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Cruel But Not So Unusual: *Farmer v. Brennan* and the Devolving Standards of Decency

I. INTRODUCTION

Christopher Scarver attacked him while he was cleaning a prison gymnasium bathroom, smashing his head with a metal bar borrowed from an exercise machine.¹ When Scarver beat his infamous fellow inmate Jeffrey Dahmer to death, many felt that justice had been served.² However, other victims of this type of assault have not been convicted of murdering young boys and eating their remains. Dee Farmer was convicted merely of credit card fraud, yet he suffered a brutal attack at the hands of a fellow inmate.³ When he refused an inmate's demand for sexual intercourse, the inmate punched and kicked Farmer.⁴ After threatening Farmer with a homemade knife, the attacker ripped off Farmer's clothes and raped him.⁵ The attacker threatened to murder Farmer if he reported the incident.⁶ Attacks of this nature are all too frequent an occurrence at prisons across this country.⁷ Prison inmates are the forgotten members of society, overlooked by most people as they go about their daily lives.⁸ However, when a prisoner as

1. Edward Walsh, *Serial Killer Dahmer Slain at Prison Job*, WASH. POST, Nov. 29, 1994, at A1; *Dahmer's Accused Killer Has Violent Past*, WASH. POST, Jan. 1, 1995, at A4.

2. In 1991, Dahmer confessed that since 1978 he had murdered 17 young men and boys. Walsh, *supra* note 1, at A6. *Id.* Dahmer reportedly dismembered his victims, preserved various body parts in formaldehyde or in his freezer, and ate some portions of the bodies. *Id.*

3. *Farmer v. Brennan*, 114 S. Ct. 1970, 1974-75 (1994).

4. Brief of Petitioner at 3, *Farmer* (No. 92-7247).

5. *Id.*

6. *Id.*

7. See James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 104-05 (1985), for a discussion of the frequency of assaults, homicides, and rapes in prison. Additionally, see David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1544-45 (1992), for a specific look at the prevalence of homosexual rape among male prisoners and the potential spread of AIDS among this population.

8. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting)

infamous as Jeffrey Dahmer is murdered, the outside world is presented with a view of the atrocities that occur regularly in prison.⁹

As a civilized society, this is not something that we can ignore. Yet, it is becoming easier to do just that. With its decision in *Farmer v. Brennan*, the United States Supreme Court indicated that it will tolerate these incidents if prison officials lacked actual knowledge that such attacks would occur.¹⁰ The Court stated that only subjective knowledge constitutes the deliberate indifference necessary to violate the Eighth Amendment.¹¹ The Court sought in *Farmer* to clarify this standard due to the lower courts' fumbling searches for the appropriate definition.¹² Whether it succeeded remains to be seen.

This Note discusses the history of Eighth Amendment jurisprudence in Part II, focusing specifically on the development of the deliberate indifference standard.¹³ Part III outlines the facts and procedural history of *Farmer*.¹⁴ Part IV analyzes the Supreme Court's opinion and its rationale behind the definition and application of the deliberate indifference standard.¹⁵ Part V explores the impact of the Court's decision on the judiciary and courts' future application of the deliberate indifference standard, as well as the effects on prisoners' rights.¹⁶ Part VI concludes that after *Farmer*, courts still lack an exact definition of deliberate indifference. Further, a prisoner's right to be free of cruel and unusual conditions of confinement appears to be in jeopardy.

II. HISTORICAL BACKGROUND

The Eighth Amendment protects the rights of those incarcerated for committing a crime.¹⁷ It guarantees that "[e]xcessive bail shall not be

("Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.").

9. See *infra* note 148.

10. *Farmer v. Brennan*, 114 S. Ct. 1970, 1974 (1994); see *infra* notes 111-22 and accompanying text.

11. *Farmer*, 114 S. Ct. at 1974.

12. See *infra* notes 91-93 and accompanying text.

13. See *infra* notes 17-95 and accompanying text.

14. See *infra* notes 96-110 and accompanying text.

15. See *infra* notes 111-72 and accompanying text.

16. See *infra* notes 173-206 and accompanying text.

17. The Cruel and Unusual Punishments Clause becomes applicable only after conviction. *Whitley v. Albers*, 475 U.S. 312, 318 (1986). For a discussion of prisoners' remedies for Eighth Amendment violations, see Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1499-1502 (1986). For a discussion of the actions a prisoner may bring to seek relief for alleged Eighth Amendment violations, see generally Maureen A. Dowd, Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁸ The Supreme Court originally interpreted and applied the Eighth Amendment's proscriptions to those punishments involving torturous and barbarous treatment.¹⁹ In *Wilkinson v. Utah*,²⁰

L. REV. 1315 (1984).

A prisoner may bring an action directly under the auspices of the Eighth Amendment or under § 1983 of the United States Code. Section 1983 states:

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

42 U.S.C. § 1983 (1988).

A prisoner may also bring a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*. 403 U.S. 388 (1971). In *Bivens*, federal agents violated the petitioner's Fourth Amendment rights by committing an illegal search and seizure of his property. *Id.* at 389. The federal agents argued that Webster Bivens's suit for money damages be dismissed because recovery of money damages for a constitutional infringement is an action in tort that should be decided in a state court under state law. *Id.* at 390-91. In rejecting the respondents' claim, the Supreme Court established that where a federal official or agent violates an individual's constitutional rights, federal courts have the power to provide that person a remedy, including compensatory and punitive damages. *Id.* at 396-97. This is true whether or not the state court with the appropriate jurisdiction has conferred such a cause of action. *Id.* at 392.

The Court reaffirmed its position in *Bivens* in *Carlson v. Green*. 446 U.S. 14, 18 (1980). *Carlson* addressed an Eighth Amendment claim for failure of prison officials to provide adequate medical care to an inmate. *Id.* at 16 n.1. The Court in *Carlson* recognized that "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.* at 18. Based on *Bivens*, the Court upheld the action for recovery of money damages despite the fact that the inmate's estate could also have brought a claim under the Federal Tort Claims Act (FTCA). *Id.* at 19. The Court stated that Congress intended FTCA to be a "counterpart" to *Bivens*. *Id.* at 20 (quoting S. Rep. No. 588, 93d Cong., 2d Sess. 2 (1974), reprinted in U.S.C.C.A.N. 2789, 2791).

18. U.S. CONST. amend. VIII.

19. See Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 840 (1972). For a look at Supreme Court accounts of the Eighth Amendment's history, see *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686-96 (1991); *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring); and *Weems v. United States*, 217 U.S. 349, 352-57 (1910).

20. 99 U.S. 130 (1898).

the Court stated that, while an exact definition of cruel and unusual punishment would be difficult to provide, "it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth A]mendment to the Constitution."²¹ The Court again noted in *In re Kemmler* that "[p]unishments are cruel when they involve torture or a lingering death."²²

With its decision in *Weems v. United States*,²³ the Court made the Eighth Amendment applicable to punishments disproportionate to the crime committed.²⁴ In reviewing a sentence of fifteen years at hard labor for the crime of falsifying a "public and official document," the Court expanded its view of the Eighth Amendment and found that a sentence of this nature for such a crime is "repugnant" to the Constitution.²⁵ The majority explained that the Cruel and Unusual Punishments Clause is "progressive, and is not fastened to the obsolete [forms of punishment it originally sought to abolish] but may acquire meaning as public opinion becomes enlightened by a humane justice."²⁶

After *Weems*, the Court further expanded the Cruel and Unusual Punishments Clause to include punishments "incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'"²⁷ such as those that are excessive because they either "involve the unnecessary and wanton infliction of pain" or are "grossly out of proportion to the severity of the crime."²⁸ The original focus of

21. *Id.* at 136.

22. 136 U.S. 436, 447 (1890). In deciding that the death penalty was not cruel and unusual punishment, the Court stated that the Eighth Amendment requires "something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* As examples of what type of punishment would be cruel and unusual, the Court listed punishments such as burning at the stake and crucifixion. *Id.* at 446.

23. 217 U.S. 349 (1910).

24. *Id.* at 379.

25. *Id.* at 378-82. The Court found that "[t]here are degrees of homicide that are not punished so severely" as the crime of falsifying public documents. *Id.* at 380.

26. *Id.* at 378.

27. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). The petitioner in *Trop* received the punishment of denationalization for desertion during wartime. 356 U.S. at 99. Since death was the alternative penalty and denationalization was less severe, the Court could not find this punishment unconstitutional under the theory that it was excessive for the crime. *Id.* Instead, the Court rejected a rigid interpretation of the Eighth Amendment and determined that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. The Court considered the punishments that other nations provided for desertion and found few employed as severe a penalty as denationalization. *Id.* at 102. Thus, through comparative analysis of other nations' penalties, the Court found denationalization cruel and unusual. *Id.*

28. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). For a complete discussion of the

these interpretations was the length of the sentence or the nature of the punishment handed down by judge or jury.²⁹ The Court declared punishments unconstitutional if they were objectively severe or excessive.³⁰

In the early 1960s, courts developed a hands-off doctrine regarding prison issues. Allegations of inhumane confinement conditions were left to legislators.³¹ Courts explained this deference to the legislatures in various ways. For example, the Tenth Circuit held that “[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.”³² Similarly, the Eighth Circuit stated that “courts have no supervisory jurisdiction over the conduct of

principle of proportionality, see Scott K. Petersen, Note, *The Punishment Need Not Fit the Crime: Harmelin v. Michigan and The Eighth Amendment*, 20 PEPP. L. REV. 747 (1993). For additional information on this subject, see Nancy Keir, Note, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require “Proportionality” of Prison Sentences*, 33 CATH. U. L. REV. 479 (1984), and Daryl P. Rush, Note, *Constitutional Law—Safeguarding Eighth Amendment Rights With a Comparative Proportionality Review in the Imposition of the Death Penalty: Pulley v. Harris*, 28 HOW. L.J. 331 (1985).

29. See *Gregg*, 428 U.S. at 173.

30. See *id.* In *Weems*, the Court compared the petitioner's punishment with sentences mandated by statute for violent crimes and determined, without any subjective intent analysis, that the petitioner's sentence was cruel and unusual. See *Weems v. United States*, 217 U.S. 349, 380-81 (1910).

31. *Gregg*, 428 U.S. at 175. “The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for ‘these are peculiarly questions of legislative policy.’” *Id.* at 176 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)). The petitioner in *Gore* asked the Court to review a penalty received under a federal statute for selling illicit drugs. 357 U.S. at 387. The petitioner questioned the constitutionality of his sentence under a federal statute that allowed him to be convicted for three individual offenses arising out of a single narcotics transaction. *Id.* The trial court issued separate sentences to run consecutively for each of the three offenses. *Id.* at 388. The petitioner asked the Court to vacate the sentence, arguing that the trial court could only impose one sentence for the one transaction that occurred. *Id.* In holding that the sentence was constitutional, the Court studied the legislative intent and explained that Congress intended to punish each aspect of the transaction separately; its purpose was to be severe. *Id.* at 390. The Court resolved that it had no power to “enter the domain of penology, and . . . the proper apportionment of punishment[.]” because questions about the severity of a sentence are to be left to legislators. *Id.* at 393.

32. *Banning v. Looney*, 213 F.2d 771, 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954); see also *Copping v. Townsend*, 398 F.2d 392, 393 (10th Cir. 1968) (stating that the “internal affairs of prisons, including the discipline, treatment, and care of prisoners are ordinarily the responsibility of the prison administrators and not subject to judicial review”).

the various institutions provided by law for the confinement of federal prisoners."³³

A. Introduction of the Deliberate Indifference Standard

In *Louisiana ex rel. Francis v. Resweber*,³⁴ the Supreme Court paved the way for the intent requirement in Eighth Amendment analysis. The petitioner in *Resweber* questioned the constitutionality of a planned second attempt to execute him after the first attempt at his electrocution failed.³⁵ The Court held that a second attempt would not violate the petitioner's rights.³⁶

In addressing the petitioner's Eighth Amendment claim, the Court stated that the Cruel and Unusual Punishments Clause prohibits cruelty that is "inherent in the method of punishment," not the suffering that is a necessary by-product of the type of punishment the judge or jury has handed down.³⁷ The Court explained, "The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed [second attempt at] execution."³⁸ The Court's reliance on the fact that prison officials had no intent to produce any added mental or physical anguish allowed for the Court's future inclusion of a mental element on the part of prison officials.³⁹

In its landmark case, *Estelle v. Gamble*, the Court partially relied on the reasoning in *Resweber*.⁴⁰ In *Estelle*, the Court, for the first time, required deliberate indifference in assessing cruel and unusual punishment claims. In so doing, the Court backed away from its prior hands-

33. *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951).

34. 329 U.S. 459 (1947).

35. *Id.* at 460-61. The first attempt at electrocution proceeded to the point of actually throwing the switch. *Id.* at 460. However, there were mechanical problems and although electrical current passed through the prisoner's body, the current did not kill him. *Id.* Officials returned the inmate to the prison and procured a new death warrant. *Id.* at 460-61. The prisoner contended that a second attempt would violate both the Fifth Amendment's double jeopardy provision and the Eighth Amendment's Cruel and Unusual Punishments Clause. *Id.* at 461.

36. *Id.* at 463-64.

37. *Id.* at 464.

38. *Id.* (emphasis added).

39. In *Estelle v. Gamble*, the Court relied on the plurality's reasoning in *Resweber* that a mere accident could not rise to the level of an Eighth Amendment violation. 429 U.S. 97, 105 (1976). See also Justice Stevens' dissent in *Estelle*, recognizing that the Court's rationale in *Resweber* created a subjective intent requirement. *Id.* at 116 (Stevens, J., dissenting).

40. *Id.* at 106.

off doctrine and recognized that certain conditions of confinement may be unconstitutional under the Eighth Amendment.⁴¹

The plaintiff in *Estelle* based his claim on the inadequacy of his medical treatment in prison for a back injury that occurred there.⁴² Writing for the majority, Justice Marshall reasoned that, since inmates are deprived of liberty and cannot provide for their own medical care, the government must accommodate this need.⁴³ However, mere medical malpractice alone does not establish a constitutional violation.⁴⁴ Only where prison doctors or prison guards exhibit deliberate indifference to an inmate's medical needs will an inmate have a valid Eighth Amendment claim.⁴⁵ Justice Marshall stated that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference It is only such indifference that can offend evolving standards of decency in violation of the Eighth Amendment."⁴⁶ The Court acknowledged *Resweber's* holding that an isolated accident or ordinary negligence does not constitute the "wanton infliction of unnecessary pain" barred by the Cruel and Unusual Punishments Clause.⁴⁷ The

41. *Id.* at 104-05.

42. *Id.* at 98. Inmate Gamble's injury arose during a work assignment when a 600-pound bale of cotton fell on him. *Id.* at 99. Prison doctors provided ineffective treatment and misdiagnosed his problems repeatedly. *Id.* at 100-01. Gamble filed suit under 42 U.S.C. § 1983, naming the director of the Texas Department of Corrections, the prison warden, and the prison's medical director as defendants. *Id.* at 98. See *supra* note 17 for a discussion of § 1983.

43. *Estelle*, 429 U.S. at 103. The Court again recognized this duty to provide proper medical care to inmates in its decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Justice Powell, writing for the majority, stated that when a person is within the custody of the state, the state has "a duty to provide certain services and care" *Id.* at 317. Likewise, in *DeShaney v. Winnebago County Dep't of Social Servs.*, the Court explained that the state has a duty "to assume some responsibility for [a prisoner's] . . . safety and well-being" when it deprives this individual of his ability to provide for himself. 489 U.S. 189, 200 (1989).

44. *Estelle*, 429 U.S. at 106.

45. *Id.* at 104. For a detailed look at prisoners' rights concerning medical care, see Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921 (1992).

46. *Estelle*, 429 U.S. at 106 (internal quotation marks omitted). The Court recognized that prison officials may exhibit deliberate indifference either in their "response to the prisoner's needs or by . . . intentionally denying or delaying access to medical care." *Id.* at 104-05. Additionally, a prison guard will be liable if he "intentionally interferes" with an inmate's prescribed treatment. *Id.* at 105.

47. *Id.*

Court's opinion, however, was incomplete, because the majority failed to set forth what a prisoner must show to evidence a prison official's deliberate indifference.⁴⁸

B. *Scrutinizing Conditions of Confinement*

Two years after *Estelle*, the Court expressly recognized that the conditions of confinement, being an essential consideration in evaluating the punishment one receives, are subject to scrutiny under the Eighth Amendment's Cruel and Unusual Punishments Clause.⁴⁹ In *Hutto v. Finney*, the Court mentioned that the conditions of Arkansas isolation cells, occupied by prisoners for indeterminate periods of time, were unconstitutional.⁵⁰ The majority proclaimed that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."⁵¹ However, the Court went no further in its analysis because there was no dispute that the conditions amounted to cruel and unusual punishment.⁵² The petitioners did not challenge the district court's conclusion that prison conditions may render one's punishment cruel and unusual.⁵³ They merely challenged the district court's order that barred prison officials from placing an inmate in punitive isolation for greater than thirty days.⁵⁴ Because it

48. Justice Stevens's dissent addressed the ambiguity of the majority opinion. He asserted that the majority incorrectly attributed a subjective component to the Eighth Amendment analysis where the Constitution does not require one. *Id.* at 108-09 (Stevens, J., dissenting). Justice Stevens argued that whether there is an Eighth Amendment violation should be based on an objective assessment of the punishment itself, not the subjective "motivation of the individual who inflicted it." *Id.* at 116 (Stevens, J., dissenting). Quoting *Resweber's* dissent, Justice Stevens explained that the "intent of the executioner cannot lessen the torture or excuse the result." *Id.* at 116 n.12 (Stevens, J., dissenting) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 477 (1947) (Burton, J., dissenting)).

49. *Hutto v. Finney*, 437 U.S. 678 (1978).

50. *Id.* at 687. The district court characterized the prison as "a dark and evil world completely alien to the free world." *Id.* at 681 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970)). The conditions prisoners regularly faced included physical brutality at the hands of fellow prisoners, rape, and 10-hour workdays in temperatures just above freezing, sometimes working in lightweight clothing and without shoes. *Id.* at 682 n.3. Conditions in isolation cells were deplorable. The cells on occasion housed up to 11 prisoners in only an eight-by-ten-foot space. *Id.* at 682. Their only luxury was a water source and a toilet that guards flushed from the outside. *Id.* Prisoners slept on mattresses that prison guards piled together each day without regard for the spread of infectious diseases. *Id.* at 682-83.

51. *Id.* at 685.

52. *Id.*

53. *Id.*

54. *Id.* The petitioner erroneously assumed that the district court's order prohibited any indeterminate sentence of isolation as unconstitutional. *Id.* The Court reiterated

did not have to examine the conditions in question, the Court did not take the opportunity to explain how it would have applied the deliberate indifference standard set forth in *Estelle* to such conditions.

In *Rhodes v. Chapman*,⁵⁵ the Court finally received a clear opportunity to specifically address when the conditions of one's confinement will constitute cruel and unusual punishment.⁵⁶ The petitioners in *Rhodes* challenged the constitutionality of an Ohio prison's practice of double-celling.⁵⁷ In holding that this condition did not constitute cruel and unusual punishment, the Court stated that there is no "static test" applicable to a court's assessment of the conditions of confinement.⁵⁸ The Court must look to society and its "evolving standards of decency."⁵⁹ The Court further expounded that "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional."⁶⁰ More importantly, the Court recognized a judicial responsibility to scrutinize the conditions of confinement to protect the rights of a prisoner who brings a constitutional claim based on such

the district court's determination that the conditions of and length of isolation are both factors to be considered. *Id.* at 685-86.

55. 452 U.S. 337 (1981).

56. In prior cases, as in *Hutto*, the Court had no opportunity to address whether specific conditions constituted an Eighth Amendment violation. *See Ingraham v. Wright*, 430 U.S. 651 (1977). In *Hutto*, the prison officials conceded that prison conditions were unconstitutional. *See supra* notes 52-54 and accompanying text. Likewise, in *Ingraham*, the Court could not expand on the standard's application. *See id.* at 653. The Court addressed the constitutionality of corporal punishment in a public school. *Id.* While this issue did not justify ascertaining an applicable standard for conditions of confinement, the Court did opine that "[p]rison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'" *Id.* at 669 (quoting *Ingraham v. Wright*, 525 F.2d 909, 915 (5th Cir. 1976)).

57. *Rhodes*, 452 U.S. at 339-40. "Double-celling" is housing two individuals together in the same cell. *Id.* Prisoners alleged that double-celling led two inmates to be confined too closely together in space intended for only one inmate. *Id.* at 340. This contributed to overcrowding, which "overwhelmed" the prison's staff. *Id.*

58. *Id.* at 346.

59. *Id.* The Court relied on the oft-quoted text of *Trop v. Dulles*: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958) (plurality opinion).

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

conditions.⁶¹ The Court erred, however, in neglecting to address the deliberate indifference requirement set forth in *Estelle*.⁶²

In *Whitley v. Albers*,⁶³ the Court had the opportunity to address yet another aspect of conditions of confinement. In *Whitley*, an inmate challenged prison officials' use of force to end a cellblock riot.⁶⁴ The Court held that only a showing that prison officials used force "maliciously and sadistically for the very purpose of causing harm" will establish a valid constitutional claim.⁶⁵ The Court distinguished this case from *Estelle* by explaining the urgency with which decisions are often made in maintaining prison security.⁶⁶ The Court stressed that there are conflicting interests that prison officials must take into consideration when attempting to quiet a disturbance within a prison.⁶⁷ The safety of prison officials and other inmates must be balanced against possible harm to violent or rioting prisoners.⁶⁸ The majority found the deliberate indifference standard set forth in *Estelle* inapplicable in this context because prison officials' duty to provide adequate medical treatment to inmates does not involve a conflict between competing governmental responsibilities like those presented in a use-of-force case.⁶⁹

61. *Id.* at 352. Justice Brennan's concurrence goes even further than the majority opinion. Justice Brennan stated that, because of the political powerlessness of prison inmates, courts are emerging as the "critical force behind efforts to ameliorate inhumane conditions." *Id.* at 359 (Brennan, J., concurring). Moreover, courts should be in the forefront in demanding remedial measures for unconstitutional conditions, even if the financial expense of raising the conditions to a constitutional level would be significant. *Id.* (Brennan, J., concurring).

62. Unlike *Hutto*, where the Court touched on deliberate indifference even though the facts of the case did not justify a thorough analysis, the Court did not broach the issue in *Rhodes*.

63. 475 U.S. 312 (1986).

64. *Id.* at 315-17. A riot broke out in the Oregon State Penitentiary, and an inmate held a prison officer hostage and threatened the officer's life. *Id.* at 314-15. Prison officials determined that the safest way to deal with the situation, both with regard to the hostage and other prisoners, was to take an armed assault team into the cell block. *Id.* at 315-16. Whitley, the prison security manager, ordered the assault team to provide coverage for him as he ascended a stairway in the cell block to negotiate the release of the hostage. *Id.* at 316. Whitley's instructions were to fire a warning shot, then aim low at any prisoner who attempted to ascend the stairs behind him. *Id.* A prison guard shot inmate Albers in the knee when he followed Whitley up the stairs. *Id.*

65. *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

66. *Id.* at 320. The Court noted that officials often make such decisions "under pressure, and frequently without the luxury of a second chance." *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

C. *Applying the Deliberate Indifference Standard to Conditions of Confinement*

Until 1991, the Court had yet to specifically apply the deliberate indifference standard to cases where a prisoner alleges that the conditions of his confinement are unconstitutional. The Court changed course with its decision in *Wilson v. Seiter*.⁷⁰ The plaintiff in *Wilson* brought a § 1983 claim,⁷¹ alleging that the combined effect of conditions in an Ohio prison constituted cruel and unusual punishment in violation of the Eighth Amendment.⁷² The issue that reached the Supreme Court was whether a prisoner claiming unconstitutionality due to prison conditions must show that the prison officials had a culpable state of mind.⁷³ The Court answered in the affirmative by holding that the deliberate indifference standard necessary in adequacy of medical care cases under *Estelle* is applicable to conditions of confinement cases.⁷⁴ The Court stated that it saw no difference between those cases involving inadequate medical care and those involving the character of the physical conditions of the facility.⁷⁵

70. 111 S. Ct. 2321 (1991). For a more detailed discussion of *Wilson*, see Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992). See also Diana L. Davis, Comment, *Deliberate Indifference: An "Unnecessary" Change?*, 29 HOUS. L. REV. 923, 935-44 (1992), for an analysis of *Wilson* and the deliberate indifference standard.

71. See *supra* note 17.

72. *Wilson*, 111 S. Ct. at 2323. Inmate *Wilson* alleged that the combined effect of overcrowding, insufficient space, inadequate temperature control and ventilation, noise, and unsanitary restrooms and dining facilities, among other things, created cruel and unusual conditions of confinement. *Id.* *Wilson* requested not only declaratory and injunctive relief, but also sought to obtain compensatory and punitive damages in the amount of \$900,000. *Id.*

73. *Id.* at 2326.

74. *Id.* at 2327. Justice Scalia, writing for the Court, quoted a Fourth Circuit opinion: "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the deliberate indifference standard articulated in *Estelle*." *Id.* (quoting *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987)). The court in *LaFaut* concluded that prison officials' failure to meet a paraplegic inmate's special physical needs, including adequate facilities and physical therapy, amounted to an Eighth Amendment violation. *LaFaut*, 834 F.2d at 394. The court declared that prison officials "should not ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy." *Id.*

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

The Court outlined two components that a prisoner must allege to have a valid Eighth Amendment claim.⁷⁶ First, the deprivation must objectively be sufficiently serious to deprive the prisoner of the minimal necessities of life, including food, clothing, shelter, medical treatment, and reasonable safety.⁷⁷ As a second component, where the pain inflicted is not a formal part of the punishment set forth by statute or by the sentencing judge, the inmate must be able to show the inflicting officer acted with a “sufficiently culpable state of mind.”⁷⁸ In considering what state of mind applies in challenges to the conditions of confinement, the parties agreed that the “malicious and sadistic” standard set forth in *Whitley* was inappropriate.⁷⁹ The Court found the deliberate indifference standard applicable by characterizing prison medical treatment as a condition of confinement with virtually no material difference from the food, clothing, and protection a prison also provides.⁸⁰ Based on this rationale, the Court extended the deliberate indifference standard to all conditions of confinement cases.⁸¹ However, the Court again neglected to define deliberate indifference.⁸²

In its 1993 term, the Court added an important element to the Eighth Amendment analysis applicable to conditions of confinement. In *Helling v. McKinney*,⁸³ inmate McKinney challenged the constitutionality of prison conditions in a Nevada State prison by alleging that involuntary exposure to environmental tobacco smoke (ETS) was cruel and unusual punishment because it unreasonably threatened his health.⁸⁴ Prison officials sought review by the Supreme Court alleging that where an inmate is not currently suffering health problems, he does not have a valid constitutional claim.⁸⁵ The officials asked the Court to hold that the Eighth Amendment only applies to those prison conditions that

76. *Id.* at 2324.

77. *Id.* at 2324-26.

78. *Id.* at 2324.

79. *Id.* at 2326; *see supra* notes 63-69 and accompanying text (discussing *Whitley* and the Court’s analysis of prison security as a condition of confinement).

80. *Wilson*, 111 S. Ct. at 2326-27.

81. *Id.* at 2327.

82. *See supra* note 62 and accompanying text.

83. 113 S. Ct. 2475 (1993).

84. *Id.* at 2478. McKinney shared a cell with an inmate who smoked five packs of cigarettes per day. *Id.* The magistrate deciding the case held that McKinney had presented no evidence establishing that he either had current medical problems due to the exposure to ETS or that prison officials exhibited any deliberate indifference to them. *Id.* The court of appeals affirmed the magistrate’s ruling that McKinney had no constitutional right to be free from cigarette smoke. *Id.* at 2478-79. However, the Supreme Court held that McKinney had a valid Eighth Amendment claim and should be permitted to prove the unreasonable risk such exposure caused. *Id.*

85. *Id.* at 2480.

create a current medical problem.⁸⁶ In rejecting this claim, the Court relied on the Eighth Amendment's requirement that prison officials must provide inmates with basic needs, including "reasonable safety."⁸⁷ Reasonable safety includes freedom from an unsafe environment, whether the risk be from infectious disease, unsuitable drinking water, or, as here, the effects of environmental tobacco smoke.⁸⁸ The Court declared that a prisoner "need not await a tragic event" before being entitled to relief.⁸⁹ The Court further noted that, if McKinney could provide proof to establish that (1) an unreasonable risk of harm exists, (2) the exposure to ETS is one which "society considers . . . to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk," and (3) prison officials manifest deliberate indifference to this situation, he would be entitled to relief under the Cruel and Unusual Punishments Clause.⁹⁰

Yet, once again the Court failed to provide a definition of deliberate indifference. The problems created by this omission become evident when one reviews lower court cases attempting to apply this standard. For example, the Tenth Circuit applies a subjective standard requiring a showing of "actual knowledge of impending harm" to the prisoner on the part of the accused prison officials.⁹¹ However, other circuits allow knowledge to be imputed in establishing deliberate indifference. The Third⁹² and Ninth⁹³ Circuits apply a "known or should have known"

86. *Id.*

87. *Id.* at 2480-81 (internal quotation marks omitted) (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989)).

88. *Id.*

89. *Id.*

90. *Id.* at 2482. For a more thorough treatment of *Helling*, see Jacqueline M. Kane, Note, *You've Come a Long Way, Felon: Helling v. McKinney Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment*, 72 N.C. L. REV. 1399 (1994).

91. *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *see also* *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988) (stating official must show actual knowledge). For a thorough account of *McGill v. Duckworth* and the Seventh Circuit's application of the criminal recklessness standard, see Scott Rauser, Comment, *Prisons Are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in McGill v. Duckworth*, 78 MINN. L. REV. 165 (1993).

92. *Young v. Quinlan*, 960 F.2d 351, 360-61 (3d Cir. 1992) (holding that a "prison official is deliberately indifferent when he *knows or should have known* of a sufficiently serious danger to an inmate").

93. *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992); *see also* *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d

standard. *Farmer v. Brennan*⁹⁴ provided the Court with the opportunity to ultimately define the “deliberate indifference” requirement in a suit against prison officials for harm suffered by an inmate stemming from the conditions of his confinement.⁹⁵

III. FACTS OF THE CASE

In 1986, Dee Farmer was convicted of credit card fraud and was sentenced to the Federal Correctional Institute in Oxford (FCI-Oxford), Wisconsin.⁹⁶ At the time of his conviction, Farmer was a preoperative transsexual who, although biologically male, had undergone breast implantation surgery and estrogen therapy and had unsuccessfully attempted black market surgery to remove his testicles.⁹⁷ He wore women’s clothing prior to and throughout his trial.⁹⁸ Additionally, Farmer claimed to have continued hormone therapy during his incarceration via drugs that were smuggled into prison.⁹⁹

In March 1989, prison officials transferred Farmer to the United States Penitentiary in Terre Haute (USP-Terre Haute), Indiana, which is a higher security prison that typically houses “more troublesome prisoners.”¹⁰⁰ Two weeks following the transfer, another prisoner raped and beat Farmer in Farmer’s own cell.¹⁰¹ In response to this incident, Farmer filed a *Bivens*¹⁰² complaint challenging the constitutionality of the prison conditions, which he claimed facilitated the brutal incident.¹⁰³ Farmer maintained that prison officials violated the Eighth

556, 560 (1st Cir.) (applying the “known or should have known” standard), *cert. denied*, 488 U.S. 823 (1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (applying the “known or should have known” standard). For a detailed account of the split among circuit courts, see generally Rauser, *supra* note 91.

94. 114 S. Ct. 1970, 1974 (1994).

95. *Id.*

96. *Farmer v. Brennan*, 114 S. Ct. 1970, 1974-75 (1994).

97. *Id.* at 1975. A transsexual is “one who has ‘a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment . . . to bring about a permanent sex change.” *Id.* (quoting AMERICAN MEDICAL ASSOCIATION, *ENCYCLOPEDIA OF MEDICINE* 1006 (1989)).

98. *Id.*

99. *Id.* Due to federal procedures of imprisoning preoperative transsexuals with inmates of the same biological sex, prison officials placed Farmer in a male prison despite his feminine appearance. *Id.* On occasion, prison officials segregated Farmer from the general prison population for disciplinary reasons. *Id.* However, at least one period of segregation was a precautionary measure to protect his safety. *Id.*

100. *Id.* Prison officials transferred Farmer for various disciplinary violations, including credit card fraud and purchasing items over the telephone. Brief of Respondents at 3, *Farmer* (No. 92-7247).

101. *Farmer*, 114 S. Ct. at 1975; see *supra* notes 3-6 and accompanying text.

102. See *supra* note 17 (discussing *Bivens*).

103. *Farmer*, 114 S. Ct. at 1975. Farmer sued the warden of USP-Terre Haute and

Amendment with deliberate indifference to his safety when they transferred him to a violent general prison population, despite knowing that his transsexual status and the facility's history of inmate violence would make him susceptible to a sexual attack.¹⁰⁴ In addition to compensatory and punitive damages, Farmer asked the court to bar his further confinement in any penitentiary.¹⁰⁵

The district court granted summary judgment in favor of the prison officials.¹⁰⁶ The court held that the prison officials were not deliberately indifferent because they lacked the criminal recklessness required for an Eighth Amendment violation.¹⁰⁷ The court reasoned that the defendants lacked the actual knowledge of a threat of harm required under the criminal recklessness standard.¹⁰⁸ On appeal, the Seventh Circuit Court of Appeals affirmed the district court's decision without opinion.¹⁰⁹ Because various courts of appeals defined the term differently, the United States Supreme Court granted certiorari to define and explain the term "deliberate indifference."¹¹⁰

the Director of the Bureau of Prisons in their official capacities. *Id.* He also sued the warden of FCI-Oxford, a case manager at FCI-Oxford, and an official and the director of the Bureau of Prisons North Central Region Office in their official capacities. *Id.*

104. *Id.*

105. *Id.* at 1975-76.

106. *Id.* at 1976. Farmer had filed a motion for summary judgment in response to the prison officials' motion for the same. *Id.* Farmer also requested, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that the district court refuse to rule on the prison officials' motion until the officials complied with Farmer's discovery requests. *Id.* The district court, in granting summary judgment, denied the 56(f) motion. *Id.*

107. *Id.*

108. *Id.*; see *supra* note 91. The district court found no actual knowledge based on the fact that Farmer had not voiced "any concern for his safety." *Farmer*, 114 S. Ct. at 1976.

109. *Farmer*, 114 S. Ct. at 1976.

110. *Id.*; see *supra* notes 91-110 and accompanying text.

IV. ANALYSIS OF THE COURT'S OPINIONS

A. Justice Souter's Majority Opinion

Justice Souter asserted that only a prison official's subjective awareness of a substantial risk of harm to an inmate constitutes a valid Eighth Amendment claim.¹¹¹ He explained that although the Court never explicitly defined "deliberate indifference," its previous decisions provide the necessary guidance.¹¹²

Justice Souter noted that *Estelle v. Gamble*¹¹³ made it clear that deliberate indifference connotes something more than mere negligence, while *Hudson v. McMillian*¹¹⁴ points to something less than intent to cause harm.¹¹⁵ He observed that the circuit courts have found middle

111. *Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994). Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, Ginsburg, and Chief Justice Rehnquist joined in Justice Souter's opinion. Justices Blackmun, Stevens, and Thomas each filed separate concurring opinions. *Id.* at 1986-91; see *infra* notes 140-72 and accompanying text (discussing concurring opinions).

112. *Farmer*, 114 S. Ct. at 1977-78. Justice Souter traced the developmental history of the deliberate indifference standard under the Court's Eighth Amendment jurisprudence. *Id.* at 1976-78. Justice Souter also stated that the Court has previously assumed that "[p]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Id.* (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988)).

113. 429 U.S. 97 (1976).

114. 112 S. Ct. 995 (1992).

115. *Farmer*, 114 S. Ct. 1978; see *supra* notes 39-48 and accompanying text for a complete discussion of *Estelle*.

In *Hudson*, a prisoner brought an Eighth Amendment Claim after an episode in which a corrections officer used unnecessary force and caused the inmate to develop bruises, facial swelling, and loosened teeth. 112 S. Ct. at 997, 1000. The guard handcuffed and shackled inmate Hudson before escorting him to another area of the prison. *Id.* at 997-98. As they were proceeding down the hallway, the guard punched Hudson "in the mouth, eyes, chest, and stomach" while other guards simply stood by and watched. *Id.*

A magistrate judge found for Hudson. *Id.* at 998. However, the Court of Appeals for the Fifth Circuit reversed, finding that there is no constitutional violation where the inmate has not suffered serious injury. *Id.* The Supreme Court found that the Fifth Circuit had erred. *Id.* at 1000. Writing for the majority, Justice O'Connor stated that, when "prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated[,]" whether or not the injury is only minor. *Id.*

The Court distinguished conditions of confinement cases from excessive force claims. *Id.* at 1000-01. In conditions of confinement cases, a serious deprivation is required, because prison officials only have a duty to provide basic needs, not a comfortable environment. *Id.*

For an in-depth discussion of *Hudson*, see John J. Phillips, Note, *Jailhouse Shock: Hudson v. McMillian and the Supreme Court's Flawed Interpretation of the Eighth Amendment*, 26 CONN. L. REV. 355 (1993), and Doretha M. Van Slyke, Note,

ground between these two extremes by applying a recklessness standard.¹¹⁶ However, the Court rejected Farmer's proposed civil recklessness approach and held that "a prison official cannot be found liable . . . unless the official knows of and disregards an excessive risk [of harm] to inmate health or safety."¹¹⁷ Justice Souter explained that the prison "official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."¹¹⁸ In reaching this conclusion, Justice Souter pointed to the two-part test set forth in *Wilson v. Seiter*.¹¹⁹

Hudson v. McMillian and Prisoners' Rights: The Court Giveth and the Court Taketh Away, 42 AM. U. L. REV. 1727 (1993).

116. *Farmer*, 114 S. Ct. at 1978; see, e.g., *La Marca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993) ("To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs . . ."), *cert. denied*, 114 S. Ct. 1189 (1994); *Manarite v. City of Springfield*, 957 F.2d 953, 957 (1st Cir. 1992) (stating reckless behavior on the part of a police official amounts to deliberate indifference), *cert. denied*, 113 S. Ct. 113 (1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (stating that officials have a duty "not to act with reckless indifference"), *cert. denied*, 112 S. Ct. 972 (1992).

117. *Farmer*, 114 S. Ct. at 1979. Farmer urged the Court to follow the definition of deliberate indifference set forth in *City of Canton v. Harris*. *Id.* at 1980; see *City of Canton v. Harris*, 489 U.S. 378 (1989). In his brief, Farmer stated that *Canton* "simplified" the Court's task of defining deliberate indifference because the *Canton* Court held that municipalities are liable for obvious risks, which officials should know about and that are likely to pose a threat to an individual's constitutional rights. Brief of Petitioner at 19-21, *Farmer* (No. 92-7247). Farmer explained that the *Canton* "should have known" standard meets the *Wilson* minimal state of mind requirement, while the "actual knowledge" requirement urged by the respondents too closely resembles the "malicious and sadistic" standard, which is preserved for use of force cases. *Id.*

In *Canton*, the respondent brought an action under 42 U.S.C. § 1983 alleging that the police department violated her constitutional rights when it failed to provide her with adequate "medical attention while in police custody." *Canton*, 489 U.S. at 381. During the time that police held her, Mrs. Harris had "slumped to the floor on two occasions," but police personnel failed to provide her with medical assistance. *Id.* An hour later, police released her from custody, and her family transported her to a hospital where she was diagnosed with "several emotional ailments." *Id.* The Court held that the city would only be liable for failing to train police personnel to spot special medical circumstances, which are beyond simple first-aid assistance, upon a showing of "deliberate indifference to the constitutional rights of its inhabitants." *Id.* at 392. The Court stated that the need for further training may be "so obvious . . . that the policymakers of the city [could] . . . reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

118. *Farmer*, 114 S. Ct. at 1979.

119. 501 U.S. 294 (1991); see *supra* notes 76-81 and accompanying text.

In *Wilson*, the Court specifically rejected imposing liability under the Eighth Amendment based on a purely objective test regarding the conditions of confinement.¹²⁰ Justice Souter stated that a subjective component recognizes that the Eighth Amendment outlaws only cruel and unusual punishments and thus applies solely to those who actually inflict punishment.¹²¹ Finally, Justice Souter asserted that without knowledge of a risk of harm to an inmate, any act or omission committed by a prison official cannot be considered an infliction of punishment.¹²²

The Court added that under this definition a prisoner may prove a prison official's subjective knowledge through the presentation of circumstantial evidence, including the fact that the risk was obvious to a reasonable person.¹²³ Justice Souter stated that, if an inmate can present evidence that a risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official . . . had been exposed to" this information, the inmate may use this evidence as proof that the official must have known of the risk.¹²⁴ A jury may then properly find that the prison official had actual knowledge.¹²⁵ Justice Souter added that a prison official who has actual knowledge of a substantial risk will likewise not escape liability by showing that he did not know which particular inmate would be assaulted or which particular inmate would commit the assault.¹²⁶

The Court quickly cautioned, however, that while knowledge may be shown by evidence that the risk was so pervasive as to be obvious, "it is not enough merely to find that a reasonable person would have known, or that the defendant should have known."¹²⁷ The jury cannot be compelled to find knowledge under these circumstances and should receive an instruction to that effect.¹²⁸ Also, prison officials may demonstrate that, although the risk seemed obvious, they were truly unaware of any danger posed to an inmate's safety.¹²⁹ Moreover, Justice

120. *Farmer*, 114 S. Ct. at 1980.

121. *Id.*

122. *Id.* at 1979.

123. *Id.* at 1981.

124. *Id.* at 1981-82 (quoting Brief of Respondents at 22, *Farmer* (No. 92-7247)).

125. *Id.* (quoting Brief of Respondents at 22, *Farmer* (No. 92-7247)).

126. *Id.* at 1982. Justice Souter stated that it is "irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." *Id.*

127. *Id.* at 1982 n.8.

128. *Id.* at 1982.

129. *Id.* A prison official who merely refuses to verify or confirm his suspicions regarding an inmate's safety does not escape liability. *Id.* Examples of such inaction were given by the Court and include the following:

Souter stated that, if an official with actual knowledge of a risk responds reasonably to that risk, he will not be liable for harm to prisoners, for prison personnel only have a duty to provide inmates with reasonable safety.¹³⁰

The Court rejected Farmer's contention that an inmate must first suffer physical injury before he can seek injunctive relief from unconstitutional conditions of confinement.¹³¹ Justice Souter explained that when an inmate can present evidence of prison officials' knowing and unreasonable disregard of a risk of harm that meets the objective component of *Wilson's* two-part test,¹³² the court will grant injunctive relief as long as the officials' disregard of the risk continues throughout the litigation.¹³³ Justice Souter warned that injunctive relief will only be appropriate where inmates can establish a need for court intervention.¹³⁴ Inmates should first seek relief through the prison procedures designed to address safety and health concerns.¹³⁵ When an inmate has

[Where] a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease.

Id.

130. *Id.* at 1983; see *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993) (recognizing that the Eighth Amendment requires prisoners be provided with "reasonable safety"); see also *Washington v. Harper*, 494 U.S. 210, 225 (1990) (asserting that prison officials have a "duty to take reasonable measures" to assure the safety of inmates); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) (stating that prison officials must take "reasonable measures" to provide for inmates' safety).

131. *Farmer*, 114 S. Ct. at 1983; see *supra* notes 83-90 and accompanying text (discussing *Helling* and this very proposition).

132. See *supra* note 77 and accompanying text. The objective component requires a showing that there exists a sufficiently serious deprivation. *Wilson v. Seiter*, 501 U.S. 294, 301 (1991).

133. *Farmer*, 114 S. Ct. at 1983; see *Helling*, 113 S. Ct. at 2481 (stating that courts "need not await a tragic event" to remedy a substantial risk to inmate safety); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (noting that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief"). In seeking injunctive relief, an inmate may introduce, with the discretion of the court, events or developments that have occurred after the filing of his complaint to establish the ongoing nature of the deprivation. *Farmer*, 114 S. Ct. at 1983. Likewise, the defendants to such a suit may rely on the same to show that injunctive relief is no longer necessary. *Id.*

134. *Farmer*, 114 S. Ct. at 1984.

135. *Id.*

failed to do so, it is appropriate for a court to take this noncompliance into account.¹³⁶

In applying this analysis to the facts before them, the majority decided to remand the case.¹³⁷ The Court found the record unclear as to whether the district court may have concluded that prison officials had no advance notice or knowledge of the danger to Farmer from the mere fact that Farmer had never lodged a complaint.¹³⁸ Additionally, judgment as a matter of law for Respondents was inappropriate because the Court found items in the record that Farmer may argue on remand as evidence of actual knowledge.¹³⁹

B. Justice Blackmun's Concurring Opinion

Justice Blackmun, in his concurring opinion,¹⁴⁰ made it clear from the beginning that a subjective component is misplaced in Eighth Amendment analysis. He stated that prison conditions may be unconstitutional irrespective of any subjective knowledge by prison officials.¹⁴¹ He announced unambiguously that *Wilson* does not follow Court precedent regarding the Eighth Amendment's Cruel and Unusual Punishments Clause, and thus, the Court should overrule it.¹⁴²

Justice Blackmun explained that because a prisoner is stripped of all means of self-protection while incarcerated, the Constitution mandates certain minimum levels of protection, treatment, and care.¹⁴³ These

136. *Id.* Relying on 42 U.S.C. § 1997e, the Court stated that a district court may compel an inmate to exhaust prison administrative procedures designed to address such concerns before he may seek relief in a court of law. *Id.* Section 1997e provides that a court may "continue such case . . . in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available" at the facility where the inmate is incarcerated. 42 U.S.C. § 1997e (1988).

137. *Farmer*, 114 S. Ct. at 1984.

138. *Id.* If this were the extent of the Court's reasoning, the decision would be inconsistent with the Court's statement that an inmate need not show that he had voiced concerns for his personal safety. *See id.* at 1983; *see supra* notes 123-25 and accompanying text.

139. *Farmer*, 114 S. Ct. at 1984. Evidence showed that the respondents acknowledged that placing Farmer in the general prison population, considering his age and feminine appearance, subjected him to danger. *Id.* at 1984-85. Also, the Court held that the district court should reconsider Farmer's Rule 56(f) motion to determine whether additional discovery should be allowed on the issue of actual knowledge. *Id.* at 1985; *see supra* note 106.

140. *Farmer*, 114 S. Ct. at 1986 (Blackmun, J., concurring).

141. *Id.* (Blackmun, J., concurring).

142. *Id.* (Blackmun, J., concurring). For a complete discussion of *Wilson*, *see supra* notes 70-82 and accompanying text.

143. *Farmer*, 114 S. Ct. at 1986 (Blackmun, J., concurring). Justice Blackmun has consistently pointed out the plight of prisoners in regard to the dangers of prison

minimum levels include freedom from rape and violence at the hands of other prisoners where reasonably possible.¹⁴⁴ Justice Blackmun indicated that the Court in *Rhodes v. Chapman* specifically recognized that such acts of violence amount to punishment that serves no penological purpose.¹⁴⁵ These conditions would clearly be unconstitutional, as "all punishment 'totally without penological justification'" is exactly what the Eighth Amendment proscribes.¹⁴⁶

Justice Blackmun further declared that over-crowding and understaffing due to budget problems do not excuse prison officials from failing to provide prisoners with a safe environment.¹⁴⁷ He proclaimed that the brutalities to which inmates subject each other are tantamount to torture.¹⁴⁸ He proclaimed that it is society's duty to protect prison-

life. See, e.g., *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting) (stating that inmates must rely solely upon prison officials for protection); *United States v. Bailey*, 444 U.S. 394, 421-23 (1980) (Blackmun, J., dissenting) (explaining that society must provide inmates with safety from the atrocious conditions of America's prisons).

144. *Farmer*, 114 S. Ct. at 1986-87 (Blackmun, J., concurring).

145. *Id.* at 1987 (Blackmun, J., concurring). See *supra* notes 55-62 and accompanying text for a complete discussion of *Rhodes*.

146. *Farmer*, 114 S. Ct. at 1987 (Blackmun, J., concurring) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

147. *Id.* (Blackmun, J., concurring).

148. *Id.* (Blackmun, J., concurring). Justice Blackmun illustrated the torturous conditions faced by inmates by citing the "horrors" documented in prior cases. *Id.* (Blackmun, J., concurring); see *United States v. Bailey*, 444 U.S. 394, 421-22 (1980) (Blackmun, J., dissenting) ("A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail Even more appalling is the fact that guards frequently participate in the brutalization of inmates."); see also *McGill v. Duckworth*, 944 F.2d 344, 346 (7th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1438-39 (9th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992). In *McGill*, three inmates carrying homemade knives stood guard while another inmate attacked the petitioner inmate while he was showering. *McGill*, 944 F.2d at 346. The attacker gagged him with his washcloth then raped him. *Id.* In *Redman*, the petitioner was housed with an inmate who prison officials knew to be an aggressive homosexual. *Redman*, 942 F.2d at 1438-39. The inmate raped the petitioner on the first night they shared a cell. *Id.* The next day, the attacker raped the petitioner again, joined this time by two additional inmates. *Id.* Justice Blackmun recognized that "[p]rison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem, accompany the perpetual terror the victim thereafter must endure." *Farmer*, 114 S. Ct. at 1987 (Blackmun, J., concurring) (citing David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1545 (1992)).

ers from unsafe or unhealthy conditions, because by convicting and incarcerating individuals, society has “toll[ed] the bell” and made the helpless prisoner the “collective responsibility” of the people.¹⁴⁹

Justice Blackmun declared that the Court’s analysis in this case and in *Wilson* was “fundamentally misguided” to the point that it “defies common sense.”¹⁵⁰ He expounded that the definition of punishment includes any suffering or severe treatment that one receives regardless of whether there is a “punisher” with the required culpable state of mind.¹⁵¹ Moreover, the Court’s narrow interpretation of what constitutes punishment “blinds it to the reality of prison life.”¹⁵² Justice Blackmun illustrated the difference in the punishment received by two hypothetical inmates convicted of the same offense and sentenced for the same period of time. He stated that when one of those inmates is sentenced to a “relatively safe, well-managed prison, complete with tennis courts and cable television, while the other is sentenced to a prison characterized by rampant violence and terror[,]” their respective punishments cannot be considered equal.¹⁵³ Likewise, the Court’s focus on the subjective knowledge and intent of a prison official is nearsighted because it fails to recognize that just because the harm resulting from one’s punishment is not intended, it is “no less cruel or unusual.”¹⁵⁴

Justice Blackmun provided additional support for his argument by pointing to the Court’s earlier decisions interpreting the Cruel and Unusual Punishments Clause. He focused on *Rhodes v. Chapman*, where the Court specifically relied on an objective standard in determining whether conditions of confinement constituted cruel and unusual pun-

149. *Farmer*, 114 S. Ct. at 1987 (Blackmun, J., concurring) (internal quotations omitted) (quoting *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting)).

150. *Id.* at 1988 (Blackmun, J., concurring).

151. *Id.* (Blackmun, J., concurring) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1843 (3d ed. 1961)).

152. *Id.* (Blackmun, J., concurring).

153. *Id.* (Blackmun, J., concurring).

154. *Id.* (Blackmun, J., concurring). Justice Blackmun pointed to the intentions of the framers of the Constitution for support. He stated that there is no indication that they intended to proscribe only those cruel and unusual punishments that judges, magistrates, or jailers intended to inflict. *Id.* (Blackmun, J., concurring). Justice Blackmun cited Judge Noonan of the Ninth Circuit as additional support for this supposition: “[The Framers] were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement . . . [and] understood that cruel and unusual punishment can be administered by the failures of those in charge to give heed to the impact of their actions on those within their care.” *Id.* (Blackmun, J., concurring) (quoting *Jordan v. Gardner*, 986 F.2d 1521, 1544 (9th Cir. 1993) (Noonan, J., concurring)).

ishment.¹⁵⁶ Justice Blackmun also referred to *Whitley v. Albers*, in which the Court held that without penological purpose, harsh and inhumane conditions of confinement are unconstitutional, even if there is no "express intent to inflict unnecessary pain."¹⁵⁶ Justice Blackmun explained that the objective approach the Court employed before *Wilson* best served the principles expounded in the Constitution, for the Constitution was not intended to shield prison officials from liability simply because they lack mens rea.¹⁵⁷

Justice Blackmun concluded his concurring opinion by reiterating his belief that *Wilson* should be overruled.¹⁵⁸ However, he joined in the Court's opinion because the petitioner did not seek to have *Wilson* reconsidered.¹⁵⁹ Additionally, Justice Blackmun recognized that the majority's opinion did nothing to extend the holding of *Wilson* and created no new obstacles for inmates challenging their conditions of confinement.¹⁶⁰ Justice Blackmun took comfort in the fact that the majority recognized that prison officials are not free to tolerate inmate assault and prisoners need not wait for harm to occur before they are entitled to relief from unsafe conditions of confinement.¹⁶¹ Finally, he concluded that the Court's opinion serves as notice to prison officials that they must affirmatively act to provide to those within their care a living environment that is free from sexual assault and other acts of violence.¹⁶²

155. *Id.* (Blackmun, J., concurring); see *supra* notes 55-62 and accompanying text (discussing *Rhodes*).

156. *Farmer*, 114 S. Ct. at 1988-89 (Blackmun, J., concurring) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

157. *Id.* at 1989 (Blackmun, J., concurring). Justice Blackmun also pointed to Justice White's concurring opinion in *Wilson*, in which Justice Blackmun joined, as support for an objective approach to assessing conditions of confinement under the Eighth Amendment. *Id.* (Blackmun, J., concurring). Justice White stated that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system" since inhuman conditions of confinement are often the result of "cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time." *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring).

158. *Farmer*, 114 S. Ct. at 1989 (Blackmun, J., concurring).

159. *Id.* (Blackmun, J., concurring).

160. *Id.* (Blackmun, J., concurring).

161. *Id.* (Blackmun, J., concurring).

162. *Id.* (Blackmun, J., concurring).

C. Justice Stevens' Concurring Opinion

Justice Stevens, in a surprisingly brief concurring opinion, stated that while he joins Justice Souter's opinion because of its dedication to precedent, he holds steadfast to the belief that prison conditions may be unconstitutional regardless of any culpable state of mind on the part of a prison official.¹⁶³

D. Justice Thomas' Concurring Opinion

In his concurring opinion, Justice Thomas remained faithful to his belief that it is only the sentence handed down by a judge or jury that amounts to punishment.¹⁶⁴ He proclaimed that “[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.”¹⁶⁵ Justice Thomas characterized the attack on the plaintiff as “unfortunate” but as it was not part of his sentence, it was not “punishment” subject to scrutiny under the Cruel and Unusual Punishments Clause.¹⁶⁶ Justice Thomas noted that with its current decision, the Court has once again refined what he referred to as the “National Code of Prison Regulation,’ otherwise known as the Cruel and Unusual Punishments Clause.”¹⁶⁷ If the petitioner had presented the issue, Justice Thomas admitted that he would have cast his vote in favor of overruling *Estelle* because the Cruel and Unusual Punishments Clause does not support including conditions of confinement in the definition of punishment.¹⁶⁸

163. *Id.* at 1989-90 (Stevens, J., concurring). Justice Stevens referred to his dissenting opinion in *Estelle* in which he indicated that the Court erred by including a reference to the subjective motivation of a person whose actions are being scrutinized under the Eighth Amendment. *Id.* (Stevens, J., concurring); see *Estelle v. Gamble*, 429 U.S. 97, 109 (1976) (Stevens, J., dissenting). Justice Stevens also cited Justice White's concurring opinion in *Wilson*, in which Justice Stevens joined, stating that the conditions of one's imprisonment are part of the punishment and prison officials should be held liable without regard to their state of mind. *Farmer*, 114 S. Ct. at 1989 (Stevens, J., concurring); see *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring).

164. *Farmer*, 114 S. Ct. at 1990 (Thomas, J., concurring). In *Helling*, Justice Thomas clarified his interpretation of the Eighth Amendment. “[T]he text and history of the Eighth Amendment . . . support the view that judges or juries—but not jailers—impose ‘punishment.’” *Helling v. McKinney*, 113 S. Ct. 2475, 2484 (1993) (Thomas, J., concurring). Additionally, Justice Thomas was explicit about his view of the Court's decision in *Estelle*: “Were the issue squarely presented . . . I might vote to overrule *Estelle*.” *Id.* at 2485 (Thomas, J., concurring).

165. *Farmer*, 114 S. Ct. at 1990 (Thomas, J., concurring).

166. *Id.* (Thomas, J., concurring).

167. *Id.* (Thomas, J., concurring); see also *Hudson v. McMillian*, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting) (“The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation.”).

168. *Farmer*, 114 S. Ct. at 1990 (Thomas, J., concurring). Justice Thomas asserted

However, Justice Thomas recognized that *stare decisis* requires him to consider the deliberate indifference standard.¹⁶⁹ Upon looking at Eighth Amendment precedent, he concluded that Farmer's proposed "should have known" standard does not comport with *Wilson's* mandate that mere negligence is not enough.¹⁷⁰ Justice Thomas added that, because he believes the Court originally erred in its decision in *Estelle*, *Estelle* and its progeny should receive the most narrow applicability.¹⁷¹ Recognizing that the Court took "a step in the right direction" in this case by narrowly construing *Estelle* and adopting the criminal recklessness standard of actual knowledge, Justice Thomas concurred in the judgment while remaining hopeful that in the "proper case the Court will reconsider *Estelle* in light of the constitutional text and history."¹⁷²

V. THE IMPLICATIONS

The Court set out in *Farmer* to eliminate the ambiguity created by the deliberate indifference standard.¹⁷³ At first glance, the Court appears to have succeeded. Lower courts have responded quickly.¹⁷⁴

that by including conditions of confinement as a component of one's punishment to be scrutinized under the Eighth Amendment, federal judges become the "superintendents of prison conditions nationwide." *Id.* (Thomas, J., concurring). Justice Thomas stated that the Court, in recognizing the almost limitless liability this addition could create for prison officials, added the state-of-mind requirement to curb the liability that might otherwise be imposed. *Id.* (Thomas, J., concurring).

169. *Id.* at 1990-91 (Thomas, J., concurring). Justice Thomas recognized that "*stare decisis* counsels hesitation in overruling dubious precedents." *Id.* at 1991.

170. *Id.* (Thomas, J., concurring).

171. *Id.* (Thomas, J., concurring).

172. *Id.* (Thomas, J., concurring).

173. *See supra* notes 90-95 and accompanying text.

174. *See Farnsworth v. Coburn*, No. 94-4193, 1995 WL 18282, at *1-2 (10th Cir. Jan. 18, 1995) (holding that under *Farmer*, county employees did not act with deliberate indifference when they failed to protect an inmate from an assault by a fellow inmate, even though the victim had previously warned the staff of the attacker's violent nature); *Brooks v. Celeste*, 39 F.3d 125, 129 (6th Cir. 1994) (holding that repeated acts of negligence by a prison doctor do not constitute deliberate indifference under the *Farmer* standard); *Clark v. Armontrout*, 28 F.3d 71, 72 (8th Cir. 1994) (reversing and remanding because the district court did not adequately instruct as to *Farmer's* subjective test of culpability); *Medley v. Turner*, No. 93-C-322, 1995 WL 23522, at *2 (N.D. Ill. Jan. 14, 1995) (applying *Farmer's* subjective standard to a case involving pretrial detainee's claim that prison officials used excessive force); *Patterson v. Walrath*, No. CIV.A.94-2451, 1994 WL 328353, at *2 (E.D. Pa. July 11, 1994) (denying a motion to dismiss because the correctional officer on duty at the time of the prisoner's rape allowed the attacker unsupervised contact with the victim, even

Unfortunately, this is where the problems begin.

A. *Is This Just Semantics?*

1. The Court's Standard—Criminal Recklessness?

The majority made an unequivocal statement that only actual knowledge on the part of prison officials constitutes deliberate indifference.¹⁷⁶ Justice Souter added that an inmate may prove the subjective intent requirement by establishing that the risk of harm was obvious.¹⁷⁶ In a recent decision, the Tenth Circuit Court of Appeals attempted to explain this aspect of *Farmer*. In *Farnsworth v. Coburn*,¹⁷⁷ a state prisoner brought an Eighth Amendment claim after he was attacked by another inmate.¹⁷⁸ The court of appeals held that the inmate had not proved the recklessness required under the deliberate indifference standard.¹⁷⁹ The court explained that the deliberate indifference standard, as set forth in *Farmer*, holds an official liable only if he has subjective knowledge.¹⁸⁰ The opinion becomes muddled, however, when the court adds that an "obvious risk is *equivalent* to the official knowing of the risk."¹⁸¹ This language too closely resembles the civil recklessness standard that Petitioner Farmer urged the Supreme Court to adopt.¹⁸² Moreover, it fails to distinguish between obviousness as circumstantial evidence and obviousness as a basis for imputing knowledge.

2. The Civil Recklessness Standard

Farmer asked the Court to adopt a civil recklessness standard, which would have held officials liable if they knew or should have known of a

though he knew the attacker to be dangerous); *Redd v. Gilless*, 857 F. Supp. 601 (W.D. Tenn. 1994) (finding that supervisory capacity is not enough to find deliberate indifference under *Farmer*).

175. *Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994); see *supra* notes 111-122 and accompanying text.

176. *Farmer*, 114 S. Ct. at 1981.

177. *Farnsworth*, No. 94-4193, 1995 WL 18282, at *2.

178. *Id.* at *1. The inmate punched Farnsworth in the mouth and attempted to stab him with a pencil. *Id.* Evidence showed that prior to this attack, Farnsworth told prison officials that his attacker was violent and that he had threatened another inmate's life. *Id.* A magistrate judge and a district court both dismissed Farnsworth's complaint because he failed to allege facts evidencing deliberate indifference on the part of the jail commander and the sheriff. *Id.* at *2.

179. *Id.*

180. *Id.*

181. *Id.* (emphasis added) (citing *Farmer v. Brennan*, 114 S. Ct. 1970, 1981 (1994)).

182. See *Farmer*, 114 S. Ct. at 1979; see also *supra* note 117.

substantial risk of harm to an inmate.¹⁸³ To prove that an official should have known of the risk, an inmate would point to the obviousness of that risk, thus imputing knowledge.¹⁸⁴ Prosser and Keeton recognize the most common meaning of recklessness as "an act of an unreasonable character [intentionally done] in disregard of a known or *obvious risk* that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."¹⁸⁵ This sounds very similar to the Court's language in *Farmer*. Justice Souter wrote that "the concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively *presumed* awareness from a risk's *obviousness*."¹⁸⁶ This is not a complete rejection of Farmer's proposed civil recklessness standard. Moreover, this is inconsistent with the usual definition of criminal recklessness.

The Model Penal Code defines criminal recklessness as actual awareness of a risk of harm: "A person acts recklessly . . . when he *consciously* disregards a substantial and unjustifiable risk . . ."¹⁸⁷ Within this definition there is no mention of inferred knowledge due to the obviousness of the risk of harm. The Court attempts to distinguish the civil and criminal standards by explaining that under the criminal standard the obviousness of the risk is not dispositive of actual knowledge.¹⁸⁸ A prison official may prove that somehow the "obvious escaped him."¹⁸⁹ The Court seems to refuse to impute knowledge on the part of prison officials even though a risk may be so blatantly obvious that a reasonable person would be aware of it. Unfortunately, the Court never makes this clear.

183. See *Farmer*, 114 S. Ct. at 1979.

184. See *supra* notes 124-25 and accompanying text.

185. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (emphasis added). Prosser and Keeton also recognized that the term "reckless" is often not clearly distinguishable from "gross negligence." *Id.* § 34, at 214. This may be what the Supreme Court found troubling about adopting a civil recklessness standard.

186. *Farmer*, 114 S. Ct. at 1980 (emphasis added).

187. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.7, at 237 n.24 (2d ed. 1986) (emphasis added) (quoting MODEL PENAL CODE § 2.02(2)(c)).

188. *Farmer*, 114 S. Ct. at 1981.

189. *Id.* at 1982 n.8.

3. A Distinction Without a Difference?

How critical this distinction is remains to be seen. As noted earlier, the Tenth Circuit Court of Appeals seems to have taken from *Farmer* a standard that will allow a prisoner to establish actual knowledge merely by pointing to the obviousness of the risk.¹⁹⁰ The court stated, "An obvious risk is *equivalent* to the official knowing of the risk."¹⁹¹ The appellate court seems to be applying a standard which allows courts to impute knowledge. This is just what the Supreme Court was trying to eliminate.¹⁹²

B. *The Actual Knowledge Standard and Prisoner's Rights*

Apart from possible continuing inconsistencies in applying the deliberate indifference standard, the Court's decision in *Farmer* presents other problems. Although the Court claims that its decision follows precedent, the Court does not properly account for its holding in *Hutto v. Finney*,¹⁹³ where it expressly recognized that conditions of confinement are part of the punishment and thus are subject to scrutiny under the Eighth Amendment.¹⁹⁴ In *Farmer*, Justice Souter stated that the Eighth Amendment forbids cruel and unusual punishment, not cruel and unusual conditions, without mentioning this decision's effect on *Hutto* and its progeny.¹⁹⁵ Justice Souter justified this position by relying on *Wilson's* holding that an Eighth Amendment violation is contingent upon the existence of a wrongdoer with a sufficiently culpable state of mind.¹⁹⁶

Moreover, by holding steadfastly to *Wilson's* subjective requirement, the Court condoned objectively inhumane conditions of confinement. According to Justice Souter, that a prison official "should have perceived [a significant risk] but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punish-

190. See *supra* notes 124-25 and accompanying text.

191. *Farnsworth v. Coburn*, No. 94-4193, 1995 WL 18282, at *2 (10th Cir. Jan. 18, 1995). The United States District Court for the Northern District of Illinois seems to be applying the intended interpretation. This court explained in a decision shortly after *Farmer* that an inmate may establish that officials "must have known" of a risk by showing the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." *Stanback v. Fairman*, No. 93 C 0816, 1994 WL 542781, at *3 (N.D. Ill. Oct. 3, 1994) (internal quotation marks omitted) (quoting *Farmer*, 114 S. Ct. at 1981-82); see *supra* notes 124-26 and accompanying text.

192. See *supra* notes 111-26 and accompanying text.

193. 437 U.S. 678 (1978).

194. *Id.* at 685; see *supra* notes 49-54 and accompanying text (discussing *Hutto*).

195. *Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994).

196. See *supra* notes 119-22 and accompanying text.

ment.¹⁹⁷ However, current standards of decency do not condone prison officials' claims of ignorance about conditions that pose a threat to the safety and well-being of inmates. A prison official is not just an ordinary, reasonable person. A prison guard is exposed daily to the special circumstances of a prison and the special needs of its inhabitants, and thus develops an expertise that courts must recognize. Inmates must rely on prison guards and officials for their most basic needs, including safety from brutal physical assault and rape.¹⁹⁸ An essential purpose of prison guards is to maintain a safe, peaceful environment by preventing inmate-on-inmate violence.

However, the actual knowledge requirement effectively places a duty on inmates to insure their own safety.¹⁹⁹ To invoke the Eighth Amendment, an inmate must take affirmative steps to unequivocally and clearly inform prison officials that a threat to his safety exists.²⁰⁰ Young prisoners incarcerated for the first time, however, may not be aware that they are potential victims of physical and sexual assault by other inmates.²⁰¹

Maintaining a subjective intent requirement as strict as actual knowledge effectively strips prisoners of the protection of the Eighth Amendment. In the context of a prison, it is difficult to point to a particular individual as a specific wrongdoer. A prison is an institution where the fault for inhumane conditions may be spread over the entire administration.²⁰² No single individual can be said to have caused the harm.²⁰³ Justice Blackmun pointed out that although many prisons are faced with overcrowding and understaffing, the Constitution must remain constant.²⁰⁴ The minimum standards of decency required by the Constitu-

197. *Farmer*, 114 S. Ct. at 1979.

198. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting) (stating that prison officials control all aspects of prisoners' lives); see also *supra* note 143.

199. See *supra* notes 127-30 and accompanying text.

200. See *James v. Cooper*, No. 91 C 7429, 1995 WL 35606, at *3 (N.D. Ill. Jan. 27, 1995). In *James*, the court stated that a "prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *Id.* (quoting *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991)).

201. See *supra* note 148 and accompanying text.

202. See *supra* note 157.

203. See generally *McGill*, 944 F.2d at 348-49 (stating that many items contribute to dangerous prison conditions, including the number of guards present per inmate and the design and size of the prison).

204. *Farmer v. Brennan*, 114 S. Ct. 1974, 1987 (1994) (Blackmun, J., concurring).

tion cannot be subordinated to the states' concerns about the cost and expense of remedying these conditions. Courts and judges "have no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff."²⁰⁵ Holding officials liable for conditions they should have known to be unconstitutional would provide the spark necessary for the changes needed in prisons across this country.²⁰⁶

VI. CONCLUSION

The decision in *Farmer* appears to be a straightforward decision geared specifically toward eliminating the ambiguity in the application of the deliberate indifference standard. With the Supreme Court's failure to specifically state that courts are not to impute knowledge from obvious threats to inmates' safety, the success of the decision is questionable. However, one outcome of *Farmer* is clear. The protection afforded by the Eighth Amendment is one step closer to being supplanted by the decisions of state legislators and prison administrators. By requiring actual knowledge on the part of an individual prison official, the Court has narrowed the scope of the Cruel and Unusual Punishments Clause's protection. This is contrary to prior interpretations by the Supreme Court, whereby the Court clearly intended that the Clause expand and evolve as an instrument, reflecting societal changes and enlightenment that inform standards of decency.²⁰⁷ For those in the underclass of prisoners, vulnerable to rape and assault, *Farmer* makes the Eighth Amendment but a dim light of hope in seeking relief from such wretched misery.

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205. *Madrid v. Gomez*, 889 F. Supp. 1146, 1279 (N.D. Cal. Jan. 10, 1995).

206. *Cf. id.* at *131 (finding constitutional violations in a newly built, but windowless, facility where inmates were confined to small cells for over 22 hours a day, guards used excessive force, and medical care was inadequate).

207. *See Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Trop v. Dulles*, 356 U.S. 86 (1958).