CONSTITUTIONAL LAW—EIGHTH AMENDMENT—A PRISONER MUST PROVE THAT PRISON OFFICIALS ACTED WITH DELIBERATE INDIFFERENCE TO CONFINEMENT CONDITIONS FOR SUCH CONDITIONS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT—*Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

The Eighth Amendment to the United States Constitution,[1] which prohibits cruel and unusual punishment, affords convicted criminals valuable protection against inhumane treatment.[2] Before the twentieth century, courts narrowly construed the Eighth Amendment to proscribe only the most heinous punishments, such as disembowelment, public dissection, beheading and burning.[3] As society progressed, however, so too did its perception of what constituted cruel and unusual punishment.[4] As a

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[1] The Eighth Amendment to the United States Constitution provides, in pertinent part: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

[2] *See* William J. Brennan, *The Constitution of the United States Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). Justice Brennan posited:

> I view the Eighth Amendment's prohibition of cruel and unusual punishment as embodying to a unique degree the moral principles that substantively restrain the punishments our civilized society may impose. . . . It is thus consistent with the fundamental premise of the Constitution that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

Id. at 443-44. *See generally* Anthony F. Grannucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969). The framers of the American Bill of Rights actually adopted the Eighth Amendment from the English Bill of Rights of 1689. *Id.* at 840. Most historians believe that the English treason trial of 1685, commonly known as the "Bloody Assize," gave rise to the promulgation of a cruel and unusual punishment clause in the English Bill of Rights. *Id.* at 853. During the trials, hundreds of people, even those who pleaded not guilty, were executed. *Id.* at 854.

[3] *Id.* For example, the common punishment for a woman felon in seventeenth century England was to be burned alive. *Id.* The common punishment for treason "consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered." *Id.* (citation omitted). Historians deduced that the cruel and unusual punishment clause of the English Bill of Rights was intended to curb these barbaric forms of punishment. *Id.* The framers, however, may have actually misinterpreted the English model. *Id.* at 860. Specifically, the English version used the word "cruel" as synonymous for severe or hard punishment. *Id.* Grannucci stated that "[i]n the seventeenth century, the word 'cruel' had a less onerous meaning than it has today. In normal usage it simply meant severe or hard." *Id.* The English prototype of the cruel and unusual punishment clause, according to Grannucci, was intended to prevent disproportionate punishments. *Id.* The framers of the American Constitution, in contrast, interpreted the clause as a proscription against torturous punishment rather than as a prohibition against excessive punishment. *Id.* at 865.

[4] *See* Gregg v. Georgia, 428 U.S. 153, 172-73 (1975) (application of the Eighth

result, twentieth century courts have interpreted the Eighth Amendment to restrict the length and character of sentences[5] as well as to require minimum standards for conditions of confinement.[6]

In recent years, the quality of prison conditions has become the subject of much debate.[7] With the crime rate on the rise[8] and stricter sentencing guidelines in place,[9] the number of individuals being incarcerated has grown astronomically.[10] Meanwhile, space available to house prison inmates has grown increasingly

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Amendment to capital punishment). Justice Stewart, writing for the majority, remarked:

> [T]he Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." Thus, the Clause forbidding "cruel and unusual punishments" is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice.

Id. at 171 (citations omitted); *see also* Stephen J. Durkin, Note, *Rhodes v. Chapman: Prison Overcrowding—Evolving Standards Evading an Increasing Problem*, 8 NEW ENG. J. OF PRISON L. 249 (1982). Durkin remarked that the United States Supreme Court first addressed the restraints that the Cruel and Unusual Punishment Clause placed upon prison conditions. *Id.* (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). The author criticized the Court, however, for failing to provide a definitive method to evaluate prison condition claims in light of the Eighth Amendment. *Id.* at 251.

[5] *See generally* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985) (discussing the Supreme Court's application of the Eighth Amendment to the length of prison sentences and exploring such seminal decisions as *Solem v. Helm*, 463 U.S. 277 (1983), *Hutto v. Davis*, 454 U.S. 370 (1982), *Rummel v. Estelle*, 445 U.S. 263 (1980), and *Robinson v. California*, 370 U.S. 660 (1962)).

[6] *See infra* notes 55-70 and accompanying text.

[7] *See id.*; *see also* Deborah A. Montick, Comment, *Challenging Cruel and Unusual Conditions of Prison Confinement: Refining the Totality of Conditions Approach*, 26 How. L.J. 227 (1983). Montick explored the recent application of the Eighth Amendment to confinement conditions. *Id.* at 229. The author noted that courts throughout the country are employing a totality of the conditions approach to determine whether penitentiary conditions amount to cruel and unusual punishment. *Id.* at 230-32.

[8] *See* Alfred Blumstein, *Planning for Future Prison Needs*, 1984 U. ILL. L. REV. 207, 208 (1984) (discussing factors contributing to expanded prison populations and resultant congestion problems).

[9] *See* Judy G. Gordon & Susan Wallace, *Long-Term Inmates*, FED. PRISON J., Summer 1991, at 61. The authors commented that, recently, more prisoners are facing longer sentences because of modifications in sentencing legislation that have curtailed allowances, such as good-time, required mandatory minimum prison sentences and eliminated parole. *Id.*

[10] *See* Scott Styles, *Conditions of Confinement Suits—What Has the Bureau of Prisons Learned?*, FED. PRISON J., Summer 1991, at 47. Recent studies project that 100,000 inmates will be incarcerated in the Federal Bureau of Prisons by 1995. *Id.*

inadequate.[11] Consequently, prison officials have witnessed the onslaught of many derivative problems, including the lack of sufficient space, decline in prison sanitation, decreases in the availability of educational and vocational work activities, lack of adequate medical treatment and an increase in prison violence.[12]

For many years, however, courts advocated a "hands off" approach to claims involving prison conditions.[13] Courts deferred to legislatures to ameliorate derivative conditions resulting from institutional overcrowding.[14] In the 1960's, America

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[11] *See* Blumstein, *supra* note 8, at 207-08 (noting that state prison populations exceed capacity). Professor Blumstein explored the prison congestion problem plaguing America's correctional facilities. *Id.* The professor stated that the overcrowding problem resulted from the configuration of the American criminal justice system: "No other institution in American society is so centrally situated among the three primary branches of government, so that each branch has only a limited perspective on the institutional functions it affects." *Id.* The author noted that the legislative branch tends to pass stringent laws to please constituents, yet fails to provide the necessary resources for implementing such laws. *Id.* The judicial branch, according to the author, pronounces strict sentences without concern for prison overcrowding. *Id.* Professor Blumstein also remarked that prosecutors, members of the executive branch, seek to impose strict sentences to exemplify their public protection role. *Id.*; *see also* Elizabeth F. Edwards & Nancy G. LaGow, Note, *Prison Overcrowding As Cruel and Unusual Punishment in Light of Rhodes v. Chapman*, 16 U. RICH. L. REV. 621 (1982). The authors commented that although it is usually true that no single prison condition violates the Eighth Amendment, many courts have cited overcrowding as the primary determinant aggravating present confinement conditions. *Id.* at 629 (citation omitted). Moreover, courts noted that overcrowding produces the most damaging physical and mental distress for inmates. *Id.*; *see generally* Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125 (1989) (exploring the difficulty in attempting to define prison crowding because it is a deceptively elusive concept).

[12] *See* Foulds v. Corley, 833 F.2d 52, 55 (5th Cir. 1987) (alleged prison conditions of frigid, rat-infested cell could constitute cruel and unusual punishment if inmate could prove that pain inflicted was "unnecessary and wanton") (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)); *see also* French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (prison conditions, including overcrowding, double celling, medical neglect, inadequate kitchen services, and excessive use of mechanical restraints constituted cruel and unusual punishment).

The Seventh Circuit recognized that these conditions resulted in "serious deprivations of basic human needs." *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); *see also* Tillery v. Owens, 907 F.2d 418, 428 (3rd Cir. 1990)(totality of prison conditions must be considered when determining if such conditions deprive an inmate of "the minimal civilized measures of life's necessities").

[13] *See generally* Lance D. Cassack, *Hearing the Cries of Prisoners: The Third Circuit's Treatment of Prisoners' Rights Litigation*, 19 SETON HALL L. REV. 526 (1989). The "hands off" doctrine, which refused prisoners their day in court, resulted from prison officials' unfettered discretion in running such institutions. *Id.* at 532. Moreover, prisoners were regarded as "slaves of the State" who forfeited not only their freedom, but also all their personal rights. *Id.* (quoting Ruffin v. Commonwealth, 62 Va. (1 Gratt) 790 (1871)).

[14] *See* Timothy G. Ronan, Comment, *Constitutional Law-Eighth Amendment-Double*

witnessed the advent of judicial activism in this arena.[15] Since then, many courts have addressed prison conditions in the context of the Eighth Amendment, yet the judicial standards employed have varied from forum to forum.[16] Some courts studied the prison condition's effects on inmates,[17] while other tribunals attempted to identify culpable prison officials who allowed such conditions to exist.[18] Recognizing the need for courts to apply a more uniform standard, the United States Supreme Court, in *Wilson v. Seiter*,[19] declared that a prisoner must establish that prison officials acted with deliberate indifference to objectionable prison conditions to prove an Eighth Amendment violation.[20]

In *Wilson v. Seiter*, Pearly L. Wilson, a prisoner, filed an action under the Civil Rights Act[21] against Richard Seiter, director of

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Celling of Long Term Inmates-Cruel and Unusual Confinement-Rhodes v. Chapman, 28 N.Y.L. SCH. L. REV. 519, 519 (1983) (noting that for many years courts deferred to state legislatures and prison officials to correct prison overcrowding).

15 *See* Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 314 (1983) (commenting that judicial activism began in the 1960's with litigation over the barbaric prison conditions in the Arkansas penal system); Cassak, *supra* note 13, at 533 & n.27 (observing that the birth of judicial activism in prison condition cases resulted from Chief Justice Warren's activist influence and an increase in the number of public interest lawyers who viewed inmates as another source of clientele).

Justice White once wrote: "[T]hough the rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country." Thornberry & Call, *supra*, at 314 (quoting Wolff v. McDonnell 418 U.S. 539, 555-56 (1974)).

16 *See, e.g.*, cases cited *supra* note 12. Various courts of appeals applied different standards when determining that specified prison conditions violated the Eighth Amendment. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981). The *Rhodes* Court found that double-celling does not constitute cruel and unusual punishment, but cited a series of circuit cases, all of which found various conditions of confinement violative of the Eighth Amendment Cruel and Unusual Punishment Clause. *Id.* at 352 n.17 (citations omitted).

17 *See infra* notes 55-70 and accompanying text.

18 *See infra* notes 49-54, 71-78 and accompanying text.

19 111 S. Ct. 2321 (1991).

20 *Id.* at 2326-27.

21 42 U.S.C. § 1983 (West 1988). The Act stated, in pertinent part:

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

Id.

the Ohio Department of Rehabilitation and Corrections, and Carl Humphreys, warden of the prison in which Wilson was incarcerated.[22] In his complaint, Wilson alleged that overcrowding, unsanitary conditions, inadequate ventilation and the practice of housing mentally and physically ill inmates within the general prison population violated the constitutional prohibition against cruel and unusual punishment.[23] Both parties moved for summary judgment.[24] The United States District Court for the District of Ohio granted respondents' motion.[25] The Court of Appeals for the Sixth Circuit affirmed the district court's decision, finding that the prisoner failed to establish an Eighth Amendment violation.[26] After granting certiorari, the Supreme Court vacated the appellate court's decision and remanded the case for reconsideration under a revised standard of deliberate indifference.[27]

The Eighth Amendment to the United States Constitution

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22 *Wilson*, 111 S.Ct. at 2322-23. The United States Justice Department joined the petitioner as amicus curiae. *Id.* at 2322.

23 *Id.* Wilson's brief enumerated the allegedly inadequate conditions present at Hockings Correctional Facility. Petitioner's Brief at 4-8, Wilson v. Seiter, 111 S. Ct. 2321 (1991). Inmate Wilson noted that the air in the prison dormitory was stagnant and smelled of human waste. *Id.* at 4. The combination of an inadequate ventilation system and high dormitory temperatures approaching ninety-five degrees in the summer months exacerbated these conditions. *Id.* Wilson also asserted that the prison was infested with mice and a variety of insects. *Id.* Moreover, Wilson alleged that often diseased inmates were charged with preparing the prison food. *Id.* Wilson commented that these unsanitary conditions were heightened by overcrowding in the dormitory. *Id.* at 5. Finally, Wilson complained of inadequate clothing and heat during the cold winter months. *Id.* For these allegedly inadequate confinement conditions, Wilson sought declaratory and injunctive relief in addition to compensatory and punitive damages. *Wilson*, 111 S. Ct. at 2323.

24 *Id.* Wilson's affidavit described the facility's deficient conditions and alleged that even after notification, the authorities failed to take any remedial action. *Id.* The respondents' affidavit denied some of the specified conditions and asserted that efforts were being made to improve the other uncontroverted conditions. *Id.*

25 Wilson v. Seiter, 893 F.2d 861, 867 (6th Cir. 1990). The district court held that the alleged conditions were not violative of the Eighth Amendment's guarantee. *Id.* at 863. The court established that to prove an Eighth Amendment violation, the prisoner must establish that prison officials acted with "obduracy and wantonness" concerning the allegedly inadequate prison conditions. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

26 *Id.* at 867. The Sixth Circuit held that the prisoner's allegations were insufficient to establish a cruel and unusual punishment claim. *Id.* The court applied the *Whitley v. Albers* intent standard of "obduracy and wantonness," to determine whether the conditions complained of were violative of the Eighth Amendment. *Id.* (citing Whitley v. Albers, 475 U.S. 312 (1986)). The court of appeals ultimately affirmed the district court's grant of summary judgment in favor of the appellees. *Id.*

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

remained a dormant provision[28] until 1910, when the Supreme Court adjudicated *Weems v. United States*.[29] In *Weems*, a Philippine court sentenced the defendant to fifteen years of hard labor with ankle and wrist chains for falsifying a public document.[30] To determine whether the defendant's punishment was proportional to the offense, the Supreme Court compared the United States penal law's punishment for forgery to the Philippine government's sanction.[31] The Court reasoned that the defendant's punishment of fifteen years of hard labor was disproportionate to the offense and therefore constituted cruel and unusual punishment in contravention of the Eighth Amendment.[32] In this incipient Eighth Amendment pronouncement, the Supreme Court held that retribution for a crime must be proportional to the offense.[33]

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28 *See* Edwards & LaGow, *supra* note 11 at 623 (commenting that until the twentieth century "the [E]ighth [A]mendment was thought to have little use for the punishments which it originally protected were no longer acceptable"); *see also* Eric G. Woodbury, *Prison Overcrowding and Rhodes v. Chapman: Double-Celling By What Standard?*, 23 B.C. L. REV. 713, 715-16 (1982) ("[T]he Amendment was deemed outmoded by the more civilized norms of American morality that prevailed at the turn of the twentieth century.").

29 217 U.S. 349 (1910).

30 *Id.* at 366. The defendant was a disbursing official for the United States Government of the Philippine Islands who was convicted of making a false entry in a public cash journal. *Id.* at 357-58. Under the Philippine Penal Laws, Weems not only received a sentence of fifteen years of hard labor, but also had to pay a large monetary fine. *Id.* at 358.

31 *Id.* at 380. The Court compared various United States sentences meted out as retribution for crimes to the sentence Weems received under the Philippine Penal Laws. *See id.* The Court noted that in the United States there are degrees of homicide that procure less stringent sentences. *Id.* The Court added that in the United States the punishments for inciting rebellion, treason and conspiracy to destroy the United States government by force were also lesser in degree than the Philippines' punishment for forgery. *Id.* The Court compared the United States punishment for forgery to the Philippine's sanction. *Id.* Specifically, the Court studied § 86 of the United States Penal Laws, which criminalized forgery, yet imposed a far more lenient sentence than its Philippine counterpart. *Id.* Namely, the maximum prison sentence under the United States Penal Laws was two years, rather than fifteen. *Id.*

32 *Id.* at 381. The Supreme Court, in declaring this punishment cruel and unusual, noted that Weems' sentence was far too excessive for the crime: "He must bear a chain night and day. He is condemned to painful as well as hard labor. . . . It may be hard labor pressed to the point of pain." *Id.* at 366.

33 *Id.* at 368. The Supreme Court stated: "What constitutes cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like." *Id.* The Court explained that disproportionate punishments might constitute cruel and unusual punishment. *Id.* (citation omitted); *see also* Pressly Millen, Note, *Interpretation of the Eighth Amendment-Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 789 (1984). The author reaffirmed that *Weems* marked the first time the Supreme Court "undertook a comprehensive discussion of the [E]ighth [A]mendment." *Id.* at 798. According to the author, the Court did not craft an

Thirty-seven years later, the Supreme Court, in *Francis v. Resweber*,[34] extended the breadth of the Cruel and Unusual Punishment Clause when applying the Eighth Amendment to capital punishment.[35] In *Francis*, a Louisiana jury found the defendant guilty of murder and the trial court sentenced him to death.[36] The first electrocution attempt failed and the Governor of Louisiana authorized a second electrocution.[37] The prisoner asserted, however, that a second electrocution, among other things, transgressed the Eighth Amendment's ban against cruel and unusual punishment.[38]

Addressing the prisoner's contention, the Court reasoned that the thwarted electrocution, the presumptive result of mechanical failure, was not intended to inflict unnecessary pain.[39] The Court declared that the Eighth Amendment pro-

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exact definition of the Eighth Amendment, but instead proffered a broad interpretation that was "capable of wider application than the mischief which gave it birth." *Id.* at 802 (quoting Weems v. United States, 217 U.S. 349, 373 (1910); *see also* John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478 (1990). Professor Wefing noted that the methodology for interpreting the Eighth Amendment was developed in *Weems*. *Id.* at 483. Professor Wefing also stated that the relative obscurity of the Eighth Amendment lasted until a 1962 Supreme Court decision that held the Eight Amendment applied to the states through the Fourteenth Amendment. *Id.* (citing Robinson v. California, 370 U.S. 660 (1962)).

34 329 U.S. 459 (1947).

35 *See id.* at 463. Justice Reed, writing for the Court, noted that "traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Id.*

36 *Id.* at 460.

37 *Id.* at 460-61. The first electrocution attempt occurred on May 3, 1946. *Id.* at 460. Although the executioner threw the switch, death did not result, presumably because of mechanical failure. *Id.* The prisoner was removed from the electric chair and returned to his cell. *Id.* The Governor subsequently issued a new death warrant, fixing the second electrocution for May 9, 1946. *Id.* at 460-61. The Louisiana Supreme Court stayed the execution based on writs of mandamus, prohibition, certiorari and habeas corpus directed at appropriate state officials, but ultimately denied the prisoner relief. *Id.* at 461. The state supreme court reasoned that no state or federal law would be violated if the prisoner was subjected to a second electrocution. *Id.* Based on the exigencies of the situation, the United States Supreme Court granted certiorari to address the prisoner's contentions. *Id.*

38 *Id.* The prisoner asserted that a second electrocution constituted cruel and unusual punishment because he experienced psychological strain due to the thwarted attempt. *Id.* at 464.

39 *Id.* at 460, 464. The prisoner asserted that a second electrocution violated the Fifth Amendment's double jeopardy provision which prohibited the state from punishing an individual twice for the same crime. *Id.* Regarding this allegation, the Supreme Court reasoned that a second execution would not violate the double jeopardy provision because the thwarted electrocution was the result of an accident and not malevolence. *Id.* at 463. Thus, when an accident prevented the consummation of a state's sentence, the Court resolved, the state's subsequent action in the fulfillment of this sentence did not constitute double jeopardy. *Id.*

scribed the infliction of inherently cruel punishment upon convicted criminals.[40] Thus, the Supreme Court held that because the first electrocution was impeded by an unforeseeable accident, a second electrocution would not violate the Eighth Amendment's ban against cruel and unusual punishment.[41]

A decade later, in *Trop v. Dulles*,[42] the Court reexamined the Eighth Amendment and declared that the revocation of one's citizenship as punishment for wartime desertion constituted cruel and unusual punishment.[43] Trop, an army deserter during World War II, was court-martialled, sentenced to three years of hard labor, received a dishonorable discharge and lost his citizenship.[44]

When deciding that such denationalization violated the Constitution, Chief Justice Warren, in a plurality opinion, stressed that the Eighth Amendment places civilized restraints upon a state when it seeks retribution for a crime.[45] Moreover, the Justice reasoned that citizenship is a fundamental right that deserves constitutional protection.[46] Thus, the imposition of stateless-

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40 *Id.* at 464.

41 *Id.* at 463-64.

42 356 U.S. 86 (1958).

43 *Id.* at 92-93. The Court noted: "Citizenship is not a license that expires upon misbehavior . . . [a]nd the deprivation of citizenship is not a weapon that the government may use to express its displeasure of a citizen's conduct, however reprehensible that conduct may be." *Id.*

44 *Id.* at 87. Trop, a private in the United States Army, was stationed in Morocco during World War II. *Id.* On May 22, 1944 Trop escaped from the Army stockade in Casablanca, where he was serving time for a disciplinary breach. *Id.* The following morning, some Army personnel spotted Trop and a companion walking along a road in the general vicinity of Casablanca. *Id.* Trop willingly accompanied the Army personnel back to the base, thus ending his one day desertion. *Id.* As a consequence of his desertion, Trop was stripped of his citizenship under § 401(g) of the Nationality Act of 1940. *Id.* at 87-88. Trop, however, was unaware that his citizenship had been revoked until he applied for a passport in 1952. *Id.* at 88. Section 401(g) of the Nationality Act of 1940 provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> (g) Deserting the military or naval force of the United States in time of war, provided he is convicted thereof by court martial or dishonorably discharged from the services of such military or naval forces.

Nationality Act of 1940, 8 U.S.C. § 401(g) (West 1988).

45 *Trop*, 356 U.S. at 100. Chief Justice Warren wrote: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.*

46 *Id.* at 101-04. The majority reasoned that the revocation of an individual's citizenship is tantamount to "the total destruction of the individual's status in organized society." *Id.* at 101. The Court further noted that the vast majority of civi-

ness, as punishment for a crime, constituted cruel and unusual punishment.[47] Ultimately, Chief Justice Warren held that the Eighth Amendment must be characterized by a maturing paradigm of decency that has evolved with the development and growth of society.[48]

In 1976, interpreting the Eighth Amendment so that it reflected 1970's mores and values, the Supreme Court affixed a subjective intent requirement to the Cruel and Unusual Punishment Clause when scrutinizing the medical treatment of prisoners.[49] In *Estelle v. Gamble*, an inmate brought a civil rights action under 42 U.S.C. section 1983,[50] alleging that he was subjected to cruel and unusual punishment for the inadequate medical treatment he received for a back injury.[51] The Court declared that the prisoner's allegedly inadequate medical treatment did not constitute cruel and unusual punishment.[52] At most, the Court proclaimed, the prisoner fell victim to medical malpractice, which did not rise to the level of an Eighth Amendment violation.[53] The Court held that a prisoner alleging cruel and unusual punishment on grounds of inadequate medical treatment must prove

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lized nations, except for the Philippines and Turkey, refused to impose statelessness as a form of punishment. *Id.* at 102.

47 *Id.* at 103.

48 *Id.* at 100-01; *see also* Wefing, *supra* note 33, at 483-84. Professor Wefing stated that the methodology developed in *Trop* remains the accepted doctrine today and is "recognized by virtually all members of the Court." *Id.* Professor Wefing conveyed that the "evolving standards of decency" definition could result in a variety of jurisprudential positions. *Id.* He noted, however, that recent decisions seem to employ a sociological interpretation—namely, what society deems right and wrong. *Id.* at 484; *see also* Woodbury, *supra* note 28, at 730 (commenting that the *Trop* "evolving sense of decency" standard is the most frequently applied interpretation of the cruel and unusual punishment clause).

49 *See* Estelle v. Gamble, 429 U.S. 97 (1976).

50 42 U.S.C. § 1983. *See also supra* note 21 for text of statute.

51 *Estelle*, 429 U.S. at 99-100. A 600-pound cotton bale fell on Gamble while he was unloading a truck, causing serious back injuries. *Id.* Gamble worked an additional four hours after receiving the injury. *Id.* at 99. His back later became so stiff that prison officials permitted him to go to the prison infirmary. *Id.*

52 *Id.* at 106-07. Over a three month period, the prison doctors treated Gamble for his back ailment on seventeen occasions, prescribing medication and bed rest. *Id.* at 107. The injured prisoner asserted, however, that more should have been done in terms of treatment and diagnosis. *Id.* The prisoner and the appellate court agreed that an X-ray of the injured inmate's lower back should have been ordered. *Id.* The Supreme Court, however, stated that doctors' failure to order an X-ray did not constitute cruel and unusual punishment. *Id.* Rather, the Court envisaged that this failure could potentially constitute malpractice and the proper forum for medical malpractice was in state court. *Id.*

53 *Id.* at 106. The Court stated that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.*

that the prison officials acted with deliberate indifference when treating the prisoner's medical needs.[54]

One year after *Estelle*, in *Hutto v. Finney*,[55] the Court declared that the Eighth Amendment applied to cruel and unusual confinement conditions; specifically, confinement in an isolation cell.[56] Writing for the majority, Justice Stevens upheld a district court's remedial orders[57] instituted to redress confinement conditions characterized by mass overcrowding, unsanitary and vermin-infested surroundings, inadequate food, the spread of infectious diseases, and the standard practice of allowing certain inmates to act as armed prison guards.[58] The Supreme Court

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54 *Id.* at 106. The Court explained: "In order to state a cognizable claim a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the [E]ighth [A]mendment." *Id.*; *see also* Sue Woolf Brenner, *The Parameters of Cruelty: Application of Estelle v. Gamble to Sentences Imposed Upon the Physically Fragile Offender*, 12 AM. J. CRIM. L. 279, 286-87 (1984) (discussing application of *Estelle* deliberate indifference standard to inmates with serious health problems for whom prison means certain physical agony and possible death); Woodbury, *supra* note 28, at 375 (noting that *Estelle* marked the first Supreme Court application of Eight Amendment judicial scrutiny to prison living conditions, specifically prisoners' medical treatment).

In *Estelle*, Justice Stevens's dissenting opinion criticized the majority for establishing a standard that "improperly attache[d] significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted." *Estelle*, 429 U.S. at 116. Justice Stevens posited that Eighth Amendment determinations "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Id.*

55 437 U.S. 678 (1977).

56 *Id.* at 685. The Court declared that confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment standards. *Id.* In *Hutto*, the Court upheld a district court remedial order that limited the length of time a prisoner could remain in isolation. *Id.* at 680-81. The conditions in the isolation cell were characterized as follows:

> Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. . . . Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.

Id. at 682-83 (citations omitted).

57 *Id.* at 680. The remedial orders asserted that a prisoner could only be put in solitary confinement for a maximum of 30 days. *Id.* The remedial orders further established that the prisoner's attorney's fees be paid out of the Department of Corrections fund because the prison officials exhibited bad faith. *Id.* at 680-81.

58 *Id.* at 681. The Arkansas prisons were described as "a dark and evil world completely alien to the free world." *Id.* Fights, stabbings and homosexual rapes were rampant in the Arkansas penal system. *Id.* at 681 n.3. Some prisons even had

reasoned that the combination of such conditions might be tolerable for a few days, but were intolerably cruel for any longer period.[59] Justice Stevens noted, however, that punitive isolation for an indeterminate period is not per se cruel and unusual, but must be considered along with the other confinement conditions.[60] Although the Court indicated that the Cruel and Unusual Punishment Clause had been violated,[61] the majority failed to articulate a clear method for applying the Eighth Amendment to prison conditions.[62]

In the 1981 case of *Rhodes v. Chapman*,[63] the Court crafted a more precise Eighth Amendment interpretation to address cruel and unusual prison conditions.[64] In *Rhodes*, inmates asserted that the practice of "double-bunking" prisoners in a cell designed for one inmate caused prisoners to be too closely confined, resulting in cruel and unusual punishment.[65] In determining that double-

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a program in which certain inmates, due to good behavior, would act as armed prison guards for other inmates. *Id.* at 682 n.6. This system, known as the "trustee" system, resulted in tremendous physical abuse of inmates meted out by their armed peers. *Id.* Moreover, sanctions for misconduct were unpredictable, cruel and unusual. *Id.* at 682. For example, inmates were whipped until their skin was bruised and bloody. *Id.* at 682 n.4. Guards also punished inmates with a device known as the "Tucker-telephone"—a hand-cranked apparatus that administered electric shocks to sensitive parts of a prisoner's body. *Id.* at 682 n.5.

59 *Id.* at 686-87.

60 *Id.* at 686; *see also* Martin K. Thomas, Note, *The Effect of Rhodes v. Chapman on the Prohibition Against Cruel and Unusual Punishment*, 35 ARK. L. REV. 731 (1982) (discussing how *Hutto* fits the continuum of Eighth Amendment interpretations and noting that "[t]his decision increased the number of factors to be considered" thereby broadening the operation of the standard); Woodbury, *supra* note 28, at 736 (declaring that *Hutto* articulated a totality of the conditions approach).

61 *See Hutto*, 437 U.S. at 685-86 (acknowledging that the Commissioner of Correction and members of the Arkansas Board of Correction did not disagree with the district court's finding that the prison conditions constituted cruel and unusual punishment).

62 *See* Montick, *supra* note 7, at 230. The author stated: "In *Hutto v. Finney*, the Court reinforced the notion that conditions of confinement are a proper subject for [E]ighth [A]mendment scrutiny." *Id.* The author also articulated that the *Hutto* decision's "precedential value for delineating a precise standard for all condition cases remains tenuous." *Id.* at 230 n.17.

63 452 U.S. 337 (1981).

64 *Id.* Two inmates at Southern Ohio Correctional Facility brought a § 1983 action alleging that double-celling inmates violated the Eighth Amendment. *Id.* at 339-40; *see generally* Thornberry & Call, *supra* note 15 (exploring application of Eighth Amendment to *Rhodes v. Chapman* and the subsequent effect of *Rhodes* on lower court decisions and Eighth Amendment jurisprudence).

65 *Rhodes*, 452 U.S. at 339. Two years before *Rhodes*, the Court entertained the concept of "double-bunking" as a deprivation of pre-trial detainees' liberty without due process of law, as required by the Fifth Amendment. Bell v. Wolfish, 441 U.S. 520, 530 (1979). The Fifth Amendment applied because the controversy involved pre-trial detainees and not convicted criminals. *Id.* The Eighth Amendment was

celling did not violate the Eighth Amendment, the Court considered objective factors, including the physical surroundings of the prison and the availability of other rooms for the inmates.[66] The Court concluded that the inmates were not confined solely to their cells and had much opportunity throughout the day to use other rooms at the prison.[67] The Court reiterated that cruel and unusual punishment claims are to be decided by "evolving standards of decency"[68] and held that Eighth Amendment prison condition decisions must be based on an objective determination of the facts.[69] Consequently, the Court's objective analysis of the *Rhodes* facts failed to evidence conditions proscribed by

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inapplicable because these confined individuals had not yet been convicted of a crime. *Id.* The Court held that the practice of "double-bunking" did not violate the Fifth Amendment, stating: "We disagree with both the District Court and the Court of Appeals that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment." *Id.* at 542. The Court reasoned that the pre-trial detainees were not confined solely to their cells and had adequate space to move about throughout the day. *Id.* at 543. *See* Rod Smolla, *Prison Overcrowding and the Courts: A Roadmap for the 1980's*, 1984 U. ILL. L. REV. 389 (1984) (exploring the impact of *Bell v. Wolfish* and *Rhodes v. Chapman* and on subsequent prison condition cases).

66 *Rhodes*, 452 U.S. at 342. Applying the objective factor approach to the prison conditions at issue, the *Rhodes* Court concluded double-celling of inmates did not deprive the prisoners of medical care, sanitation or essential food. *Id.* at 348. Moreover, the incidence of violence among inmates did not increase and the educational and vocational opportunities only diminished marginally. *Id.* The Court further declared that "[d]ouble celling had not reduced significantly the availability of space in the dayrooms or visitation facilities, nor had it rendered inadequate the resources of the library or school rooms." *Id.* at 342. The prison, Southern Ohio Correctional Facility, was described as a "top-flight, first-class facility." *Id.* at 341. The prison was constructed in the 1970's and, in addition to 1,620 cells, it contained workshops, schoolrooms, chapels, a hospital ward, barbershop, commissary, library and a garden and recreation field for inmate use. *Id.* at 340-41.

67 *Id.* at 341.

68 *Id.* at 346; *see also supra* notes 48-54 and accompanying text.

69 *Id.* at 347. The Court noted that an example of an objective factor approach appeared in opinions applying the Eighth Amendment to capital punishment. *Id.* at 346. To determine whether capital punishment for certain crimes violated the "evolving standards of decency," the Court considered objective factors derived "from history, the action of state legislatures, and the sentencing by juries." *Id.* at 346-47 (citations omitted). Interestingly, the Court declared that the deliberate indifference standard articulated in *Estelle v. Gamble* also relied on objective facts. *Id.* at 347. Specifically, the majority recognized that the *Estelle* Court had looked to "the fact, recognized by the common law and state legislatures, that '[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.' " *Id.* (quoting Estelle v. Gamble 429 U.S. 97, 103 (1976)).

The *Rhodes* majority added that the objective factor approach also applied to confinement conditions. *Id.* Conditions cannot "be grossly disproportionate to the severity of the crime warranting imprisonment," nor can they involve the unnecessary and wanton infliction of pain. *Id.* The majority noted that confinement condi-

"evolving standards of decency."[70]

Four years later, in *Whitley v. Albers*,[71] the Supreme Court departed from the *Rhodes* objective factor approach and again embraced a subjective intent inquiry for adjudicating Eighth Amendment claims.[72] In *Whitley*, a prison guard, attempting to quell a violent prison riot, shot an inmate in the left leg.[73] As a result, the injured inmate asserted that being shot while confined constituted cruel and unusual punishment.[74]

The Supreme Court declared, however, that the guard exerted a genuine attempt to return the prison to a secure status and to save lives.[75] Specifically, the Court inquired into the

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tions, alone or in combination, would be cruel and unusual if they deprived prisoners "of the minimal civilized measure of life's necessities." *Id.*

70 *Id.* at 347-50. *See also supra* notes 48-54 and accompanying text for discussion of the "evolving standards of decency" definition; Susan N. Herman, *Institutional Litigation in the Post-Chapman World*, 12 N.Y.U. REV. L. & SOC. CHANGE 299, 302, 308-09 (1983-84). Professor Herman declared that *Chapman* was the most encouraging Supreme Court decision involving inmate's rights to come down in a decade. *Id.* at 302. Moreover, according to Professor Herman, *Chapman* reaffirmed the judiciary's obligation to "scrutinize claims of cruel and unusual confinement." *Id.* at 308 (quoting Rhodes v. Chapman, 452 U.S. 337, 352 (1981)). The author commented that the opinion "to some degree encourages meaningful federal court review." *Id.* at 309; *see also* Ronan, *supra* note 14, at 539. The author stated that *Rhodes v. Chapman* confirmed the federal judiciary's position as the final arbiter of Eighth Amendment claims involving prison conditions. *Id.* Ronan commented that the Supreme Court answers the perennial question of who will watch the keepers themselves—"[t]he federal courts will." *Id. But see* Woodbury, *supra* note 28, at 746 (criticizing the *Rhodes* decision as unsatisfactory precedent for cruel and unusual punishment analysis it signaled a reversion to the "hands off" doctrine, in which the federal judiciary will defer to the decisions and policies of the legislatures).

71 475 U.S. 312 (1985).

72 *Id.* at 321. In the 1976 case of *Estelle v. Gamble*, the Supreme Court crafted the subjective intent inquiry of deliberate indifference to determine whether an inmate's medical treatment qualified as cruel and unusual. Estelle v. Gamble, 429 U.S. 97, 106 (1976). Although the *Whitley* Court returned to a subjective intent analysis, the Court formulated the more exacting standard of "obduracy and wantonness." *Whitley*, 475 U.S. at 319. The *Whitley* Court declared that the *Estelle* deliberate indifference standard was inappropriate because deliberate indifference "can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff and other inmates." *Id.* at 320. *See also* Robert A. West, Comment, *Constitutional Law: Quelling a Prison Riot: Cruel and Unusual Punishment or a Necessary Infliction of Pain?*, 26 WASHBURN L.J. 208 (1986) (tracing the development of Cruel and Unusual Punishment Clause and its application to *Whitley*, proclaiming that the *Whitley* holding narrowed the parameters of the Eighth Amendment).

73 *Whitley*, 475 U.S. at 314. It should be noted that a prison official had been taken hostage and the guard who fired at the inmate believed that the inmate was going to harm the hostage. *See id.* at 315.

74 *Id.* at 317.

75 *Id.* at 326. The Court stated: "Under these circumstances, the actual shooting was part and parcel of a good-faith effort to restore prison security. As such, it did

prison official's state of mind to determine whether the official's conduct was characterized by obduracy and wantonness.[76] The Court determined that the guard's actions were not characterized by obduracy and wantonness and held that there was no Eighth Amendment violation because the actual shooting was not intended to inflict wanton or unnecessary pain.[77] The Court established that this state-of-mind inquiry was the applicable standard to determine whether prison conditions, a prisoner's medical treatment, or the methods used in restoring order during a prison riot constitute cruel and unusual punishment.[78]

Cognizant of the need to apply an equitable standard to prison condition claims,[79] the Supreme Court, in *Wilson v.*

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not violate respondent's Eighth Amendment right to be free from cruel and unusual punishments." *Id.*

[76] *Id.* at 319-20. Moreover, the Court established that a claimant must "allege and prove the unnecessary and wanton infliction" for an Eighth Amendment violation to exist. *Id.*

[77] *Id.* at 324.

[78] *Id.* at 319 (quoting Estelle v. Gamble, 429 U.S. 97, 105-06 (1976)). *See also* Melissa Whish Coan, Note, *Whitley v. Albers: The Supreme Court's Attempted Synthesis of Eighth Amendment Standards For Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155 (1988). The author opined that the *Whitley* Court failed to articulate a clear Eighth Amendment standard by which prison guards may gauge their behavior when punishing prisoners. *Id.* at 168. Furthermore, the author forewarned that this holding would inhibit subsequent cruel and unusual punishment violations. *Id.*

See also Elizabeth A. Blackburn, Note, *Prisoners' Rights: Will They Remain Protected After Whitley?*, 16 STETSON L. REV. 385 (1987). The author lambasted the *Whitley* decision as "further mudd[ying] the already murky waters surrounding the issue of prisoners' rights." *Id.* at 387. Courts are charged with protecting prisoners' Eighth Amendment rights, yet *Whitley* signaled a return to the pre-1960's "hands off" doctrine. *Id.* at 393, 408. Ultimately, the author indicated that this more exacting intent standard would adversely affect substantive prisoner rights: "The strict standard identifies and dismisses those claims that involve 'mere negligence' and a lack of ordinary care as claims outside the constitutional realm." *Id.* at 406 (citation omitted).

[79] The following cases represent a small portion of the myriad of federal cases that have addressed various aspects of prison conditions in light of the Eighth Amendment: Johnson v. Moore, 948 F.2d 517 (9th Cir. 1991) (confinement to prison cell pursuant to policy requiring all inmates not attending classes or working to be confined did not violate any liberty interest of prisoner); LaBounty v. Adler, 933 F.2d 121 (2d Cir. 1991) (black prisoner allegedly required to complete vocational training to qualify for electrician maintenance program brought action alleging equal protection and Eighth Amendment violations); United States v. Michigan, 940 F.2d 143 (6th Cir. 1991) (trial court should not impose overly intrusive remedies to alleviate conditions of confinement, but instead should exercise reason and restraint in performing its oversight duty); Marsh v. Arn, 937 F.2d 1056 (6th Cir. 1991) (deliberate indifference standard applied to determine whether prison officials' failure to protect an inmate from fellow inmate's assaults qualified as cruel and unusual punishment); Porth v. Farrier 934 F.2d 154 (8th Cir. 1991) (confine-

Seiter,[80] declared that an Eighth Amendment violation requires proof that prison officials acted with deliberate indifference to allegedly unconstitutional confinement conditions.[81] Writing for the majority,[82] Justice Scalia explained that the ban on cruel and unusual punishments applied both to punishments that are specifically meted out as part of the sentence and to deprivations suffered during imprisonment.[83] The Justice proclaimed that implicit in the Eighth Amendment lies a subjective intent requirement that must be proven for punishment to qualify as cruel and unusual.[84] Thus, the majority demonstrated that for the punish-

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ment of a prisoner without bedding, mattress or clothes for 12 hours did not violate the Eighth Amendment); Hughes v. Joliet Correctional Ctr., 931 F.2d 425 (7th Cir. 1991) (affirming trial court's dismissal of inmate's claim alleging that medical malpractice constituted cruel and unusual punishment); Andrews v. Siegel, 929 F.2d 1326 (8th Cir. 1991) (holding that officials did not violate an assaulted inmate's right to be free from cruel and unusual punishment absent a showing that prison officials were deliberately indifferent or acted with reckless disregard); Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991) (inmate's widow filed action against medical doctor and prison officials to recover for deliberate indifference to prisoner's medical needs); Moore v. Winebrenner, 927 F.2d 1312 (4th Cir. 1991) (proper question was whether the warden acted with deliberate indifference to pervasive risk of harm present at the prison), *cert. denied*, 112 S. Ct. 97 (1991); Moore v. Morgan, 922 F.2d 1553 (11th Cir. 1991) (unavailability of funds for jail facilities did not justify maintenance of unconstitutional conditions); Varnado v. Lynaugh, 920 F.2d 320 (5th Cir. 1991) (unsound medical treatment of an inmate did not qualify as § 1983 claim for the deliberate indifference to prisoner's medical needs); Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990) (state prison policy allowing involuntary coupling of nonsmokers with smokers, could qualify as deliberate indifference to nonsmoking inmates' health); Fruit v. Norris, 905 F.2d 1147 (8th Cir. 1990) (prisoners established a prima facie cruel and unusual punishment claim when they were disciplined for refusing to clean out prison facility's raw sewage station without necessary protective equipment and clothing); Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989) (medical malpractice did not rise to the level of an Eighth Amendment violation); Jackson v. Arizona, 885 F.2d 639 (9th Cir. 1989) (allegations of polluted water and unsanitary food handling qualified as Eighth Amendment cause of action); Taylor v. Turner, 884 F.2d 1088 (8th Cir. 1989) (denial of medical treatment could violate Eighth Amendment if prison officials evidenced deliberate indifference to inmate's medical needs); Cowans v. Wyrick, 862 F.2d 697 (8th Cir. 1988) (no Eighth Amendment claim is established without evidence of some pain suffered by inmate); Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988) (the confinement of capital prisoners to cells for 22 hours each day did not violate Eighth Amendment); Hassine v. Jeffes, 846 F.2d 169 (3d Cir. 1988) (prison conditions did not violate Eighth Amendment).

80 111 S. Ct. 2321 (1991).

81 *Id.* at 2327 (quoting LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987)).

82 *Id.* at 2322. Justice Scalia delivered the opinion in which Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy and Justice Souter joined. *Id.*

83 *Id.* at 2323 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

84 *Id.* The Justice relied heavily on the *Estelle* decision to illustrate the presence of a subjective intent requirement. *Id.* Justice Scalia noted: "Since we said, only the 'unnecessary and wanton infliction of pain' implicates the Eighth Amendment, a

ment to be deemed cruel there must exist some level of culpability on the official's part.[85]

Justice Scalia next addressed the Court's vacillation between subjective and objective standards used to interpret the Eighth Amendment.[86] The Justice explained that the *Rhodes v. Chapman* decision,[87] which called for an objective approach to determine whether prison conditions violated the Eighth Amendment, marked a brief departure from the evolving intent requirement associated with Eighth Amendment jurisprudence.[88]

The majority made clear, however, that this departure from the subjective intent requirement was short-lived.[89] The Court explained that, less than one year later, the subjective intent requirement resurfaced in *Whitley v. Albers*,[90] when the Court declared that the conduct prohibited by the Eighth Amendment was characterized by obduracy and wantonness.[91] Thus, claimed Justice Scalia, the *Whitley* holding marked the resurgence of a subjective intent requirement in cruel and unusual punishment claims.[92]

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prisoner advancing such a claim must, at a minimum, allege 'deliberate indifference' to his 'serious' medical needs. 'It is only such indifference' that can violate the Eighth Amendment." *Id.* (citation omitted) (quoting *Estelle*, 429 U.S. at 106).

85 *Id.* at 2323 (quoting *Estelle*, 429 U.S. at 105). The Justice referenced the *Francis v. Resweber* decision as further evidence of the existence of an Eighth Amendment culpability requirement. *Id.* Specifically, Justice Scalia focused on *Francis*'s "wanton infliction of pain" requirement and concluded that this demonstrated an intent requirement within Eighth Amendment judicial scrutiny. *Id.* (quoting Francis v. Resweber, 329 U.S. 459, 463 (1947)).

86 *Id.* at 2324. The Justice elucidated that the Court had once temporarily departed from the subjective culpability standard and opted instead to use an objective factor approach to determine whether prison conditions were in violation of the Constitution. *Id.* (citations omitted).

87 452 U.S. 337 (1981). *See supra* notes 63-70 and accompanying text (discussing *Rhodes v. Chapman*).

88 *Wilson*, 111 S. Ct. at 2324. Justice Scalia explained that *Rhodes* focused on an objective interpretation of the Eighth Amendment: Was the human deprivation suffered sufficiently serious to constitute cruel and unusual punishment? *Id.* (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). According to Justice Scalia, the subjective interpretation—the official's state-of-mind requirement—was not considered in the context of *Rhodes*. *Id.*

89 *See id.*

90 475 U.S. 312 (1985).

91 *See Wilson*, 111 S. Ct. at 2324. *See also supra* notes 71-78 and accompanying text (discussing *Whitley v. Albers*).

92 *Id.* The majority quoted *Whitley*:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Justice Scalia next addressed the petitioner's[93] suggestion that the Court make a distinction between short-term and continuing confinement conditions.[94] The majority observed that the petitioner believed an intent requirement was applicable to short-term conditions, but not to systemic conditions.[95]

Disagreeing with the petitioner's proposition, Justice Scalia declared that if the inflicted pain was not specifically imposed as punishment by the sentencing judge or by statute, then a level of culpability must be attributed to the prison official before the infliction can qualify as cruel and unusual.[96] The majority contended, however, that the long duration of cruel prison conditions might evidence the required intent; yet, in no way would the mere presence of such conditions cause the intent requirement to vanish.[97] In conclusion, the Court reasoned that it would be difficult, if not impossible, to rationally implement short-term versus long-term condition distinctions.[98]

Justice Scalia then turned to examine the United States Justice Department's argument that a subjective intent requirement would raise additional defenses for prison officials.[99] Justice Scalia rebuffed the Justice Department's argument that prison officials could claim that they made a good faith effort to eliminate the inhumane prison conditions, but were stymied by fiscal constraints.[100] The majority noted that a cost defense was never

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Id. (quoting Whitley v. Albers, 475 U.S. 312, 319 (1985)).

The petitioner in *Wilson* conceded that some conditions did not rise to the level of an Eighth Amendment violation. *Id.* at 2325. For example, the petitioner agreed that if a boiler malfunctions during a cold winter, the inmate could not assert a viable Eighth Amendment violation. *Id.* The concurrence attacked the majority's reliance on *Estelle*, *Resweber* and *Whitley*, pointing out that those cases "did not involve 'conditions of confinement' but rather 'specific acts or omissions directed at individual prisoners.' " *Id.* at 2324 n.1.

93 *Id.* The United States Justice Department joined the petitioner as amicus curie. *Id.* at 2322.

94 *Id.* at 2325.

95 *Id.*

96 *Id.* The majority quoted Judge Posner, who stated: "The infliction of punishment is a deliberate act intended to chastise or deter." *Id.* (citation omitted). Thus, Justice Scalia suggested that if the pain inflicted was not intended as a form of retribution, then intent must attach. *Id.*

97 *Id.*

98 *Id.* The Court stated: "Apart form the difficulty of determining the day or hour that divides the two categories . . . the violations alleged in specific cases often do not lend themselves to such pigeonholing." *Id.*

99 *Id.* at 2326.

100 *Id.*

raised by respondents and, therefore, was not at issue.[101]

Having determined that a subjective intent requirement was relevant, the majority next considered what state of mind should apply to prison condition claims.[102] The Court recalled that in previous cases wantonness was the appropriate standard required for punishment to qualify as cruel and unusual.[103] According to the majority, both the petitioner and the respondent agreed that the standard of obduracy and wantonness was too exacting a standard in the context of prison condition cases.[104] The Court noted the petitioner's belief that a culpability requirement, if relevant, should not exceed the standard of deliberate indifference.[105]

The respondent's counter-argument, added the Justice, called for the application of two different standards: a deliberate indifference standard for claims in which the inmate was injured, and a malice standard for claims in which no physical harm occurred.[106] The Court disagreed with the respondent's counter-argument, however, and stated that the wantonness of the conduct is determined by the constraints placed on the prison official rather than the effects upon the prisoner.[107] The majority agreed with the petitioner's stance and denoted that deliberate indifference is the correct standard to apply to challenges to confinement conditions.[108]

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101 *Id.* The majority claimed that "the validity of a 'cost' defense as negating the requisite intent [was] not at issue in this case. . . ." *Id.*

102 *Id.*

103 *Id.* Justice Scalia noted that in emergency situations, wantonness is characterized by sadistic and malicious acts that are intended to cause harm. *Id.* By contrast, the Justice pointed out that in regard to a prisoner's medical needs, the prison officials' deliberate indifference satisfied the wantonness standard. *Id.* (citing Whitley v. Albers, 475 U. S. 312, 320 (1986)).

104 *Id.* at 2326. Justice Scalia commented: "The parties agreed with the consistent holdings of the lower courts that the very high state of mind prescribed by *Whitley* does not apply to prison condition cases." *Id.* (citations omitted).

105 *Id.*

106 *Id.* The respondents contended that the deliberate indifference standard was applicable to cases involving personal injury claims raised while confined, but a malice standard should be employed when there was no "detriment to bodily integrity, pain, injury, or loss of life." *Id.*

107 *Id.* The majority relied on *Whitley* and stated that if "the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim . . . whether it can be characterized as 'wanton' depends upon the constraints facing the *official*." *Id.* (citation omitted)(emphasis in original).

108 *Id.* at 2327. The Court reasoned that conditions of confinement that include food, space, sanitation and clothing are as much a condition as prisoners' individual medical needs. *Id.* To strengthen its position, the Court quoted Justice Powell, who reasoned: "Whether one characterizes the treatment received by [the pris-

Having identified deliberate indifference as the appropriate governing standard, the Court addressed the petitioner's contention that the appellate court erred in dismissing the claim because the combination of the alleged conditions[109] rose to the level of an Eighth Amendment violation.[110] The Court stressed that, for a combination of conditions to be deemed cruel and unusual, the conditions must be mutually re-enforcing and also result in the deprivation of a specific human need.[111] The Court reserved judgment on whether the alleged conditions in this instance constituted an Eighth Amendment violation.[112]

Turning to the Sixth Circuit's affirmation of the district court's order for summary judgment in favor of respondents,[113] the Court found that the appellate court relied on the more exacting standard of obduracy and wantonness. Consequently, the Supreme Court vacated the appellate court's judgment and remanded the case for reconsideration under the deliberate indifference standard.[114]

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oner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.* (citation omitted).

109 *Id.* The Court enumerated some of the allegedly cruel and unusual conditions, which included inadequate cooling, overcrowding and the housing of mentally ill inmates with the general prison population. *Id.*

110 *Id.* The Court noted that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.*

111 *Id.* For example, the majority stipulated that a cold prison cell combined with a lack of adequate blankets illustrated how separate confinement conditions might combine to violate the Eighth Amendment. *Id.*

112 *Id.*

113 *Id.* The Court concluded that while the court of appeals' reference to negligence might have led to an erroneous finding, it could have been merely harmless error. *Id.* Nevertheless, exercising an "abundance of caution," the Court required a reevaluation of the case under the proper standard. *Id.*

114 *Id.* The United States Court of Appeals for the Seventh Circuit, relying on *Wilson*, recently held that exposure to secondary smoke did not constitute cruel and unusual punishment. Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991). In *Steading*, an asthmatic prisoner alleged cruel and unusual punishment resulting from his exposure to smoke produced by other inmates and guards. *Id.* at 499. The court noted that *Wilson v. Seiter* established that evidence of a prison official's culpable mental state was necessary for confinement conditions to qualify as punishment. *Id.* at 500. The court declared that this standard established an insuperable impediment to the prisoner's claim. *Id.*

The Seventh Circuit reasoned that secondary tobacco smoke was common in restaurants, offices and other public domains, yet "[n]o one supposes that restaurateurs who allow smoking are subjecting their other patrons to 'punishment', or desire to harm them." *Id.* Thus, because the smoking guards and inmates did not intend to harm the asthmatic inmate, the court opined that their behavior did not violate the Eighth Amendment. *Id.* Ultimately, the court proclaimed that the estab-

Concurring solely in the judgment,[115] Justice White disagreed with the majority's requirement of subjective intent in cases involving conditions of confinement.[116] Justice White emphasized that a level of culpability is *not* required to prove an Eighth Amendment violation when the suffering or pain is actually imposed as part of the convicted criminal's sentence.[117] The Justice stressed that prior Supreme Court decisions have established that conditions of confinement are actually considered part of the punishment.[118] Thus, Justice White reasoned that in the context of prison conditions, no fixed test would suffice to determine whether the Eighth Amendment has been violated.[119]

The concurrence remarked that previously the Court relied on objective factors to determine whether confinement conditions were cruel and unusual.[120] The Justice turned to the reasoning in *Rhodes v. Chapman* to evidence the existence of an objective approach.[121] According to Justice White, *Rhodes* explic-

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lishment of smoke-free prisons, or smoke-free sections within the institution, failed under *Wilson*. *Id.*

More recently, the United States Court of Appeals for the Seventh Circuit invoked the *Wilson* decision, holding that a prisoner's rape did not violate the Eighth Amendment. McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991). Inmate McGill, described as young and small, received a number of physical threats and sexual advances by other inmates. *Id.* at 346. As a result, McGill requested that he be placed in a protective custody unit within the prison. *Id.* Unable to fully comply with his request, prison officials placed McGill in a segregated area that housed inmates on disciplinary segregation status. *Id.* While showering in the segregated unit, McGill was sodomized by a fellow inmate. *Id.* The prison guard charged with monitoring the shower area had left his post without authorization. *Id.* at 350. McGill alleged that the rape and the prison officials' failure to prevent it constituted cruel and unusual punishment. *Id.* at 346.

The court held, however, that this "unpleasant happening" did not qualify as punishment because the inmate failed to prove that the officials deliberately neglected his safety. *Id.* at 349-50. The court declared that the prisoner should have warned the guards of the impending rape threat. *Id.* at 351. The court stated that the inmate's failure to impute the guards with actual knowledge coupled with his decision to accept the risk while showering precluded him from asserting an Eighth Amendment violation. *Id.* at 351, 353.

115 *Wilson*, 111 S. Ct. at 2328 (White, J., concurring). Justice White delivered the concurrence in which Justices Marshall, Blackmun and Stevens joined. *Id.*

116 *Id.*

117 *Id.*

118 *Id.* The concurrence stated: "[W]e have made it clear that the conditions are themselves part of the punishment, even though not specifically 'meted out' by a statute or judge." *Id.*

119 *Id.* *See supra* notes 63-70 and accompanying text for discussion of the *Rhodes v. Chapman* decision.

120 *Wilson*, 111 S. Ct. at 2329.

121 *Id.* Justice White stressed:

> *Rhodes* makes it crystal clear, therefore, that Eighth Amendment chal-

itly called for an objective standard, under which one looks to see if the human deprivations suffered were sufficiently serious to constitute cruel and unusual punishment.[122]

Further denouncing the majority's position, the concurrence attacked Justice Scalia's reliance on cases that dealt with specific individual prisoner claims, resulting from the acts or omissions of prison officials, rather than cases that addressed the issue of prison conditions.[123] Moreover, the concurrence asserted that *Whitley v. Albers* clearly called for an objective standard in challenges to prison conditions.[124] Thus, the concurrence asserted that the majority had departed from established precedent.[125]

Justice White further predicted that the implementation of a subjective intent requirement would probably be impossible in a large number of cases.[126] Justice White noted that inhumane prison conditions are frequently the result of cumulative behavior by numerous government officials over a significant period of time.[127] Accordingly, the Justice suggested that it is difficult to determine whose intent truly governs.[128]

Finally, Justice White addressed the ease by which a prison official, under the guise of a subjective intent requirement, could defeat a section 1983[129] prison condition claim.[130] Specifically, the Justice noted that officials need only assert that the inadequate prison conditions were the result of inadequate funding, allowing the official to circumvent the issue of deliberate indiffer-

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> lenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is "formally meted out as punishment by the state or the sentencing judge,"—we examine only the objective severity, not the subjective intent of government officials.

Id. at 2329-30 (White, J., concurring) (quoting *Wilson*, 111 S. Ct. at 2325).

122 *Id.* at 2330.

123 *Id.* (White, J., concurring). Specifically, Justice White referred to the majority's reliance on *Francis v. Resweber*, *Estelle v. Gamble* and *Whitley v. Albers*. *Id.* *See also supra* notes 34-41, 49-54, 71-78 and accompanying text (discussing those cases).

124 *Id.* The Justice, quoting *Whitley*, emphasized: "An express intent to inflict unnecessary pain is not required . . . and 'harsh conditions of confinement' may constitute cruel and unusual punishment. . . ." *Id.* (citations omitted).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* The concurrence noted that "it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue." *Id.* The Justice commented that lower courts often relied on an objective factor method. *Id.* at 2330, 2324 n.1.

129 *See supra* note 21 (quoting relevant portions of 42 U.S.C. § 1983).

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

ence.[131] In conclusion, Justice White posited that Eighth Amendment jurisprudence should be guided by a "contemporary standard of decency."[132] The deliberate indifference standard, Justice White postulated, would result in serious human deprivations because of cruel and unusual prison conditions.[133]

Eighth Amendment jurisprudence involving prison condition claims needed a uniform standard that would facilitate continuity and fairness among this country's courts.[134] Until *Wilson v. Seiter*, the standards employed spanned the continuum from objective factor approaches to varying subjective intent requirements.[135] Recognizing the need for a uniform test, the Supreme Court affirmatively endorsed the deliberate indifference standard.[136]

The deliberate indifference standard will prove quite workable when an individual prisoner suffers a specific Eighth Amendment deprivation resulting from the actions or inactions of prison officials. For example, if an inmate receives inadequate medical treatment due to official action or inaction, the affected inmate can rely on the deliberate indifference standard to evidence cruel and unusual punishment.[137] In this scenario, there is a single, specific deprivation and also identifiable officials to which the intent requirement of deliberate indifference can attach.

Although sufficient for specific deprivation claims, the deliberate indifference standard will prove wholly inadequate to address prison overcrowding claims. As distinct from specific individual claims, overcrowding is caused by a multitude of factors working concurrently and affecting a large number of inmates. In this scenario, inmates asserting an overcrowding claim will have the impossible task of trying to conjoin an official with this subjective culpability. Moreover, overcrowding is most often the result of inadequate funding,[138] to which no culpability can be attributed. Thus, the *Wilson* holding will have a chilling effect

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131 *Id.* at 2330-31.

132 *Id.* at 2331 (citation omitted).

133 *Id.* at 2330-31

134 *Id.* at 2331.

135 *See supra* notes 46-75 and accompanying text for discussion of the varying Eighth Amendment standards employed by the Supreme Court over the years.

136 *Wilson*, 111 S. Ct. at 2326.

137 *See supra* notes 46-52 and accompanying text.

138 McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991). The majority commented that the legislature ultimately controls the size and number of prisons built. *Id.* at 349. Furthermore, crowding is endemic because taxpayers demand longer

on prisoners' valid prison overcrowding claims. This frustration will not only result in the decrease of successful overcrowding claims, but also will ultimately result in a judicial regression to the pre-1960's laissez-faire stance toward prison overcrowding.

This relapse directly contravenes the purposes of the American judiciary. The judicial branch of our government is charged with the duty of interpreting and upholding the Constitution, which was designed to protect the rights and interests of the people, especially powerless and disfavored minorities. In this instance, courts must remain involved to protect the rights and interests of inmates. Prison overcrowding is not a popular issue among elected officials and often it goes unredressed if left to the legislative branch of government.[139] Thus, to protect the unpopular, judicial intervention is essential. Should federal courts be unwilling to act, then state courts must intervene.[140]

Chief Justice Warren established that the Eighth Amendment must be interpreted by "evolving standards of decency that mark the progress of a maturing society."[141] With the maturation of society, we have witnessed the power and effectiveness of judicial intervention in a number of controversial areas, such as public school desegregation and the right to affordable housing.[142] The judicial branch can and has effectively supervised

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sentences that increase prison populations, yet are unwilling to pay for the increased space needed. *Id.*

139 *See* Smolla, *supra* note 65, at 421. The author concluded his article by proclaiming: "Courts . . . play a crucial role in dealing with the overcrowding crisis: they must remain the nagging conscience of government. The evolving standards of decency embodied in the [E]ighth [A]mendment too often fail to surface in the budget messages of governors and appropriations bills of legislatures." *Id.*

140 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan discussed the importance of state court activism in protecting individual liberties. *Id.* Justice Brennan eloquently stated:

> [S]tate courts no less than federal are and ought to be the guardians of our liberties. . . . State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.

Id. at 491.

141 Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

142 *See* Woodbury, *supra* note 28, at 719-20. The author stressed the necessity for judicial intervention in claims involving prison overcrowding. *Id.* Furthermore, the author recalled the success of judicial activism in other "administrative areas, such as education and welfare." *Id.* (citing Clay v. United States, 403 U.S. 698 (1971)

the implementation of its decisions in such perplexing areas.[143] Following evolving standards of decency, the judiciary is bound to uphold such precedent and, consequently, must remain active in the area of prison overcrowding.

Not only will the deliberate indifference standard stymie judicial intervention, it will also be circumvented. As the concurrence and petitioners in *Wilson* noted, prison officials can effortlessly avoid this intent standard by simply asserting that the overcrowding was the result of inadequate funding. As Justice White asserted, prisoners will have the onerous job of trying to satisfy this elusive standard and, in the process, many valid cruel and unusual punishment claims will go unredressed.

A far more feasible standard is one grounded in objectivity. Specifically, courts should focus on the objective and recognizable effects prison conditions have upon inmates, rather than focusing on a prison official's subjective intent. Jurists should scrutinize objective factors—such as the inmates' physical condition, their mental well-being and the conditions of the prison—and query whether the deprivations suffered are serious enough to constitute an Eighth Amendment violation. Such an objective approach will prove feasible not only with specific individual deprivations, but also with more systemic deprivations resulting from overpopulated prisons. Furthermore, with an objective standard, circumvention is no longer an issue. Rather, courts will look for physical proof evidencing cruel and unusual punishment instead of a prison official's state of mind. Such an objective standard will prevent valid Eighth Amendment claims from going unredressed and ultimately will protect the rights and interests of that unpopular minority, the American inmate.

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(draft boards); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare officers); Brown v. Board of Educ. 347 U.S. 483 (1954)(public schools)).

143 *See* Theodore Eisenberg and Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). The authors noted that in many institutional litigation cases the judiciary "only began to prescribe the specific details of institutional reform when it became clear that state and local officials were not likely to cooperate." *Id.* at 492. Continuing, the professors commented that "it does not seem to be an outrageous abuse of judicial authority for courts to supervise state and local authorities in order to ensure that these officials protect the constitutional rights of prisoners, patients, and school children." *Id.* at 494. Ultimately, the authors declared that federalism and separation of powers should not restrain judicial intervention when courts attempt to protect constitutional rights in institutional litigation cases. *Id.* at 501.