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Eighth Amendment, Prison Conditions and Social Context, The

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Notes

The Eighth Amendment, Prison Conditions and Social Context

Wilson v. Seiter[1]

I. INTRODUCTION

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[2]

In this passage, Justice Oliver Wendell Holmes contends that one cannot fully understand a judicial decision divorced from its social and historical context. While this concept in the abstract may seem an obvious truism to some, its application to a specific case can frequently provide the legal community with a fresh and sometimes enlightening perspective on the evolution of a specific body of law. Failure to take account of this approach results in the inability of the student of the law to comprehend epochal swings in judicial interpretation. Moreover, only by exploring the underlying causes of such swings can the legal practitioner understand and take full advantage of the law as it stands today, as well as its likely development in the future.

Application of the Eighth Amendment to "cruel and unusual" prison conditions is one area where such an approach proves to be a useful tool. This is a body of law where epochal swings in the law reflect changing social and political values. Traditionally, federal courts gave great deference to state legislatures and prison officials in the management of prisons and largely refused to apply the Eighth Amendment to prison conditions.[3] The 1970s, however, saw a general movement away from this "hands-off" doctrine toward an approach which offered prisoners a modest opportunity to voice these Eighth Amendment claims.[4] This development in the law coincided with the

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1. 111 S. Ct. 2321 (1991).

2. JUSTICE OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1923).

3. *See generally* Bell v. Wolfish, 441 U.S. 520 (1979); *Leading Cases*, 105 HARV. L. REV. 177, 235-36 (1991); Debra T. Landis, Annotation, *Propriety and Construction of "Totality of Conditions" Analysis in Federal Court's Consideration of Eighth Amendment Challenge to Prison Conditions*, 85 A.L.R. FED. 751, 753 (1987).

4. *See generally Wolfish*, 441 U.S. 520; *Leading Cases*, *supra* note 3, at 235-36; Landis, *supra* note 3, at 753.

growing popularity of the belief that prisoners could be rehabilitated while in prison.[5]

The Eighth Amendment pendulum swung back in 1991 when the Supreme Court in *Wilson v. Seiter* established a constitutional standard for such claims which, in all likelihood, will be virtually insurmountable. The Court held that in order for a prisoner to allege an Eighth Amendment violation on the basis of "cruel and unusual" prison conditions, he must show that prison officials acted with "deliberate indifference" to his welfare.[6] This state of mind requirement will present significant proof problems for prisoners; its development reflects recent changes in public attitudes towards crime and allocation of scarce public resources.

This Note will first explore the Supreme Court's four major pre-*Wilson* rulings on the proper scope of the Eighth Amendment regarding claims of inhuman prison conditions. This review will show that these opinions, while containing a great deal of apparently applicable language,[7] fail to specifically state whether a state of mind element is required for such claims.[8] Second, this Note will describe the factual background of *Wilson* and the Court's holding and concurring opinion. Third, it will criticize both frameworks advanced, and suggest a particular application of the majority's holding which would ensure continued Eighth Amendment protection of prison conditions. This Note will conclude by depicting the Court's holding as a manifestation of evolving social and political factors.

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5. *See, e.g.*, MARTIN R. HASKILL & LEWIS YABLONSKY, CRIME AND DELINQUENCY 387 (1971) ("A large segment of the public and many authorities view the function of the custodial institutions as largely punitive, but the more enlightened and hopeful look to these institutions to rehabilitate the offender."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Algis Mickunas, *Philosophical Issues Related to Prison Reform*, *in* ARE PRISONS ANY BETTER? 77-93 (John W. Murphy & Jack E. Dison eds., 1990).

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

7. *See infra* notes 15-93 and accompanying text.

8. Another significant issue which remained unresolved after these four cases was the appropriate focus of the Court's analysis in such claims—whether a court could find the "totality of the conditions" violated the Eighth Amendment, or if it was required to find one specific deprivation which may or may not have been the product of one or more conditions. *See generally* Landis, *supra* note 3. The annotation states that only the Ninth Circuit followed the latter approach while the other circuits used *Rhodes v. Chapman* in applying the former. *Id.* at 754. Concerning *Rhodes*, *see infra* notes 48-73 and accompanying text. In *Wilson*, the Supreme Court applied the latter approach, requiring a court to find a specific deprivation. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 363 (1981); Hutto v. Finney, 437 U.S. 678, 687 (1978).

In Robert M. Lapinsky, *Prison Conditions: The Eighth Amendment Standard and the Remedial Authority of Judges*, 57 GEO. WASH. L. REV. 1387 (1989), the author boldly states, "In *Rhodes*, the Supreme Court endorsed the use of a 'totality of the circumstances' test as a means for plaintiff prisoners to support their constitutional challenges." *Id.* at 1392.

II. LEGAL BACKGROUND

The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[9] The Supreme Court has ruled that it is applicable to the states through the Fourteenth Amendment.[10] Before the 1970s, courts only applied the Eighth Amendment to tortuous punishments meted out by statutes or sentencing judges, and not generally to any deprivations that a prisoner may suffer during incarceration.[11] Courts gave extreme deference to state legislatures and prison officials regarding prison administration, believing that federalism and the narrowness of the Eighth Amendment required such an approach.[12] However, starting with *Estelle v. Gamble*,[13] the Supreme Court adopted an approach which probed the constitutionality of prison conditions.[14]

A. Estelle v. Gamble:[15] *Medical Care*

In *Estelle*, the Supreme Court ruled that the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .'"[16] and therefore "proscribes more than physically barbarous punishments."[17] The Court wrote, "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'[18] or which 'involve the unnecessary and wanton

9. U.S. CONST. amend. VIII.

10. Robinson v. California, 370 U.S. 660 (1962).

11. *See generally* Weems v. United States, 217 U.S. 349 (1910); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

12. *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; Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 654-55 (1971).

13. 429 U.S. 97 (1976); *see infra* notes 15-33 and accompanying text.

14. Courts also made use of a variety of other constitutional provisions to reform prison conditions: Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) (procedural due process); United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment right to assistance of counsel); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (First Amendment and Equal Protection Clause of Fourteenth Amendment); Bounds v. Smith, 430 U.S. 817 (1977) (right of access to the courts); Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) (personal privacy); *see generally* Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253 (1991). For an excellent explanation for this development, see Jeff Bleich, *The Politics of Prison Overcrowding*, 77 CAL. L. REV. 1125, 1146-49 (1989).

15. 429 U.S. 97 (1976). The majority opinion was written by Justice Marshall and joined by Chief Justice Burger, Justices Brennan, Stewart, White, Powell, and Rehnquist. Justice Blackmun concurred in the judgment, and Justice Stevens filed a dissenting opinion.

16. *Id.* at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

17. *Id.*

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

infliction of pain,'" violate the Eighth Amendment.[19] *Estelle* instructed courts to scrutinize the conditions in which prisoners were incarcerated to determine whether they complied with society's conception of humane treatment.[20]

In *Estelle*, Gamble, a prison inmate, hurt his back in the course of a prison assignment and contended that the medical treatment he received for the injury was inadequate and thus constituted a violation of his Eighth Amendment rights.[21] The treatment lasted for three months, including a variety of muscle relaxants and pain relievers, examinations by prison doctors, and work releases.[22] However, he claimed that due to his back injury and high blood pressure, he was unable to return to work.[23] In response, he was placed in solitary confinement, where he asked to see a doctor concerning chest pains and "blackouts."[24] After being hospitalized, examined, and treated with additional drugs, he was moved to administrative segregation where he complained of chest, arm, and back pains, but was twice denied access to a doctor.[25] Gamble argued that prison officials, doctors, and guards had been unresponsive to his medical needs.[26]

The Court ruled that the state has an affirmative obligation to provide prison inmates with adequate medical care, because a failure to do so would obviously result in those needs being unfulfilled.[27] Such a failure could result in "pain and suffering which no one suggests would serve any penological purpose," and could actually result in "physical 'torture or a lingering death.'"[28] However, for such failure to rise to the level of "cruel and unusual punishment," the prisoner must show "deliberate indifference to serious medical needs" on the part of prison employees.[29] The Court included a mens rea element, because in the context of supplying medical

19. *Id.* at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

20. *Estelle* was the first case in which the Supreme Court extended the protection of the Eighth Amendment to a prisoner's conditions of confinement. However, a number of lower courts had already done so. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (pre-trial detainee hit by prison guards); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (corporal punishment); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (solitary confinement); *see generally* William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3D 111 (1973).

21. *Estelle*, 429 U.S. at 97.

22. *Id.* at 99-101.

23. *Id.*

24. *Id.* at 101.

25. *Id.*

26. *Id.* at 101, 106-07. The district court dismissed the complaint for failure to state a claim upon which relief could be granted; the Fifth Circuit ruled that the insufficiency of the medical treatment warranted reinstatement of the complaint. *Id.* at 107-08.

27. *Id.* at 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.") (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

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

29. *Id.* at 104.

attention to prisoners, "an innocent misadventure"[30] would not be "repugnant to the conscience of mankind."[31]

Applying this standard to the facts of *Estelle*, the Court found that Gamble had failed to allege facts sufficient to constitute an Eighth Amendment claim.[32] The Court noted that Gamble had been seen by medical personnel on seventeen occasions, and though an X-ray possibly should have been taken, the failure to do so fell within the realm of the Texas Tort Claims Act, and not the Eighth Amendment.[33]

B. Hutto v. Finney:[34] *Prison Conditions*

In *Hutto*, prisoners in an Arkansas prison claimed that the conditions of their confinement violated the Eighth Amendment.[35] These conditions included: severe overcrowding, lack of beds, a diet of less than 1,000 calories a day, extremely vandalized cells, an inadequate number of prison guards, and a systematic use of "punitive isolation" which lasted for indeterminate periods of time.[36] Punitive isolation involved the crowding of as many as ten or eleven prisoners into a windowless 8' x 10' cell that contained only a source of water and a toilet that could not be flushed from inside the cell.[37] In addition, infectious diseases were spread when mattresses were removed each morning and randomly returned in the evening.[38]

In issuing a number of remedial orders, the district court described the prison conditions as "a dark and evil world completely alien to the free world,"[39] and thus violative of the Eighth Amendment.[40] The prison officials did not contest the Court's finding that conditions in the state prison system, including its punitive isolation cells, violated the Eighth Amendment.[41] However, prison officials did dispute the lower court's order limiting punitive isolation to thirty days.[42] In an opinion supported by eight

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30. *Id.* at 105 (quoting Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947)).

31. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)). In dissent, Justice Stevens argued that the subjective motivation of prison officials should only be relevant to the appropriate remedy. *Id.* at 116 (Stevens, J., dissenting). Justice Stevens concluded, "[w]hether the conditions . . . were the product of design, negligence, or mere poverty . . ." the only issue is whether they were "cruel and inhuman." *Id.*

32. *Id.* at 107.

33. *Id.* (citing TEX. REV. CIV. STAT. art. 6252-19 § 3 (Supp. 1976)).

34. 437 U.S. 678 (1978).

35. *Id.* at 680.

36. *Id.* at 682, 684.

37. *Id.* at 682.

38. *Id.* at 682-83.

39. *Id.* at 680-81 (quoting Holt v. Sonver, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (Holt II)).

40. *Id.* at 680.

41. *Id.* at 685.

42. *Id.* at 680. Prison officials also contested the district court's award of attorney fees to be paid out of the Arkansas Department of Correction funds. *Id.*

justices[43] and authored by Justice Stevens,[44] the Supreme Court upheld the lower court's limitation on punitive isolation, ruling that prison conditions are "a form of punishment subject to scrutiny under Eighth Amendment standards."[45] The Court wrote that the Eighth Amendment "prohibits penalties that are grossly disproportionate to the offense,"[46] in addition to those that "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"[47]

C. Rhodes v. Chapman:[48] *Prison Conditions*

In *Rhodes*, two inmates who shared a cell in an Ohio maximum security prison brought a class action suit alleging that the conditions of their confinement were "cruel and unusual."[49] The prisoners asserted that "double celling" constituted a violation of the Eighth Amendment and sought an injunction barring prison officials from housing more than one inmate per cell, except as a temporary procedure.[50] The district court agreed with the prisoners[51] and the Sixth Circuit affirmed.[52] However, in a decision written

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43. Only Justice Rehnquist dissented from the Court's holding, arguing that the district court had abused "the remedial discretion of the federal courts" that should be practiced in this area. *Id.* at 710 (Rehnquist, J., dissenting). His dissent was joined by Justice White, but only concerning the district court's award of attorney fees. *Id.* In a separate opinion, Justice Powell, joined by Chief Justice Burger, also dissented from the Court's ruling, but only so far as it related to the award of attorney fees. *Id.* at 704 (Powell, J., concurring in part and dissenting in part).

44. It is interesting to note that Justice Stevens dissented from the Court's holding in *Estelle v. Gamble* primarily because of the majority's inclusion of a state of mind requirement for Eighth Amendment claims concerning prison conditions. *Estelle*, 429 U.S. at 109 (Stevens, J., dissenting) (The Court incorrectly applies a standard that "relate[s] to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution.").

45. *Hutto*, 437 U.S. at 685. In making this determination, the Court stated the length of isolation should not be "considered in a vacuum," but rather in the context of the general prison environment (diet, overcrowding, violence, vandalized cells, and "lack of professionalism and good judgment on the part" of prison personnel). *Id.* at 685-87. The conditions in punitive isolation may be "tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87. For a general discussion of the "totality of conditions" approach adopted here, see *infra* notes 135-38 and accompanying text.

46. *Id.* at 685 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

47. *Id.* (quoting *Estelle*, 429 U.S. at 102).

48. 452 U.S. 337 (1981).

49. *Id.* at 339-40.

50. *Id.* at 340.

51. 434 F. Supp. 1007 (S.D. Ohio 1977). The court made this determination on the basis of five factors: (1) the inmates were serving long prison terms which would exacerbate the problems of overcrowding and close confinement; (2) the prison housed 38% more inmates than its design capacity; (3) several studies recommended that each inmate should have at least 50-55 square feet of living space, but double celling in this prison resulted in the sharing of 63 square feet; (4) most prisoners spent the majority of their time in their cells; and (5) the prison made

by Justice Powell and joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist, the Supreme Court reversed the lower courts' determination because "double celling under these conditions [n]either inflicts unnecessary or wanton pain [n]or is grossly disproportionate to the severity of crimes warranting imprisonment."[53] While the prisons may be uncomfortable,[54] the plaintiffs had failed to prove "deprivations of essential food, medical care or sanitation."[55] The Court noted that each cell was "exceptionally modern and functional . . . heated and ventilated . . . [has] hot and cold running water and a sanitary toilet . . . [and] a radio."[56] In addition, because inmates were only required to be in their cells from 9:00 p.m. to 6:30 a.m., the problems associated with a lack of living space were minimal.[57]

The Court held that the constitutionality of prison conditions could not rest on a fixed test, but must be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society."[58] Conditions are to be analyzed "alone or in combination," to determine whether they "deprive inmates of the minimal civilized measure of human life's necessities."[59] At the same time, the Court ruled that such judgments should not be based on the subjective views of judges, but instead on objective factors to the utmost degree.[60] The Court cited its opinion in *Estelle v. Gamble* and cases in which it determined whether application of capital punishment in specific instances violated contemporary values as examples of the use of "objective indicia" to determine whether the Eighth Amendment had been violated.[61]

The Supreme Court wrote that it was considering, "for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a State may confine those convicted of crimes."[62] While *Hutto* had clearly established that prison conditions were within the scope of the Eighth

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double celling a systematic practice. *Id.* at 1020-21.

52. The Sixth Circuit stated its holding in a two-paragraph order of affirmance which it did not publish. *See* Chapman v. Rhodes, 624 F.2d 1099 (6th Cir. 1980), *rev'd,* 452 U.S. 337 (1981). While agreeing that the conditions in question constituted a violation of the Eighth Amendment, the Court refused to accept the prisoners' contention that the practice of double celling was a per se violation of the Eighth Amendment. *Rhodes,* 452 U.S. at 344. The Court found a violation of the Eighth Amendment within the context of other specific circumstances at that prison. *Id.*

53. *Rhodes,* 452 U.S. at 344, 348.

54. The Court wrote, "the Constitution does not mandate comfortable prisons, and prisons of [this] type, which house persons convicted of serious crimes, cannot be free of discomfort." *Id.* at 349.

55. *Id.* at 348. The Court scolded the district court for correlating expert opinions with "contemporary standards of decency." *Id.* at 348 n.13.

56. *Id.*

57. *Id.* at 349 n.15.

58. *Id.* at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

59. *Id.* at 347.

60. *Id.* at 346.

61. *Id.* at 346-47.

62. *Id.* at 344-45.

Amendment, the Court stated that it had not considered "a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment."[63]

Concurring in the judgment, Justice Brennan, joined by Justices Blackmun and Stevens, wrote separately to point out that the majority's holding should not be construed as a "retreat from careful judicial scrutiny of prison conditions."[64] Justice Brennan stated that while the Supreme Court had not previously considered what types of conditions of confinement violate the Eighth Amendment,[65] the issue had been confronted repeatedly by lower courts, which resulted in prisons in twenty-four states being declared unconstitutional.[66] Nonetheless, Justice Brennan stated, courts have neither usurped state legislatures' and prison administrations' functions nor mandated "comfortable prisons."[67]

Justice Brennan's concurrence blamed the poor condition of many prisons on "[p]ublic apathy and the political powerlessness of inmates," which resulted in prison officials lacking sufficient resources to ensure humane prisons.[68] While it was noted that the cost of bringing American prisons into compliance with the Eighth Amendment may be substantial, "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ."[69]

While the majority failed to detail the process by which courts should examine prison conditions, Justice Brennan outlined a simple two-step approach. First, courts should explore the "totality of conditions," understanding that all of the conditions together have a "cumulative impact on the inmates."[70] Courts should seek such information from all possible sources,

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63. *Id.* at 345. In a footnote, the Court stated that it had not ruled on this issue in *Hutto* because in that case prison officials had not contested the district court's determination that the conditions violated the Eighth Amendment. *Id.* at 345 n.11.

64. *Id.* at 353 (Brennan, J., concurring). Justice Blackmun also wrote a concurring opinion which largely reiterated the themes discussed by Justice Brennan. *Id.* at 368-69 (Blackmun, J., concurring).

Justice Marshall was the sole dissenter. *Id.* at 369 (Marshall, J., dissenting). He argued that because double celling was a systematic practice, not a short-term solution to a short-term problem, and produced "excess limitation of general movement as well as physical and mental injury . . . ," it violated the Eighth Amendment. *Id.* at 374 (quoting the district court's findings, *Rhodes*, 434 F. Supp at 1020).

65. In his concurrence, Justice Blackmun pointed out that the Court's decision in *Hutto*, 437 U.S. at 678, provided at least some guidance for this decision. *Rhodes*, 452 U.S. at 368 (Blackmun, J., concurring).

66. *Rhodes*, 452 U.S. at 353.

67. *Id.* at 354.

68. *Id.* at 358. Justice Brennan contended that these circumstances demanded that courts continue to demand strict compliance with the Eighth Amendment because only the judiciary is immune from political pressures. *Id.* at 345 n.11.

69. *Id.* (quoting Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968)).

70. *Id.* at 362-63. Justice Brennan argued that the majority had also accepted this test when it wrote: "[prison conditions], alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities." *Id.* at 363 n.10.

including experts in public health, psychology, and architecture.[71] Second, courts should apply "realistic yet humane standards to the conditions as observed."[72] In short, Justice Brennan contended that the proper analysis of prison conditions focuses specifically on "the[ir] effect upon the imprisoned."[73]

D. Whitley v. Albers:[74] *Official Acts to Quell Disturbances*

In *Whitley*, the Court was asked to determine the appropriate Eighth Amendment standard for a claim by an inmate who was shot by prison personnel during a riot at the Oregon State Penitentiary.[75] The disturbance was triggered by an attempt of two guards, Officers Kemper and Fitts, to place intoxicated prisoners in the prison isolation and segregation facility.[76] Onlookers believed that excessive force was being used and refused to obey orders to return to their cells.[77] An inmate, Richard Klenk, assaulted Officer Kemper, but Kemper was able to escape.[78] However, Officer Fitts was taken hostage.[79] Klenk, armed with a homemade knife, informed prison officials that one inmate had already been killed and that additional deaths would follow.[80]

Gerald Albers, the prisoner who filed the complaint, asked Captain Whitley to give him a key to the cells which housed the elderly prisoners so that he could move them to safety in the event of a tear gas assault by prison officials.[81] When Whitley appeared at the barricade erected by the prisoners, Albers, expecting to be given the key, was instead met by four officers armed

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71. *Id.* Justice Brennan disapproved of the majority's treatment of the district court's use of expert testimony. *Id.* at 363 n.11.

72. *Id.* at 363. Justice Brennan stated:

> The court must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates).

Id. at 364.

73. *Id.* (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977)). Whether this approach accurately reflected the Supreme Court's interpretation of the proper standard for such claims is certainly debatable. *See supra* notes 15-72 and accompanying text.

74. 475 U.S. 312 (1986).

75. *Id.* at 314-18.

76. *Id.* at 314.

77. *Id.*

78. *Id.*

79. *Id.* at 314-15.

80. *Id.* at 315.

81. *Id.* Whitley denied having spoken to Albers. *Id.*

with shotguns and a number of unarmed officers behind them.[82] Shots were fired, one of which hit Albers in the knee.[83]

The district court directed a verdict for the prison officials,[84] but the Ninth Circuit reversed.[85] Ruling that the Eighth Amendment had not been violated, a narrow five member majority of the Supreme Court framed the issue as follows:

> Where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[86]

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82. *Id.* at 316.

83. *Id.*

84. 546 F. Supp 726, 735 (D. Or. 1982); *see Whitley*, 475 U.S. at 312. The court ruled that the prison officials' use of force was justified and reasonable in light of the circumstances. *Whitley*, 546 F. Supp. at 735.

85. 743 F.2d 1372, 1376 (9th Cir. 1984). The court of appeals reversed, focusing on evidence that the disturbance was subsiding and on expert testimony that the use of deadly force was unnecessary. The court ruled that

> if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary . . . [or] if the emergency plan was adopted or carried out with "deliberate indifference" to the right of Albers to be free of cruel and unusual punishment, an Eighth Amendment violation had taken place.

Id. at 1375. The court remanded the case to the district court to reevaluate the claim in light of this standard. *Id.* at 1376.

86. *Whitley*, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

The majority's opinion contained a great deal of dicta concerning the proper relationship between the Eighth Amendment and prison conditions. The most significant and often quoted passage is:

> An express intent to inflict unnecessary pain is not required and harsh "conditions of confinement" may constitute cruel and unusual punishment unless such conditions "are part of the penalty that criminal offenders pay for their offenses against society."
>
> Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the '"unnecessary and wanton infliction of pain"'. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Id. at 319 (citations omitted).

The Court viewed this standard as more difficult for prisoners to meet than the "deliberate indifference" standard outlined in *Estelle v. Gamble*.[87] A lower standard was appropriate in *Gamble*, because an inmate's right to receive adequate medical care did not compete with other government responsibilities.[88] In contrast, the Court justified the heightened *Whitley* standard by the necessity of considering competing government interests in the safety and welfare of both prison officials and the general inmate population.[89]

The dissent began by stating that the majority had properly summarized the relevant holdings of previous cases including the tenet that an Eighth Amendment violation did not require an "express intent to inflict unnecessary pain."[90] However, the dissent asserted that the majority had contradicted this tenet and established an intent requirement by its holding.[91] The dissent also contended that deciding whether this heightened standard applied necessitated a very fact-intensive determination[92] and the issue should have been presented to a jury.[93]

E. Synthesis of Supreme Court Cases

Thus, the appropriate Eighth Amendment standard for two categories of challenges to prison conditions are well settled. *Estelle* established that the denial of medical care only rises to the level of "cruel and unusual punishment" if the prison officials acted with "deliberate indifference to the 'serious' medical needs of prisoners."[94] In contrast, when the alleged violation involves use of excessive force to quell a prison disturbance, prisoners must show that prison officials acted "maliciously and sadistically for the purpose of causing harm."[95] In both situations, the court must inquire into the state of mind of prison officials to determine whether an Eighth Amendment violation occurred. Unfortunately, however, this is where the water becomes muddied. It is unclear whether a state of mind element is required in cases

87. *Id.* at 320.

88. *Id.*

89. *Id.*

90. *Id.* at 329 (Marshall, J., dissenting).

91. *Id.* The dissent viewed the majority as holding that a violation of the Eighth Amendment would only take place if prison officials, attempting to quell a disturbance, used force "maliciously and sadistically for the very purpose of causing harm." *Id.*

92. *Id.* The dissent noted that the majority imposed its heightened standard only when "the injury occurred in the course of a 'disturbance' that 'poses significant risks.'" *Id.*

93. *Id.*

94. *See supra* note 29 and accompanying text.

95. *See supra* note 86 and accompanying text.

In *Hudson v. McMillian*, a case decided after *Wilson*, the Supreme Court ruled that in cases where prisoners allege excessive force by prison officials a violation of the Eighth Amendment is established solely by showing prison officials acted with the requisite state of mind; an examination of the extent of the injury, assuming it was not de minimis, is only relevant to the issue of damages. Hudson v. McMillian, 112 S. Ct. 995, 1000-01 (1992).

where the alleged deprivation is the result of the physical conditions of the prison.[96]

It is important to note, however, that in both *Hutto* and *Rhodes*, cases involving physical conditions of confinement, the Supreme Court failed to include a state of mind requirement in its analysis. The *Hutto* Court ruled that the defendant prison's practice of "punitive isolation" violated the Eighth Amendment.[97] However, it is unclear if the Court chose not to discuss the issue simply because the practice was by definition inflicted with punitive intent. In *Rhodes*, the Court held that the alleged cruel and unusual prison conditions did not constitute a constitutional violation.[98] However, this is also not conclusive, in that it is possible that the Court did not engage in a mens rea analysis because the plaintiffs were unable to assert a "serious" deprivation, the first requirement of such claims.[99]

Because the Supreme Court had failed to accurately instruct lower courts as to the proper standard for such claims, there was a notable lack of consistency in the lower courts concerning the existence and nature of a state of mind requirement. Lower courts applied the Eighth Amendment to prison conditions well before the four Supreme Court holdings.[100] These courts usually based their determinations on whether the condition was of "inherent cruelty," repulsive to contemporary standards of decency, or "excessive."[101] In general, conclusions were reached through an analysis of the objective conditions of confinement and their effect on inmates.[102] However, lower courts have attempted to interpret the four Supreme Court cases discussed above and adjust their standards accordingly. The result has been that courts quote the same passages from the same cases, but reach different conclusions as to the propriety of inquiring into the state of mind of prison officials.[103]

For example, in *Lopez v. Robinson*,[104] prisoners complained of double celling, inadequate heating, poor ventilation, and insufficient hot water for showers.[105] The Fourth Circuit ruled that such conditions did not violate the Eighth Amendment because they were not the product of prison officials' "deliberate indifference" to the prisoners' welfare.[106] In *French v. Owens*,[107] the alleged Eighth Amendment violations included overcrowding,

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96. *See supra* notes 15-93 and accompanying text.

97. *See supra* notes 34-47 and accompanying text.

98. *See supra* notes 48-73.

99. This argument assumes that the holding in *Estelle v. Gamble* is the applicable standard for cases concerning prison conditions. *See supra* notes 15-33 and accompanying text.

100. Danne, *supra* note 21, at 130-34.

101. *Id.* at 119.

102. *Id.*

103. *See infra* notes 104-09 and accompanying text.

104. 914 F.2d 486 (4th Cir. 1990).

105. *Id.* at 488.

106. *Id.* at 490; *see also* Cortes-Quines v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988); Ducksworth v. Franzen, 780 F.2d 645 (7th Cir. 1985); Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985); Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980).

107. 777 F.2d 1250 (7th Cir. 1985); *see also* Tillery v. Owens, 907 F.2d 418 (3d Cir.

use of mechanical restraints, poor medical care and food, inadequate recreation facilities, and noncompliance with fire and occupational standards.[108] The Seventh Circuit held that these conditions constituted cruel and unusual punishment because they resulted in "serious deprivations of basic human needs."[109] This inconsistent treatment of such claims was finally addressed by the Supreme Court in *Wilson v. Seiter*.

III. BACKGROUND: *WILSON V. SEITER*

Pearly L. Wilson is a convicted felon serving fifteen to fifty-five years for rape[110] at the Hocking Correctional Facility in Nelsonville, Ohio.[111] Wilson, along with fellow inmates, alleged that the conditions of their confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[112] They sued Richard P. Seiter, then Director of the Ohio Department of Rehabilitation and Correction, and Carl Humphreys, then warden of the prison, in federal district court pursuant to 42 U.S.C. § 1983.[113] Their complaint listed eight specific conditions which the inmates asserted constituted an infliction of cruel and unusual punishment: (1) overcrowding, (2) excessive noise, (3) insufficient locker storage space, (4) inadequate heating and cooling, (5) improper ventilation, (6) unclean and inadequate restrooms, (7) unsanitary dining facilities and food preparation, and (8) housing with mentally and physically ill inmates.[114] The inmates sought declaratory and injunctive relief in addition to $900,000 in compensatory and punitive damages.[115] The district court granted the prison officials' motion for summary judgment, finding that while the Eighth Amendment requires that inmates be furnished adequate food, clothing, shelter, sanitation, medical care, and personal safety, the petition and supporting affidavits failed to allege that the prison conditions

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1990); Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988); Touissaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984); Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982); Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).

108. *French*, 777 F.2d at 1251.

109. *Id.* at 1252 (quoting *Rhodes*, 452 U.S. at 347). The only instance where the court included a mens rea element in this analysis concerned denial of adequate medical care. *Id.* at 1254.

110. Linda Campbell, *Crowded, Unsanitary Prisons Might Not be Cruel and Unusual*, CHI. TRIB., June 18, 1991, at 5.

111. *Wilson*, 111 S. Ct. at 2322.

112. *Id.* at 2322-23. Under § 1983, a prisoner may seek redress when a person acting under color of state law deprives the prisoner of rights protected by the Constitution or federal law. *See* Zick & Trask, *supra* note 14, at 1281-94. Federal courts may award the full range of remedies available to civil litigants. *Id.* at 1293.

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

114. *Id.*

115. *Id.*

were a result of "obduracy and wantonness"[116] on the part of prison officials.[117]

The Sixth Circuit Court of Appeals affirmed the trial court's determination.[118] While the court stated that some of the conditions challenged by the prisoners "suggest[ed] the type of 'seriously inadequate and indecent surroundings' necessary to establish an Eighth Amendment violation,"[119] the prisoners failed to meet the state of mind standard set out in *Whitley v. Albers*.[120] The court admitted that "state of mind is typically not a proper issue for resolution on summary judgment," but ruled that the prisoners had failed to contradict prison management's assertions of "specific affirmative measures" to provide inmates with "minimally decent confinement conditions."[121] The Sixth Circuit ruled that the *Whitley* standard is met only by a showing of "behavior marked by persistent and malicious cruelty."[122] The inmates sought further review, filing a writ of certiorari with the Supreme Court, which was granted.[123]

IV. INSTANT DECISION

Justice Scalia, writing for the majority,[124] held that for inmates to present an Eighth Amendment claim on the basis of prison conditions, they are required to show that the prison officials acted with "deliberate indifference."[125] A showing of this state of mind element involves an analysis of the "constraints facing the [prison] official."[126] The Court reasoned that a state of mind element was implicit in the Eighth Amendment[127] by defining

116. Wilson v. Seiter, 893 F.2d 861, 863 (6th Cir. 1990) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

117. *Id.*

118. *Id.* at 867.

119. *Id.* at 865.

120. *Id.* at 866.

121. *Id.*

122. *Id.* at 867. The Sixth Circuit is the only circuit to apply this standard to a case involving physical plant conditions. *See* Linda Greenhouse, *Justices Restrict Suits Challenging Prison Conditions*, N.Y. TIMES, June 18, 1991, at 1.

123. Wilson v. Seiter, 111 S. Ct. 41 (1990).

124. Justice Scalia was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Souter. *Wilson*, 111 S. Ct. at 2322.

125. *Id.* at 2326. Because the Sixth Circuit had applied a standard of culpability that was too strict, the Court vacated the district court's grant of the prison officials' motion for a summary judgment and remanded the case to be heard pursuant to the "deliberate indifference" standard. *See supra* notes 126-34 and accompanying text.

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

127. *See id.* In this area of the law, it is not uncommon for courts to treat the "state of mind" requirement as synonymous with the "intent" requirement. This is confusing because intent is only one type of mental culpability. Because the standard at issue in *Wilson* is "deliberate indifference," this Note will use the term "state of mind" when discussing judicial inquiry into the mind of the actor.

"punishment" as a "deliberate act intended to chastise or deter."[128] However, the Court refused to affirm the Sixth Circuit's application of the heightened *Whitley* standard,[129] holding that it was appropriate only in emergency situations when prison officials are forced to act quickly in response to prison disturbances.[130] Contending that deprivation of medical care constituted a condition of confinement, the Court ruled that the proper approach was outlined in *Estelle v. Gamble*.[131]

While implicitly admitting that previous opinions articulated a state of mind element in cases involving "specific acts or omissions directed at individual prisoners," the Court argued that such acts or omissions in fact constitute conditions of the plaintiff's confinement and that a distinction between the two lacked support.[132] In addition, the Court argued that any attempt to distinguish between "short-term" and "long-term" conditions, only requiring a state of mind inquiry in the latter, has neither a "logical [n]or practical basis."[133] Moreover, the Court ruled that such an approach conflicts with the definition of "punishment," which includes an element of intent.[134]

The Court also identified an "objective" component to such Eighth Amendment claims: the extent of the injury.[135] In order for a court to find that prison conditions are unconstitutional, not only must the prisoner meet the "subjective" requirement (state of mind), he must also show a "serious deprivation" denying "the minimal civilized measure of life's necessities."[136] A prisoner cannot meet this standard, the Court held, by pointing to "overall conditions;" rather, he must show the "deprivation of a single, identifiable human need such as food, warmth, or exercise . . . ."[137] Nonetheless, a single unconstitutional deprivation can be the product of many conditions of

128. *Id.* at 2325 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

129. This standard requires the plaintiff to show that the prison official acted "maliciously and sadistically for the very purpose of causing harm." *See supra* note 86 and accompanying text.

130. *Wilson*, 111 S. Ct. at 2326. The Court vacated the Sixth Circuit's judgment and remanded the case for reconsideration under the appropriate standard. *Id.* at 2328. The Sixth Circuit remanded the case to the district court. Wilson v. Seiter, 940 F.2d 664 (6th Cir. 1991).

131. *Wilson*, 111 S. Ct. at 2326-27. ("the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

132. *Id.* at 2324 n.1 ("Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is 'condition of confinement' and the other is not—much less that the one constitutes 'punishment' and the other does not.").

133. *Id.* at 2325.

134. *Id.* Concerning use of the term "intent," see *supra* note 127.

135. *Id.* at 2327.

136. *Id.* at 2324 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

137. *Id.* at 2327.

confinement, such as "low cell temperature at night combined with a failure to issue blankets."[138]

In a vehement concurrence joined by Justice Marshall, Justice Blackmun, and Justice Stevens, Justice White argued that prior Supreme Court cases on point only required an objective analysis of the conditions of confinement.[139] Thus, the only Eighth Amendment issue for a court examining prison conditions is whether they result in "unquestioned and serious deprivations of basic human needs," which are "without any peneological purpose."[140] A state of mind requirement, the concurrence argued, was appropriate only when the Eighth Amendment challenge concerns "specific acts or omissions directed at individual prisoners."[141] In such cases, conduct by prison officials constitutes "conduct that does not purport to be punishment at all;" thus, a state of mind requirement is proper.[142] In contrast, a prisoner's conditions of confinement "are themselves part of [his] punishment, even though not specifically 'meted out' by a statute or judge."[143]

The concurrence contended that the Court's deliberate indifference standard, which includes an analysis of the "constraints facing the [prison] official," will "prove impossible to apply."[144] "Inhumane" prison conditions are frequently the result of insufficient funding and the "cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."[145] Thus, the Court's standard would allow prison officials to escape liability simply by shifting responsibility to such third parties.[146] The concurrence noted that it is well established among the lower courts that a lack of adequate funding will not function as a "good faith" defense to Eighth Amendment challenges concerning conditions of confinement.[147]

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138. *Id.*

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

140. *Id.* at 2329 (quoting Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)).

141. *Id.* at 2330. In Estelle v. Gamble, 429 U.S. 97, 104 (1976), the Court required prisoners to show "deliberate indifference" on the part of prison officials concerning the deprivation of medical care to the plaintiffs. In Whitley v. Albers, 475 U.S. 312, 320-21 (1986), an inmate shot by prison officials during a prison riot was required to show that "the measure taken inflicted unnecessary and wanton pain and suffering . . . maliciously and sadistically for the very purpose of causing harm."

142. *Wilson*, 111 S. Ct. at 2330 (quoting Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam), *reinstated in part*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc)).

143. *Id.* at 2328.

144. *Id.* at 2330.

145. *Id.*

146. *Id.* at 2330-31.

147. *Id.* at 2331 n.3.

V. LEGAL ANALYSIS

As a result of the Court's holding in *Wilson*, all Eighth Amendment claims by inmates against prison employees must include a state of mind element. If the grievance involves excessive force by prison guards, the *Whitley* standard is appropriate;[148] if it is based on inadequate medical care or inhumane physical prison conditions, the *Estelle* standard is to be applied.[149] The concurring opinion argued that it was appropriate to adopt the policy followed by some lower courts[150] that distinguishes cases alleging deprivations arising from "physical plant conditions" from those which involve deprivations arising from specific acts directed at particular inmates.[151] Courts should apply a state of mind requirement only for those cases in the latter category. Both approaches are problematic; the majority opinion basically removes such claims from the realm of Eighth Amendment protection, while the concurrence sets up a framework which would be extremely difficult to apply. However, this Note contends that if federal courts apply the majority's standard with a willingness to infer "deliberate indifference" from the surrounding circumstances and refuse to recognize the legitimacy of the "good faith defense,"[152] both of these shortcomings are avoided.

A. Majority's Approach: 1970s "Hands Off Doctrine" Revisited

The majority's holding in *Wilson* does bring a modicum of consistency to this area of the law. In practice, however, this approach marks a return to the pre-1960s "hands off" policy that courts applied to defer to the internal actions and decisions of prison officials. In all likelihood, this will result in prisoners once again being subjected to prison conditions which offend "the evolving standards of decency that mark the progress of a maturing society."[153]

The majority's determination that an inmate must show "deliberate indifference" on the part of prison officials fails to take notice of "institutional

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148. *See supra* note 86 and accompanying text. *Hudson v. McMillian* refines this standard by eliminating any possible objective component of such claims. *Hudson*, 112 S. Ct. at 1000-01; *see supra* note 95.

149. *See supra* notes 15-33, 124-47 and accompanying text.

150. *See, e.g.*, Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987).

151. *Wilson*, 111 S. Ct at 2330 (White, J., concurring in judgment) ("[N]one of these cases involved a challenge to conditions of confinement. Instead, they involved challenges to specific acts or omissions directed at individual prisoners."). For the majority's response, see *id.* at 2324 n.1.

The term "prison conditions" as used by courts and commentators alike can be further broken down into five categories: (1) physical plant conditions; (2) established practices of prison officials; (3) assaults by fellow inmates; (4) denial of medical care to a specific inmate; and (5) the use of excessive force by prison officials. *Id.* at 2326-27.

152. *See supra* notes 144-47 and accompanying text.

153. *See supra* note 12 and accompanying text.

deliberate indifference" by prison officials, sentencing judges, and legislatures.[154] If a judge is aware of the prison conditions in his or her state, yet continues to sentence defendants to terms of confinement in those prisons, the judge is surely being "deliberately indifferent" to the rights of those defendants.[155] In addition, if a state legislature determines the level of funding for state prisons and is aware that such amounts will result in inhumane conditions, but passes statutes which require lengthy terms in such prisons, the legislature is arguably being "deliberately indifferent" to the rights of those sentenced.[156]

The *Wilson* Court ruled that whether prison conditions constitute an Eighth Amendment violation "depends upon the constraints facing the official."[157] This language is both alarming and contrary to well-established principles. It would allow prison officials to escape liability simply by asserting that even though they were aware of the alleged deprivations, they lacked the financial resources to remedy them. The majority confronted this issue by stating that policy considerations could not override the state of mind requirement; however, it avoided grappling with its consequences by stating that lack of resources was not at issue in this case because the prison officials had not advanced the argument.[158]

It has been well settled in lower courts that in ascertaining whether prison conditions constitute cruel and unusual punishment, "the economic burden involved in their prevention or alleviation" is not a "relevant consideration."[159] For example, in *Wellman v. Faulkner*,[160] the court stated, "[w]e understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment."[161] In *Ramos v. Lamm*,[162] the court chastised the defendants for attempting to make use of such a defense, ruling that "[t]he lack of funding is no excuse for depriving inmates of their constitutional rights."[163] However, in light of the Court's holding in *Wilson*, whether such lower court decisions still constitute good law is now in serious doubt.[164]

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154. *Leading Cases*, supra note 3, at 242.

155. *Id.*

156. *Id.* The same argument would apply to a finding of "deliberate indifference" on the part of the electorate which provided the legislature with its mandate.

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

158. *Id.*

159. Danne, *supra* note 21, at 145.

160. 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

161. *Id.* at 274. In this case, the court ruled that prison officials had shown "deliberate indifference" to the medical needs of inmates. *Id.*

162. 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

163. *Id.* at 573 n.19. The court held that a variety of prison conditions, including insufficient ventilation, inadequate health care facilities, poor sanitation, and lack of security, constituted an Eighth Amendment violation. *Id.* at 567-75.

164. *See, e.g.*, Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992). This case was decided after *Wilson*.

If such a defense is allowed to negate the requisite state of mind element and at the same time "institutional deliberate indifference" is overlooked, it is likely that prisoners will have no recourse to the courts concerning such claims. This is unfortunate because the judiciary, insulated from the political process and charged with enforcing the Constitution, is in the best position to remedy inhumane prison conditions.[165]

B. Concurrence's Approach: Difficulty of Application

While the majority's approach is troublesome because it fails to account for the institutional causes of inhumane prison conditions, the concurrence's reasoning is problematic in that it assumes it is possible to distinguish physical plant conditions from acts/omissions directed at specific inmates by prison personnel. In fact, both are manifestations of the same problem, namely lack of funding and prison overcrowding.[166] An American Civil Liberties Union official stated that regardless of the underlying complaints, the organization systematically frames cases against prison officials in terms of overcrowding, so as to capitalize on judicial receptiveness to these claims.[167] For example, in *Morgan v. District of Columbia*,[168] overcrowding, an inadequate number of guards, and the alleged indifference of one prison officer resulted in the attack on the plaintiff by another prisoner.[169] The prisoner broke one of the plaintiff's molars during the fight, but it was not extracted until the following day because a dentist was not on duty and prison officials were unwilling to take him to the hospital.[170] This case illustrates the problematic nature of the concurrence's attempt to implement different standards for claims based on conditions of confinement and those based on acts/omissions by prison officials directed at prisoners. Arguably, the plaintiff's injury in *Morgan* would not have taken place had the prison been built to cope with this number of prisoners, so the conditions of his confinement played a role in the injury. Furthermore, the injury would not have been as severe had the officer made a greater effort to break up the fight and give the plaintiff easier access to medical facilities, both of which are acts/omissions.[171]

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165. Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring) (stating that "[i]nsulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost.").

166. *See generally* Bleich, *supra* note 14. Furthermore, the cause of overcrowding is invariably the lack of financial resources. *Id.* at 1158.

167. *Id.* at 1154.

168. 824 F.2d 1049 (D.C. Cir. 1987).

169. *Id.* at 1054.

170. *Id.* at 1054-55. Prison officials did take the plaintiff to the hospital when he got their attention by flooding his cell and cutting his arm. *Id.*

171. *Id.* The court applied a "deliberate indifference" standard and ruled that it had been met. *Id.* at 1058.

Another example of the illusive character of the concurrence's distinction is Lafaut v. Smith, 834 F.2d 389 (4th Cir. 1987). In this case, a paraplegic inmate complained that prison

Another example is *Duckworth v. Franzen*.[172] In this case, prisoners claimed their Eighth Amendment rights had been violated when they sustained serious injuries in a bus fire.[173] For security reasons, the prisoners were chained to their seats, and all but one door was sealed.[174] One of the inmates was able to escape the smoke, but was thrown back into the bus by one of the guards.[175] As a result of this ordeal, one prisoner died, and others suffered "serious," and in one case, "permanent" lung injury.[176] A court could find that the injuries were the result of the prison officials chaining the prisoners to their seats, failing to rescue the prisoners quickly, and throwing the prisoner who attempted to escape back into the bus. In contrast, a court could rule that the prisoners' injuries were sustained because of the conditions of their confinement, namely the practice of chaining prisoners to their seats while riding in a bus. Under the concurrence's approach, a court finding the latter would not examine the state of mind of prison officials, while a finding of the former would require such an examination.

In short, implementation of the concurrence's approach would be quite difficult. Frequently the claims of inhumane treatment involve both the physical plant conditions and specific acts/omissions by prison officials. Moreover, the underlying cause of the injury is usually due to insufficient funds and overcrowding. While the concurrence's approach is admirable because it reflects a deep concern for Eighth Amendment protection, it would prove quite difficult to apply.[177]

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officials had failed to provide him with facilities to accommodate his handicap. *Id.* at 390. The court required a showing that prison officials were aware of his predicament, that it could have been easily ameliorated, and that they failed to do so. *Id.* at 391-95.

A third example is Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). In this case, prisoners complained of the following deprivations: cells which provided one half the square footage of space deemed necessary by some experts in the area, inadequate ventilation, rodent and insect infestation, unhealthy eating facilities, stained and soiled bedding, frequent attacks by fellow inmates, and systematic denial of adequate medical care. *Id.* at 569-70.

172. 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). The court applied the "deliberate indifference" standard and ruled that no constitutional violation had taken place. *Id.* at 653.

173. *Id.* at 648.

174. *Id.*

175. *Id.*

176. *Id.*

177. Some might argue that the majority's opinion suffers from a similar defect, namely that its different state of mind requirements for prison disturbances and prison conditions fails to appreciate the gray area between the two. However, this potential problem will only exist if courts interpret "prison disturbances" very broadly, a development that does not appear to have taken place to date.

C. *Inclusion of Objective Aspects in the Culpability Standard*

It is clear that a court must explore surrounding circumstances to determine whether the plaintiff has shown deliberate indifference on the part of prison officials. As Prosser and Keeton have noted, because indifference "is almost never admitted, and can be proved only by the conduct and circumstances, an objective standard must of necessity in practice be applied."[178] Prior to *Wilson*, lower courts frequently found deliberate indifference on the basis of objective culpability standards.[179] In fact, even though the majority opinion focuses on the "subjective" element, it appeared to confirm the legitimacy of this concept by stating that "[t]he long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent."[180] In other words, if a prisoner is able to show that the inhumane condition existed for a long time, then it is permissible for a trier of fact to infer the prison official knew of the condition. This knowledge coupled with a failure to rectify the inhumane condition could support a finding of deliberate indifference.

In short, it appears clear from traditional tort doctrine, lower court precedent, and the language in *Wilson* that courts will continue to employ some objective means to determine culpability in Eighth Amendment prison conditions cases. However, in the post-*Wilson* cases, there appear to be two schools of thought as to the nature of these objective means. The first simply states that deliberate indifference is shown by actual knowledge of the inhumane condition and failure to remedy it.[181] Actual knowledge can be inferred from the surrounding circumstances.[182] The second requires an additional element, namely that the condition be "easily preventable."[183]

Inclusion of this additional element, as contended by the concurrence, violates a great deal of lower court precedent and would prevent recourse

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178. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34 (5th ed. 1984), *cited in* Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 440 (1992).

179. *See, e.g.*, Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 560 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988) (knowledge of the practice can be inferred when there is a pervasive risk of harm); Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) ("deliberate indifference" is shown if the plaintiff can prove that the defendant had actual knowledge of the "hazardous risk" and "allowed [it] to continue over time without doing anything significant to alleviate the risk.") (For the facts of this case, see *supra* notes 164-67 and accompanying text); Brook v. Warren County, 713 F. Supp. 238, 243 (E.D. Tenn. 1989) (inferring deliberate indifference from the county sheriff's and commissioners' failure to act to cure known jail heat and ventilation problems).

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

181. Williams v. Griffin, 952 F.2d 820, 824-26 (4th Cir. 1991); Choate v. Lockhart, 779 F. Supp. 987, 993 (E.D. Ark. 1991).

182. *Choate*, 779 F. Supp. at 993.

183. Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); James v. Milwaukee County, 956 F.2d 696, 700 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 63 (1992); Diaz v. Broglin, 781 F. Supp. 566, 574 (N.D. Ind. 1991); Patrick v. Staples, 780 F. Supp. 1528, 1540 (N.D. Ind. 1991).

against institutional deliberate indifference.[184] When prison officials are able to escape liability by showing that the inhumane prison condition was not "easily preventable," a showing of insufficient economic resources would defeat the prisoner's case. Because the federal government and the states are facing severe budgetary problems and the prison population continues to grow,[185] judicial acceptance of this "good faith defense" is the functional equivalent of removing the federal courts' jurisdiction over such claims.

It is important to note that no court has expressly held that inadequate prison funding constitutes a valid defense. However, in *Alberti v. Sheriff of Harris County*,[186] the Fifth Circuit implied that it might recognize the legitimacy of such a defense. The court remanded this case in light of *Wilson*, but instructed the district court that state officials' actual knowledge of the "objectively cruel conditions" and coinciding failure to remedy them was "strong if not compelling evidence of deliberate indifference."[187] However, because of *Wilson*'s order to look to the "constraints"[188] facing prison officials in making the determination of deliberate indifference, the court felt obliged to support its conclusion by stating that the trial record failed to "offer substantial evidence that the state's actions were constrained by legislative refusal to fund the [proposed remedy]."[189]

Because the first approach does not require an analysis of the difficulty of curing the inhumane condition, the danger of the "good faith defense" is mitigated. Prison officials will be unable to escape liability simply by placing the blame on legislative and executive officials.[190] By focusing the inquiry solely on the nature of the prison condition, prison officials' knowledge of it, and their failure to remedy the condition, this standard ensures the continued vitality of Eighth Amendment protection of humane prison conditions.

It is not clear which approach will ultimately become "the law." However, the most logical interpretation of *Wilson*'s instruction on this issue, to make note of the "constraints" facing prison officials, is to recognize some form of the "cost defense." When prisoners allege that long-term physical plant conditions (overcrowding, heat, ventilation, sewage, etc.) violate the Eighth Amendment, it is difficult to imagine what types of "constraints" face prison officials other than the lack of financial resources. Thus, in claims concerning such conditions, lower courts will be faced with the choice of either ignoring this language by calling it mere dicta or allowing this defense to negate the deliberate indifference requirement.

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184. *See supra* notes 144-47 and accompanying text.

185. *See infra* notes 208-19, 243-56 and accompanying text.

186. 937 F.2d 984 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992).

187. *Id.* at 999.

188. *See supra* note 126 and accompanying text.

189. *Alberti*, 937 F.2d at 999. The court also admitted that prior to *Wilson*, "[i]t was well established that in this circuit that 'inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.'" (quoting Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980)).

190. Courts have traditionally been reluctant to explore the "subjective motivations" of executive and legislative officials. Kritchevsky, *supra* note 178, at 461.

VI. SOCIOLOGICAL ANALYSIS

As a result of the Court's holding in *Wilson* and lower courts' likely interpretation of it, prisoners will face an almost insurmountable obstacle in their attempts to force prison officials to provide humane living conditions. Whether this ruling was mandated by the purpose of the Eighth Amendment, prior decisions, and legal reasoning is debatable. Nonetheless, it is clear that the *Wilson* decision was shaped by economic, political, and ideological factors. These factors converged, compelling American society to do one of the following: attempt to combat the underlying causes of crime,[191] develop alternative systems for dealing with convicted criminals, or greatly limit the opportunity for Eighth Amendment challenges to prison conditions. American society, via the Court's holding in *Wilson*, chose the third option.[192]

A. Factor I: "Get Tough on Crime"

Incarceration as an approach to crime began as a uniquely American experiment.[193] In *The Discovery of the Asylum*[194] and *Conscience and Convenience*,[195] David Rothman chronicles this development, which for much of the last 150 years has been viewed as progressive by the international community, inviting a great deal of interest and commentary.[196] Traditionally, the philosophical underpinning of this approach was rehabilitation, a

191. Some argue that before prison reform is possible, it is necessary to break the cycle of poverty, crime, public fear of crime and criminals, increased incarceration, and limited economic opportunities for disadvantaged groups. *See* Murphy & Dison, *supra* note 5, at preface; *see generally* FOLKE DOVRING, INEQUALITY: THE POLITICAL ECONOMY OF INCOME DISTRIBUTION (1991) (author argues that in order to prevent a crisis in capitalism similar to the crisis in communism, American society will need to transform its economy in such a manner so as to ensure greater economic equality).

192. Evidence of this decision to greatly reduce the success of such litigation can also be seen in Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992). In this case the Supreme Court made it easier for state and local governments to challenge federal court consent decrees that governed the operation of government facilities such as prisons. *See generally*, Paul S. Penticuff, Note, *A New Standard for the Modification of Consent Decrees*, 57 MO. L. REV. 1391 (1992). Further evidence is the Justice Department's changing attitude toward the Eighth Amendment, which Attorney General William Barr believes has gone too far. *See* Ronald J. Ostrow, *U.S. Backs States in Lifting of Prison Caps*, L.A. TIMES, Jan. 15, 1992, at 13.

193. The United States has the highest incarceration rate among Western democracies as well as the highest crime rate. *See* BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, IMPRISONMENT IN FOUR COUNTRIES 1 (1987).

194. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

195. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).

196. *See, e.g.*, GUSTAVEDE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Herman R. Lantz et al. eds., 1968).

concept that flourished most clearly in the 1960s and early 1970s.[197] However, it was determined that the institutions designed to facilitate this process were failing miserably, as evidenced by the high rate of recidivism.[198] Thus, society turned increasingly to alternative grounds for incarceration, namely, deterrence, retribution, and the protection of society.[199]

In *The Politics of Prison Crowding*, Jeff Bleich contended that the 1980s witnessed a changing public attitude toward the proper response to crime.[200] The author pointed to a growing public belief that government should "get tough on crime," which resulted in public pressure on elected officials to develop new policies which reflected these beliefs.[201] These new "tough" policies included legislative enactments that (1) required mandatory incarceration for convicted criminals, (2) made incarceration periods longer and (3) systematically denied parole opportunities.[202]

A good example of this development is the federal mandatory sentencing guidelines,[203] which were designed to greatly reduce the amount of judicial discretion in sentencing, resulting in increased prison terms.[204] According to Melissa McGrath, the legislation was enacted as a result of "public clamor about increasing drug abuse and distribution, violent crime and repeat offenders . . . ."[205] For drug cases the Sentencing Commission created a sentence formula based on the weight of the drugs and not the criminality of the offender.[206] The professed goal of the system was to deter drug use and

197. *See, e.g.*, ROTHMAN, *supra* note 194; ROTHMAN, *supra* note 195; *supra* note 5 and accompanying text. Coinciding with society's interest in rehabilitation during this time period was the development of judicial willingness to police the constitutionality of prison conditions. *See supra* note 4 and accompanying text.

198. Of the 108,580 persons released from prisons in eleven states in 1983, over 60% were rearrested for a felony or serious misdemeanor with in three years, and almost 50% were reconvicted. BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, AT 1 (1989).

199. *See generally* Teresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?*, 40 EMORY L.J. 393 (1991).

200. Bleich, *supra* note 14, at 1146-47.

201. *Id.* at 1149.

202. *Id.* at 1147.

203. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 STAT. 1987 (1984) (empowering U.S. Sentencing Commission); 52 C.F.R. § 18,046 (1986); *see generally* Karle & Sager, *supra* note 199; Hon. Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991).

204. United States v. Stockton, 968 F.2d 715, 721 (8th Cir. 1992) (Bright, J., concurring); *see* Selya & Kipp, *supra* note 203; *see, e.g.*, Stanley Sporkin, *Address at the American University Law Review Annual Dinner*, 41 AM. U. L. REV 1 (1991).

205. Melissa McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321, 321 (1990).

206. *Stockton*, 968 F.2d at 721 (Bright, J., concurring).

"win the war on drugs;" however, the frequent result has been extremely long prison sentences and a massive increase in the prison population.[207]

B. Factor II: Incarceration Rates

As a result of these policies, during the 1980s the probability that a convicted offender would go to prison increased.[208] In 1980, there were roughly 23 prison commitments for every 1000 reports of "serious"[209] crimes.[210] By 1990, this ratio increased to 62.[211] There was a corresponding increase during this period in the ratio between adult prison commitments for selected crimes per 1000 arrests from 196 to 332.[212] A significant portion of this increase in incarceration is attributable to drug-related arrests. Since 1985 the number of adult arrests for drug violations has increased by 74 percent.[213]

At the end of 1990, the number of sentenced prisoners per 100,000 residents was 293, an all time record.[214] This represents a 111 percent increase from 1980, when the rate was 139.[215] As a result of this increase in sentencing, the number of inmates in state and federal correctional institutions reached 771,243 in 1990, representing an increase of 134 percent in the ten year period.[216] The 1990 growth rate of 8.2 percent translates into a nationwide need for approximately 1,100 additional bedspaces per week.[217] At the end of 1990, prisons were operating from 18 percent to 29 percent above their design capacities.[218] As of 1992, largely as a result of the minimum federal sentencing guidelines, federal prisons are operating at 165 percent of capacity.[219]

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207. *Id.* In this case, the two defendants were sentenced to nearly twenty years for their first offenses, involvement in a conspiracy to manufacture methamphetamine. *Id.* at 716, 721.

208. BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990, at 1 (1991).

209. These crimes include murder, non-negligent manslaughter, rape, robbery, aggravated assault, and burglary. *Id.* at 7.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 8.

214. *Id.* at 2.

215. *Id.* The per capita incarceration rates have grown most rapidly in the Northeast (167%) and the West (163%). *Id.* The Midwest (119%) and the South (68%) experienced less severe increases. *Id.*

216. *Id.* at 1.

217. *Id.*

218. *Id.* Because of this overcrowding, jurisdictions reported a total of 18,380 state prisoners held in local jails or other facilities. *Id.* at 5.

219. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1700 n.102 (1992) (citing Attorney General William P. Barr, remarks to the California District Attorneys Association (Jan. 14, 1992)), *cited in Stockton*, 968 F.2d at 721 n.2.

C. Factor III: Prison Conditions Litigation

As mentioned earlier, the 1970s witnessed an increased judicial willingness to hear claims of cruel and unusual prison conditions.[220] The result has been a dramatic rise in such litigation. For example, in the mid-1980s, prisoner appeals constituted close to half of the cases filed with the Supreme Court; by 1991, the proportion was past 60 percent. Between 1975 and 1980, prisoners filed 527 lawsuits in the federal district court for the Southern District of Ohio.[221] The Massachusetts Department of Corrections reports that as of 1990, 60 inmate lawsuits are filed each month, in addition to approximately 2,000 cases that are still pending.[222] As a result, the Department incurs an approximate annual cost of $1 million in attorney salaries.[223] As of 1982, there were 529 local jails involved in litigation regarding their conditions.[224]

In response to these suits, the courts have taken an active role in addressing cruel and unusual prison conditions and have ordered over 40 jurisdictions to reduce or restrict prison populations.[225] As of 1982, 285 local jails reported being under court orders related to crowded prison conditions.[226] As of 1991, prisons in 38 states were under federal court orders to remedy unconstitutional conditions.[227] An excellent illustration of court involvement in remedying such conditions continues to unfold in the Fifth Circuit's treatment of Eighth Amendment claims by prisoners in Texas jails. In 1985, after several years of litigation, the state entered into a "crowding stipulation," agreeing to limit its prison population to 95 percent of capacity.[228] In 1987, court-appointed monitors reported that the jails were "clean, well-run and reasonably safe and secure."[229] However, by the end of 1988 those same monitors concluded that the jails were dangerously overcrowded and cited a number of specific conditions in dire need of

220. *See supra* note 4 and accompanying text.

221. Bleich, *supra* note 14, at 1130 n.17 (citing McCoy, *The Impact of Section 1983 Litigation on Policymaking in Corrections: A Malpractice Lawsuit by Any Other Name Would Smell as Sweet, in* THE DILEMMAS OF PUNISHMENT: READINGS IN CONTEMPORARY CORRECTIONS 224, 229 (Kenneth C. Haas & Geoffrey P. Alpert eds., 1986)).

222. Sally Jacobs, *Dueling Lawsuits*, BOSTON GLOBE, May 23, 1990, at 1. This article lists a few of the most frivolous grievances such as scrambled eggs which were too hard and lightbulbs which were underbright. *Id.*

223. *Id.*

224. Bleich, *supra* note 14, at 1154 n.149 (citing KERLE & FORD, THE STATE OF OUR NATION'S JAILS 43, 45, 51 (1982)).

225. *Id.* at 1130.

226. KERLE & FORD, *supra* note 224, at 43, 45, 51.

227. Greenhouse, *supra* note 122, at 1.

228. *See* Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987).

229. *See* Alberti v. Sheriff of Harris County, 937 F.2d 984, 987 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992).

improvement.[230] In *Alberti v. Sheriff of Harris County*,[231] the Fifth Circuit noted these "dangerous" conditions, but remanded the case in light of the *Wilson* Court's requirement of a state of mind element in such claims.[232]

D. Factor IV: Government Spending on Prisons

There is a direct and logical correlation between successful litigation in this area and increased public spending on corrections.[233] During the 1970s and 1980s, the amount of public monies allocated to deal with crime grew dramatically. In 1988, federal, state, and local governments totaled $61 billion in justice-related expenditures, of which $19.1 billion was devoted to financing correctional institutions.[234] This represents an increase of 31 percent since 1985, compared with an increase in total government spending of 21 percent during this period.[235] The percent of total government spending for justice activities increased from 2.9 percent in 1985 to 3.2 percent in 1988.[236] Total government spending on correctional facilities increased at a greater rate (65 percent) than any other justice activities from 1979 to 1988 in constant dollars.[237] Criminal justice is chiefly a state and local responsibility[238] and the above-mentioned increases in total government spending in this area are most accurately comparable in relation to state budgeting. Corrections spending grew by 45 percent in real terms between 1979 and 1983, faster than any other category of state government spending, and almost three times faster than total state spending.[239] Between 1979 and 1988, state government expenditures to operate correctional facilities increased by 226 percent in actual dollars.[240] More significantly, expenditures for prison construction rose by 593 percent during this period.[241] The proportion of total direct expenditures by state governments for correctional capital outlays increased from 6.4 percent in 1973 to 15.1 percent in 1988, and between 1977 and 1988, their direct spending on prison construction increased from 7.7 percent to 12.9 percent.[242]

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230. *Id.* at 988.

231. 937 F.2d 984 (5th Cir. 1991).

232. *Id.* at 998-99.

233. *See* Bleich, *supra* note 14, at 1157-58.

234. BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT 1988, at 2 (1990).

235. *Id.* at 1.

236. *Id.* at 3.

237. *Id.* at 4.

238. *See id.* at 2, table 2 which shows $61 billion total government spending on justice related activities, $54 billion of which was spent by the state and local governments.

239. Bleich, *supra* note 14, at 1130, 1156.

240. JUSTICE EXPENDITURE AND EMPLOYMENT, *supra* note 234, at 5.

241. *Id.*

242. *Id.*

E. Factor V: Government Budget Deficits

While the demand for public resources to house prisoners has increased dramatically over the last twenty years, the available supply of such is shrinking. By the end of 1991, the federal government owed creditors close to $2.7 trillion[243] and the 1991 budget deficit was approximately $400 billion.[244] While having less money to spend, the public demands that the government address problems concerning health care,[245] the AIDS virus,[246] homelessness,[247] education,[248] banking,[249] the nation's infrastructure,[250] and the environment.[251] At the same time, the federal government is still reeling from the savings and loan crisis which some commentators believe will cost American taxpayers $500 billion.[252] Furthermore, if current policies are not changed, the Social Security program will be running at a deficit by 2015, when millions of baby boomers begin to retire in large numbers.[253]

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243. BUDGET OF THE U.S. GOV'T, FISCAL YEAR 1993, at Part One 287.

244. Paul Craig Roberts, *Bush and the Budget: Don't Make a Bad Mistake Worse*, BUS. WK., Feb 24, 1992, at 22.

245. *See, e.g.*, Tom Morganthau, *Cutting Through the Gobbledygook*, NEWSWEEK, Feb. 3, 1992, at 24.

246. *See, e.g.*, *Cost Soars for HIV Treatment*, CHI. TRIB., July 23, 1992, at 8C (lifetime cost of treating an AIDS patient in the United States is now $102,000, up from $85,333 in 1991).

247. According to the National Alliance to End Homelessness, on any given night there are about 735,000 homeless in the United States and during the course of the year, between 1.3 and 2 million people will be homeless for one or more nights. THE UNIVERSAL ALMANAC 246 (John W. Wright ed., 1990).

248. *See, e.g.*, CAROLINE PERCELL, SCHOOLS UNDER STRESS (1991); Vartan Gergorian, *Public Education is Still a Radical Idea*, NEWSDAY, Oct. 25, 1992, at 22 (there is a crisis of both quality and equality in public education); Bruce W. Nelan, *How the World Will Look in Fifty Years*, TIME, Oct. 15, 1992, at 36 (the U.S. must cope with the "education crisis" or it cannot expect to be a "major player" in global economic and political affairs).

249. Richard Ringer, *S & L Rerun? Banks Fear It's Their Turn*, CRAIN'S CHIC. BUS., Oct. 12, 1992, at 4 (as many as 80 banks will be closed down in the first quarter as the government institutes new capitalization requirements); Donna Smith, *Regulators See No Impending Banking Disaster*, REUTER BUS. REP., Oct. 23, 1992 (some experts argue the taxpayers will be forced to pay $75 billion to cover bank failures).

250. *See, e.g.*, John H. Cushman, Jr., *Building and Rebuilding*, N.Y. TIMES., Oct. 18, 1992, at 12A (Clinton and Perot both call for increasing public works spending by "tens of billions of dollars"); Barbara Rudolph, *A Quick Fix is not Enough*, TIME, Jan. 13, 1992, at 39.

251. *See, e.g.*, Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning*, 9 STAN. ENVTL. L.J. 46 (1990) (author projects that it will cost American society $570 billion to remedy lead-based paint problem which may cause severe neurological problems for children in 57 million homes).

252. *See, e.g.*, *Critics Say S&L Problems Are Understated*, ST. L. POST-DISPATCH, Mar. 29, 1992, at 3E.

253. Jo Mannies, *Borrowed Time: Deficit Generates Politics of Paralysis*, ST. L. POST-DISPATCH, Apr. 5, 1992, at B1.

Coinciding with these federal budgetary constraints is the aftermath of Ronald Reagan's "New Federalism."[254] This doctrine involved a transfer of federal responsibility over many social programs to the states, forcing them to determine whether to fund the programs or eliminate them.[255] The result has been that many states are finding it increasingly difficult to balance their budgets and are forced to raise taxes and reduce total spending.[256]

F. Convergence of Factors

American society before *Wilson* was faced with a serious problem. Popular opinion that criminals should be punished and not coddled led to a massive increase in the prison population; this led to overcrowding and a general lack of resources in the prisons. Because courts adopted more probing standards for policing prison conditions, society witnessed increased litigation of such claims and frequent court orders to improve conditions in their prison systems. However, in light of severe budgetary constraints, the government expenditures necessary to rectify these conditions were not available.

VII. CONCLUSION

In *Wilson*, the Supreme Court held that in order for a prisoner to state an Eighth Amendment claim on the basis of inhumane prison conditions, he or she must show that prison officials acted with "deliberate indifference." Lower courts will likely interpret this standard in such a manner as to virtually eliminate such claims. In order to understand why the Court would deliver such a ruling, it is necessary to look beyond the text of the Eighth Amendment, prior judicial interpretations, and the facts of the case at bar, to the social context in which the *Wilson* Court found itself.

As a result of the convergence of the factors outlined in Part VI of this Note, American society has been forced to choose among three options: attempt to combat the underlying causes of crime, develop an alternative to incarceration, or reduce the opportunity for prisoners to litigate these claims.

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254. *See generally* RICHARD NATHAN AND FRED DOLITTLE, REAGAN AND THE STATE (1987); THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRIORITIES (John Palmer & Isabel Sawhill eds., 1984); THE REAGAN EXPERIMENT: AN EXAMINATION OF ECONOMIC AND SOCIAL POLICIES UNDER THE REAGAN ADMINISTRATION (John Palmer & Isabel Smith eds., 1982), *cited in* Cristy A. Jensen et al., *Implementing Title III: Assessing Opportunities for State Activism*, PUBLIC BUDGETING & FINANCE, V. 10, no. 3, Fall 1990.

255. Jensen, *supra* note 254, at 54.

256. *See, e.g.*, Andrew J. Corwin & Jay Kingdom Fellow, *How Washington Boosts State and Local Deficits*, HERITAGE FOUNDATION REPORTS, July 31, 1992, at 1 (the combined deficits of 31 states totaled over $30 million, 40% of all counties with populations over 100,000 faced budget deficits in 1991); Thomas J. Lueck, *Deficits Bring More Splits, Less Progress*, N.Y. TIMES, October 19, 1992, at 1B (Connecticut, in light of soaring budget deficit, established its first personal income tax).

Society, through the pen of Justice Scalia, chose to solve this dilemma by employing the third option. Unfortunately, this short-term solution is likely to result in prisoners being housed under conditions incompatible with the norms and values of a civilized society.[257]

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257. The avenue which was taken is also unfortunate from an economic perspective. There are presently over one million prisoners in United States jails, *United States Leads in Imprisonment*, ST. L. POST-DISPATCH, Jan. 6, 1991, at 6E, and it costs $18,000 to incarcerate each federal prisoner for a year. United States v. Quarles, 955 F.2d 498, 505 (8th Cir. 1992) (Bright, J., concurring and dissenting), *cited in* United States v. Stockton, 968 F.2d 715, 721 n.3 (8th Cir. 1992). Thus, it appears that the necessary resources to make productive change in this area are being used in a nonproductive manner.