[157] The meaning of this standard depends upon the conduct involved and the governmental interests at stake.[158] But lower courts were split on how this test applied to cases involving conditions of confinement.[159] Second, how should multiple prison conditions be analyzed? The Supreme Court's previous cases left it unclear whether multiple conditions should be considered individually, in their totality, or in combination at the court's discretion.[160] *Wilson v. Seiter*, the Supreme Court's most recent prison conditions case, resolved both of these ambiguities.[161]

IV. THE CASE OF *WILSON V. SEITER*

A. The Facts

In *Wilson v. Seiter*,[162] Pearly L. Wilson, a felon imprisoned at the Hocking Correctional Facility in Nelsonville, Ohio, brought an action in federal court under 42 U.S.C. § 1983 alleging Ohio

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requiring a specific unconstitutional condition).

155. *See, e.g.*, Walker v. Mintzes, 771 F.2d 920, 925 (6th Cir. 1985); Grubbs v. Bradley, 552 F. Supp. 1052, 1122 (M.D. Tenn. 1982) (requiring a specific unconstitutional condition).

156. 111 S. Ct. 2321 (1991).

157. Whitley v. Albers, 475 U.S. 312, 320 (1986); *see supra* notes 126-37 and accompanying text (discussing the *Whitley* decision).

158. *Whitley*, 475 U.S. at 320.

159. *See supra* notes 123-24 and accompanying text (discussing the split of authority).

160. *See supra* notes 139-41 and accompanying text (discussing the various analyses of multiple conditions of confinement).

161. *See infra* notes 162-204 and accompanying text (discussing the *Wilson* decision).

162. 111 S. Ct. 2321 (1991).

prison officials violated the Eighth and Fourteenth Amendments.[163] The complaint alleged overcrowding, excessive noise, insufficient locker 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.[164] Wilson sought declaratory

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163. *Wilson*, 111 S. Ct. at 2322-23.

164. *Id.* at 2322-23. Petitioner made the following allegations:

Ventilation

. . . .

The air in the dormitory is stagnant and foul from toilets, urinals and colostomy bags. It is difficult to sleep at night because of this foul air. In summer, the temperature goes up to 95°, and this heat is aggravated by the lack of ventilation and the fact that fire exits are locked at all times. The fans in the dormitories are inadequate to move the foul air out. As a result of the heat some prisoners "[fall] out" (faint). Prisoners with respiratory problems have trouble breathing; others develop heat rash.

. . . .

Sanitation

. . . .

Urine accumulates around the toilets and urinal and is inadequately cleaned, resulting in offensive odor; floors are filthy because of lack of proper cleaning supplies. The dormitory is infested with a variety of insects and mice, and extermination is totally inadequate. The dining hall is filthy and the food is prepared by unsupervised, sometimes diseased prisoners. As a result, petitioner fears to eat in the dining hall.

. . . .

Overcrowding

. . . .

There are 143 beds in the dormitory; all but twenty eight of the beds are double-bunked. Prisoners have less than 50 square feet per person. The beds are spaced so closely that, with the inadequate ventilation, prisoners smell the body odors of others. The general noise level is high, even during sleeping hours.

. . . .

Lack of Heat

. . . .

The dormitory is "frigid" in winter, causing petitioner physical pain. There are cracks in the walls that can be seen through. Most of the windows cannot be closed completely, so that some bunks get wet during the rain. The clothing is ragged and inadequate to keep prisoners warm in winter; no underwear is distributed.

. . . .

Safety Protection from Communicable Disease

. . . .

Psychotic prisoners are placed in the dormitories. This causes stress to other prisoners, who cannot predict the behavior of the mentally ill prisoners. Following surgery, prisoners with open sores are housed in the dormitory because of a lack of space in the prison infirmary. One named prisoner housed in the dormitory was repeatedly hospitalized for pneumonia.

and injunctive relief, as well as $900,000 in compensatory and punitive damages.[165] The district court granted summary judgment against Wilson, and the United States Court of Appeals for the Sixth Circuit affirmed, holding that the prison officials exhibited no "persistent malicious cruelty" as required by *Whitley*.[166] The United States Supreme Court granted certiorari, vacated the court of appeals's judgment by a five to four vote, and remanded the case for reconsideration with the deliberate indifference standard of *Estelle v. Gamble*.[167]

B. The Majority Opinion

Justice Scalia wrote the opinion of the Court in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined.[168] The majority began its opinion by stating that the Eighth Amendment, through the Due Process Clause of the Fourteenth Amendment, prohibits the states from inflicting cruel and unusual punishment upon prisoners, including deprivations not specifically part of the sentence, such as prison conditions.[169]

The majority noted that the determination that a prison official has inflicted cruel and unusual punishment requires an inquiry into the official's state of mind.[170] The majority supported this assertion by reviewing its decisions in *Resweber*, *Estelle*, and *Whitley*, which applied the wanton infliction of pain standard.[171]

Brief of Petitioner at 4 n.3, Wilson v. Seiter, 111 S. Ct. 2321 (1991) (No. 89-7376).

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

166. Wilson v. Seiter, 893 F. 2d 861, 867 (6th Cir.), *motion granted and cert. granted*, 111 S. Ct. 41, *motion granted*, 111 S. Ct. 577 (1990), *vacated*, 111 S. Ct. 2321 (1991).

167. Wilson v. Seiter, 111 S. Ct. 2321, 2328 (1991).

168. *Id.* at 2322.

169. *Id.* at 2323. The Court relied upon Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). *Id.*

170. *Id.* at 2324.

171. *See id.* at 2323-24 (discussing the *Resweber*, *Estelle*, and *Whitley* cases); *see also* Whitley v. Albers, 475 U.S. 312, 319 (1985); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (interpreting the Eighth Amendment to require a wanton infliction of pain). The majority explained that in Rhodes v. Chapman, 452 U.S. 337 (1981), the majority did not consider the issue of whether the officials acted with a sufficiently culpable state of mind because the holding turned on the preliminary question of whether the deprivation was

Since "wantonness" involves a mental element, inquiry into an inflicting official's state of mind is required.[172] Moreover, the source of the state of mind requirement, according to the majority, is the text of the Eighth Amendment itself which prohibits "punishment," a concept that implies a deliberate intent to chastise or deter.[173] Thus, some mental element must be attributed to an official to constitute "punishment" under the Eighth Amendment.[174] The mental element may be satisfied by the deliberate imposition of punishment by a statute or sentencing judge, or by a prison official's conduct.[175]

Having decided that some mental element is required for Eighth Amendment prison conditions claims, the majority next determined which specific state of mind was required.[176] The majority concluded that "wantonness" is the required state of mind in all prison conditions cases.[177] However, relying upon *Whitley*, the *Wilson* Court explained that the meaning of wantonness depends upon the type of conduct at issue and the constraints facing prison officials in the particular circumstances.[178] For example, in an emergency situation, such as a prison riot, wantonness means acting maliciously and sadistically with the purpose of causing harm.[179] This standard allows wide latitude for behavior to take into account the high pressure of the situation facing prison officials and the need to protect the safety of prison staff and inmates.[180] Where conduct relating to a prisoner's medical needs

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sufficiently serious. *Wilson*, 111 S. Ct. at 2324.

172. *Wilson*, 111 S. Ct. at 2324.

173. *Id.* at 2325 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)). The United States argued that a state of mind inquiry might allow prison officials the defense that they lacked the requisite intent because fiscal constraints beyond their control caused the inhumane conditions. *Id.* at 2326. The majority responded that the meaning of "punishment" in the Eighth Amendment must control despite these policy considerations. *Id.*

174. *Id.* at 2325.

175. *Id.*

176. *Id.* at 2326-27.

177. *Id.* at 2326.

178. *Id.*

179. *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320-321 (1985), quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973)).

180. *Id.* (quoting *Whitley*, 475 U.S. at 320-21).

is at issue, wantonness means "deliberate indifference."[181] The deliberate indifference standard is less demanding because attending to prisoners' medical needs does not generally conflict with other equally important governmental obligations.[182] The majority concluded, therefore, that since there is no significant distinction between inadequate medical care and other conditions of confinement, such as the food served, the clothes issued, or the temperature maintained in the prison, prison conditions cases should be judged by the deliberate indifference standard.[183] Since the constraints facing officials regarding these conditions are similar (in contrast to the constraints posed by a riot), the deliberate indifference standard applies to all the conditions.[184]

The majority next addressed how to apply the deliberate indifference standard when multiple prison conditions are at issue.[185] The majority stated that conditions are unconstitutional individually or in combination only when there is a deprivation of an identifiable human need.[186] Examples of human needs include food, warmth, and exercise.[187] Overall conditions can constitute cruel and unusual punishment, the *Wilson* majority asserted, only if there is a specific deprivation of a human need.[188]

In sum, the *Wilson* majority decided that there is an Eighth Amendment violation in any prison conditions case only if a prison official was deliberately indifferent to the deprivation of an inmate's human need.[189] The majority finally remanded the case for reconsideration under the deliberate indifference standard.[190]

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181. *Id.* (relying upon Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

182. *Id.* (quoting *Whitley*, 475 U.S. at 320).

183. *Id.*

184. *Id.* at 2327.

185. *Id.* at 2327-28.

186. *Id.* at 2327. This is the majority's interpretation of the statement in *Rhodes* that conditions of confinement alone or in combination may deprive prisoners of the minimal civilized measure of life's necessities. *Id.*; *see* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

187. *Wilson*, 111 S. Ct. at 2327. The Court did not exhaustively define "human need." *See infra* notes 227-29 and accompanying text (discussing interpretations of human needs).

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

189. *Id.*

190. *Id.* at 2328.

C. The Concurring Opinion

Justice White, writing for himself and Justices Marshall, Blackmun, and Stevens, concurred in the judgment.[191] Justice White argued that a determination of a prison official's mental state is not required under Eighth Amendment analysis of prison conditions because prison conditions are part of the punishment, even though they are not expressly imposed by a statute or judge.[192]

In support of his assertion, Justice White focused on the Supreme Court's past cases of *Hutto v. Finney* and *Rhodes v. Chapman*.[193] In both of these cases, he argued, confinement in a prison was treated as a form of punishment.[194] Furthermore, each case examined only the objective severity of conditions in its Eighth Amendment analysis.[195] Justice White distinguished the Supreme Court's decisions in *Estelle* and *Whitley*, where the Court had required an inquiry into the state of mind of the charged officials,[196] by noting that those cases did not involve *conditions* of confinement, but rather specific *acts or omissions* directed at individual prisoners.[197] For example, he stated that in *Estelle* the challenge was to the allegedly inadequate delivery of medical care to the plaintiff, not to a general lack of medical care.[198] In *Whitley*, the challenge regarded a guard's shooting of the plaintiff during a riot.[199] An intent requirement was proper in these cases

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191. *Id.* (White, J., concurring).
192. *Id.* (White, J., concurring).
193. *Id.* at 2328-29 (White, J., concurring).
194. *Id.* at 2328-30 (White, J., concurring).
195. *Id.* at 2329-30 (White, J., concurring).
196. *See* Whitley v. Albers, 475 U.S. 312, 319-21 (1986); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-64 (1947) (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined) (requiring a purposeful or wanton infliction of unnecessary pain). *See generally supra* notes 82-85 and accompanying text (discussing *Resweber*); *supra* notes 97-110 and accompanying text (discussing *Estelle*); *supra* notes 126-34 and accompanying text (discussing *Whitley*).
197. *Wilson*, 111 S. Ct. at 2330 (White, J., concurring).
198. *Id.* (White, J., concurring).
199. *Id.* (White, J., concurring).

because the specific conduct did not even purport to be punishment.[200] In contrast, according to Justice White, conditions of confinement are part of a prisoner's punishment, and the Court's prison conditions cases have never made intent an element of a cause of action.[201]

In addition, Justice White argued that an intent requirement is impossible to apply in the context of prison conditions since conditions are often the result of many officials' actions or inactions, both inside and outside a prison, and sometimes occur over a long period of time.[202] Thus, Justice White maintained, it is unclear whose intent should be examined.[203] Moreover, Justice White asserted that under the deliberate indifference standard imposed by the *Wilson* majority, serious deprivations of prisoners' basic human needs will not be remedied because officials will be able to defeat a prisoner's action simply by showing that the conditions were not caused by a culpable official, but instead by insufficient funding from the state legislature.[204]

V. RAMIFICATIONS

A. A Framework for Analyzing Eighth Amendment Prison Cases

One of *Wilson*'s most significant features is its synthesis of the Supreme Court's previous Eighth Amendment prison cases. In the course of reviewing its past decisions, the Court established a framework for analyzing all Eighth Amendment prison claims.[205]

According to *Wilson*, the Eighth Amendment has objective and subjective components, both of which are necessary for an Eighth Amendment violation.[206] The objective component requires that

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200. *Id.* (White, J., concurring) (quoting Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam), *reinstated in part en banc*, 858 F.2d 1101, 1103 (5th Cir. 1988)).

201. *Id.* at 2328, 2330 (White, J., concurring).

202. *Id.* at 2330 (White, J., concurring).

203. *Id.* (White, J., concurring).

204. *Id.* at 2330-31 (White, J., concurring).

205. *See Wilson*, 111 S. Ct. at 2324-26.

206. *Id.* at 2324 (stating that *Rhodes*, which turned on the objective component, did not eliminate the required subjective component).

a deprivation be sufficiently serious or harmful to be cruel and unusual.[207] Relying on *Rhodes*, the Court stated that a deprivation is sufficiently serious if it denies human needs or minimal civilized necessities.[208] The subjective component insures that the deprivation a prisoner suffers constitutes punishment.[209] The concept of punishment requires that a deprivation be inflicted with some form of intent.[210] Clearly, a deprivation formally imposed by a statute or sentencing judge satisfies this requirement.[211] Pain inflicted by prison officials requires a wanton state of mind on the part of the officials to qualify as punishment.[212] But the definition of wantonness, according to the *Wilson* majority, varies with the constraints facing prison officials in particular prison contexts.[213] For example, in prison conditions cases wantonness means deliberate indifference,[214] while in emergency situations involving prison disturbances, wantonness means a malicious and sadistic infliction of pain.[215] It makes sense to have a higher standard for punishment when an official acts to quell a prison disturbance because under these circumstances it is likely that the official is not inflicting pain with the intent to punish, but to maintain prison security.

While the members of the Court, all agree that the Eighth Amendment contains both subjective and objective components, they disagree about how this structure is applied. In *Wilson*, for example, four Justices concurred in the judgment, contending that the Eighth Amendment does not require an inquiry into an

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207. *Id.* at 2324, 2325 & n.2, 2326.

208. *Id.* at 2324; *see* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (requiring a serious deprivation of a basic human need or a deprivation of the minimal civilized measure of life's necessities for an Eighth Amendment violation).

209. *Wilson*, 111 S. Ct. at 2325 (stating that the Eighth Amendment concept of punishment requires that some mental element be attributed to the inflicting official if the pain a prisoner suffers is not formally meted out).

210. *Id.*; *see The Supreme Court, 1990 Term -- Leading Cases*, 105 HARV. L. REV. 177, 242 n.52 (1991) (citing commentators arguing that the concept of punishment implies an intentional act).

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

212. *Id.* at 2326.

213. *Id.*

214. *Id.* at 2327; *see infra* note 251 and accompanying text (defining the deliberate indifference standard).

215. Whitley v. Albers, 475 U.S. 312, 320-21 (1986).

official's state of mind in challenges to conditions of confinement.[216] The extent of the disagreement on the Court regarding the proper Eighth Amendment analysis became striking in *Hudson v. McMillian*,[217] the Court's most recent Eighth Amendment case.

In *Hudson*, the majority held that when prison officials use malicious and sadistic force against a prisoner, courts need not inquire into whether the force was sufficiently harmful as long as the force used was not *de minimis*.[218] This holding suggests that the Eighth Amendment's subjective and objective requirements are interdependent and analogous to a sliding scale, at least in the excessive force context.[219] A particularly culpable mental state on the part of the inflicting officer can compensate for a less serious injury and still violate the Eighth Amendment. The *Hudson* dissenters, Justices Thomas and Scalia, argued that allowing all but a *de minimis* use of force to satisfy the objective component eliminates the Eighth Amendment's serious injury requirement mentioned in *Wilson*.[220]

The dispute in *Hudson* centers around what constitutes a serious injury under the Eighth Amendment's objective component. The *Hudson* majority held that the concept depends on all the circumstances of the claim at issue including the inflicting official's state of mind.[221] The dissenters suggested that the amount of pain a prisoner suffers is the controlling factor.[222]

Wilson and *Hudson* illustrate that the Supreme Court's Eighth Amendment framework is tremendously flexible. The standards under the subjective and objective components vary with the

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216. *Wilson*, 111 S. Ct. at 2330 (concurring opinion of White, J., in which Marshall, Blackmun, and Stevens, JJ. joined).

217. 112 S. Ct. 995 (1992).

218. *Hudson*, 112 S. Ct. at 1000.

219. *See id.* (limiting the Court's holding to the excessive force context).

220. *Id.* at 1007 (Thomas, J., dissenting); *see Wilson*, 111 S. Ct. at 2324 (stating that the objective component determines whether a deprivation is sufficiently serious).

221. *Hudson*, 112 S. Ct. at 1000.

222. *See id.* at 1009 (Thomas, J., dissenting) (quoting Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1088)) (stating that a serious injury need not be physical since many things can cause agony and pain).

aspects of prison life and the specific claims at issue. When added to the sharp disparity of opinions on the Court, this variability presages much uncertainty for future Eighth Amendment litigation.

B. The "Single Deprivation of a Human Need" Requirement: Resolution of the Totality of the Conditions Ambiguity

Prison conditions cases have presented a special problem for lower courts. Before *Wilson*, there was considerable conflict among lower courts regarding how to analyze multiple conditions of confinement under the Eighth Amendment.[223] *Wilson* does not overrule the diverse analyses lower courts developed. Courts are still free to consider conditions individually, in their totality, or in combination. But after *Wilson* their inquiries must focus on whether prisoners have been deprived of a human need.[224] *Wilson* rejects the idea that overall conditions of confinement, without a specific deprivation of a human need, can constitute cruel and unusual punishment.[225] Thus, the *Wilson* decision focuses the complex and conflicting legal analyses of many jurisdictions on the heart of what it means to inflict cruel and unusual conditions of confinement: to deprive an inmate of a human need.[226]

The *Wilson* Court did not set forth a rule for determining what is a human need. Although the Court refers to the equally ambiguous "minimal civilized measure of life's necessities," the Court leaves these concepts for a case-by-case determination.[227] However, lower courts have much experience in determining minimally acceptable conditions and have declared many prison

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223. *See supra* notes 139-55 and accompanying text (discussing various analyses of multiple conditions of confinement).

224. *See Wilson*, 111 S. Ct. at 2327 (requiring a deprivation of a human need to constitute cruel and unusual punishment).

225. *See id.* at 2327 (requiring a specific deprivation of a human need for conditions to constitute cruel and unusual punishment).

226. *Id.*; *see supra* notes 139-55 and accompanying text (discussing the differing approaches to conditions of confinement cases).

227. *Wilson*, 111 S. Ct. at 2327; *see* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (requiring a serious deprivation of a basic human need or a deprivation of the minimal civilized measure of life's necessities for an Eighth Amendment violation).

conditions unconstitutional.[228] Not surprisingly, human needs generally relate to the core areas of the penal environment which include shelter, sanitation, food, personal safety, and medical care.[229] Over time, trial court determinations of what constitutes a human need will enable prison officials and state legislators to anticipate constitutionally acceptable standards with greater certainty.

C. *Prison Conditions as Punishment*

The *Wilson* majority and the *Wilson* concurrence both agreed that pain or suffering imposed as punishment by a statute or judge is subject to Eighth Amendment scrutiny without any additional inquiry into intent.[230] They also agreed that *Estelle* and *Whitley* properly required a culpable state of mind on the part of prison officials, since the pain the officials inflicted was not imposed as punishment.[231] However, the majority and the concurrence disagreed about whether pain resulting from prison conditions constitutes punishment. The majority argued that since the concept of punishment implies an intentional act, some mental element must be attributed to the inflicting prison official for prison conditions to constitute punishment.[232] The concurrence

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228. *See* Robbins & Buser, *supra* note 138, at 909-14; William H. Danne, Jr., Annotation, Comment Note, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111 (1973 & Supp. 1992) (citing cases declaring prison conditions unconstitutional).

229. *See* Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (stating that the core areas of Eighth Amendment claims are shelter, sanitation, food, personal safety, and medical care), *cert. denied*, 450 U.S. 1041 (1981). Two commentators have selected eleven foci for analyzing conditions of confinement: physical facilities, overcrowding, absense of a classification system, isolation and segregation cells, medical facilities and treatment, food service, personal hygiene and sanitation, protection from violence, prison personnel, rehabilitation programs, and other prisoners' rights. *See* Robbins & Buser, *supra* note 138, at 909-14 (citing cases examining each aspect of a prison's conditions of confinement).

230. *Wilson*, 111 S. Ct. at 2325; *id.* at 2328 (White, J., concurring).

231. *See id.* at 2323-25 (reviewing the *Estelle* and *Whitley* cases, stating that they mandate an inquiry into an official's state of mind if the pain is not "formally meted out *as punishment*") (emphasis in original); *id.* at 2330 (White, J., concurring) (arguing that the Court made intent an element in *Estelle* and *Whitley* because they involved conduct that did not purport to be punishment at all).

232. *Id.* at 2325.

maintained that prison conditions are impliedly part of the formally imposed punishment.[233]

The Supreme Court's prior case law does not resolve this disagreement because it can be interpreted to support either side depending on one's definition of "conditions of confinement." The concurrence, for example, suggested that conditions of confinement are *general* characteristics of a prison.[234] Accordingly, the concurrence argued that *Hutto* and *Rhodes* were the Court's only prison conditions cases and, since they did not require a mental element, the Eighth Amendment does not require one.[235] *Estelle* and *Whitley*, which did require a mental element, were not prison conditions cases in their view, but rather involved conduct directed at individual prisoners.[236]

Yet it is equally valid, as the majority argued, to define conditions of confinement as those characteristics of a prison that affect an individual prisoner.[237] For example, the inmate in *Estelle* who alleged he had not received adequate medical care experienced that deprivation as a condition of his confinement, just as the prisoner in *Whitley* experienced being shot. The majority also distinguished *Hutto* as turning on a narrow holding,[238] and *Rhodes* as not reaching the consideration of the mental element.[239]

Both the majority and the concurrence can distinguish opposing cases, and under either the majority's or the concurrence's definition of conditions of confinement, the prisoner experiences pain as a circumstance of his incarceration in prison. Therefore, the concurrence's distinction between pain resulting from conduct and

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233. *Id.* at 2328 (White, J., concurring).

234. *See id.* at 2330 (White, J., concurring) (stating that since *Estelle* did not involve a challenge to "a general lack of access to medical care at the prison," it did not involve a challenge to conditions of confinement).

235. *See id.* at 2328-30 (White, J., concurring) (characterizing *Hutto* and *Rhodes* as conditions of confinement cases and emphasizing that they focused only on the objective conditions).

236. *Id.* at 2330 (White, J., concurring).

237. *Id.* at 2324 n.1.

238. *Id.* at 2325 n.2.

239. *Id.* at 2324.

pain resulting from conditions is a weak rationale for calling one punishment and not the other.

Moreover, using the vague and imprecise concept of a prison condition to determine whether circumstances of the prison environment constitute punishment, as the concurrence suggested, would amplify the uncertainty in prison litigation. For example, the concurrence asserted that conduct directed at an individual prisoner is clearly not a condition of confinement.[240] Thus, depriving a single prisoner of medical care is not a condition of confinement.[241] If the deprivation of medical care pervades throughout the prison, however, then it is a condition of confinement.[242] Where does one draw the line? Is it a condition of confinement when dozens or hundreds of prisoners suffer a deprivation? Since it is uncertain how many prisoners must suffer a deprivation for there to be a condition of confinement, courts will not know whether any deprivation constitutes punishment. Consequently, under the concurrence's view, courts would have to decide whether intent would be an element of a cause of action in each case. In contrast, the majority's holding that some form of intent is required whenever the pain inflicted is not formally imposed by a statute or judge,[243] provides a clear, unambiguous rule.

Finally, common sense rebels against the notion that prison conditions are intended to be punishment. Clearly a judge does not sentence a criminal to prison so that he will suffer from overcrowded, unsanitary conditions. Although these conditions are a consequence of the sentence, they lack the element of intent that is necessary for them to be punishment. Thus, the concurrence's argument that prison conditions are imposed as part of the punishment is unsound.

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240. *Id.* at 2330 (White, J., concurring).

241. *Id.* (White, J., concurring).

242. *Id.* (White, J., concurring) (implying that a general lack of access to medical care at the prison would be a condition of confinement).

243. *Id.* at 2325.

D. The Deliberate Indifference Standard

1. Source of the State of Mind Requirement

Justice Scalia argued for the majority that the concept of punishment is the source of the state of mind requirement.[244] The Supreme Court's precedents, however, have consistently identified the mental element of wantonness within the cruel and unusual concept, not the punishment concept.[245] Each of the Supreme Court's prison conditions cases derives the element of wantonness from the "unnecessary and wanton pain" standard first presented in *Gregg v. Georgia*.[246] In *Gregg*, the Supreme Court held that the death penalty was not cruel and unusual.[247] In interpreting the Eighth Amendment, the Court had no reason to consider whether the death sentence constituted punishment; that much was obvious. Instead, the *Gregg* Court focused on the cruel and unusual concept and interpreted it to prohibit unnecessary and wanton pain.[248] Thus, Justice Scalia's inclusion of the state of mind element within

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244. *Id.*

245. *See supra* notes 73-85 and accompanying text (discussing the "cruel and unusual" standard); *supra* notes 86-137 and accompanying text (discussing the Court's prison conditions cases). The Court's discussion in *Whitley* is ambiguous regarding the source of the wantonness requirement. *See* Whitley v. Albers, 475 U.S. 312, 319 (1986). While the Court refers to "cruel and unusual punishment" and "the Cruel and Unusual Punishments Clause," it does not expressly state whether the wantonness standard derives from the "cruel and unusual" or "punishment" aspects of the Eighth Amendment. *Id.*

246. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (recognizing the "unnecessary and wanton infliction of pain" prohibition of the Eighth Amendment). As support for its standard, the Court in *Gregg* cited Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting) (discussing the decision in *Wilkerson*), Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (interpreting the Eighth Amendment to prohibit "unnecessary cruelty"), and Weems v. United States, 217 U.S. 349, 381 (1910) (prohibiting penalties unnecessary to fulfill the purposes of punishment). *Id.* The Supreme Court also mentioned "unnecessary pain" and "wanton infliction of pain" in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (plurality opinion of Reed, J. in which Vinson, C.J., Black, and Jackson, JJ., joined), but the Court has consistently preferred to quote the standard from *Gregg*. *See* Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)) (quoting *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, and Stevens, JJ.)); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting *Gregg*, 429 U.S. at 173 (opinion of Stewart, Powell, and Stevens, JJ.)).

247. *Gregg*, 428 U.S. at 187 (opinion of Stewart, Powell, and Stevens, JJ.).

248. *Id.* at 173 (opinion of Stewart, Powell, and Stevens, JJ.).

the concept of punishment rather than within the cruel and unusual concept is a subtle departure from the Court's precedents.

Since the Eighth Amendment prohibits punishments that are cruel and unusual, *a fortiori* courts must find that punishment exists before inquiring into whether that punishment is cruel and unusual. Accordingly, the *Wilson* majority requires that courts first find deliberate indifference to prison conditions before evaluating whether those conditions deprive prisoners of basic human needs. This distinction, while significant in theory, will have few practical effects. The threshold consideration of whether there is punishment will probably not result in more summary judgments against prisoners since the inquiry into whether prison officials were deliberately indifferent involves evaluating their mental state, and courts generally refuse to grant summary judgment where a defendant's state of mind is at issue.[249]

2. *Application of the Deliberate Indifference Standard*

One fundamental issue remaining after *Wilson* is how courts will apply the deliberate indifference standard to prison conditions cases. *Wilson* merely set forth the standard and did not address this practical matter. Fortunately, lower courts provide helpful guidance on this question since they have applied the deliberate indifference standard in medical needs cases following *Estelle* and in cases challenging other prison circumstances.[250]

While formulations of the deliberate indifference standard vary, courts generally conclude deliberate indifference exists when there is an unreasonable risk of harm to prisoners which was known or should have been known to prison officials, and a failure to take

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249. *See, e.g.*, Wilson v. Seiter, 893 F.2d 861, 866 (6th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2321 (1991) (quoting 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2730, at 238 (1983)) (stating that since determining someone's state of mind generally requires the drawing of factual inferences as to which reasonable men might differ, that function is traditionally left to the jury).

250. *See infra* notes 251-62 and accompanying text (discussing cases interpreting the deliberate indifference standard).

reasonable steps to prevent the harm.[251] Clearly courts have had no difficulty applying this standard in cases where a specific official's conduct inflicts the alleged cruelty.[252] In such cases, the particular official must be shown to have been deliberately indifferent to a prisoner's basic needs.

However, when general prison conditions are alleged to violate the Eighth Amendment, multiple individuals may be responsible for creating the conditions, and it may be unclear whose state of mind must be examined.[253] The solution to this problem is for prisoners to file suit against those policymakers who are ultimately

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251. *See* Young v. Quinlan, 960 F.2d 351, 360-61 (3d Cir. 1992) (citing Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991)) (holding that an official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate); Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (requiring: (1) Actual knowledge of the risk or that the risk was so substantial or pervasive that knowledge could be inferred; (2) a failure to take reasonable measures to prevent the harm; and (3) a failure which in light of the knowledge justifies liability for the consequences of the conduct); Goka v. Bobbitt, 862 F.2d 646, 651 (7th Cir. 1988) (stating that an Eighth Amendment violation will be found where defendants know of the danger or where their knowledge can be inferred due to the substantial or pervasive threat of violence, and yet defendants fail to enforce a policy or take other reasonable steps which may have prevented the harm); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988) (requiring at a minimum acts or omissions so dangerous that prison officials' knowledge of the risk can be inferred); Vosburg v. Solem, 845 F.2d 763, 765 (8th Cir.) (upholding a jury instruction stating that prison officials are deliberately indifferent if they intend to deprive a right or if they act with reckless disregard of the right where reckless disregard may be shown by the existence of a pervasive risk of harm to inmates from other prisoners and a failure by prison officials to reasonably respond to that risk), *cert. denied*, 488 U.S. 928 (1988); Morgan v. Dist. of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (upholding a jury instruction stating that deliberate indifference exists when there is an obvious unreasonable risk of violent harm to a prisoner that is known to be present or should have been known, and the District, through its employees, was outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm to the prisoners who were subject to the unreasonable risk of violent harm); Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985) (stating that conduct is sufficiently reckless to be called punishment if it implies actual knowledge of impending harm easily preventable, such 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).

252. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 98-101 (1976) (alleging that medical personnel inadequately treated the prisoner).

253. Wilson v. Seiter, 111 S. Ct. 2321, 2330 (White, J., concurring); *see The Supreme Court, 1990 Term – Leading Cases*, *supra* note 210, at 243 (arguing that the cumulative actions of state actors are responsible for state-sanctioned punishment, and that the *Wilson* Court's state of mind requirement for individual prison officials is misconceived).

accountable for remedying the conditions.[254] Regardless of who created the conditions, governmental policymakers are responsible for the prisoners' well-being and could be shown to be deliberately indifferent to implementing a possible remedy.[255]

Courts have also not found deliberate indifference an impossible standard to apply, as Justice White envisioned, when prison conditions deteriorate over a long period of time.[256] Courts have stated that deliberate indifference may exist when a long-standing policy or custom of inaction causes the harm,[257] or by systemic and flagrant deficiencies in staffing, facilities, equipment, or procedures.[258] Moreover, conditions that endure over a long

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254. *See* Simmons v. City of Philadelphia, 947 F.2d 1042, 1064-65 (3d Cir. 1991) (permitting plaintiff to sue a city by showing that the responsible policymakers were deliberately indifferent), *cert. denied*, 112 S. Ct. 1671 (1992); Ramos v. Lamm, 639 F.2d 559, 559 (10th Cir. 1980) (prison inmates filed suit against the state governor, the director or the department of corrections, and the prison warden, among others); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 854 (D. D.C. 1989) (prisoners filed suit against the mayor, among others, regarding prison conditions).

255. *See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (asserting the existence of the government's obligation to provide medical care for those whom it incarcerates and noting the common law view that it is the public's obligation to care for prisoners since they cannot care for themselves); Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 469-70 (1992) (arguing that municipalities should be liable when their policymakers' deliberate indifference creates constitutional violations); James Rosenzweig, Comment, *State Prison Conditions and the Eighth Amendment: What Standard for Reform Under Section 1983?*, 1987 U. CHI. LEGAL F. 411, 426 (arguing that a warden's failure to remedy oppressive conditions is a violation of his constitutional obligations).

256. *See infra* notes 257-58 and accompanying text (citing cases applying the deliberate indifference standard). *But see Wilson*, 111 S. Ct. at 2330 (White, J., concurring) (speculating that the deliberate indifference will be impossible to apply in many cases).

257. Berry v. City of Muskogee, 900 F.2d 1489, 1499 (10th Cir. 1990); *see* Simmons v. City of Philadelphia, 947 F.2d 1042, 1064 & n.20 (3d Cir. 1991) (holding that a showing of deliberate indifference regarding a failure to train personnel requires evidence that policymakers either chose not to provide officers with training or acquiesced in a long-standing practice or custom not to provide training), *cert. denied*, 112 S. Ct. 1671 (1992); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir.) (holding that an unexplained delay in treating a prisoner's serious injury constitutes deliberate indifference), *cert. denied*, 496 U.S. 928 (1990); LaFaut v. Smith, 834 F.2d 389, 394 (4th Cir. 1987) (finding that inordinate delays in accommodating basic needs despite the availability and practicality of solutions due to neglect constituted deliberate indifference).

258. *See* Wellman v. Faulkner, 715 F.2d 269, 272-74 (7th Cir. 1983) (holding that insufficient staffing, including insufficient physicians who could communicate effectively in English, delays in treatment, and problems stocking supplies constituted deliberate indifference), *cert. denied*, 468 U.S. 1217 (1984); Ramos v. Lamm, 639 F.2d 559, 575-78 (10th Cir. 1980) (holding that staff shortages effectively denied access to diagnosis and treatment by qualified health care professionals, thus rendering unnecessary suffering inevitable and constituting deliberate indifference to inmates' serious

period of time may make it easier to establish the knowledge of preventable harm that the deliberate indifference standard requires.[259]

Justice White also feared that prison officials would be able to avoid violating the Eighth Amendment simply by showing that prison conditions are caused by insufficient funding from state legislatures, and not by officials' deliberate indifference.[260] However, lower courts before and after *Wilson* have rejected the argument that inadequate funding precludes a finding that prison officials are deliberately indifferent, holding that lack of funds is no excuse for depriving inmates of their constitutional rights.[261]

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medical needs), *cert. denied*, 450 U.S. 1041 (1981); Gilland v. Owens, 718 F. Supp. 665, 684 (W.D. Tenn. 1989) (holding that plaintiffs failed to show deliberate indifference since they did not establish that deprivations of medical attention occurred with sufficient frequency and that the interference with medical services was sufficient to create a constitutional violation); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 867 (D. D.C. 1989) (holding that systemic failures throughout the medical services showed deliberate indifference).

259. Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991). Elizabeth Alexander, counsel for Mr. Wilson, expressed confidence in being able to prove deliberate indifference in many cases by showing that inadequate conditions "had been around so long that somebody's got to know about it." Linda Greenhouse, *Justices Restrict Suits Challenging Prison Conditions*, N.Y. TIMES, June 18, 1991, § A, at 1.

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

261. *See* Stone v. City & County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) ("[F]inancial constraints do not allow states to deprive persons of their constitutional rights."); Moore v. Winebrenner, 927 F.2d 1312, 1322 (4th Cir. 1991) (quoting Morgan v. Dist. of Columbia, 824 F.2d 1049, 1068 (D.C. Cir. 1987)) (holding that the Constitution offers no allowances for fiscal difficulties), *cert. denied*, 112 S. Ct. 97 (1991); Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991) (stating that a lack of funds allocated to prisons by the state legislature will not excuse the failure of prison systems to maintain minimum levels of medical services); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding that failure to provide necessary treatment due to budgetary constraints was not justified); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 (11th Cir. 1985) (holding that a county's duty to provide adequate medical treatment to inmates was non-delegable and not justified on lack of funds); Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (holding that a minimum level of medical service must be maintained despite funding levels), *cert. denied*, 468 U.S. 1217 (1984); Ramos v. Lamm, 639 F.2d 559, 573 & n.19 (10th Cir. 1980) (stating that lack of funding is no excuse for depriving inmates of their constitutional rights), *cert. denied*, 450 U.S. 1041 (1981). *But see* Amy Newman, Note, *Eighth Amendment -- Cruel and Unusual Punishment and Conditions Cases*, 82 SUP. CT. REV. 979, 997-99 (1992) (arguing that an Eighth Amendment standard with any level of subjective intent will permit a lack of resources defense). Courts are flexible regarding the alternatives they will permit prison officials to implement to avoid unconstitutional confinement. *See, e.g.*, Alberti v. Sheriff of Harris County, 937 F.2d 984, 999 (5th Cir. 1991) (stating that acceptable alternatives to cruel jail conditions included housing prisoners in a military bootcamp or tent city), *cert. denied*, Richards v. Lindsay, 112 S. Ct. 1994 (1992).

The *Wilson* decision will probably not make it more difficult for prisoners to obtain relief from harsh prison conditions. Deliberate indifference requires only that the prison officials have knowledge of the harmful conditions, and that they fail to take reasonable steps to rectify those conditions.[262] In many cases, prison conditions will be so widespread and prominent that officials could not fail to notice them. In other cases, inmates could easily make prison officials aware of the conditions with a simple letter or verbal complaint. Since insufficient funding is generally not a valid excuse for unconstitutional conditions, officials are required to take some remedial action if an inmate is deprived of a human need. If the conditions are not corrected, courts might be faced with the dangerous prospect of having to let prisoners go free rather than subject them to cruel and unusual punishment. Whatever the form of judicial relief, prisoners should not find the deliberate indifference standard a barrier, provided the deprivations they suffer are sufficiently serious.

CONCLUSION

The primary significance of *Wilson v. Seiter* is that it more precisely defines what "punishment" means under the Eighth Amendment where prison conditions are at issue. Any pain or suffering an inmate experiences in prison is not punishment if it was not inflicted with deliberate indifference. For much of this century, lower courts held that punishment was imposed only when a criminal was sentenced. Since *Rhodes v. Chapman* in 1981, the Supreme Court has recognized that conditions of confinement could constitute punishment, and now *Wilson v. Seiter* has provided a specific standard by which prisoners may obtain relief.[263] Prisoners challenging the conditions of their confinement in most

262. *See supra* note 251 and accompanying text (defining the deliberate indifference standard).

263. *See Wilson*, 111 S. Ct. at 2327 (requiring the deliberate indifference standard for cases alleging cruel and unusual conditions of confinement).

jurisdictions will not find the deliberate indifference standard a high hurdle to clear.

Richard D. Nobleman