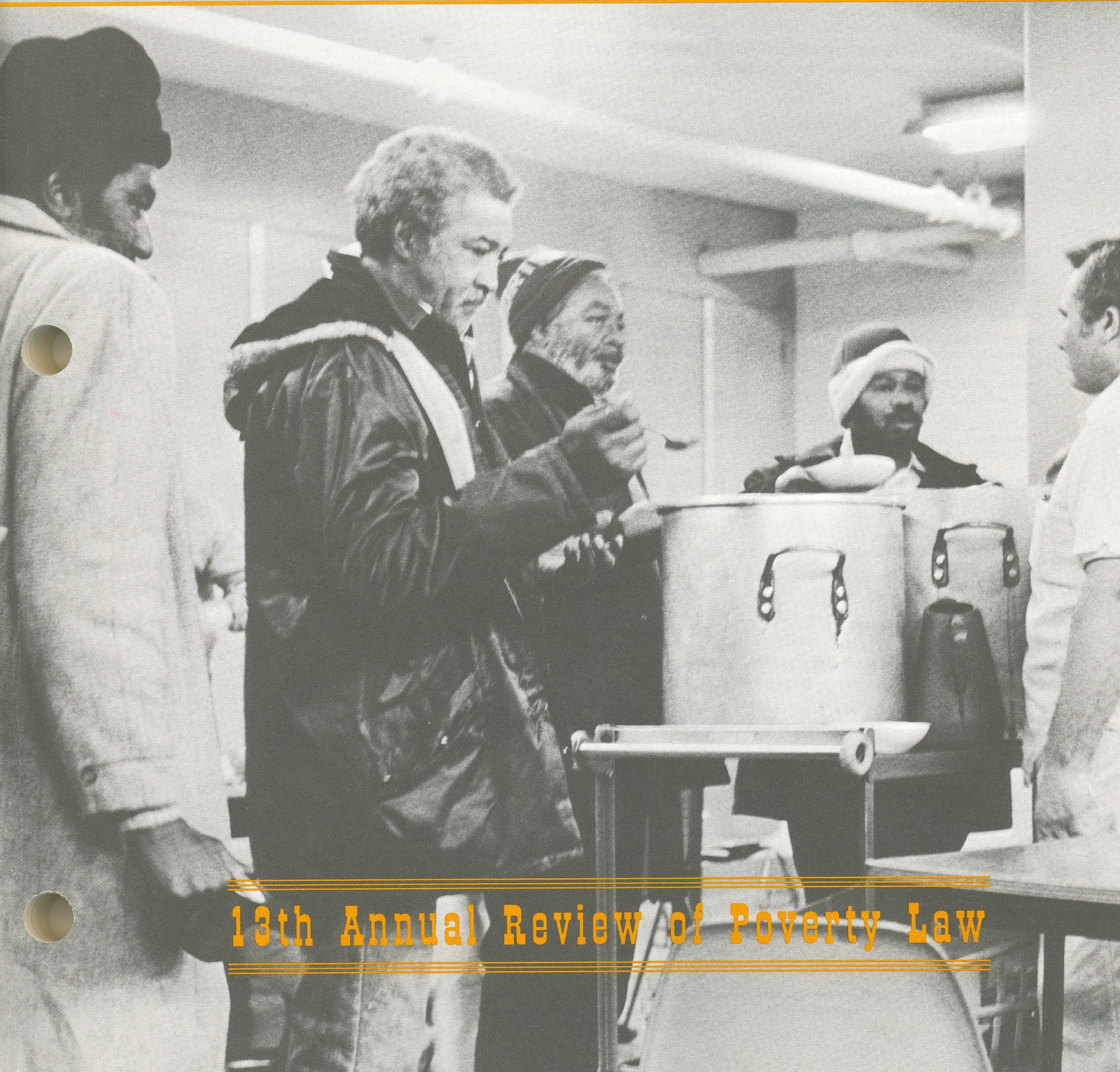


# Clearinghouse Review

NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC.

Volume 26 ■ Number 9

January 1993



13th Annual Review of Poverty Law



## **The View from Inside the Heads of Correctional Officials: The Legacy of Resweber**

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**Summary.** In 1991 the Supreme Court held in *Wilson v. Seiter* that correctional officials are liable for inhumane conditions of confinement if--but only if--the inhumane conditions are the direct result of the deliberate indifference of those officials. Deliberate indifference is a subjective mental state that includes both intent to harm and criminal recklessness. Unless responsible correctional officials acted with at least criminal recklessness in creating and maintaining inhumane conditions of confinement, prison conditions that are objectively inhumane do not violate the Eighth Amendment. Plaintiffs challenging the constitutionality of prison conditions must now establish both a subjective and an objective component.

### **I. Wilson's Forebears**

In June 1991 the Supreme Court in the five-to-four *Wilson v. Seiter* decision /1/ formally parsed the Eighth Amendment into an objective and a subjective component. The Court's sequential reasoning--heavily influenced by its grandsire, *Louisiana ex rel. Francis v. Resweber* /2/ through *Estelle v. Gamble* /3/--ran as follows. First, as to the objective component, the Court held that (1) the Eighth Amendment forbids correctional officials from inflicting cruel and unusual punishment upon convicted persons; /4/ (2) cruel and unusual punishment is manifested in correctional officials' unnecessary and wanton infliction of pain upon convicted persons; /5/ (4) pain implies harm; and (5) correctional officials must have engaged in some quantum of harmful conduct sufficient to merit constitutional concern (objective component). /6/

As to the subjective component, /7/ the Court held that wanton conduct is intentional conduct. /8/ Intentionality is a state of mind, and a state of mind is a subjective phenomenon. Only a correctional official's conduct resulting in constitutionally cognizable harm (objective component) caused by the official's culpable state of mind (subjective component) is violative of the Eighth Amendment. What constitutes a culpable state of mind depends upon the constraints facing the correctional official. /9/ In challenges to the conduct of correctional officials not implicating the competing concerns of prisoners'

needs and governmental responsibilities, the subjective component is satisfied only if the harm resulted from correctional officials' deliberate indifference /10/ to the risk of harm. In challenges to the conduct of correctional officials implicating the competing concerns of prisoners' needs and governmental responsibilities, the subjective component is satisfied only if the correctional officials acted maliciously and sadistically for the purpose of causing harm. /11/

Justice Scalia, writing for the majority, cavalierly dismissed the United States' suggestion /12/ that imposing a requirement of a culpable state of mind would allow correctional officials to escape responsibility for inhumane conditions of confinement because of fiscal constraints beyond their control. /13/ According to the majority, even if this "cost defense" does negate the subjective component of a culpable mental state, the defense does not eliminate the requirement that the inhumane conditions of confinement created and maintained by correctional officials derive directly from a culpable mental state. /14/ The majority was untroubled by the possibility that correctional officials might escape responsibility for inhumane conditions of confinement on this basis because, they said, no correctional officials in this or any other case had ever raised a "cost defense." /15/

The majority was simply wrong in concluding that the "cost defense" is a chimera. Defendant correctional officials have frequently argued their good faith in the face of insufficient funding in litigation challenging the constitutionality of conditions of confinement. In *Smith v. Sullivan*, /16/ for example, the defendant correctional officials claimed that state spending limits would be exceeded if the lower court's order were implemented. In response, the Fifth Circuit indicated that "[i]t is well established that inadequate funding" will not absolve correctional officials from liability for the perpetuation of unconstitutional conditions. /17/

Other circuit courts of appeals have similarly and consistently found prison conditions unconstitutional regardless of the fiscal constraints facing the defendant correctional officials. /18/ These cases all stand for the proposition that fiscal constraints may be relevant to--although not dispositive of--the issue of remedy but are not relevant to the issue of liability. /19/

Wilson may signal a significant departure from this well-established precedent at least in litigation challenging conditions of confinement in prisons and jails. By requiring a subjective component in Eighth Amendment litigation, the Supreme Court has shifted the money issue from remedy to liability. The potential for mischief stuns. True, Justice Scalia writes that "[t]he long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent." /20/ But if correctional officials can successfully defend inhumane prison conditions on the basis of insufficient appropriated funds, then the length of duration of those conditions may establish the intent of the legislative branch, but not of defendant correctional officials.

Justice White, joined by Justices Marshall, Blackmun, and Stevens, wrote an opinion concurring in the judgment only that correctly spotlights this problematic outcome. /21/ As they point out,

[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined. . . . [I]ntent simply is not very meaningful when considering a challenge to an institution, such as a prison system. /22/

If a prisoner challenges the specific acts of specific correctional personnel, e.g., a nurse who refuses to summon medical assistance for a comatose prisoner, a guard who assaults a prisoner, or a warden who orders a starvation diet, a subjective standard of deliberate indifference will not be difficult to apply. The intent of the actor is apparent in the act itself. But cases challenging systemic prison conditions are very different. A comparison of *Estelle v. Gamble*, /23/ a case in which an individual prisoner challenged the adequacy of the medical care he received while incarcerated in a Texas state prison, with cases such as *Bishop v. Stoneman*, /24/ challenging the prison medical system as a whole, illustrates the problems created by requiring a subjective component in the latter category of cases.

In *Gamble* the Supreme Court held that deliberate indifference to the serious medical needs of prisoners, whether "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" violates the Eighth Amendment. /25/ The Court was considering the specific acts of specific prison personnel in responding to the specific medical problems of an individual prisoner, /26/ not a prisoner's challenge to the overall adequacy of a prison's medical care system.

In contrast, *Bishop*, a class action, challenged the medical care system at the Vermont State Prison. /27/ The lower court had granted defendants' motion to dismiss after determining that none of the "typical incidents" of inadequate medical care alleged in the complaint amounted to more than negligence. /28/ According to the lower court, the plaintiffs would be entitled to relief only if one or more incidents of inadequate medical care standing alone met the "deliberate indifference" standard. /29/

The Second Circuit disagreed with the lower court's analysis. Instead, the court of appeals held that either (1) a series of incidents of negligent medical care closely related in time, or (2) a medical care system "so wholly inadequate for the prison population's needs that suffering would be inevitable" would constitute culpable, deliberate indifference. /30/ At least in systemic challenges to medical care, the Second Circuit was willing to infer deliberate indifference from consequences. The Second Circuit's reasoning is consistent with Justice Stevens's dissent in *Gamble*.

In his dissent, Justice Stevens raised serious concerns about the majority's emphasis on the defendants' motivation "as a criterion for determining whether cruel and unusual

punishment has been inflicted." /31/ Holding fast to an objective standard, Justice Stevens indicated that whether prison conditions inflict cruel and unusual punishment on prisoners should be determined by "the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and unusual." /32/

The possibility that a series of negligent incidents closely related in time might constitute deliberate indifference while none of those incidents standing alone was more than inadvertence or negligence was raised by Justice Frankfurter in his concurring opinion in *Resweber*. /33/ Justice Frankfurter agreed with the majority that an inadvertent failure to electrocute successfully a convicted person did not preclude the state from again attempting the electrocution. But he added that a series of "abortive attempts" might be something more than an "innocent misadventure" and therefore perhaps violative of the Eighth Amendment. /34/

The Seventh Circuit dealt directly with the individual versus systemic challenge to conditions of confinement in *Kelley v. McGinnis*. /35/ One of plaintiff's theories was that "the prison clinic's repeated long-term negligent treatment of his medical condition, rather than its intentional actions, amounts to deliberate indifference." /36/ The Seventh Circuit reaffirmed its earlier position that, at least in class actions, repeated, negligent acts can evidence deliberate indifference. The court then went on to indicate that repeated, negligent acts directed at an individual prisoner can also constitute deliberate indifference. If legal theories of repeated, negligent incidents and a system so grossly inadequate that harm is inevitable remain viable after *Wilson*, the question remains: Who is deliberately indifferent--the legislature or the defendant correctional officials? /37/

## **II. Wilson's Progeny**

Prior to *Wilson*, it seemed clear that there were objective criteria against which to measure the constitutionality of prison conditions. /38/ Prisoners' rights against cruel and unusual punishment were violated when responsible correctional officials who either knew or should have known of conditions falling below constitutional minima as measured against objective criteria failed to act to correct those conditions. /39/

Since *Wilson*, a number of circuit courts of appeals have required actual knowledge of inhumane conditions in order to find correctional officials liable for inflicting cruel and unusual punishment on prisoners. /40/ The mental state required for a finding of culpability is criminal recklessness, i.e., that prison officials have "actual knowledge of impending harm easily preventable so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." /41/

The cases decided by the circuit courts under *Wilson* have principally been individual cases as opposed to class actions. Because these cases were filed prior to *Wilson*, the issue of fiscal and other constraints raised by defendant correctional officials as a counter to the

subjective "deliberate indifference" standard has not yet been dealt with by the appellate courts. /42/ But, in this day of state budget crises and overcrowded and aging prisons, the issue will inevitably arise. /43/

A variety of substantive issues has reached the appellate level in the last year-and-a-half. In each of the cases discussed below, the court cited Wilson in support of its reasoning.

### **A. Medical Care**

In *Johnson v. Lockhart*, /44/ the Eighth Circuit for the second time reversed the dismissal of a prisoner's complaint that a ten-month delay between diagnosis and treatment of his extreme medical condition violated the Eighth Amendment. The court distinguished the doctrine *respondeat superior*--which will not support a section 1983 claim against correctional officials--from a theory of direct liability for failure properly to train, supervise, direct, or control the actions of subordinates. "Abdication of policy-making and oversight responsibilities can reach the level of deliberate indifference . . . caus[ing] constitutional injury." /45/

*Harris v. Thigpen* /46/ challenged the Alabama Department of Corrections' programs for treatment of prisoners testing positive for the HIV virus. While the Eleventh Circuit ultimately found no Eighth Amendment violation, the court reaffirmed the purview of the "deliberate indifference" standard in systemic challenges to medical care first announced by the Second Circuit in *Bishop v. Stoneman*: /47/ either a series of incidents of delayed or denied medical care closely related in time, or such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the prison population is effectively denied access to adequate medical care. /48/

At the district court level, three cases have arisen in the Northern District of Indiana culminating in written opinions by Judge Allen Sharp. In *Felders v. Miller* /49/ the court found that the defendant physician had not denied the prisoner-plaintiff treatment for tuberculosis. The plaintiff had received tests for tuberculosis, which he was found not to have, and was prescribed prophylactic medication to prevent the onset of the disease. /50/ In dicta the court stated that "mere delay in receiving treatment does not generally involve deliberate indifference." /51/ That remark, however, appears to conflict with the statement in *Gamble* that deliberate "indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." /52/ Certainly, the *Felders* court concluded that *Wilson* established a much higher standard for deliberate indifference than had been the case in prior medical care cases. /53/

The second of the Indiana trilogy is *Hagan v. Clark*. /54/ Again, applying the Seventh Circuit's "criminal recklessness" standard, /55/ which was cited with approval by the Supreme Court in *Whitley v. Albers*, /56/ the court held that the prisoner failed to prove deliberate indifference to his medical needs.

Finally, Judge Sharp adopted the recommendation of the magistrate in *Diaz v. Broglin* /57/ and granted summary judgment in favor of the defendants. The magistrate concluded that the prisoner had failed to prove criminal recklessness and that he had received adequate medical care. /58/ In adopting the magistrate's recommendations, the court indicated that "deliberate indifference is not a static concept but an evolutionary one, even at this level of the federal judiciary," and that *Gamble* must be reexamined under *Wilson*. /59/

In *Ross v. Kelly*, /60/ the court applied the "deliberate indifference" standard in a case challenging treatment received for wrist and knee problems. The court found that the objective component of the standard requires a serious deprivation of a prisoner's constitutional rights, while the subjective component requires that the defendant have brought about that deprivation in wanton disregard of those rights. /61/ "To establish deliberate indifference, therefore, plaintiff must prove that the defendants had a culpable state of mind and intended wantonly to inflict pain." /62/ The court also indicated that the same standards of medical care cannot be imposed upon a prison as are required of hospitals in the free community. /63/ In reaching this conclusion, the court misapplies the language of other cases and seems to indicate that substandard medical care is acceptable in prisons. /64/ The implications of that conclusion for the eight hundred thousand men and women currently incarcerated in state and federal prisons /65/ are frightening.

## **B. Suicide**

Each of the following cases arose from jail suicides. The Eighth Amendment is not applicable to pretrial detainees. Litigation to remedy inhumane jail conditions affecting pretrial detainees arises under the Fourteenth Amendment. /66/ Therefore, *Wilson*, which is an Eighth Amendment case, may not be directly applicable. Indeed, in *City of Canton v. Harris*, /67/ the Supreme Court indicated that "something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody." Nonetheless, lower courts deciding jail cases continue to apply the standards promulgated by the Supreme Court in Eighth Amendment cases to analogous cases arising under the Fourteenth Amendment.

*Simmons v. City of Philadelphia* /68/ involved the suicide of a pretrial detainee in the city jail. The court discussed the impact of *Wilson* on challenges to pretrial conditions of confinement (Fourteenth Amendment) as contrasted with prison conditions for convicted persons (Eighth Amendment). The court concluded that, "in order to establish that the City was deliberately indifferent to the needs of intoxicated and potentially suicidal detainees, plaintiff must have adduced scienter-like evidence of the deliberate indifference of specific policymakers." /69/

*Manarite v. City of Springfield* /70/ also involved the suicide of a pretrial detainee held in the protective custody unit of the city's jail. Applying the *Wilson* "criminal recklessness" standard, the court held that, in order to demonstrate culpable, deliberate indifference by city officials in cases involving serious harm or death, including suicide, plaintiff must

demonstrate (1) an unusually serious risk of harm that was (2) actually known to the defendant, (3) who, in the face of that actual knowledge, fails to take "obvious steps to address that known, serious risk." /71/

In the three years before the detainee's suicide in Manarite, sixteen other detainees had attempted suicide; in the preceding nine months, four detainees had attempted to hang themselves with shoelaces. The defendant police chief knew about each of the suicide attempts and knew that departmental policy called for removal of detainees' shoelaces. The police chief had promulgated "commonplace suicide prevention policies" and had ordered copies of the policies distributed to all officers. /72/ The court found that the police chief's "shortcomings" were (1) a failure to realize shoelaces were involved in an unusual number of suicides and (2) a consequent failure to order officers to implement the no-shoelace policy. /73/ The court concluded that, although these "shortcomings" may well have amounted to negligence, they did not constitute deliberate indifference. Therefore, the court affirmed the lower court's grant of summary judgment to defendants.

*Bell v. Stigers* /74/ was decided shortly after *Wilson* but makes no reference to it. Nonetheless, the Eighth Circuit reversed the district court's denial of summary judgment to the defendants for failing to prevent the suicide attempt of an 18-year-old arrested for drunk driving. The suicide attempt failed, leaving the arrestee permanently brain-damaged and otherwise physically injured. /75/ After acknowledging that the Supreme Court has not expressly recognized a prisoner's right to be protected from self-inflicted harm, the Eighth Circuit indicated that a number of cases have extended the *Gamble* standard of deliberate indifference to prisoner suicide cases. /76/ The court held that a defendant prison official's actual knowledge of a particular detainee's suicidal tendencies was essential to establishing the official's deliberate indifference. Since, in this case, the defendant was not aware that the detainee was a suicide risk, although the detainee fit the profile of the likely jail suicide, the court held that the defendant's failure to take away the detainee's belt was at most negligence, not deliberate indifference. /77/ Agreeing with the Eleventh Circuit, the Eighth Circuit decided that "the law does not require jail officials to keep up with the latest literature in the social sciences, i.e., the literature on suicide high-risk detainees." /78/

### ***C. Prisoner-on-Prisoner Assaults***

In *Henricks v. Coughlin* /79/ the court applied the "deliberate indifference" standard to prisoner-on-prisoner violence. The court stated that protecting prisoners from each other generally involves no competing governmental responsibilities. Therefore, a prisoner's claim that correctional officials acted with deliberate indifference to his safety in failing to protect him from harm inflicted by other prisoners may state an Eighth Amendment claim under section 1983. /80/

But in another case, in which a prisoner was fatally stabbed by a fellow prisoner, the Sixth Circuit found that the correctional officer who failed to follow prison policy by failing to search cells and pat down prisoners was not deliberately indifferent to the victim's safety.



/81/ The court found that only violations of prison policies that rise to the level of a wanton infliction of pain will support an Eighth Amendment claim. /82/

In *Young v. Quinlan* /83/ the Third Circuit analyzed the quantum of knowledge required post-Wilson, i.e., whether defendant correctional officials actually knew or should have known of a serious imminent risk of harm, in order to satisfy the subjective component of the "deliberate indifference" standard. The Third Circuit agreed with the Ninth Circuit that the "should have known" quantum is sufficient. /84/ The court defined "should have known" as a strong likelihood of harm that is so obvious that a lay person would recognize the need for preventative action. /85/ "Should have known" is "more than a negligent failure to appreciate the risk" but "less than a subjective appreciation of the risk." /86/

In *Redman v. County of San Diego* the Ninth Circuit reaffirmed that, if correctional officials have actual knowledge of a risk of harm facing a prisoner or should have known of the particular vulnerability of the prisoner, they may not act with reckless indifference to his or her safety. /87/

Because of the split among the circuits, the issue of whether the subjective component of the "deliberate indifference" standard requires actual knowledge, or whether constructive knowledge is sufficient, will likely reach the Supreme Court. Since Wilson relied heavily on the Seventh Circuit's reasoning in *Duckworth v. Franzen*, /88/ and the Seventh Circuit subsequently adopted an "actual knowledge" requirement in *McGill v. Duckworth*, /89/ it is reasonable to predict that the Supreme Court will require the actual knowledge component of criminal recklessness.

#### ***D. General Conditions of Confinement***

In an overcrowding case implicating both state and county correctional facilities, the state defendants argued that the intent requirement in emergency situations established in *Wilson*, i.e., that the defendant correctional officials have acted maliciously and sadistically for the purpose of causing harm, should be applied to conditions of confinement cases arising from overcrowding. /90/ The Fifth Circuit rejected this argument, stating that the higher intent requirement was applicable only to cases in which the correctional officials were required to deal with an immediate emergency requiring them to act in haste and under pressure. The defendants also argued that the legislature's refusal to fund corrections was responsible for the unconstitutional conditions. The court also rejected this argument, finding that the defendants could have taken actions within their available resources to remedy the overcrowding problem. /91/

The plaintiff in *Williams v. Griffin* /92/ challenged both overcrowding and the resultant unsanitary conditions. The court found that, for the plaintiff to state a claim under the Eighth Amendment, he must show that "overcrowding, in light of overall prison conditions, deprived him of a specific human need." /93/ The court reached its conclusion based on Wilson's narrowing of the "totality of conditions" approach to determining the

constitutionality of prison conditions. As Wilson stated, conditions that do not alone violate the Eighth Amendment will be found unconstitutional only if they "have a mutually enforcing effect" that together deprive a prisoner of life's basic necessities. /94/

The Seventh Circuit reaffirmed its "actual knowledge" requirement in *Jackson v. Duckworth*. /95/ The court held that correctional officials' actual knowledge of impending, easily preventable harm is required to establish the subjective component of Wilson. A desire that the prisoner suffer harm can be inferred from a failure to act in these circumstances. But, "[i]f the harm is remote rather than immediate, or the officials don't know about it or can't do anything about it, the subjective component is not established and the suit fails." /96/

Finally, in *Baker v. Holden*, /97/ the district court determined that double celling of some units was unconstitutional because of the resultant conditions, while double celling of other units would not cause unconstitutional conditions of confinement, e.g., with respect to ventilation, personal safety, showers, fire protection. /98/

### **III. Conclusion**

Wilson has had a significant influence on the reasoning of the lower courts deciding cases challenging the constitutionality of prison conditions. Whether Wilson has actually changed anything beyond adding language to pleadings, jury instructions, and posttrial briefs is unclear. It is likely, however, that the "actual knowledge" component of criminal recklessness as opposed to the lesser measure of "knew or should have known" will ultimately be adopted by the Supreme Court as a requirement for a finding that correctional officials acted or failed to act from a culpable mental state causing constitutionally cognizable harm to a prisoner. Plaintiffs are well advised in Seventh Circuit litigation as well as in other circuits to plead and be prepared to prove that correctional officials had actual knowledge of the challenged conditions.

#### footnotes

/1/ *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). The opinion was written by Justice Scalia, joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Souter. Justice White, joined by Justices Marshall, Blackmun, and Stevens, wrote an opinion concurring in the judgment only.

/2/ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). The plaintiff, a "colored citizen of Louisiana," was convicted of murder and sentenced to death by electrocution. After Mr. Francis was strapped into the electric chair, the executioner pulled the switch. But due to an equipment failure, Mr. Francis survived the attempt. The event clarified the mind of the unfortunate man sufficiently for him to challenge the right of Louisiana

officials to try it again. Quite understandably, he argued that, while the first attempt to kill him did not constitute cruel and unusual punishment, a repeat performance would violate the Eighth Amendment. A plurality of the Supreme Court disagreed, holding that the first attempt was simply an unfortunate accident, an event not intended by state officials. Therefore, while regrettable, the accident did not violate the right of Mr. Francis not to be subjected to cruel and unusual punishment. This writer has never been able to bring herself to inquire into the ultimate disposition of the unfortunate Mr. Resweber.

/3/ *Estelle v. Gamble*, 429 U.S. 97 (1976) (Clearinghouse No. 16,324).

/4/ *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (Clearinghouse No. 4889).

/5/ *Gregg v. Georgia*, 428 U.S. 153, 178 (1976).

/6/ *Wilson*, 111 S. Ct. at 2326. In *Hudson v. McMillian*, 112 S. Ct. 995 (1992), the Supreme Court stated that the objective component is "contextual and responsive to 'contemporary standards of decency.'" In conditions of confinement cases, only "extreme deprivations" violate the objective standard, while in medical care cases, unmet, "serious" medical needs cross the objective threshold. *Id.* at 1000.

/7/ The Seventh Circuit has found the "state of mind" requirement "too complex for a pro se plaintiff to understand or present to a jury"; therefore, where at issue, the subjective component requires the appointment of counsel. *Swofford v. Mandress*, 969 F.2d 547, 552 (7th Cir. 1992).

/8/ See *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985).

/9/ *Wilson*, 111 S. Ct. at 2326.

/10/ *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

/11/ *Id.* In *Hudson*, 112 S. Ct. 995, the Supreme Court held that, in "excessive use of force" cases, the subjective component requires that correctional officials have used force beyond de minimis force or force that is qualitatively repugnant, maliciously and sadistically, for the purpose of causing harm (as distinguished from a good-faith use of force to restore order). The objective component in "excessive use of force" cases is met whenever force is maliciously and sadistically applied for the purpose of causing harm, whether or not that force results in a significant injury to the prisoner, because such use of force always violates contemporary standards of decency. *Id.* at 1000. Justice Thomas, joined by Justice Scalia, dissented. They would require a prisoner to prove that he or she suffered a serious injury. "Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." *Id.* at 1010. Having imposed a "significant injury" requirement on the plaintiff and reversed the judgment of the lower court, which awarded



an abused prisoner \$800 for a guard's beating, the Fifth Circuit on remand affirmed the judgment of the magistrate judge. *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992).

/12/ The United States filed an amicus brief in support of the state prisoner, who was the plaintiff in the original action and the petitioner in the proceedings before the Supreme Court.

/13/ *Wilson*, 111 S. Ct. at 2326.

/14/ *Id.*

/15/ *Id.*

/16/ *Smith v. Sullivan*, 611 F.2d 1039, 1043 (5th Cir. 1980) (Clearinghouse No. 28,855).

/17/ *Id.* at 1043-44.

/18/ E.g., *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974) ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature have been rejected by the federal courts."); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977) (Clearinghouse No. 23,349) ("Nor is the lack of financing a defense to a failure to provide minimum constitutional standards. . . . If the State of Oklahoma wishes to hold inmates in institutions, it must provide the funds to maintain the inmates in a constitutionally permissible manner."); *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977), rev'd in part sub nom. *Alabama v. Pugh*, 438 U.S. 781, cert. denied sub nom. *Newman v. Alabama*, 438 U.S. 781 (1978) ("It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide necessary funds."); *Ramos v. Lamm*, 639 F.2d 559, 573 n.19 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (Clearinghouse No. 28,389) ("If the appellants are suggesting, by their reference to their proposed 1981 budget, that they lack sufficient funds to increase the security staff at Old Max, we must reject their argument. The lack of funding is no excuse for depriving inmates of their constitutional rights."); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984) (Clearinghouse No. 28,138) ("We 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."); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("[W]e are troubled by and reject any suggestion in the court's reasoning that a state's comparative wealth might affect an HIV-infected prisoner's right to constitutionally adequate medical care. We do not agree that 'financial considerations must be considered in determining the reasonableness of inmates' medical care. . . . We are aware that systemic deficiencies in medical care may be related to a lack of funds allocated to prisons by the state legislature. Such a lack, however, will not excuse the failure of correctional systems to maintain a certain minimum

level of medical service necessary to avoid the imposition of cruel and unusual punishment."); and, finally, *Stone v. City & County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (and cases cited therein) ("[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.").

/19/ See also *Missouri v. Jenkins*, 495 U.S. 33, 79, 81 (1990) (Kennedy, J.; Rehnquist, C.J.; O'Connor, J.; and Scalia, J., concurring in part and concurring in the judgment) ("Even when faced with open defiance of the mandate of educational equality, however, no court has ever found necessary a remedy of the scope presented here. For this reason, no order of taxation has ever been approved. . . . Indeed, while this case happens to arise in the compelling context of school desegregation, the principles involved are not limited to that context. There is no obvious limit to today's discussion that would prevent (federal) judicial taxation in cases involving prisons, hospitals, or other public institutions, or indeed to pay a large damages award levied against a municipality under 42 U.S.C. Sec. 1983. This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."); *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983) (and cases cited therein) ("Constitutional rights are not, of course, confined to those available at modest cost. . . . Yet in considering remedies for unconstitutional deprivation, the cost of one proposed remedy in comparison with the cost of others and the demonstrable need for the remedy should both be considered.").

/20/ *Wilson*, 111 S. Ct. at 2325.

/21/ *Id.* at 2330, 2331.

/22/ *Id.* at 2330.

/23/ *Gamble*, 429 U.S. 97.

/24/ *Bishop v. Stoneman*, 508 F.2d 1224 (2d Cir. 1974) (Clearinghouse No. 11,023).

/25/ *Gamble*, 429 U.S. at 104-5.

/26/ "Deliberate indifference" and not an "inadvertent failure" to provide essential medical care established culpability, consistent with the decisions of the lower courts. *Id.* at 106 n.14.

/27/ *Bishop*, 508 F.2d 1224.

/28/ *Id.* at 1224-25.

/29/ *Id.*

/30/ Id. at 1226.

/31/ Gamble, 429 U.S. at 116.

/32/ Id.

/33/ Resweber, 329 U.S. 459.

/34/ Id. at 471.

/35/ Kelley v. McGinnis, 899 F.2d 612 (1990).

/36/ Id. at 616.

/37/ In suits to remedy unconstitutional conditions in county or municipal correctional facilities, the respective political units may be sued directly. See, e.g., Owen v. City of Independence, Mo., 445 U.S. 622 (1980). The Eleventh Amendment, however, precludes suing a state or a state department of corrections directly for maintaining unconstitutional conditions of confinement in state correctional facilities. See, e.g., Pugh, 438 U.S. 781. However, the governor of a state is subject to suit in appropriate situations. In Alberti v. Sheriff of Harris County, Tex., 937 F.2d 984 (5th Cir. 1991) (Clearinghouse No. 18,023), for example, the county defendants brought in the governor of Texas as a third-party defendant. The district court found the state jointly liable with the county for the unconstitutional conditions at the county jail because, "under Texas law, the State of Texas had 'primary responsibility for convicted felons.'" The court ordered the state to deposit \$750,000 with the court to pay for the housing of convicted felons held by the defendant county in other counties' correctional facilities. The state argued on appeal that this monetary order violated the Eleventh Amendment. The Fifth Circuit affirmed the district court's order against the state because the state had been found liable for a constitutional violation, and the monetary order was both prospective and "'a necessary consequence of compliance with a substantive federal question determination.'" Id. at 1001. The same reasoning would apply in suits to remedy unconstitutional conditions in state correctional facilities.

/38/ Duncan v. Duckworth, 780 F.2d 645 (7th Cir. 1985), which Wilson quotes enthusiastically, leaves open the possibility that the requisite, culpable, subjective component may be inferred from the actions of correctional officials. According to Duncan, a conscious refusal to prevent impending, easily preventable harm to a prisoner--deliberate indifference--can be inferred from a correctional official's failure to prevent such harm. Id. at 653.

/39/ E.g., Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).



/40/ E.g., *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) ("Applied to a prison, the objective 'should have known' formula of tort law approaches absolute liability, rather a long distance from the Supreme Court's standards in *Gamble* and its offspring.").

/41/ *Franzen*, 780 F.2d at 652-53. Actual knowledge is ordinarily shown by proof that a prisoner complained about inhumane conditions to responsible prison officials; failure to complain to prison officials may defeat a prisoner's claim if those conditions are not readily apparent. *McGill*, 944 F.2d at 349. Where, however, correctional "officials themselves actively and knowingly (or recklessly) place a detainee in a particular situation that is dangerous, then such a report becomes superfluous." *Swofford*, 969 F.2d at 551.

/42/ An exception is *Harris*, 941 F.2d 1495. The complaint in *Harris* was filed on November 17, 1987, and the case was dismissed posttrial on January 8, 1990. Thus, the "cost defense" door opened in *Wilson* was still closed to defendants at the time of trial. Nonetheless, the trial court reasoned that "'financial considerations must be considered in determining the reasonableness' of inmates' medical care." *Id.* at 1509. The Eleventh Circuit reached its decision post-*Wilson* on September 18, 1991. Nonetheless, the court of appeals rejected the lower court's reasoning, which would permit correctional officials to deny minimally adequate medical care to prisoners because of a lack of funds: "We do not agree that 'financial considerations must be considered in determining the reasonableness' of inmates' medical care to the extent that such a rationale could ever be used by so-called 'poor states' to deny a prisoner the minimally adequate care to which he or she is entitled." *Id.*

/43/ The United States prison population increased by 134 percent in the 1980s. Some states are using temporary facilities to house inmates, such as trailers and tents. Forty states, the District of Columbia, Puerto Rico, and the Virgin Islands are currently under court order to reduce prison overcrowding or remedy unconstitutional conditions of confinement. Yet state budgets for new prison construction and operation are being cut severely at a time when the country's prison population is increasing by 1,160 persons each week. As a result of lack of funding, some newly constructed prisons are simply not being opened, although they were constructed to relieve overcrowding. 17 CORRECTIONS COMPENDIUM 1, 5-6, 19 (April 1992).

/44/ *Johnson v. Lockhart*, 941 F.2d 705 (8th Cir. 1991).

/45/ *Id.* at 707.

/46/ *Harris*, 941 F.2d 1495.

/47/ *Bishop*, 508 F.2d 1224.

/48/ *Harris*, 941 F.2d at 1505.

/49/ *Felders v. Miller*, 776 F. Supp. 424 (N.D. Ind. 1991).

/50/ Id. at 427.

/51/ Id.

/52/ Gamble, 429 U.S. at 104-5 (emphasis added).

/53/ Felders, 776 F. Supp. at 426.

/54/ Hagan v. Clark, 779 F. Supp. 107 (N.D. Ind. 1991).

/55/ See discussion of Kelley, 899 F.2d 612, *supra* note 35.

/56/ Whitley, 475 U.S. at 321.

/57/ Diaz v. Broglin, 781 F. Supp. 566 (N.D. Ind. 1991).

/58/ Id. at 574.

/59/ Id. at 567.

/60/ Ross v. Kelly, 784 F. Supp. 35 (W.D.N.Y. 1992).

/61/ Id. at 43.

/62/ Id. at 44.

/63/ Id. at 45.

/64/ The American College of Physicians, the American Correctional Health Services Association, and the National Commission on Correctional Health Care recently issued a joint statement saying that prisoners and pretrial detainees must receive health care that meets the currently accepted standard of medical care in the community. The Crisis in Correctional Health Care: The Impact of the National Drug Control Strategy on Correctional Health Services, 117 ANNALS OF INTERNAL MED. 71-74 (1992) (discussed in NCCHC Issues Joint Statement on State of Prison Health, 6 CORRECT CARE 1, 2 (Summer 1992)).

/65/ 17 CORRECTIONS COMPENDIUM 6 (Apr. 1992).

/66/ Ingraham, 430 U.S. at 664; Bell v. Wolfish, 441 U.S. 447, 520, 535 n.16 (1979).

/67/ City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1989).

/68/ Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991).

/69/ Id. at 1064 n.20.

/70/ Manarite v. City of Springfield, 957 F.2d 953 (1st Cir. 1992).

/71/ Id. at 956.

/72/ Id. at 957.

/73/ Id. at 958.

/74/ Bell v. Stigers, 937 F.2d 1340 (8th Cir. 1991).

/75/ Id. at 1341.

/76/ Id. at 1342.

/77/ Id. at 1344-45.

/78/ Id. at 1344.

/79/ Henricks v. Coughlin, 942 F.2d 109 (2d Cir. 1991).

/80/ Id. at 112-13.

/81/ Gibson v. Foltz, 963 F.2d 851 (6th Cir. 1992).

/82/ Id. at 854.

/83/ Young v. Quinlan, 960 F.2d 351 (3d Cir. 1992).

/84/ Id. at 360.

/85/ Id. at 361.

/86/ Id.

/87/ Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991).

/88/ Franzen, 780 F.2d 645.

/89/ McGill, 944 F.2d 344. The standard in the Seventh Circuit is "criminal recklessness."

/90/ Alberti, 937 F.2d at 998 n.6.



/91/ Id. at 999-1000.

/92/ Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991).

/93/ Id. at 824.

/94/ Wilson, 111 S. Ct. at 2327.

/95/ Jackson v. Duckworth, 955 F.2d 21 (7th Cir. 1992).

/96/ Id. at 22.

/97/ Baker v. Holden, 787 F. Supp. 1008 (D. Utah 1992).

/98/ Id. at 1019.