

# NOTE

## HUDSON v. McMILLIAN AND PRISONERS' RIGHTS: THE COURT GIVETH AND THE COURT TAKETH AWAY

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### INTRODUCTION

Prisoners have been described as the starkest example of a "discrete and insular minority";<sup>1</sup> they are politically powerless and subject to public disdain and apathy.<sup>2</sup> The general public hears little about inmates' suffering except in the most severe cases.<sup>3</sup> Consequently, daily horrors and small infringements of prisoners' rights go virtually unnoticed.<sup>4</sup> The barriers of prison walls, however, do

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1. Eric Neisser, "*Kind and Usual Punishment*" Revisited, N.J. L.J., Mar. 30, 1992, at 21, 21-23 (warning that hesitancy of Supreme Court to examine correctional abuses in constitutional framework may harm incarcerated prisoners and pose threat to society by returning abused and neglected prisoners to streets).

2. See *id.* (reporting that prisoners and their problems are despised and easily forgotten until prisoners are returned to society); see also *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) (suggesting that combination of public apathy and inmates' lack of political power has fostered neglect of prisons).

3. See *Rhodes*, 452 U.S. at 358 (Brennan, J., concurring) (maintaining that prisoners' suffering affects general public only in most severe situations); see also Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 921 (1992) (asserting that outside of riot situation, public has little knowledge of, or interest in, prisoners' confinement conditions).

4. These violations, however, have not necessarily been ignored by the courts. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affirming district court's imposition of 30-day limit on punitive isolation); *Johnson v. Levine*, 588 F.2d 1378, 1380-81 (4th Cir. 1978) (approving district court's order to eliminate prison overcrowding); *Williams v. Edwards*, 547 F.2d 1206, 1212 (5th Cir. 1977) (upholding district court's authority to order state to increase inmate safety measures and improve medical facilities). While it has been recognized that "courts are in the strongest position to insist that unconstitutional conditions be remedied," *Rhodes*, 452 U.S. at 359 (Brennan, J., concurring), the Supreme Court has continually admonished the courts to leave the running of prisons to prison officials. See *Whitley v. Albers*, 475 U.S. 312, 322 (1986) (commenting that judge and jury should not "substitute their judgment for that of officials who have made a considered choice"); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (noting that daily operation of correctional institution is complex process that demands judicial deference to institutional policies and practices); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (noting that courts are poorly positioned to address critical issues associated

not separate inmates from their constitutional rights.<sup>5</sup> Nonetheless, by creating legal barriers to Eighth Amendment<sup>6</sup> claims through high standards of proof, the Supreme Court makes upholding these rights increasingly difficult.<sup>7</sup> The Court's imposition of restrictive Eighth Amendment tests threatens a retrogression of the Eighth Amendment from watchdog of incarceration violations to sentinel of only formal punishments mandated by statute or sentence.<sup>8</sup> Such a retreat would signal the end of the Eighth Amendment's proscription of prisoners' rights violations, place too much discretionary authority in the hands of prison officials, and severely restrict prisoners' ability to seek redress for abuse of their constitutional rights.<sup>9</sup>

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with prison administration and reform), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 407-14 (1989). Continued pressure for a return to the "hands-off" approach to prison administration, combined with standards that place increased burdens on inmates attempting to prove their Eighth Amendment claims, could signal the end of the Eighth Amendment as a vital remedy for post-incarceration constitutional violations. See Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 219 (1980) (suggesting that Court's decision in *Bell v. Wolfish* may signal return of "hands-off" approach); see also William C. Collins, *The Defense Perspective on Prison-Conditions Cases*, in 1 PRISONERS AND THE LAW 7-3, 7-7 (Ira P. Robbins ed., 1992) (noting that reduction in judicial intervention in prison administration may "be a return to those unfortunate days when prison reform occurred only as the intermittent result of prison riots and other institutional scandals").

5. See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (noting that prison officials may not interfere with inmates' constitutional rights unless regulation of those rights is reasonably related to legitimate penological goal); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (determining that prisoners retain constitutional right of meaningful access to courts); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (finding that prisoners are entitled to receive protection of due process). See generally *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990*, 79 GEO. L.J. 1253, 1253-95 (1991) [hereinafter *Review of Criminal Procedure*] (detailing prisoners' retained constitutional rights).

6. U.S. CONST. amend. VIII. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The protection against cruel and unusual punishment encompasses prison living conditions, disciplinary treatment, and medical care. See, e.g., *White v. Napoleon*, 897 F.2d 103, 110-11 (3d Cir. 1990) (holding that doctor's refusal to prescribe appropriate medication for prisoners amounted to Eighth Amendment violation); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (finding Eighth Amendment violation where officials intentionally sprayed inmates with high-powered fire hose while extinguishing fire started by inmates); *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (holding that exposure to subfreezing temperatures constituted cruel and unusual punishment). See generally *Review of Criminal Procedure*, *supra* note 5, at 1263-68 (citing Supreme Court and circuit court cases determining that certain prison conditions constituted cruel and unusual punishment).

7. See *Whitley v. Albers*, 475 U.S. 312, 328-30 (1986) (Marshall, J., dissenting) (stating that high standard devised by Court creates "distinct and more onerous burden" that is inappropriate for inmate to meet because it removes from jury crucial factual determination of whether use of force was sanctioned by existing situation).

8. See *Hudson v. McMillian*, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting) (supporting return to time when "judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration").

9. See, e.g., *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (recognizing that Eighth Amendment operates as principal source of substantive protection for inmates in situations where deliberate use of force is questioned as excessive and unnecessary); *Huguet v. Barnett*,

Recently, the Supreme Court had the opportunity to review its Eighth Amendment jurisprudence. In *Wilson v. Seiter*,<sup>10</sup> argued during the 1990-1991 Term, the Court extended the "deliberate indifference" standard used in medical care claims to cases of prison overcrowding.<sup>11</sup> The imposition of this standard renders it increasingly difficult for inmates to obtain redress for cramped and unsanitary prison conditions by bringing suit under the Eighth Amendment.<sup>12</sup> In *Hudson v. McMillian*,<sup>13</sup> however, decided in the 1991-1992 Term, the Supreme Court dispelled the notion that a "significant injury" is necessary for an inmate to have a valid Eighth Amendment excessive force claim.<sup>14</sup> This decision represents a victory for inmates<sup>15</sup> and sends the message that even those forms of

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900 F.2d 838, 840 (5th Cir. 1990) (explaining that Eighth Amendment is principal basis through which prisoners can address constitutional deprivations arising during incarceration). Although prisoners retain procedural due process protection under the Fifth and Fourteenth Amendments, redress through these amendments is limited to whether the alleged conduct or condition violates an established "liberty interest." See generally *Review of Criminal Procedure*, *supra* note 5, at 1268-76 (describing protection afforded prisoners through Due Process Clauses of Fifth and Fourteenth Amendments).

10. 111 S. Ct. 2321 (1991). For a comprehensive and insightful analysis of *Wilson v. Seiter*, see generally 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).

11. *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991). In *Wilson*, the Court determined that Eighth Amendment claims based on official conduct outside of formally imposed sanctions require a state of mind inquiry. *Id.* The Court concluded: "[W]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his [or her] medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle [v. Gamble]*." *Id.*

12. See *id.* (asserting that deliberate indifference is relevant intent requirement in prison conditions cases). The increased difficulty arises from the addition of an intent requirement in Eighth Amendment conditions claims. *Id.* at 2330 (White, J., concurring). Prior to *Wilson*, the query in conditions cases was governed by an objective inquiry into the seriousness of the deprivation. *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981). The state of mind requirement places an additional burden on inmates. See generally Gray, *supra* note 10, at 1357 & nn.95-104 (discussing Court's derivation of state of mind requirement and deliberate indifference standard).

13. 112 S. Ct. 995 (1992).

14. *Hudson v. McMillian*, 112 S. Ct. 995, 999-1001 (1992). The U.S. Court of Appeals for the Fifth Circuit applied a four-part test, developed in an earlier decision, to determine whether Hudson's excessive force claim fell under the coverage of the Eighth Amendment. *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1991), *rev'd*, 112 S. Ct. 995 (1992). Under that test, a plaintiff bringing an Eighth Amendment excessive force claim must prove the following elements to prevail: "(1) a significant injury which (2) resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was (3) objectively unreasonable, and (4) that the action constituted an unnecessary and wanton infliction of pain." *Id.* The Fifth Circuit found that Hudson easily met the last three elements, but dismissed his claim for failure to prove a significant injury. *Id.*

15. The Court's rejection of a significant injury requirement in excessive force claims has benefited prisoners in cases following the *Hudson* decision. See, e.g., *Flowers v. Phelps*, 956 F.2d 488, 491 (5th Cir. 1992) (upholding inmate's Eighth Amendment excessive force claim for minor injuries sustained during unprovoked beating because showing of significant injury is not required under *Hudson*); *Tijerina v. Plentl*, 958 F.2d 133, 136 (5th Cir. 1992) (remanding case involving allegation of excessive force inflicted by prison guard for reconsideration in light of *Hudson's* mandate that "physical force may constitute cruel and unusual punishment even though the inmate does not suffer serious injury"); *Winder v. Leak*, 790 F. Supp. 1403,

torture and abuse that fail to leave a permanent mark on the body simply will not be tolerated under "the evolving standards of decency that mark the progress of a maturing society."<sup>16</sup>

In reaching its decision in *Hudson*, the Court chose to apply the stringent "malicious and sadistic use of force" standard.<sup>17</sup> The malice standard requires prisoners to meet a virtually insurmountable burden of proof that will make it extremely difficult for inmates to win Eighth Amendment claims alleging the use of excessive force.<sup>18</sup> Thus, while the *Hudson* decision portrays a landmark breakthrough in prisoners' rights by rejecting the need for a significant injury and decrying the torture of inmates, it also creates a roadblock to obtaining redress for inmates' grievances by extending the malice standard to all claims involving the use of excessive force.

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1406-07 (N.D. Ill. 1992) (rejecting defendant's argument to dismiss inmate's excessive force claim for failure to demonstrate cognizable injury because *Hudson* rejected significant injury requirement).

16. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (determining that under "the evolving standards of decency," denationalization as punishment is prohibited by Eighth Amendment). The notion of "evolving standards of decency," first articulated in *Trop*, has been used throughout Eighth Amendment jurisprudence to define and refine what conduct and conditions are intolerable under the Eighth Amendment. See, e.g., *Rhodes*, 452 U.S. at 346 (explaining that no static test can determine when confinement conditions violate Eighth Amendment because that determination must be based on evolving standards of decency); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (maintaining that *Trop* dictates that contemporary values always inform whether challenged sanction violates Eighth Amendment).

17. *Hudson*, 112 S. Ct. at 999 (1992). The Court in *Hudson* not only applied the malice standard, but also extended the standard's application to all cases involving allegations of the use of excessive force by prison officials. *Id.* The Court did so in recognition of the similarities it found between cases involving prison riots and those involving "lesser disturbances." *Id.*

The malice standard was first articulated by the Supreme Court in response to an excessive force claim stemming from a prison riot. See *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (holding that what constitutes unnecessary and wanton infliction of pain for Eighth Amendment purposes in context of prison disturbance is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm").

18. See Neisser, *supra* note 1, at 22 (describing malice standard as mandating strictest mental component of any Eighth Amendment test). To determine whether a prison official's conduct inflicts unnecessary and wanton pain and thus violates the Eighth Amendment, the standard requires an inquiry into the official's state of mind to prove that he or she applied force "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. The term "malicious" characterizes the infliction of injury "done with[] wicked, evil or mischievous intentions or motives . . . without just cause or excuse or as a result of ill will." BLACK'S LAW DICTIONARY 958 (6th ed. 1990). Acting "sadistically" implies "satisfaction . . . derived from inflicting harm on another." *Id.* at 1336. The standard requires proof that the official inflicted injury on a prisoner with cruel and wicked intent, without an excuse, with the very purpose of causing harm. *Hudson*, 112 S. Ct. at 999-1001.

Furthermore, it must be demonstrated that the official derived some satisfaction by inflicting the pain on the prisoner. *Id.* The standard fails to encompass the fact, however, that people often harm others simply because they think they should or because they believe that they can get away with it. See *infra* note 109 and accompanying text (describing case studies that explain various motives behind infliction of harm on others by those in positions of authority). Consequently, the malice standard is virtually impossible to prove and places a practically insurmountable burden on prisoners.

Part I of this Note discusses the background of Eighth Amendment jurisprudence and focuses on recent Supreme Court decisions. Part II addresses the reasoning and analysis of the Supreme Court in *Hudson v. McMillian*. Part III analyzes the Court's decision and suggests that deliberate indifference, and not the malicious and sadistic use of force, is the appropriate standard to be applied in excessive force claims that do not involve an actual prison disturbance. Part IV recommends that courts should only apply the malice standard to situations involving actual prison unrest and should adopt a low threshold for the showing of malice by labeling certain acts without penological justification, such as beatings, as *prima facie* malicious and sadistic.

## I. BACKGROUND

### A. *Mental Culpability*

#### 1. *The Whitley malice standard*

The Supreme Court has determined that only "the unnecessary and wanton infliction of pain" violates the Cruel and Unusual Punishments Clause in post-incarceration Eighth Amendment claims.<sup>19</sup> The Court has struggled to establish the requisite elements for determining when post-incarceration conduct violates the Eighth Amendment<sup>20</sup> and has determined that what constitutes unneces-

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19. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); see *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976) (describing recent holdings proscribing "physically barbarous punishments"); see also *Gregg*, 428 U.S. at 169-73 (recounting development of Eighth Amendment jurisprudence regarding unnecessary and wanton infliction of pain).

Justice Thomas describes the inclusion of a wide range of prison deprivations as an expansion of the Eighth Amendment that "cut[s] the Eighth Amendment loose from its historical moorings." *Hudson v. McMillian*, 112 S. Ct. 995, 1007 (1992) (Thomas, J., dissenting). The increased scope of the Eighth Amendment is more aptly described, however, as the practical application of the Court's message in *Trop v. Dulles* that the Eighth Amendment should expand according to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Note, however, that the broad standard articulated by the language in *Trop* has not always been easy for courts to apply. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (stating that as long as prison conditions meet standards of decency, prisoners may have to accept those conditions as part of their penalty, even though they are harsh and restrictive); *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (noting narrow distinction between applying evolving standards of decency and subjective views of presiding judge); see also Amy Newman, *Eighth Amendment—Cruel and Unusual Punishment and Condition Cases*, 82 J. CRIM. L. & CRIMINOLOGY 979, 989-90 (1992) (discussing Court's deemphasis in *Rhodes* of *Trop* standard of evolving decency and explaining that harsh conditions that do not qualify as cruel and unusual are price prisoners must pay for their offenses against society).

20. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2325 (1991) (deciding that "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [under the Eighth Amendment]"); *Whitley*, 475 U.S. at 319 (determining that "conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety").

sary and wanton infliction of pain varies with the nature of the claim asserted.<sup>21</sup> In 1991, the Supreme Court in *Wilson v. Seiter*<sup>22</sup> confirmed that post-incarceration Eighth Amendment claims contain a mental element.<sup>23</sup> The Court did not delineate a precise standard for establishing mental culpability, but concluded that the application of the little-more-than-negligence "deliberate indifference" standard<sup>24</sup> or the stringent "malicious and sadistic intent to harm" standard would depend on the claim involved.<sup>25</sup>

In making its determination of what standard of mental culpability

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21. *Whitley*, 475 U.S. at 320 (noting that "general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged").

22. 111 S. Ct. 2321 (1991).

23. *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) (determining that Eighth Amendment claims involving official conduct that does not purport to be formal penalty imposed for crime require inquiry into state of mind of prison officials accused of using excessive force); cf. *Rhodes*, 452 U.S. at 347-48 (finding that placing two inmates in one 63-square-foot cell did not violate Eighth Amendment and required examination of objective factors only). The Court in *Wilson* was able to address the subjective standard by asserting that *Rhodes* had not eliminated consideration of the subjective component because it was a relevant consideration in *Whitley v. Albers*, which had followed *Rhodes*. *Wilson*, 111 S. Ct. at 2324. See generally Gray, *supra* note 10, at 1356-61 (describing derivation of state-of-mind requirement).

24. See *Wilson*, 111 S. Ct. at 2326 (discussing deliberate indifference standard of mental culpability); see also Gray, *supra* note 10, at 1367-78 (explaining that deliberate indifference standard has been variously interpreted as encompassing knowledge and failure to act, inexcusable lack of knowledge, recklessness, and negligence). The deliberate indifference standard was first articulated by the Supreme Court in *Estelle v. Gamble*, where the Court addressed whether the failure of prison officials to provide a prisoner with adequate medical care amounted to an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Court noted that punishments violate the Eighth Amendment if they are incompatible "with evolving standards of decency that mark the progress of a maturing society," *id.* at 102, or if they "involve the unnecessary and wanton infliction of pain." *Id.* at 103. The Court determined that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). In dicta, the Court explained that an Eighth Amendment violation could be established by a showing of deliberate indifference by prison doctors in treating inmates, by prison guards in delaying prisoner access to medical care, or by prison guards in interfering with a prescribed medical treatment. *Id.* at 104-05. The Court noted that while negligence does not rise to a constitutional level merely because the victim is incarcerated, prisoners can still sue in tort for negligence or medical malpractice. *Id.* at 106.

25. See *Wilson*, 111 S. Ct. at 2326 ("Whitley makes clear . . . [that] wantonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.'" (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986))).

To determine what constitutes the unnecessary and wanton infliction of pain in the case of a prison disturbance, the Court in *Whitley* initially looked to the *Estelle* standard. *Whitley*, 475 U.S. at 320. The Court concluded, however, that the standard of deliberate indifference failed to capture the gravity of the competing obligations present in a prison disturbance. *Id.* The Court found that prison riots require prison officials to act in haste when balancing the effect their actions will have on the inmates against the opposing institutional goals of insuring the security of the institution, staff, visitors, and the inmates themselves. *Id.* at 320-21. The Court thus determined that situations where prison officials must balance institutional needs with inmate safety require a higher standard of mental culpability than the *Estelle* standard. *Id.*

to apply in *Wilson*, the Court examined *Whitley v. Albers*.<sup>26</sup> The *Whitley* decision developed the "malicious and sadistic intent to harm" standard in response to an excessive force claim by an inmate shot in the leg by a prison official during an attempt to quell a prison riot.<sup>27</sup> The Court in *Wilson* rejected the malice standard articulated in *Whitley* precisely because it evolved within the specific emergency circumstances of a prison riot.<sup>28</sup> The Court determined that the hasty balancing between institutional security and prisoners' rights that occurs during a disturbance is not present in prison condition cases<sup>29</sup> and, therefore, declined to apply the stringent malice standard.<sup>30</sup>

## 2. *The Estelle deliberate indifference standard*

The Court in *Wilson* also examined *Estelle v. Gamble*,<sup>31</sup> an earlier decision that first articulated the "deliberate indifference" standard. In *Estelle*, the Court was required to ascertain whether the deprivation of sufficient medical treatment violated an inmate's Eighth Amendment rights.<sup>32</sup> In *Wilson*, the Court concluded that the *Estelle*

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26. 475 U.S. 312 (1986).

27. *Whitley v. Albers*, 475 U.S. 312, 314 (1986); see *supra* notes 17-18, 22-25 and accompanying text (describing Court's derivation of malice standard).

28. *Wilson*, 111 S. Ct. at 2326-27; see *supra* note 25 and accompanying text (discussing *Whitley* and its derivation of malice standard). It has been suggested that the malice standard is inappropriate even in the context of a prison riot. *Whitley*, 475 U.S. at 328-29 (Marshall, J., dissenting). Justice Marshall maintained that the proper standard in any Eighth Amendment inquiry is the unnecessary and wanton infliction of pain, which already places a heavy burden on the prisoner seeking relief. *Id.* at 329. Justice Marshall further contended that the malice standard usurps the jury's fact finding authority and places an unnecessarily heavy burden on the inmate: "There is simply no justification for creating a distinct and more onerous burden for the plaintiff to meet merely because the judge believes that the injury at issue was caused during a disturbance . . ." *Id.* at 329-30.

29. See *Wilson*, 111 S. Ct. at 2326 (noting that in contrast to emergency situation in *Whitley*, "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities," . . . so that in that context as *Estelle* held, 'deliberate indifference' would constitute wantonness") (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

30. See *id.* (deciding that "the very high state of mind prescribed by *Whitley* does not apply to prison condition cases"); see also *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987) (holding that *Estelle* deliberate indifference standard is appropriate standard in situation where official deprived paraplegic inmate of toilet facilities and physical therapy). In *LaFaut*, the court held that the *Whitley* malice standard was inapplicable because there was no clash between the inmate's treatment and equally important institutional responsibilities within the specific context of the claim. *LaFaut*, 834 F.2d at 391-92.

31. 429 U.S. 97 (1976). The Court in *Wilson* noted that *Estelle v. Gamble* marked the first application of the Cruel and Unusual Punishments Clause to a deprivation that was not part of an inmate's imposed sentence. *Wilson*, 111 S. Ct. at 2323.

32. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). While the prisoner in *Estelle* did not succeed in his claim due to his failure to prove deliberate indifference on the part of medical personnel, the Court explained in dicta that proof of deliberate indifference does constitute an Eighth Amendment violation whether it is displayed by prison doctors in response to a prisoner's needs, or by prison guards in delaying or refusing prisoners access to medical personnel. *Id.* at 104-07.

deliberate indifference standard was appropriate in prison conditions claims for three main reasons: (1) it prevents inadvertent accidents and mere negligence from rising to the level of a constitutional violation;<sup>33</sup> (2) it requires a sufficient level of proof of mental culpability that, the Court resolved, is essential to bringing an Eighth Amendment claim;<sup>34</sup> and (3) it does not place an onerous burden of proof on the inmate.<sup>35</sup>

*a. The subjective element*

In choosing the deliberate indifference standard over the malice standard, the Court in *Wilson* heeded *Whitley*'s instruction that wantonness is not determined by the effect of conduct upon a prisoner, but rather by the constraints facing the prison official.<sup>36</sup> In other words, the Court confirmed that the determination of wantonness requires a subjective inquiry into the mind of the official and not an objective inspection of observable physical results.<sup>37</sup> In its adoption of a subjective definition of wantonness, the Court in *Wilson* mentioned that it found no significant distinction among claims involving medical care, food, cell temperature, or protection from other inmates.<sup>38</sup> The Court decided that the deliberate indifference standard should apply in all "conditions" situations.<sup>39</sup> Thus, *Wilson* held the door open for categorizing excessive force against inmates as

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33. See *Wilson*, 111 S. Ct. at 2325 (noting that pain inflicted not as part of formal punishment requires mental element); *Estelle*, 429 U.S. at 105-06 (determining that neither inadvertence nor negligence establishes requisite mental culpability for Eighth Amendment violation); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (finding that second electrocution attempt did not amount to wanton infliction of pain because failed first attempt was "unforeseeable accident").

34. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) (maintaining that word "punishments" in Cruel and Unusual Punishments Clause contains implicit intent requirement and therefore requires state of mind inquiry for Eighth Amendment claims).

35. *Id.* at 2326-27. The Court in *Wilson* chose the *Estelle* standard over the *Whitley* standard because it believed that the malice standard was burdensome on the inmate and that, in the absence of a prison disturbance, no justification, such as the balancing of competing institutional and safety goals, existed for the malice standard. *Id.* Requiring proof of "unnecessary and wanton infliction of pain" presents an inmate with a sufficient burden in bringing an Eighth Amendment claim. See *Whitley v. Albers*, 475 U.S. 312, 329 (1986) (Marshall, J., dissenting) (stating "the 'unnecessary and wanton' standard . . . establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation"). Finally, while deliberate indifference is difficult to prove, see *Wilson*, 111 S. Ct. at 2328-30 (White, J., concurring) (explaining inherent difficulty in proving intent and positing that intent requirement breaks with case precedent), it does not place as onerous a burden on the inmate as the malice standard. See *supra* notes 25-30 and accompanying text (detailing burden of malice standard).

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

37. *Id.*

38. *Id.* at 2326-27.

39. *Id.* at 2327 (determining that deliberate indifference standard is appropriate whether treatment of prisoner is defined with regard to inhumane conditions of confinement or failure to respond to prisoner's medical needs).



another condition of confinement<sup>40</sup> to which the deliberate indifference standard should apply.

*b. The objective element*

The Court in *Wilson* also concluded that a conditions claim requires an objective determination of deprivation, phrased here as a "single, identifiable human need."<sup>41</sup> The Court's focus on an objective standard of deprivation in conditions claims is not an innovation.<sup>42</sup> In the *Wilson* decision, however, the Court clearly identified the analysis of conditions claims as embodying separate and distinct objective and subjective factors.<sup>43</sup> The objective element requires an initial factual determination of sufficiently serious physical deprivation.<sup>44</sup> Then the court must conduct a subjective determination of wantonness that is based on the official's mental perception of the prevailing conditions.<sup>45</sup> The *Wilson* decision left unanswered the question of whether a similar two-pronged analysis for Eighth Amendment conditions claims would be applicable in excessive force cases.<sup>46</sup>

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40. See *id.* at 2326 ("Indeed the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."). The Court could have added "as is the inmate's freedom from excessive force." Cf. R. Wilson Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 701-11 (positing that no Supreme Court precedent recognizes uniform constitutional right to be free from excessive force).

41. *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991). The Court rejected petitioner's suggestion that each challenged prison condition be viewed as part of the overall conditions in the prison. *Id.*; see Gray, *supra* note 10, at 1352-54 (explaining that totality of circumstances test and core conditions test that courts have applied in Eighth Amendment conditions cases consider aggregate of prison conditions). Although the Court in *Wilson* chose not to aggregate the prison conditions, it concluded that conditions not amounting to Eighth Amendment violations on their own can violate the Eighth Amendment if they work together to deprive the prisoner of a single identifiable human need such as warmth or food. See *Wilson*, 111 S. Ct. at 2327 (finding that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists"); see also Gray, *supra* note 10, at 1384-86 (analyzing Court's derivation of identifiable human need test).

42. See *Hoptowit v. Ray*, 682 F.2d 1237, 1246-47 (9th Cir. 1982) (finding that Eighth Amendment violation requires deprivation of specific basic needs); *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981) (holding that to establish Eighth Amendment violation, court must focus on specific conditions of confinement); see also Gray, *supra* note 10, at 1384-86 (describing totality of circumstances and core conditions tests that Court has used to identify objective deprivations of human needs).

43. See *Wilson*, 111 S. Ct. at 2324 (basing analysis of conditions claim on objective component of sufficiently serious deprivation and subjective component of sufficiently culpable state of mind).

44. *Id.*

45. *Id.*

46. See Brief for Respondents at 19-21, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531) [hereinafter Brief for Respondents] (arguing that *Wilson* decision mandates that Court require objective component in addition to existing subjective component in Eighth Amendment excessive force claims).

*B. Malice Versus Deliberate Indifference**1. Prison riot cases*

In *Whitley v. Albers*, the Court determined that deliberate indifference was an inappropriate standard for measuring the mental culpability of officials involved in a prison riot.<sup>47</sup> The Court explained that deliberate indifference can usually be proved or disproved without having to balance competing institutional concerns against the safety of others.<sup>48</sup> Because deliberate indifference can be established without conducting a balancing test, the Court found this standard inadequate for effectively capturing the importance of competing institutional goals present in a riot situation.<sup>49</sup> Consequently, the Court in *Whitley* balanced institutional security against the amount of force needed to quell the riot and determined that only force applied "maliciously and sadistically for the very purpose of causing harm" amounted to a violation of the Eighth Amendment.<sup>50</sup> In recognizing these factors, the Court articulated the need for consideration of the existing context in the determination of what constitutes unnecessary and wanton infliction of pain for purposes of an Eighth Amendment violation.<sup>51</sup>

*2. Prison conditions cases*

The Court in *Whitley* confirmed that the nonbalancing deliberate indifference standard was appropriate in *Estelle* because, in contrast to a prison riot situation, the administration of medical care to inmates does not require the balancing of "equally important government responsibilities" against prisoners' safety.<sup>52</sup> The Court in

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47. See *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (determining that deliberate indifference standard does not capture importance of competing obligations of institutional safety and harm to inmates or give necessary deference to haste with which these decisions are made in disturbance situations).

48. *Id.*; see also *supra* notes 25-35 and accompanying text (discussing balancing of institutional concerns against inmates' rights).

49. *Whitley*, 475 U.S. at 320 ("In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.").

50. *Id.* at 320-21.

51. *Id.* at 320.

52. *Id.* (determining that deliberate indifference to inmate's medical needs can be established without consideration of institution's safety). The Court thus makes clear that situations that implicate a conflict between the official's responsibility to prisoners' needs and equally important governmental considerations are those that involve a threat to institutional safety. *Id.* This begs the question of how the Court can find that there is a balancing of responsibilities facing an official where the inmate is shackled and handcuffed, as in *Hudson*. See *Hudson v. McMillian*, 112 S. Ct. 995, 998-99 (1992) (noting that whenever prison disturbance occurs, regardless of degree of disturbance, there must be balancing of need to maintain discipline with risk of injury).

*Whitley* held that the deliberate indifference standard was appropriate where the danger of imminent turmoil did not exist, but that the heightened malice standard was appropriate in the presence of an actual disturbance.<sup>53</sup> Together, *Whitley* and *Wilson* suggest that situations of actual unrest would require the malice standard, whereas all other allegations of excessive use of force absent a prison disturbance would implicate the deliberate indifference standard.<sup>54</sup>

In *Hudson v. McMillian*,<sup>55</sup> the Court was presented with the question of whether a certain level of injury was necessary to state a claim of cruel and unusual punishment in an excessive force context.<sup>56</sup> In addressing this issue, the Court examined whether the malice standard or the deliberate indifference standard was appropriate for ascertaining the subjective mental culpability of the official in a nonriot situation involving allegations of use of excessive force.<sup>57</sup>

## II. HUDSON V. McMILLIAN

### A. The Facts of the Case

Keith J. Hudson, an inmate of Louisiana State Penitentiary,<sup>58</sup> brought suit against three state correctional officers, Jack McMillian, Marvin Woods, and Arthur Mezo, alleging that his Eighth Amendment rights were violated by a beating he received from those officers.<sup>59</sup> On October 30, 1983, Officers Woods and McMillian issued two disciplinary reports on Hudson following an exchange of words with him.<sup>60</sup> Officers Woods and McMillian placed Hudson in handcuffs and shackles ("full restraints"), removed him from his cell, and escorted him to administrative lockdown.<sup>61</sup> Hudson testified that during this escort, Officer McMillian punched him in the mouth, eyes, chest, and stomach, while Woods held him in place

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53. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (noting that standard to be applied in Eighth Amendment claims should depend on context of situation in which alleged conduct occurred).

54. See Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3, 3 (positing that *Whitley* and *Wilson* suggest that in excessive use of force cases, different standards apply in disturbance and nondisturbance situations).

55. 112 S. Ct. 995 (1992).

56. *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992).

57. *Id.* at 998-99 (discussing whether different standards should apply in riot and nonriot situations).

58. See Brief for Respondents, *supra* note 46, at 4 n.2 (indicating that Hudson was serving time in Louisiana's maximum security prison for armed robbery).

59. *Hudson*, 112 S. Ct. at 995.

60. Brief for Petitioner at 3, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531) [hereinafter Brief for Petitioner].

61. *Hudson*, 112 S. Ct. at 997.

and kicked him from behind.<sup>62</sup> He further alleged that Lieutenant Mezo, the supervisor on duty, observed the beating and told the other officers "not to have too much fun."<sup>63</sup> Hudson suffered minor bruises and swelling of his face, mouth, and lips.<sup>64</sup> The beating also loosened his teeth and cracked his partial dental plate, which was rendered unusable for several months.<sup>65</sup>

Plaintiff subsequently brought a § 1983 action<sup>66</sup> alleging that the officers had violated the Eighth Amendment's prohibition on cruel and unusual punishment and seeking compensatory damages.<sup>67</sup> A federal magistrate found that respondents McMillian and Woods "had used force when there was no need to use any force at all" and that respondent Mezo had expressly condoned the use of force in this instance.<sup>68</sup> The magistrate further found that the petitioner had

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Section 1983 is the codification of § 1 of the Civil Rights Act of 1871 and provides in relevant part:

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

42 U.S.C. § 1983 (1988). The Supreme Court has identified at least three types of conduct that implicate § 1983, including the conduct of a police officer or prison guard who is granted the authority of state law. *See, e.g.,* Parrat v. Taylor, 451 U.S. 527, 535-36 (1981) (finding that prison official is state actor under § 1983); Monroe v. Pape, 365 U.S. 167, 184-85 (1961) (maintaining that police officers are state actors under § 1983); United States v. Classic, 313 U.S. 229, 326 (1941) (determining that misuse of power granted by state law to person whose ability to wield power was possible only because person was "clothed with the authority of state law" is action taken under color of state law).

A § 1983 claim must state a violation of federal or constitutional law; redress for a violation of state-granted rights is not possible under § 1983. *Oklahoma City v. Tuttle*, 471 U.S. 808, 817 n.4 (1985). Additionally, state legislators, judges, and prosecutors enjoy absolute immunity from liability under § 1983. *See Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976) (considering policy reasons for common law immunities of prosecutors, judges, and grand jurors). Similarly, qualified or partial immunity from § 1983 liability is granted to state officials performing discretionary functions so long as they do not violate the "statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This qualified immunity extends to state prison officials. *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). For an overview of § 1983 suits, see generally *Review of Criminal Procedure*, *supra* note 5, at 1281-94, and Randy J. Amster, Note, *Defining a Uniform Culpability Standard in Section 1983*, 56 *BROOK. L. REV.* 183, 185-91 (1990).

67. *Hudson*, 112 S. Ct. at 997-98. Both parties agreed to submit the case to a magistrate pursuant to 28 U.S.C. § 636(c), which states in pertinent part:

Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he [or she] serves.

28 U.S.C. § 636(c)(1) (1988).

68. *Hudson*, 112 S. Ct. at 998.

only sustained minor injuries and therefore awarded damages of \$800.<sup>69</sup>

The U.S. Court of Appeals for the Fifth Circuit reversed.<sup>70</sup> The Fifth Circuit determined that *Huguet v. Barnett*<sup>71</sup> provided the controlling legal standard for determining whether the Eighth Amendment's ban on cruel and unusual punishment had been violated.<sup>72</sup> In *Huguet*, the court ruled that a plaintiff bringing an Eighth Amendment excessive force claim must prove four elements: "(1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was (3) objectively unreasonable, and (4) the action constituted an unnecessary and wanton infliction of pain."<sup>73</sup> The Fifth Circuit agreed with the magistrate's factual determination that the use of force against Hudson was unwarranted<sup>74</sup> and held that the plaintiff satisfied the latter three of the four prongs.<sup>75</sup> The court also held, however, that the plaintiff could not prevail in his claim

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69. *Id.*

70. *See* Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (determining that Hudson's injuries were insufficient to sustain § 1983 claim), *rev'd*, 112 S. Ct. 995 (1992).

71. 900 F.2d 838 (5th Cir. 1990).

72. *Hudson*, 929 F.2d at 1014-15.

73. *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990). The four-pronged test developed by the Fifth Circuit in *Huguet* evolved from the three-pronged test delineated in *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989). *Johnson* involved a Fourth Amendment excessive force claim in which an arresting police officer applied handcuffs so tightly to a man that they broke through his skin and disabled him from going to work for two weeks. *Johnson*, 876 F.2d at 478. In an appeal from the lower court's granting of summary judgment, the Fifth Circuit reversed, holding that the test for deciding an excessive force claim was whether there was: (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable. *Id.* at 480. These factors constitute the first three prongs of the *Huguet* test.

In *Huguet*, the Fifth Circuit added the fourth prong: the unnecessary and wanton infliction of pain. *Huguet*, 900 F.2d at 841. The court in *Huguet* intended for the first three elements of the test to serve as a threshold objective inquiry. *Id.* If the elements of the initial inquiry were present, the court could conduct a subjective analysis into the officer's state of mind in order to determine if the force was applied with malicious intent to harm. *Id.* In *Hudson*, the court determined that because no force was required, the officers' use of such force was objectively unreasonable. *Hudson*, 929 F.2d at 1015. The court then proceeded to the fourth *Huguet* prong and determined that the officers' conduct "occasioned unnecessary and wanton infliction of pain." *Id.* Only then did the court in *Hudson* return to the first prong and determine that the claim failed to prove a significant injury. *Id.* The *Hudson* court likened Hudson's injuries to those suffered by an inmate in *Wise v. Carlson*, 902 F.2d 417, 417 (5th Cir. 1990) (determining that prisoner's injuries, including bruises on chest and forearm and hematoma on eyelid, were superficial and insufficient for excessive force claim), and held them "likewise insufficient." *Hudson*, 929 F.2d at 1015.

74. *Hudson*, 929 F.2d at 1015; *see also* Hudson v. McMillian, No. 83-1385-A, slip op. at 9 (M.D. La. Apr. 30, 1987) (describing magistrate's factual determination that there was no need to use any force against Hudson, as evidenced by credibility of witnesses, contemporaneity of another inmate's complaint of excessive force, and sick call sheet describing Hudson's injuries), *rev'd*, 929 F.2d 1014 (5th Cir. 1990), *rev'd*, 112 S. Ct. 995 (1992).

75. *See Hudson*, 929 F.2d at 1015 (holding that Hudson successfully demonstrated that officers' conduct was excessive, objectively unreasonable, and constituted unnecessary infliction of pain).

because he sustained only minor injuries and thus failed to meet the "significant injury" requirement.<sup>76</sup> On appeal, the Supreme Court granted certiorari to determine whether a significant injury was necessary for a successful Eighth Amendment excessive force claim, not whether the *Whitley* malice standard applied to excessive force allegations outside of a riot context.<sup>77</sup>

### B. *The Supreme Court's Analysis*

In *Hudson v. McMillian*, Justice O'Connor, writing for the majority, determined that it is not necessary for a prisoner to suffer a significant injury from the use of excessive physical force in order to state an Eighth Amendment claim for cruel and unusual punishment.<sup>78</sup> The Court concluded, however, that the inmate must prove that the prison official using force did so with a level of mental culpability amounting to a "malicious and sadistic" intent to cause harm.<sup>79</sup> Based on the facts of the case, the Court found that Hudson met this burden of proving malice and he thus should have prevailed in his excessive force claim.<sup>80</sup>

#### 1. *Standard of mental culpability*

The Court concluded that "malicious and sadistic" intent to harm is the appropriate standard of mental culpability to be applied in the determination of any Eighth Amendment excessive force claim.<sup>81</sup> In reaching this result, the Court accepted *Wilson's* mandate that all

76. *Id.*

77. See *Hudson v. McMillian*, 112 S. Ct. 995, 997 (1992) ("This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury."). Hudson argued that because the magistrate found that the correctional officers acted with malice, the issue of whether the malice standard applied to excessive force cases not involving an actual disturbance need not be decided by the Court. Brief for Petitioner, *supra* note 60, at 10 n.6 (suggesting that if Court finds that significant injury is not required to state § 1983 claim, Court need only reverse with instructions to reinstate judgment of district court). Even the correctional officers maintained that the instant case presented a dispute over the objective component and not the subjective component of the appropriate legal standard. Brief for Respondents, *supra* note 46, at 20-21.

78. *Hudson*, 112 S. Ct. at 1000 (finding that requirement of significant injury would permit diabolic punishment that was unacceptable to drafters of Eighth Amendment as well as to present society). Chief Justice Rehnquist, Justice White, Justice Kennedy, and Justice Souter joined Justice O'Connor's majority opinion. *Id.* at 997.

79. *Id.* at 998-99 (holding that malice standard should be applied to all excessive force cases).

80. See *id.* at 1002 (Stevens, J., concurring) (agreeing with majority's decision that more demanding malice standard was met in this case, but nonetheless asserting that application of malice standard was misplaced). The presence of malice in the guards' beating of Hudson was first noted by the magistrate. See *Hudson v. McMillian*, No. 83-1385-A, slip op. at 11 (M.D. La. Apr. 30, 1987) (finding malice as only possible motivation underlying officials' conduct), *rev'd*, 929 F.2d 1014 (5th Cir. 1990), *rev'd*, 112 S. Ct. 995 (1992).

81. *Hudson*, 112 S. Ct. at 999.

Eighth Amendment claims based on conduct not purported to be part of an imposed punishment require an inquiry into the state of mind of the allegedly offending official.<sup>82</sup> The Court based this determination on the factual similarities it perceived between prison riots, present in cases such as *Whitley v. Albers*,<sup>83</sup> and instances of lesser prison disruptions.<sup>84</sup> In deference to these perceived similarities, and to the fact that many courts of appeals apply the malice standard to excessive force claims not involving prison disturbances,<sup>85</sup> the Supreme Court decided to apply the malice standard to all cases involving allegations of use of excessive physical force.<sup>86</sup>

In determining the proper legal standard governing an Eighth Amendment excessive force claim, the Court initially focused on its earlier decision in *Whitley v. Albers*.<sup>87</sup> The Court recalled that *Whitley* determined what legal standard governed the Eighth Amendment claim of an inmate who was shot by a prison guard during a riot.<sup>88</sup> The Court in *Whitley* concluded that the fundamental inquiry was based on the "settled rule" that "the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."<sup>89</sup> The Court in *Hudson*, however, realized that while this inquiry provides the basis for analyzing an Eighth Amendment claim, the determination of what constitutes "wanton infliction" varies according to the particular facts of each

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82. *Id.* Thus, the Court in *Hudson* focused directly on what level of mental culpability was appropriate, not whether a state of mind inquiry should be conducted at all. *Id.* at 998.

83. 475 U.S. 312 (1986) (determining that prison riots involve balancing of institutional needs with inmate safety); see *supra* notes 25-28 and accompanying text (describing facts and decision in *Whitley*).

84. *Hudson*, 112 S. Ct. at 998. The Court failed to distinguish between quelling a prison riot and escorting a nonviolent prisoner in full restraints. Instead, it simply stated that "many of the concerns underlying *Whitley* arise whenever guards use force to keep order." *Id.*

85. See *infra* notes 139, 151-53 (examining application of malice standard by U.S. courts of appeals).

86. *Hudson*, 112 S. Ct. at 999.

87. *Id.* at 998.

88. *Id.* (citing *Whitley v. Albers*, 475 U.S. 312 (1986)).

89. *Whitley*, 475 U.S. at 319. The Eighth Amendment proscribes punishments that are grossly disproportionate to the severity of the crime and places substantial limits on what type of conduct is considered criminal and, therefore, punishable. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (determining that death sentence can be applied to crime of murder only if punishment is found not to be grossly disproportionate to severity of crime); *Robinson v. California*, 370 U.S. 660, 664-67 (1962) (asserting that Eighth Amendment imposes limits on what is considered criminal and therefore punishable). If punishment inflicted on a prisoner is not imposed by sentence or statute, more than a lack of ordinary due care must be involved to warrant a constitutional violation. See *Whitley*, 475 U.S. at 319 (maintaining that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause"). The standard for determining whether cruel and unusual punishment has been inflicted is wantonness, not error in good faith. See *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (determining that accidental or inadvertent failure to provide adequate medical care does not violate Eighth Amendment).

case.<sup>90</sup> The Court thus found it necessary to derive a standard defining "wantonness."<sup>91</sup>

In adopting the malice standard for determining wantonness, the Court in *Hudson* concentrated on the balancing test it devised in *Whitley*.<sup>92</sup> In *Whitley*, the Court concluded that "deliberate indifference" was an inappropriate standard for measuring wantonness in cases where officials were called upon to immediately balance, with little or no time for reflection, prisoners' rights against the force necessary to contain the disturbance.<sup>93</sup> Building on *Whitley*, the Court in *Hudson* decided that the better determinant of wantonness in excessive force cases was whether the officials applied force in a good faith effort to restore discipline, or whether they acted maliciously and sadistically for the very purpose of causing harm.<sup>94</sup>

The Court found that the need for haste and the balance of concerns between necessary force and prisoners' rights arises in any situation where guards are attempting to keep order, whether quelling a riot or a disturbance of lesser magnitude.<sup>95</sup> The Court also resolved that both situations require great deference to guards' determinations of appropriate courses of action.<sup>96</sup> The Court did not address whether escorting a compliant, shackled inmate rose to the level of a "lesser disturbance" or whether the need for balancing institutional safety against the force used on an inmate was present under the facts of *Hudson*.<sup>97</sup> Rather, the Court held that in deference to the similarities between a riot and a "lesser disturbance," it is sufficient to make the malice standard the core of inquiry in any

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90. *Hudson*, 112 S. Ct. at 998; see also *supra* notes 25-30 and accompanying text (describing balancing conducted in *Whitley*). The Court in *Hudson* provided an illustration of how the standard for wantonness varies according to the particular facts. *Hudson*, 112 S. Ct. at 998. If, for example, prison officials fail to attend to a prisoner's serious medical needs, then the appropriate inquiry is whether those officials exhibited deliberate indifference. *Id.* This inquiry is proper because there is ordinarily no conflict between the state's responsibility to provide medical care and its administrative duties. *Id.* On the other hand, "deliberate indifference" is not the appropriate standard for a prison disturbance because officials must balance institutional security against the possibility of injury to inmates if guards used force to quell the disturbance. *Id.*; see also *infra* note 93 and accompanying text (indicating that "deliberate indifference" inquiry is inappropriate standard for prison disturbances).

91. *Hudson*, 112 S. Ct. at 998-99.

92. *Id.* at 998-99; see also *supra* notes 25-30 and accompanying text (discussing balancing test in *Whitley*).

93. *Whitley v. Albers*, 475 U.S. 312, 320 (1986) ("[T]he deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance . . . because officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance.'").

94. *Hudson*, 112 S. Ct. at 999.

95. *Id.*

96. See *id.* (justifying judicial deference to guards' responses to disturbances by noting that any level of disturbance requires quick and decisive response from guards).

97. See *supra* note 84 and accompanying text (pointing out Court's failure to draw distinction between quelling of prison riot and escorting of restrained prisoner).



excessive force case, and maintained that this extension of the *Whitley* malice standard "works no innovation."<sup>98</sup>

## 2. Significant injury

The Court found that the approach taken in *Whitley* permits examination of the extent of injury suffered as one factor to indicate whether the use of force was justifiable or unnecessary.<sup>99</sup> The Court then concluded that the absence of a serious injury, while not determinative, was relevant to an Eighth Amendment inquiry.<sup>100</sup> In response to the correctional officers' contention that a significant injury requirement is mandated by the factual "objective component" of the Eighth Amendment analysis advanced in *Wilson v. Seiter*, the Court reexamined its reasoning in *Wilson*.<sup>101</sup> In *Wilson*, the Court extended the deliberate indifference standard used with medical claims to claims involving conditions of confinement.<sup>102</sup> In making this extension, the Court distinguished the subjective and objective elements of a prospective Eighth Amendment violation.<sup>103</sup> As a result of this distinction, the Court created a double inquiry: a subjective examination of whether the "officials act[ed] with a sufficiently culpable state of mind" and an objective determination of whether the wrongdoing was "harmful enough."<sup>104</sup>

The Court explained that the *Wilson* decision broke no new ground regarding the objective component of an Eighth Amendment violation.<sup>105</sup> Rather, the Court found that *Wilson* simply illustrated that the determination of what constitutes sufficient harm in any given situation depends on both the facts of the situation and what society believes is humane treatment within that specific con-

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98. *Hudson*, 112 S. Ct. at 999.

99. *Id.* The question of whether the use of force was applied in good faith or with malice turns on "such factors as the need for application of force, the relationship between the need and the amount of force that was used, [and] the extent of the injury inflicted." *Whitley v. Albers*, 475 U.S. 312, 321 (1986).

100. *Hudson*, 112 S. Ct. at 999.

101. *Id.* at 999-1000. In *Wilson*, the Court determined that prisoners' Eighth Amendment confinement conditions claims required both a subjective and an objective analysis. *Wilson v. Seiter*, 111 S. Ct. 2321, 2323, 2326, 2329 (1991) (explaining that subjective inquiry asks whether officials acted with sufficiently culpable state of mind and that objective inquiry asks whether alleged infraction was harmful enough to sustain constitutional violation).

102. *Wilson*, 111 S. Ct. at 2326-27. The Court in *Wilson* held that claims of both inadequate medical care and conditions of confinement require the same standard because in both situations the prison official has a duty to ensure that the inmate receives appropriate care. *Id.*

103. *See id.* (emphasizing that subjective questions concerning whether officials acted with "deliberate indifference" arise after one assumes that objective component of Eighth Amendment claim already is fulfilled).

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

105. *Hudson*, 112 S. Ct. at 999. *But see* Gray, *supra* note 10, at 1362 n.127 (positing that Supreme Court did in fact break new ground in *Wilson* by clarifying confusing objective criteria set forth in *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981)).

text.<sup>106</sup> The Court posited that because society expects harsh incarceration conditions and less than unqualified access to health care for inmates, only extreme deprivations in these cases constitute cruel and unusual punishment.<sup>107</sup> The Court acknowledged, however, that society's expectations are different where excessive force is concerned.<sup>108</sup> The Court suggested that contemporary standards of decency are violated every time an official maliciously and sadistically uses force to injure an inmate, whether or not a significant physical injury is inflicted.<sup>109</sup> Consequently, the Court rejected the adoption of an objective component in excessive force cases by declining to apply a significant injury requirement.<sup>110</sup> To demand such a significant injury requirement, the Court recognized, would place the Eighth Amendment in the position of sanctioning any tortious act as long as it did not leave any visible injury.<sup>111</sup>

The Court also addressed the correctional officers' assertion that their conduct was outside the scope of the Eighth Amendment because it occurred in an isolated, unauthorized attack.<sup>112</sup> The Court

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106. *Hudson*, 112 S. Ct. at 1000 (ruling that resolution of Eighth Amendment case depends on facts of particular claim because of differences in types of harmful conduct upon which claims are based and because of ever-evolving standards of decency); see also *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that objective component is contextual and responsive to "contemporary standards of decency").

107. *Hudson*, 112 S. Ct. at 1000; see also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (suggesting that society expects restrictive and harsh confinement conditions for criminal offenders); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (determining that society does not expect prisoners to have unqualified access to health care).

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

109. *Id.* While this conclusion is rational, it does not take the analysis far enough. Officials do not only use force against prisoners with the heightened awareness of malicious intent to cause harm. Officials often beat or use excessive force against prisoners out of frustration, anger, enjoyment, or simply because they believe their position demands it. See Brief for Petitioner, *supra* note 60, at 24-25 n.20 (describing classic studies that show extreme use of force by "nonsadistic" types). Studies cited by Hudson in his brief include Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 73 (1973) (describing aggression, brutality, and dehumanizing treatment inflicted by college students on classmates when assuming role of prison guards); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 62 (1965) (documenting electric shock experiment that demonstrated that people will inflict immense pain on others through high-voltage electric shocks when they believe they are encouraged to do so by authority figures). Any beating or use of force unrelated to a valid penological purpose violates humane standards of decency. A high standard of proof, such as the malicious intent standard, will judicially sanction abuse of power by prison officials.

110. *Hudson*, 112 S. Ct. at 999-1000.

111. *Id.* at 1000. This holding excludes *de minimis* uses of force. *Id.* The Court determined, however, that Hudson's injuries, including bruises, swelling, loosened teeth, and a cracked dental plate, were not *de minimis*. *Id.* Therefore, the extent of his injuries provided no basis for a dismissal of his § 1983 claim. *Id.*; see *infra* note 132 and accompanying text (defining *de minimis* use of force).

112. *Hudson*, 112 S. Ct. at 1001. In their brief, the correctional officers contended that the magistrate's finding that the beating of Hudson was not an isolated assault was a finding of law and not of fact. Brief for Respondents, *supra* note 46, at 28 n.23. The correctional officers also asserted that the assault was "a personal dispute between correctional security officers

rejected this notion, finding that the beating of Hudson was neither isolated nor unauthorized<sup>113</sup> and holding that the officers' assertion raised an issue that was not properly before the Court.<sup>114</sup> Consequently, the question of whether an isolated beating falls within the purview of the Eighth Amendment remains undecided.<sup>115</sup>

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and a prisoner, outside of, unforeseeable by, and strongly disapproved of by higher officials of the prison" and was, therefore, unauthorized. *Id.* at 28. Based on this contention, the correctional officers argued that the attack, as isolated and unauthorized, should be governed by *George v. Evans*, 663 F.2d 413, 416 (5th Cir. 1980) (holding that single, unauthorized attack by prison official does not constitute cruel and unusual punishment). Brief for Respondents, *supra* note 46, at 28-29.

113. *Hudson*, 112 S. Ct. at 1001. The Supreme Court found that the magistrate's determination that the attack on Hudson was not an isolated assault was relied upon by the Fifth Circuit and amply supported by trial testimony. *Id.* at 1001-02 (explaining that trial testimony revealed that officers McMillian and Woods beat another prisoner shortly after they beat Hudson). The Court also noted that the officers' contention that the beating was unauthorized ignored the magistrate's finding that in telling officers McMillian and Woods "not to have too much fun," Lieutenant Mezo, in his supervisory capacity, "expressly condoned the use of force in this instance." *Id.* at 1002.

114. *See id.* at 1001-02 (finding that Fifth Circuit had not addressed question of whether attack was unauthorized and that question of authorization was not issue on which certiorari was granted).

115. Inmates' redress under the Eighth Amendment could be further limited if the question of whether an isolated beating can be considered punishment is answered in the negative. The Eighth Amendment prohibits cruel and unusual *punishment*, not all *acts* that are cruel and unusual. U.S. CONST. amend. VIII; *see supra* note 6 and accompanying text (listing incidents that courts have interpreted as inflicting cruel and unusual punishment on inmates); *see also* Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531) (explaining that Eighth Amendment proscribes only cruel and unusual punishments).

The consideration of punishment in its traditional context, the terms of a sentence, is not currently a matter of discussion in the courts. It is conduct and conditions occurring after incarceration that have been the subject of dispute. *See supra* notes 19-25 and accompanying text (explaining courts' various approaches to determining what constitutes cruel and unusual punishment after incarceration). The fact that conduct after incarceration does not purport to be punishment, however, does not remove such conduct from the purview of the Eighth Amendment as long as it wantonly inflicts pain. *See, e.g., Wilson v. Seiter*, 111 S. Ct. 2321, 2325-26 (1991) (finding that claims involving official conduct not purporting to be formal penalty for crime can violate Eighth Amendment, but mandating inquiry into official's state of mind); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (determining that conduct that does not purport to be punishment is still actionable under Eighth Amendment if such conduct involves more than ordinary lack of due care for prisoners' well-being); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) ("[A]fter incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.") (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Thus, while a spontaneous attack by a guard may not constitute the traditional notion of punishment, it would qualify as an Eighth Amendment violation if it wantonly inflicted pain. *See Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (stating that "[i]f a guard decided to supplement a prisoner's official punishment by beating him [or her], this would be punishment, and 'cruel and unusual'"); *see also* Brief for Petitioner, *supra* note 60, at 34-37 (arguing that Eighth Amendment's prohibition on wanton infliction of pain has never required proof of more than isolated incident). *But see* *George v. Evans*, 633 F.2d 413, 416 (5th Cir. 1980) (asserting that "a single, unauthorized assault by a guard does not constitute cruel and unusual punishment"); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.) ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment.'"), *cert. denied*, 414 U.S. 1033 (1973).

The decision in *Whitley* confirmed that the scope of the Eighth Amendment inquiry includes the subjective intent of the official. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). To deter-

C. *The Dissent*

In his dissent, Justice Thomas, joined by Justice Scalia, maintained that significant injury is essential to an Eighth Amendment excessive force claim.<sup>116</sup> Justice Thomas posited that force without significant harm is merely criminal or tortious and, therefore, not violative of the Eighth Amendment under pre-*Hudson* case precedent.<sup>117</sup> The dissent contended that the Framers did not envision the Eighth Amendment as encompassing the protection of inmates from harsh treatment.<sup>118</sup> Applying this original intent analysis, the

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mine if an allegation of excessive force violates the Eighth Amendment, the Court may compare the extent of the injury with the need for force and the amount of force used. *Id.* at 321. The crux of the inquiry, however, is whether the official acted with malicious intent to inflict pain. *Id.* Furthermore, there is no requirement that a pattern or system of brutality be established. See Brief for Petitioner, *supra* note 60, at 36-37 (arguing that there was no requirement to prove anything other than single instance of excessive force). To conclude that a beating is not punishment simply because it was a single incident involving one guard and one prisoner is to ignore the full realm of inquiry mandated by evolving standards of decency. The victim of an isolated beating suffers the consequences of punishment just as much as the victim of an authorized daily beating. See *Wilson*, 111 S. Ct. at 2324 n.1 (holding that although deprivations involving all prisoners are greater policy concern than isolated instances of deprivation, both instances constitute punishment). To permit indiscriminate beatings to escape the purview of the Eighth Amendment simply because they are singular occurrences would essentially authorize excessive force on the part of prison guards. See Brief for Petitioner, *supra* note 60, at 37 n.34 ("The consequences of adopting an 'isolated incident' limitation on the Eighth Amendment would be that no individual prison brutality case could ever be tried and decided without also trying and deciding the facts of some indeterminate number of other incidents."). The state of mind inquiry adopted by *Hudson* should apply regardless of whether the injury results from authorized conduct or an isolated act of vigilantism.

116. *Hudson v. McMillian*, 112 S. Ct. 995, 1005-08 (1992) (Thomas, J., dissenting). The dissent theorized that the bifurcated objective and subjective inquiry in *Wilson* prison condition cases mandated that an inmate prove the objective significant injury element in addition to the subjective mental culpability element in cases involving allegations of excessive force. *Id.* at 1006. The dissent suggested that since the *Estelle* decision, the Eighth Amendment has played "a very limited role" in the administrative regulation of prisons. *Id.* Justice Thomas further noted that the Court had "never found a violation of the Eighth Amendment in the prison context when an inmate has failed to establish either of these [objective or subjective] elements." *Id.*

The majority responded that the dissent's theory misapplied *Wilson* because *Wilson* did not involve an allegation of excessive force or an injury relating to the objective component of an Eighth Amendment claim. *Id.* at 1001. The majority recognized that *Wilson* "did touch on these matters" in summarizing case precedent, but insisted that *Wilson* announced no new rule regarding the objective component in Eighth Amendment analysis. *Id.* at 1001. *But see* Gray, *supra* note 10, at 1362 n.127 (suggesting that Court in *Wilson* did announce new rule regarding objective component in Eighth Amendment analysis).

In his concurrence, Justice Blackmun vividly synopsized what would result from adopting the dissent's approach of requiring a significant injury in excessive force claims. *Hudson*, 112 S. Ct. at 1002 (Blackmun, J., concurring). Justice Blackmun cautioned that "were we to . . . [mandate a significant injury requirement] we might place various kinds of state-sponsored torture and abuse—the kind ingeniously designed to cause pain but without a telltale 'significant injury'—entirely beyond the pale of the Constitution." *Id.*

117. *Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting) ("In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.'").

118. *Id.* The dissent explained that the absence of language in *Weems v. United States*, 217 U.S. 349 (1910) (documenting history of Eighth Amendment), suggesting that the Cruel

dissent insisted that the Eighth Amendment should only apply to cruel and unusual punishments imposed by statute or sentence.<sup>119</sup> In an analysis that ignores the fact that both subjective and objective elements have not been addressed in all Eighth Amendment cases,<sup>120</sup> the dissent further contended that the Court had never found an Eighth Amendment violation in the prison context in the absence of both objective and subjective elements.<sup>121</sup> The dissent correctly pointed out that the majority's application of the *Whitley* malice standard to every allegation of the use of excessive force will make it difficult for inmates to state an Eighth Amendment excessive force claim.<sup>122</sup> Justice Thomas indicated that the extension of the *Whitley* standard beyond instances of actual disturbances was misguided because the underlying balancing of competing goals is not present absent actual unrest.<sup>123</sup>

### III. IMPLICATIONS

The expansion of prisoners' rights stemming from the Supreme Court's refusal to require a significant injury for a successful Eighth

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and Unusual Punishments Clause might apply to treatment of prisoners, combined with the fact that the first case to apply the Eighth Amendment to prison deprivation, *Estelle v. Gamble*, 429 U.S. 97 (1976), occurred 185 years after the adoption of the Eighth Amendment, suggested that the Eighth Amendment was never intended to apply to the treatment of inmates and that its use should be restricted to statutes and sentences. *Id.* at 1005-06.

119. *Id.* at 1005. While the Founding Fathers may indeed not have envisioned that the Eighth Amendment would one day apply to the treatment of prisoners, this argument ignores the mandate of case precedent suggesting that the Eighth Amendment, while imprecise in its wording, should be dynamically interpreted and should preserve human decency. See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (holding that denationalization is punishment proscribed by Eighth Amendment because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"). For a criticism of the dissent's interpretation of originalist philosophy in *Hudson*, see Terence Moran, *The Future of the Past at the High Court*, *LEGAL TIMES*, Aug. 3, 1992, at 23, 23 (maintaining that Justice Thomas' historical arguments were "didactic" and "shallow"); Stuart Taylor, Jr., *Justice Thomas Strikes Cruel and Unusual Pose*, *N.J. L.J.*, Mar. 16, 1992, at 16, 16 (arguing that dissent's use of "flawed" originalist jurisprudence in *Hudson* leads to "intolerable" results). But see Gregory P. Tazin, *The Eighth Amendment in Section 1983 Cases: Hudson v. McMillian*, 15 *HARV. J.L. & PUB. POL'Y* 1050, 1055-56 (1992) (defending Justice Thomas' interpretation of Eighth Amendment jurisprudence and supporting dissent's criticism of majority opinion).

120. See *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (applying only subjective element in holding that shooting of inmate in riot situation did not constitute Eighth Amendment violation for excessive force); see also *Rhodes v. Chapman*, 452 U.S. 337, 345-52 (1981) (focusing only on objective factor in declining to find Eighth Amendment violation for double-celling inmates).

121. *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting).

122. See *id.* (noting that majority's "unwarranted" extension of *Whitley* malice standard renders it more difficult for inmates to establish subjective component of Eighth Amendment excessive force claim because malice standard requires heightened mental state).

123. *Id.* (noting that departure from baseline deliberate indifference inquiry in Eighth Amendment claims is justified where, as in *Whitley*, prison officers acted in response to emergency, and arguing that there was no justification for applying *Whitley* malice standard to all excessive force cases where no competing institutional concerns are present).

Amendment excessive force claim is significantly curtailed by the Court's imposition of the malice standard in this context.<sup>124</sup> The Court's unqualified declaration that torture and abuse will not be tolerated is tarnished by the extension of the malice standard because prisoners must now overcome heightened barriers to obtain redress for Eighth Amendment violations.<sup>125</sup>

### A. *Rejection of the Objective Factor*

The Court's rejection of a significant injury requirement in cases of excessive force signifies an advancement of prisoners' rights.<sup>126</sup> This holding dispels the view that a certain level of injury<sup>127</sup> is needed for a successful Eighth Amendment claim<sup>128</sup> and declares

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124. See *infra* notes 136-60 and accompanying text (explaining that malice standard is appropriate only when prison officials must balance valid institutional goals, such as prison safety, against infringement of inmates' rights).

125. See *infra* notes 169-79 and accompanying text (discussing difficulty of proving that officials acted with malicious intent and arguing that reasonableness standard affords ample latitude to prison officials in performance of their duties and provides prisoners better protection from use of unnecessary force by guards).

126. See *supra* note 15 and accompanying text (citing cases upholding prisoners' excessive force claims based on *Hudson's* dismissal of significant injury requirement). The victory for prisoners' rights is twofold. First, the rejection of a significant injury requirement creates a legal standard unencumbered by both an objective and a subjective prong. Consequently, while prisoners must meet the stringent subjective standard of malice, they need not also prove that they sustained an observable physical injury. See *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) (stating that decency standards are violated in brutality cases regardless of whether significant injury resulted from beating). Second, the rejection of the significant injury requirement sends the message that abusive handling of prisoners will not be tolerated. See *id.* at 1002-03 (Blackmun, J., concurring) (contending that requirement of significant injury would be equivalent to condoning torture, whereas prohibition of wanton infliction of pain places constraint on officials who might otherwise abuse prisoners).

127. See *Hudson*, 112 S. Ct. at 1000 (holding that prison officials' use of malicious force constitutes Eighth Amendment violation regardless of extent of injury). Courts had previously considered a variety of factors in determining whether an injury rose to a level cognizable as significant for Eighth Amendment purposes. See, e.g., *Wise v. Carlson*, 902 F.2d 417, 417-18 (5th Cir. 1990) (determining that superficial injuries such as bruises and hematoma were not significant and therefore not actionable under Eighth Amendment); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 32 (2d Cir. 1988) (holding guards' rendering inmate unconscious was cognizable injury under Eighth Amendment, even though injury was not severe or permanent); *Wyatt v. Delaney*, 818 F.2d 21, 24 (8th Cir. 1987) (finding cut in mouth and resulting emotional harm, inflicted by guard punching inmate, to be *de minimis* and thus not violative of Eighth Amendment rights).

128. See *Hudson*, 112 S. Ct. at 1002 (Blackmun, J., concurring) (finding that significant injury requirement for Eighth Amendment excessive force claims is misguided). Prior to the Supreme Court's decision in *Hudson*, many circuits had already rejected the requirement of a significant injury for a successful Eighth Amendment claim. See, e.g., *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991) (finding that violation of Eighth Amendment does not require proof of certain degree of injury); *McHenry v. Chadwick*, 896 F.2d 184, 187 (6th Cir. 1990) (determining that prisoner alleging Eighth Amendment excessive force violation need not prove serious or permanent injury); *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979) (maintaining that manner of infliction and not nature of injury establishes Eighth Amendment excessive force violation). In other circuits, however, the significant injury requirement still existed prior to *Hudson*. See, e.g., *Adams v. Hansen*, 906 F.2d 192, 193-94 (5th Cir. 1990) (holding that prisoner proved requisite significant injury for Eighth Amendment excessive

that certain barbarous treatment of prisoners will not be tolerated.<sup>129</sup> As Justice Blackmun noted in his concurrence, heeding the dissent's call<sup>130</sup> for a significant injury requirement would place the Court in the position of sanctioning various forms of torture and abuse.<sup>131</sup> Thus, the refusal to adopt a significant injury requirement squarely decries torture and sends a clear message of what constitutes intolerable official conduct.

Notably, the Court's rejection of the significant injury requirement does not bar all consideration of the extent of a prisoner's injury. *De minimis* uses of force<sup>132</sup> are still excluded from the pur-

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force claim where guard lacerated prisoner's fingers by closing them in small door); *Bennett v. Parker*, 898 F.2d 1530, 1533-34 (11th Cir. 1990) (determining that prisoner failed to prove severe injury, which is required element in Eighth Amendment excessive force claim, where medical records contained no mention of head injuries or treatment following altercation).

*Hudson's* rejection of the significant injury requirement has caused the Fifth Circuit to amend its test for finding an Eighth Amendment excessive force violation. See *infra* note 134 and accompanying text (describing new test applied to excessive use of force claims in Fifth Circuit). Due to the Fifth Circuit's new test, which is predicated on the *Hudson* decision, a prisoner's Eighth Amendment claim that was previously dismissed for lack of significant injury has been remanded for reconsideration in light of *Hudson*. *Shabazz v. Lynaugh*, 974 F.2d 597, 598 (5th Cir. 1992); see also *supra* note 15 and accompanying text (detailing outcome of other cases following *Hudson's* rejection of significant injury requirement).

129. *Hudson*, 112 S. Ct. at 999-1000. Precedent supports the holding that barbarous treatment was not intended by the Constitution. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (noting that drafters of Eighth Amendment were primarily concerned with proscribing barbarous methods of punishment); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . are forbidden by . . . the Constitution."), *overruled on other grounds by* *Gregg v. Georgia*, 428 U.S. 153 (1976). The Constitution expressly forbids cruel and unusual punishment, which has been interpreted by the Court as the unnecessary and wanton infliction of pain. *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977) (stating that brutality against prisoners is within scope of Eighth Amendment scrutiny, but only where actions caused unwarranted suffering). This construction does not mean that pain must have a corollary physical prong. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that punishments may not involve physical mistreatment or primitive torture). *Contra Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting) (noting that *Weems v. United States*, 217 U.S. 349 (1910), chronicled background of Eighth Amendment and failed to make any suggestion that treatment of prisoners falls within scope of Eighth Amendment).

130. See *supra* notes 116-21 and accompanying text (explaining dissent's requirement that significant injury exist to bring Eighth Amendment excessive force claim).

131. *Hudson*, 112 S. Ct. at 1002 (Blackmun, J., concurring). Abuses might include conduct that causes considerable pain but does not leave visible marks or permanent scars. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (describing punitive isolation in which prisoners were forced to share mattresses with other prisoners having infectious diseases); *McRorie v. Shimoda*, 795 F.2d 780, 781-82 (9th Cir. 1986) (finding that guard plunged riot stick into inmate's anus as punishment for giggling during strip search); *Jackson v. Bishop*, 404 F.2d 571, 574-75 (8th Cir. 1968) (describing "Tucker Telephone," device used to administer electric shock to sensitive areas of inmates' bodies and routine whipping with four-inch wide leather strap).

132. See BLACK'S LAW DICTIONARY 431 (6th ed. 1990) (translating *de minimis non curat lex* as "[t]he law does not care for, or take notice of, very small or trifling matters"). Uses of force that are trifling or insignificant are termed *de minimis* and are not considered by the courts. See, e.g., *Hudson*, 112 S. Ct. at 1000 (stating that not every malevolent touch by prison guard gives rise to federal cause of action); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (stating that "[n]ot every push or shove . . . violates a prisoner's constitutional rights").

view of the Eighth Amendment,<sup>133</sup> and the extent of injury in light of the circumstances causing it will still be a factor in determining the necessity of the force.<sup>134</sup> As a consequence, *Hudson* gives officials sufficient latitude in the legitimate pursuit of their duties,<sup>135</sup> but disallows abuse of their positions.

### B. Extension of the Whitley Malice Standard

Despite the recognition of prisoners' rights attendant to the rejection of the significant injury requirement, the Court's extension of the *Whitley* malicious and sadistic intent standard to all excessive force claims is inappropriate<sup>136</sup> and will make it difficult for inmates to state an Eighth Amendment claim. The Court's extension of the *Whitley* malice standard is inappropriate for several reasons. First, such an application fails to make the important distinction between cases where some use of force may be necessary, such as riot situations, and cases where no force is appropriate, for example where inmates are shackled and handcuffed.<sup>137</sup> The Court's reliance on the malice standard here is simply misplaced.<sup>138</sup> The majority glosses over the factual gulf between *Whitley* and *Hudson* by maintaining that the same concerns present in *Whitley* occur every time prison guards use force to maintain order.<sup>139</sup> The Court in *Whitley*

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133. *Hudson*, 112 S. Ct. at 1000 ("The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort '[r]epugnant to the conscience of mankind.[.]'" (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986))).

134. *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992). On the remand of *Hudson v. McMillian*, the Fifth Circuit developed a new test in response to the Supreme Court's rejection of the significant injury requirement, for determining whether a prisoner's Eighth Amendment rights were violated by excessive use of force. *Id.* The new test has five factors and considers the extent of the injury in light of the circumstances causing it. *Id.* The five factors are: (1) the extent of the injury suffered; (2) the need for the application of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response. *Id.*

135. See *Hudson v. McMillian*, 112 S. Ct. 995, 998-99 (1992) (recognizing that because prison officials must act quickly to preserve order and security, deference should be accorded to practices they adopt). Even in the absence of a significant injury requirement, officials can do their jobs without fear that incidental physical contact or injuries will provide grounds for Eighth Amendment claims.

136. See *supra* note 77 and accompanying text (arguing that question of whether to apply *Whitley* malice standard was not issue before Court).

137. See *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990) (finding that no use of force was necessary because prisoner was in full restraints), *rev'd*, 112 S. Ct. 995 (1992).

138. See *Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring) (maintaining that majority's reliance on malicious and sadistic standard is misplaced absent special circumstances of actual prison unrest); *Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring) (rejecting Court's extension of *Whitley* standard to all allegations of excessive force); *Hudson*, 112 S. Ct. at 1008 (Thomas, J., dissenting) (finding Court's extension of *Whitley* to all excessive force cases unwarranted where no competing institutional concerns are present).

139. *Hudson*, 112 S. Ct. at 999 (stating that application of *Whitley* standard to all excessive



used the malice standard because of specific concerns facing officials

force claims is no deviation from precedent). *Whitley* and *Hudson* present opposite ends of the spectrum for the need to use force. In *Whitley*, officials were presented with an emergency situation where "the ever-present potential for violent confrontation and conflagration" ripen[ed] into actual unrest and conflict." *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977)). In this situation, "very real threats" existed "that indisputably pose[d] significant risks to the safety of inmates and prison staff." *Id.* at 320-21. To protect others and restore order to the prison, the guards in *Whitley* needed to make quick judgments on how best to subdue the riot. These decisions required the guards to balance the need to "preserve internal order and discipline" through force against the risk of injury to inmates from the use of that force. *Id.* at 322. The Court determined that "in such situations [the guards'] conduct cannot be characterized as 'wanton' unless it is taken 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Such competing institutional concerns were not sufficiently present in *Hudson* to justify the use of such force. *Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring). *Hudson* was shackled and handcuffed while being escorted to administrative lockdown; he was therefore unable to run away or strike the officers. *Id.* at 997-98. Furthermore, he was not offering resistance or inciting other prisoners to riot. *Id.* There was no lack of order or discipline to justify the officers' use of force; there was no need to balance the safety of the institution against the injury that force would cause to *Hudson*. *Id.* at 1002 (Stevens, J., concurring); *id.* at 1008 (Thomas, J., dissenting). Consequently, in the absence of a need to balance, "officials' license to use force is more limited" and should be governed by the less stringent deliberate indifference standard. *Id.* at 1002 (Stevens, J., concurring); see *supra* notes 25-35 and accompanying text (discussing evolution of balancing test established in *Whitley*).

Falling between *Whitley* and *Hudson* are a realm of situations where force may or may not be necessary. Lower courts have found that the requisite balancing of institutional goals and the need for force justifying the malice standard are not present every time officials use force. In *Unwin v. Campbell*, for example, a fight between two inmates broke out in a crowded dayroom. *Unwin v. Campbell*, 863 F.2d 124, 126-27 (1st Cir. 1988). In attempting to end the fight and restore order, guards rushed into the dayroom brandishing nightsticks. *Id.* *Unwin*, a prisoner completely uninvolved in the fight, was initially hit from behind; he was then repeatedly hit with a nightstick, handcuffed, and forcibly taken to his cell. *Id.* at 127. While this situation exhibits an actual disturbance that the Court in *Hudson* would find justifies the malice standard, the court in *Unwin* determined that this disturbance was not of sufficient magnitude to warrant use of the malice standard. *Id.* at 130. The court in *Unwin* explained that while *Whitley* presented a true emergency situation where institutional security was at stake, the altercation in *Unwin* did not present such a situation. *Id.* Therefore, the official's license to use force was limited and the inmate did not need to prove malicious and sadistic intent. *Id.*

In *Wyatt v. Delaney*, a prison maintenance worker allegedly hit an inmate in the mouth during a minor argument. *Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987). The district court applied a four-part test to determine whether the worker's actions violated the Eighth Amendment, examining: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury inflicted; and (4) whether force was applied maliciously and sadistically for the very purpose of causing harm. *Id.* The Eighth Circuit then determined that because the instant situation did not involve a prison disturbance, or even a prison security measure, the fourth prong, or malice standard, should not be applied. *Id.*

Similarly, in *McRorie v. Shimoda*, the Ninth Circuit held that a guard's plunging of a riot stick into an inmate's anus during a controlled strip search constituted excessive force in violation of the Eighth Amendment. *McRorie v. Shimoda*, 795 F.2d 780, 781-82 (9th Cir. 1986). The court recognized that the decisions in *Whitley* and *Bell* justified the use of force against an inmate to ensure institutional safety or to prevent escape. *Id.* at 784. The court found that a controlled strip search of a completely naked, spread-eagled inmate, even after a shakedown, did not pose a threat for which the guard could have "plausibly" thought such force was necessary. *Id.*

*Parrish v. Johnson* illustrates the Sixth Circuit's reluctance to apply the malice standard where no balancing of institutional goals is necessary. *Parrish v. Johnson*, 800 F.2d 600, 604-05 (6th Cir. 1986). In *Parrish*, a prison official extorted food from paraplegic inmates at knifepoint, failed to relay inmate medical requests to nurses, and caused inmates to sit in their own feces

in riot situations.<sup>140</sup> In developing the malice standard, the Court focused on the existence of an actual prison disturbance and cautioned that the standard was not intended to shield from judicial review instances of force without penological justification.<sup>141</sup> The Court in *Whitley* never intended the malice standard to be a general test for all excessive force cases.<sup>142</sup>

In *Hudson*, there were no competing institutional concerns to balance.<sup>143</sup> The Court's deference toward prison officials' decisions in the running of correctional institutions is not appropriate in every situation.<sup>144</sup> The purpose of judicial deference is to provide officials

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for extended periods of time. *Id.* at 600. The court noted that, even though the balancing of prison security and discipline often requires inmates to be subjected to physical contact that would be actionable at common law, the degree of intent in the malice standard is not an indispensable element in an Eighth Amendment claim. *Id.* at 604-05. Furthermore, it indicated that specific animus is not necessary to finding such conduct violative of the Eighth Amendment because it does not support penological or institutional goals. *Id.*

*Stenzel v. Ellis*, 916 F.2d 423 (8th Cir. 1990), is an example of a contrary holding. In *Stenzel*, three officials pulled an inmate from his bed by his hair, shoved him to the floor, pulled back a finger of his left hand, smashed his head into the cell door, and choked him for refusing to pull back his bed covers and "show skin." *Id.* at 425-29. The majority held that this was a clear case of the use of justifiable force to get an inmate into isolation for refusing a direct order. *Id.* at 428. As the dissent pointed out, however, while the inmate should have been moved to isolation for refusing a direct order, the compelling institutional goals requiring the application of the malice standard were not present. The dissent concluded that this case presented no level of disturbance to justify "application of the *Whitley* standard." *Id.* at 429; see also *Campbell v. Grammer*, 889 F.2d 797, 800-02 (8th Cir. 1989) (finding that institutional safety outweighed risk of injury to inmates from guards' use of power hoses, thus justifying malice standard in situation involving repeated inmate misconduct, including starting of small fires and throwing feces on staff).

140. *Whitley v. Albers*, 475 U.S. 312, 321 (1986). Due to the safety risks inherent in prison disturbances, the *Estelle* deliberate indifference standard did not give officials sufficient leeway to respond to such situations. *Id.* at 320. Therefore, the malice standard first articulated in *Johnson v. Glick* was employed. *Id.* at 320-21. In *Johnson*, a prison guard made an unprovoked attack on an inmate, detained him without cause in a holding cell, and prevented him from seeking medical care for two hours. *Johnson v. Glick*, 481 F.2d 1028, 1029-30 (2d Cir. 1973). The court enumerated four considerations in its determination of whether a constitutional violation had occurred: (1) the need for force; (2) the amount of force used in relation to the need; (3) the extent of the injury; and (4) whether force was used in good faith to restore order, or maliciously and sadistically with an intent to harm. *Id.* at 1033.

141. *Whitley*, 475 U.S. at 322 (explaining that deference for prison officials' decisions, especially in riot situations, "does not insulate from review actions taken in bad faith or for no legitimate purpose").

142. See *id.* at 320 (discussing appropriateness of *Estelle* deliberate indifference standard in situations where prisoners' rights do not clash with government objectives, and maintaining that situations that necessitate security measures for settling disturbances require different standard).

143. In *Hudson*, the prisoner was in shackles and handcuffs and was not offering resistance to being led to administrative lockdown by the guards. Brief for Petitioner, *supra* note 60, at 3; Brief for Respondents, *supra* note 46, at 7. *Hudson* was restrained and docile and, therefore, offered no risk of flight, violence, or disruption of prison security. Brief for Respondents, *supra* note 46, at 7. One might argue, however, that a prisoner's history of violence or escape, demeanor, or size could pose a threat to prison security even if the prisoner were fully restrained. But see *supra* note 139 (listing circuit cases that advocate use of standard lower than malice even in minor disturbance situations).

144. See *Whitley*, 475 U.S. at 322 (contending that judicial deference to actions taken by

with room to maneuver; in this way, officials can concentrate on meeting institutional goals without fear of persistent judicial interference.<sup>145</sup> Complete deference to officials' decisions, however, is inappropriate in situations such as that present in *Hudson* where there is an absence of penological purpose underlying the use of force.<sup>146</sup> Absent the need to balance important institutional concerns, the appropriate standard to be applied in Eighth Amendment excessive force claims is the *Estelle* deliberate indifference standard.<sup>147</sup>

Second, the majority incorrectly states that the extension of the malice standard "works no innovation."<sup>148</sup> Not more than eight months prior to the *Hudson* decision, the Court in *Wilson* declined the opportunity to invoke the malice standard outside the context of a prison disturbance.<sup>149</sup> In *Wilson*, the Court examined the constraints facing the prison officials and determined that because conditions claims and medical claims are not significantly different, the "deliberate indifference" standard, and not the "malicious and sadistic" intent to harm standard, should apply.<sup>150</sup>

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prison officials is appropriate only in situations involving violent inmates or breaches of discipline, but not where officials acted in bad faith or with no valid purpose).

145. See *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (stating that prison administrators have necessary expertise in dealing with problems of operating correctional institutions and should therefore be granted deference by courts on matters concerning prison security policy). The Court in *Bell* explained that judicial deference is accorded prison administrators for several reasons: (1) prison officials must be free to take actions necessary to ensure prison safety; (2) prison officials are most knowledgeable about the day-to-day operations of a prison; and (3) the operation of correctional facilities is not the responsibility of the judicial branch. *Id.*

146. See *supra* note 139 (explaining that penological justification for use of force, such as need to maintain or restore institutional security, is not always present in excessive force cases); see also *Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987) (recognizing that need to balance government responsibilities with prisoners' rights is not present in every instance of use of force); *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (finding that waving knife in paraplegic inmate's face and extorting food at knifepoint were unreasonable and without legitimate penological justification). The *Whitley* malice factor, therefore, should not be applied in situations where force is not used to resolve a prison disturbance. *Wyatt*, 818 F.2d at 23; see also *Unwin v. Campbell*, 863 F.2d 124, 135 (1st Cir. 1988) (finding that license to use force is limited where interests of institutional security are not at stake); Freyermuth, *supra* note 40, at 697 (arguing that all excessive force cases do not involve balancing between prisoners' rights and equally important government responsibilities).

147. See *Wyatt*, 818 F.2d at 23 (finding that "the Supreme Court endorsed the rule that in cases not involving matters of institutional security, a court should apply the deliberate indifference standard"); see also Freyermuth, *supra* note 40, at 696-97 (arguing that in Eighth Amendment cases where competing institutional considerations are not at issue, courts should apply standard such as *Estelle* deliberate indifference standard).

148. *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992).

149. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) ("The parties agree (and the lower courts have consistently held . . .) that the very high state of mind prescribed by *Whitley* does not apply to prison condition cases.").

150. *Id.* The prison officials in *Wilson* argued that the deliberate indifference standard is appropriate in personal injury cases and that the malicious intent standard is appropriate in situations not involving bodily integrity. *Id.* at 2326. Thus, the Court concluded that whether

While the U.S. courts of appeals have used the *Whitley* malice standard outside of riot situations, the standard is not uniformly applied.<sup>151</sup> Circuit courts applying the malice standard often do so in a rote and unsophisticated manner and without concentrating on the bifurcated inquiry set out in *Whitley*.<sup>152</sup> Alternatively, the circuit courts employ the *Whitley* standard in situations involving at least some level of prison disturbance.<sup>153</sup> Adopting the malice standard as the departure point for all excessive force claims thus represents a definite innovation in Eighth Amendment jurisprudence, especially because the standard was developed in consideration of the constraints facing officials during a disturbance.

While it is commonly accepted by the Court that running a prison is a specialized job requiring a certain amount of judicial deference,<sup>154</sup> there should be some accountability when officials use force.<sup>155</sup> The malice standard overextends the deference given to prison officials.<sup>156</sup> Furthermore, by mandating that every victim of excessive force prove that the officer acted with malicious and sadistic intent to cause harm, the malice standard operates to create an almost irrebuttable presumption that force is justifiable whenever officials choose to use it.<sup>157</sup>

There are several errors in applying the malice standard to every

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the challenged treatment is characterized as inhumane living conditions or as failure to provide necessary medical treatment, the *Estelle* "deliberate indifference" standard is applicable. *Id.* at 2327 (citing *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987)).

151. See *supra* note 139 and accompanying text (discussing U.S. Courts of Appeals' various applications of *Whitley* malice standard in excessive force claims).

152. See, e.g., *Stenzel v. Ellis*, 916 F.2d 423, 426-27 (8th Cir. 1990) (applying *Whitley* malice standard without providing clear explanation of institutional goals that prison officials were balancing); *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (applying *Whitley* malice standard without giving due consideration to governmental responsibilities in claim alleging infliction of beating by guard in mess hall and exposure to brutally cold temperatures).

153. See *Kinney v. Indiana Youth Ctr.*, 950 F.2d 462, 465-66 (7th Cir. 1991) (adopting *Whitley* standard in case involving escape attempt); *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (determining that *Whitley* standard was appropriately applied in altercation between guard and unrestrained inmate).

154. See, e.g., *Whitley v. Albers*, 475 U.S. 312, 322 (1986) (noting that neither judge nor juror should freely substitute his or her judgment for that of prison officials who have made deliberate choices); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (commenting that courts should extend wide-ranging deference to policies implemented by prison administrators to maintain institutional security); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (finding that problems in running prisons are "complex and intractable . . . and peculiarly within the province of the legislative and executive branches of government"), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

155. See *Whitley*, 475 U.S. at 322 (explaining that judicial deference should not insulate bad faith actions of prison officials from judicial review).

156. See *supra* note 18 and accompanying text (delineating malice standard, which requires prisoner to prove that officer used force maliciously and sadistically for very purpose of causing harm, a showing that places heavy burden on prisoner and excuses cruel, unthinking, or "fun" use of force from purview of Eighth Amendment).

157. See *supra* note 18 and accompanying text (describing burden that *Whitley* malice standard places on inmates).

excessive force claim. First, unnecessary force may be used out of negligence, carelessness, habit, or even cruelty, and yet fail to rise to the level of malice.<sup>158</sup> Second, the balancing test that justifies the malice standard weighs the need to use force to achieve valid institutional goals, such as safety, against the risk of injury to prisoners posed by the use of that force.<sup>159</sup> Such a balance is not present in every situation where force is used.<sup>160</sup>

### C. *The Estelle Deliberate Indifference Standard*

In *Wilson*, the Court explained that the deliberate indifference standard is the "baseline mental state" for establishing an Eighth Amendment violation.<sup>161</sup> In *Hudson*, the Court recognized that departure from the *Estelle* deliberate indifference standard was appropriate only in cases where the state's responsibility to attend to prisoners' needs was in conflict with competing governmental responsibilities.<sup>162</sup> As the Court explained in *Whitley*, nondisturbance situations do not create a need for the balancing of competing concerns, and the determination of the wantonness of the officials' conduct is predicated upon deliberate indifference.<sup>163</sup> The Court in *Hudson* made an unsubstantiated leap, however, when it held that the situation in *Whitley* was analogous to all situations where officials use force.<sup>164</sup> The Court's logic thus provided an erroneous justification for a departure from the deliberate indifference standard.<sup>165</sup> Indiscriminate beatings by guards, as occurred in *Hudson*, can more accurately be described as "conditions of confinement" to which the

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158. See *supra* note 109 and accompanying text (detailing classic studies of how people act when given authority over others).

159. See *supra* notes 25-35 and accompanying text (describing derivation of malice standard's balancing test).

160. See *supra* notes 137-39 and accompanying text (explaining that important governmental interests are not present in all excessive force claims); see also *Hudson v. McMillian*, 112 S. Ct. 995, 1008 (1992) (Thomas, J., dissenting) (maintaining that many excessive force cases do not arise from officials' attempts to restore discipline and order and do not involve competing institutional goals).

161. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991) (noting that deliberate indifference standard is applicable in prison conditions cases that do not require higher standard of malicious intent); see also *Hudson*, 112 S. Ct. at 1008 (Thomas, J., dissenting) (discussing Court's analysis in *Wilson*).

162. *Hudson*, 112 S. Ct. at 998; see Freyermuth, *supra* note 40, at 696-97 (positing that deliberate indifference is appropriate standard in cases where Eighth Amendment violation can be determined without balancing competing institutional concerns).

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

164. See *supra* notes 138-42 and accompanying text (discussing why situation in *Whitley* is not similar to all instances where officials use force).

165. See *Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring) (maintaining that "less demanding" *Estelle* standard should be applied absent "special circumstances" of *Whitley*); *id.* at 1008 (Thomas, J., dissenting) (arguing that "[d]eparture from [deliberate indifference] baseline [mental state] is justified where, as in *Whitley*, prison officials act[ed] in response to an emergency").

deliberate indifference standard should be applied, than as a type of "prison disturbance" justifying the malice standard.<sup>166</sup> Had the Court applied the deliberate indifference standard, the inquiry would have been whether the officials had reason to use force under the circumstances of the case.<sup>167</sup> If force were not called for, its use would constitute wanton infliction of pain for the purpose of showing the officials' deliberate indifference to the inmate's rights.<sup>168</sup>

#### D. Burden on Inmates

The difficulty of proving the heightened mental state imposed by the *Whitley* malice standard will be a significant burden on inmates who bring Eighth Amendment excessive force claims.<sup>169</sup> Inmates

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166. Cf. *Wilson*, 111 S. Ct. at 2326 (finding no significant distinction between claims involving inadequate medical care and those involving inadequate conditions of confinement). The Court in *Wilson* noted that temperature, food, and protection against other inmates are all "conditions" of confinement. *Id.*; see *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987) (finding that deliberate indifference is appropriate standard regardless of whether treatment of inmate is characterized as inhumane living condition or failure to meet medical needs); see also *supra* note 40 and accompanying text (suggesting that subjection to excessive force is condition of confinement). In a recent post-*Hudson* case, an inmate attempted to classify his excessive force claim, involving a strip search and exposure to cold temperatures, as a "condition case" to which the *Estelle* deliberate indifference standard should apply. *Cornwell v. Dahlberg*, 963 F.2d 912, 917 (6th Cir. 1992). Based on the language in *Hudson*, that "when-ever prison officials stand accused of using excessive . . . force," the court rejected the use of the *Estelle* standard and applied the malice standard as instructed by *Hudson*. *Id.* at 917-18.

167. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (stating that deliberate indifference is evidenced where prison officials unnecessarily and wantonly inflict pain absent any institutional safety concerns).

168. See *Estelle*, 429 U.S. at 103-05 (concluding that guards' infliction of unnecessary suffering may result in Eighth Amendment violation). Use of the deliberate indifference standard would more effectively curtail inmate beatings. For example, in cases where some use of force is arguably necessary but not clear-cut, such as where an inmate violently resists being placed in handcuffs, some threat to institutional security exists because the inmate could injure guards or other prisoners, or could escape. Under the deliberate indifference standard, an official could only use the amount of force that is reasonably necessary to subdue the prisoner. Shooting the prisoner in this example would illustrate indifference to the need for an appropriate amount of force and would therefore constitute an Eighth Amendment violation. On the other hand, twisting the inmate's arm or perhaps even using a club would not be a violation. Beating the inmate once handcuffed or beating her unconscious to get her handcuffed might not amount to malice, but would certainly amount to deliberate indifference to the inmate's rights. Use of the deliberate indifference standard in this context would thus hold the offending prison official accountable for his or her indiscriminate use of force.

169. See *supra* notes 17-30 and accompanying text (explaining difficulty of proving existence of malice). As demonstrated by lower courts' excessive force decisions, the malice standard is very difficult to prove. See, e.g., *Stenzel v. Ellis*, 916 F.2d 423, 425-28 (8th Cir. 1990) (deciding that malice was not present where three guards physically attacked inmate for refusing to comply with direct order); *Unwin v. Campbell*, 863 F.2d 124, 127, 130 (1st Cir. 1988) (holding *Whitley* malice standard inapplicable to situation where guards broke up fight and beat inmate repeatedly with nightstick even though he was not involved in fight); *Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987) (determining that malice standard is unwarranted where prison worker allegedly hit inmate on mouth). As a consequence, heinous action by guards may be determined not to be violative of the Eighth Amendment. *Stenzel*, 916 F.2d at 430 (Lay, C.J., dissenting) (noting that despite ample evidence of unnecessary and excessive use of force in nonriot situation, majority failed to find that guards acted maliciously).

may be discouraged from bringing such claims that seek to enforce rights recognized by the Court in its rejection of the significant injury requirement.<sup>170</sup> Additionally, as officials realize that they are insulated by the holding in *Hudson*, the beneficial message against abusive conduct sent by the rejection of the significant injury requirement will never be received by guards because inmates are unlikely to sustain claims against them.

Confinement in an institution does not strip inmates of their constitutional rights.<sup>171</sup> Those rights, however, must be balanced against the competing needs of the institution.<sup>172</sup> The courts have long recognized that the running of a prison is a specialized process that should be left to prison administrators who can operate free from retrospective second-guessing by the judiciary.<sup>173</sup> The malice standard, which creates new hurdles for inmates seeking redress for abuse by prison officials, limits judicial scrutiny of allegations of use of excessive force and is thus consistent with this policy of judicial deference toward prison administrations.

In *Turner v. Safley*,<sup>174</sup> the Court addressed the balance between inmates' constitutional rights and the organized and safe operation of

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170. See *supra* note 9 and accompanying text (explaining that Eighth Amendment is principal source of redress of constitutional violations for incarcerated individuals). The fact that the burdensome malice standard may discourage inmates from bringing Eighth Amendment claims, combined with the difficulty of proving deprivation of an identifiable human need in Eighth Amendment conditions cases, will significantly curtail the use of the Eighth Amendment as an avenue for inmate redress of rights violations. See, e.g., *Cornwell v. Dahlberg*, 963 F.2d 912, 915-16 (6th Cir. 1992) (stating that convicted prisoner may only bring excessive force claim under Eighth Amendment and not under Due Process Clause); see also *supra* note 9 (noting that prisoners must claim that liberty interest was violated to pursue Fifth or Fourteenth Amendment due process protection).

171. See *supra* note 5 and accompanying text (describing constitutional rights retained by prisoners).

172. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95-97 (1987) (determining that prisoners retain right to marry, subject to restrictions based on valid institutional goal of safety); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (stating that prisoners should retain all rights, unless those rights are "inconsistent with imprisonment itself or incompatible with the objectives of incarceration"); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (noting that inmate's First Amendment rights are subject to limitations based on legitimate penological goals of institution). In an excessive force context, this means that inmates' right to be free from excessive force must be balanced against the need for force to subdue an actual threat to prison security. See *Whitley v. Albers*, 495 U.S. 312, 320 (1986) (stating that prison officials must consider danger to both inmates and officials during unrest, as well as possible harm to inmates against whom force would be used). Only when institutional safety is at stake is infringement of inmates' right to be free from excessive force warranted. *Id.* In *Hudson*, there was no need for any force and thus no need to conduct any balancing. See *supra* note 139 and accompanying text (detailing circumstances from *Hudson* where institutional concerns are not competing with inmates' rights).

173. See *supra* note 154 and accompanying text (describing cases that articulate Supreme Court's desire to permit prison officials to operate prisons free from judicial interference).

174. 482 U.S. 78 (1987).

the institution.<sup>175</sup> In considering prison regulations that infringe upon inmates' constitutional rights, the Court determined that heightened scrutiny of the regulations was not warranted and that the infringement need only be reasonably related to legitimate penological goals.<sup>176</sup> This reasonableness standard has been used in cases involving the practice of religion, access to abortions, and the receipt of legal correspondence.<sup>177</sup> The logical extension of this reasonableness standard would suggest that, absent an actual disturbance, the inquiry in a use of excessive force case should focus on whether the force was reasonably related to valid penological goals.<sup>178</sup> The application of the deliberate indifference standard

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175. See *Turner v. Safley*, 482 U.S. 78, 84-89 (1987) (balancing prisoners' rights to marry and conduct correspondence against regulations to protect institutional security).

176. *Id.* at 87-91. *Turner* held that the standard of review in balancing inmates' constitutional rights against the need for prison regulations that are designed to protect institutional security is not one of strict scrutiny. *Id.* Rather, the Court considered whether the regulation is reasonably related to legitimate penological objectives. *Id.* at 87. The determination of reasonableness turns on several factors: (1) a showing of a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it," *id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)); (2) whether there are alternative means available to the inmates to exercise the infringed right; (3) the impact that accommodating the asserted right will have on prison officials, other inmates, and prison resources; and (4) the lack of ready alternatives. *Id.* at 87-91. Case law is not clear as to who should determine when and whether a valid penological goal exists. Precedent merely instructs that a regulation restricting inmates' rights is valid only if it furthers an important or substantial governmental interest or is "reasonably related" to a legitimate penological objective. *Turner*, 482 U.S. at 87; *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), *overruled on other grounds* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Maintaining institutional security is clearly the predominant penological objective facing officials. See, e.g., *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986) (stating that officials must be allowed to act as necessary to ensure safety of inmates and guards and to prevent escape); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (noting that prison administration's primary concern is protecting institutional security). Even though courts generally defer to prison officials on matters of prison policy and operations, see *supra* note 4 and accompanying text (describing judicial deference to prison officials), the determination of penological objectives is not left entirely to the discretion of prison officials. See *Whitley*, 475 U.S. at 322 (indicating that deference to prison officials does not preclude judicial review of actions that lack legitimate penological purposes); see also *supra* notes 138-46 and accompanying text (explaining that courts seem willing to override prison officials when use of force lacks penological justification because it has no relation to institutional security).

177. See, e.g., *United States v. Stotts*, 925 F.2d 83, 84 (4th Cir. 1991) (upholding prison regulation requiring special markings on inmate legal correspondence as reasonably related to legitimate penological interests); *Salaam v. Lockhart*, 905 F.2d 1168, 1171, 1173-74 (8th Cir. 1990) (stating that prison regulation restricting inmate's ability to change name was not reasonable); *Whitney v. Brown*, 882 F.2d 1068, 1069 (6th Cir. 1989) (finding that prison regulations prohibiting annual congregations of inmates at Passover seders were not reasonably related to valid penological interests); *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987) (holding that court-ordered release requirement for obtaining abortions was not reasonably related to legitimate penological interest and therefore was impermissible burden on inmates' constitutional rights).

178. See *Turner*, 482 U.S. at 87 (stating that inquiry is "whether a prison regulation that burdens a fundamental right is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns"). The *Turner* reasonable relationship analysis could be applied to claims of excessive force. For example, this analysis might find a rational connection between the use of force and a legitimate governmental in-



could be analyzed in this light. Removing the malice standard would not infringe upon officials' ability to perform their duties any more than the *Turner* reasonableness requirement restricts prison officials from regulating inmates' constitutional rights.<sup>179</sup> Officials would have the latitude to do their job, yet excesses such as indiscriminate prisoner beatings would not be tolerated.

### CONCLUSION

In order to allow inmates to gain redress for violations of their constitutional rights, the Eighth Amendment needs to be a vital entity. To prevent the Eighth Amendment from applying only to judicially imposed sanctions, the Supreme Court must not limit valid claims through unnecessarily high burdens of proof. Until such time as the Supreme Court reconsiders its unwarranted extension of the malice standard, courts should apply the malice standard only to instances of actual prison unrest and apply the deliberate indifference standard to all other occurrences of excessive force.

Additionally, to counteract the dampening effect that *Hudson's* imposition of the malice standard will have on prisoners' rights, the circuit courts should adopt a low threshold for determining what constitutes malicious and sadistic intent to harm. By recognizing certain acts without penological justification, such as beatings, as being *prima facie* malicious and sadistic, the circuit courts can circumvent the burdensome journey into officers' minds and thus lessen the impact of the malice standard on valid excessive force claims.<sup>180</sup>

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terest where an inmate is a threat to security because the inmate is dangerous, threatening officers, or unrestrained. The *Turner* analysis would examine whether the exercise of restraint in using force might result in an inmate's escape, harm to a guard, or a threat to prison security or other inmates. Finally, this analysis would consider what other alternatives to the use of force existed, such as handcuffing or shackling the inmate, instituting emergency lockdown in cells, or calling for backup. *Cf. id.* at 89-90 (enumerating factors of reasonable relationship analysis); Freyermuth, *supra* note 40, at 707-11 (contending that although there is no constitutional due process right to be free from excessive force, prisoners have specific right to be free from cruel and unusual punishment under Eighth Amendment).

179. *Turner*, 482 U.S. at 88-91. While *Turner* mandates that prison regulations of inmates' rights to marry and correspond must be reasonably related to valid penological interests, officials are still free to enact restricting regulations to protect prison security and ensure the orderly running of the institution. *Id.* at 89-91. If a similar "reasonable" analysis were employed with the use of force, officials could still maintain an orderly and safe institution by using force where it is reasonably related to achieving the goal of safety.

180. See *Flowers v. Phelps*, 956 F.2d 488, 490-91 (5th Cir. 1992) (finding that guards acted without provocation and intended to cause serious harm even though defendant suffered no significant injury). In *Flowers*, the Fifth Circuit applied the malice standard to an excessive force claim in which a prisoner was beaten by guards. *Id.* at 491. In determining whether the guards' action amounted to malice, the court focused on whether the "force was applied in a good-faith effort to maintain or restore discipline." *Id.* Because the officials attacked the inmate "without provocation or rational justification," the court determined that the force was not applied in pursuit of legitimate penological goals. *Id.* The court then determined that an

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attack without penological justification is necessarily malicious. *Id.* Such an application of the malice standard avoids the difficult subjective inquiry into the guards' minds by accepting, almost *prima facie*, that an unprovoked use of violence is not in furtherance of institutional goals and is therefore, unquestionably, proof of malice.