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Use of Excessive Physical Force against an Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury.

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CASENOTES

CRIMINAL LAW—Cruel and Unusual Punishments—Use of Excessive Physical Force Against an Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury.

Hudson v. McMillian,
__ U.S. __, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

On October 30, 1983, corrections officers Jack McMillian and Marvin Woods allegedly beat Keith J. Hudson, an inmate at a Louisiana state penitentiary, while their supervisor, Arthur Mezo, looked on.[1] In federal district court, pursuant to 42 U.S.C. Section 1983,[2] Hudson brought suit against the officers for their use of excessive force in violation of the Eighth Amendment's prohibition of cruel and unusual punishments.[3] The parties agreed to bring the case before a magistrate, who awarded Hudson damages of $800 on a finding that "McMillian and Woods used force when there was no need to do so and that Mezo expressly condoned their actions."[4] The Fifth Circuit Court of Appeals reversed the Magistrate's judgment, finding that Hudson proved all but one of the four required elements of an Eighth Amendment claim: "(1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive, (3) the excessiveness of which was objectively unreasonable, and (4) the action constituted an unnecessary and wanton infliction of pain."[5] The Fifth Circuit determined that all the elements were met except the significant injury requirement because

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1. Hudson v. McMillian, __ U.S. __, __, 112 S. Ct. 995, 997-98, 117 L. Ed. 2d 156, 164 (1992). Hudson alleged that McMillian punched him in the stomach, chest, and eyes while Woods restrained Hudson, punching and kicking him from behind. *Id.* Mezo, the supervisor, watched the beating and told the officers "not to have too much fun." *Id.*

2. 42 U.S.C. § 1983 (1986). The Civil Rights Act of 1871 provides that "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." *Id.*

3. *Hudson*, __ U.S. at __, 112 S. Ct. at 997-98, 117 L. Ed. 2d at 164.

4. *Id.* at __, 112 S. Ct. at 998, 117 L. Ed. 2d at 164.

5. *See* Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990), *rev'd*, __ U.S. __, __,

Hudson's injuries "were minor and required no medical attention."[6] The United States Supreme Court granted certiorari to determine whether the Fifth Circuit's requirement of significant injury was the correct legal standard to apply to Hudson's Eighth Amendment claim.[7] HELD—*reversed and remanded*.[8] Use of excessive physical force against an inmate may constitute cruel and unusual punishment even though the prisoner does not suffer any significant injury.[9]

The prohibition against cruel and unusual punishments predates the Eighth Amendment of the United States Constitution.[10] The guarantee against cruel and unusual punishments first appeared in the English Bill of Rights of 1689.[11] The English enacted this proscription to halt the then-common barbarous and torturous punishments.[12] A similar provision later

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112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (stating that no significant injury requirement exists for excessive physical force claims brought under Eighth Amendment).

6. *Hudson*, 929 F.2d at 1014. The blows delivered by the officers split Hudson's lip, loosened his teeth, cracked his partial dental plate, and bruised his body. *Id.* at 1015.

7. Hudson v. McMillian, __ U.S. __, 111 S. Ct. 1679, 114 L. Ed. 2d 75 (1991).

8. *Hudson*, __ U.S. at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 169. Justice O'Connor delivered the majority opinion in which Chief Justice Rehnquist, and Justices White, Kennedy, and Souter joined. *Id.* Justice Stevens joined as to part of the majority opinion and filed an opinion concurring in part and concurring in the judgment. *Id.* Justice Blackmun concurred in the judgment. *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 170. Justice Thomas, joined by Justice Scalia, filed a dissenting opinion. *Hudson*, __ U.S. __, 112 S. Ct. at 1004, 117 L. Ed. 2d at 170.

9. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167.

10. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (stating that prohibition of cruel and unusual punishments first arose in English Bill of Rights of 1689); Furman v. Georgia, 408 U.S. 238, 242-43 (1972) (Douglas, J., concurring) (commenting that English Bill of Rights of 1689 prohibited "cruel and unusual punishments" and Magna Charta devoted three chapters to regulation of excessive punishments); Trop v. Dulles, 356 U.S. 86, 100 (1958) (stating that Eighth Amendment phrase derived directly from English Declaration of Rights of 1688). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-46 (1969) (discussing English origins of Cruel and Unusual Punishments Clause). The Norman Conquest of England caused the collapse of the English system of penalties and the old system of fines was replaced by discretionary amercements. *Id.* Amercements led to a severe problem of excessive fines and punishments, but this problem went unaddressed until the Magna Charta was enacted. *Id.* Chapter 14 of the Magna Charta specifically prohibited excessive punishments, and is a precursor to the Cruel and Unusual Punishments Clause of the English Bill of Rights. *Id. See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 305 (1989) (stating that term "cruel and unusual punishments" first arose in English Bill of Rights of 1689); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 209 (1992) (noting that English Bill of Rights originated prohibition of cruel and unusual punishments).

11. 1 W. & M., Sess. 2, c. 2 (1689).

12. *See Gregg*, 428 U.S. at 169 (noting that English version prohibited extra-jurisdictional sentences and punishments disproportionate to crime); *Furman*, 408 U.S. at 242 (Douglas, J.,

appeared in the Virginia Constitution of 1776 and several other state constitutions.[13] The Articles of Confederation also prohibited cruel and unusual punishments; however, the original United States Constitution did not.[14]

The Framers fiercely debated the lack of a "cruel and unusual punishments" clause during the Constitution's ratification.[15] The Framers' primary concern was the potential for abuse inherent in a legislature with an

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concurring) (finding that English Bill of Rights prohibited harsh and severe punishments); Weems v. United States, 217 U.S. 349, 371-72 (1909) (stating that after revolution of 1688, English enacted Declaration of Rights admonishing violent abuses occurring under reign of Stuarts). *See generally* Anthony F. Granuchi, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-46 (1969) (noting that Cruel and Unusual Punishments Clause was historically interpreted as forbidding barbarous punishments); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 209 (1992) (reasoning that Supreme Court traditionally interpreted Eighth Amendment to prohibit same punishments proscribed by English clause — barbarism and torture).

13. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989) (listing Virginia, Delaware, Georgia, Massachusetts, Maryland, New Hampshire, North Carolina, and Pennsylvania as having constitution or Declaration of Rights proscribing excessive fines); Rummel v. Estelle, 445 U.S. 263, 287 (1980) (stating phrase "cruel and unusual punishments" as used in Virginia Declaration of Rights originated in English Bill of Rights); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (recognizing that Eighth Amendment language originated with Virginia Declaration of Rights prohibition of cruel and unusual punishments and Virginia prohibition derived from English Bill of Rights); *Furman*, 408 U.S. at 243-44 n.5 (listing Virginia, Delaware, Georgia, Maryland, Massachusetts, North Carolina, Pennsylvania, and South Carolina as prohibiting excessive punishments). *See generally* Anthony F. Granuchi, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860-61 (1969) (noting that several states adopted prohibitions comparable to Eighth Amendment); Recent Case, *Constitutional Law—Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 136 (1950) (stating that several states and colonies prohibited excessive punishments long before adoption of Eighth Amendment). The Massachusetts colony prohibited such punishments before the English Bill of Rights was enacted. *Id.*

14. *See* U.S. CONST. amend. VIII (adding proscription of cruel and unusual punishments to original Constitution in 1791).

15. *See Rummel*, 445 U.S. at 287 (noting that absence of such clause was also debated during first Congress); *Gregg*, 428 U.S. at 170 (stating that absence of provision banning excessive punishments hotly debated at state level); *Furman*, 408 U.S. at 260-61 (Brennan, J., concurring) (noting that Patrick Henry at Virginia Convention, and Abraham Holmes at Massachusetts Convention, showed concern about lack of provision). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 306 (1989) (stating that lack of provision was of particular concern to certain statesmen of day); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 826-27 (1975) (commenting that George Mason, author of Virginia Bill of Rights, was strong objector to lack of federal bill of rights, and to absence of excessive punishments proscription).

unfettered power to punish.[16] This concern resurfaced at the First Congress' debates on the Bill of Rights,[17] and led to the adoption in 1791 of the Eighth Amendment, which provides that "[e]xcessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[18]

Judges and scholars have differed considerably on the precise meaning the Framers attached to "cruel and unusual."[19] Thus, the meaning of the

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16. *See Gregg*, 428 U.S. at 170 n.17 (finding that during Virginia Convention, Patrick Henry was particularly concerned about lack of restriction upon Congress). Henry believed that without such restriction, Congress could introduce civil law, endorse the torture of prisoners, and punish with relentless severity. *Id.*; *see also Ingraham*, 430 U.S. at 666 (reiterating Henry-Holmes conversation); *Furman*, 408 U.S. at 259-60 (Brennan, J., concurring) (discussing Abraham Holmes's concern over potentially unrestricted power of Congress absent this clause). Holmes proclaimed that Congress would not be "restrained from inventing the most cruel and unheard of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline." *Id. But see Weems*, 217 U.S. at 372 (stating that in Pennsylvania Convention, James Wilson considered such clause unnecessary and contended that clause purposefully omitted in Constitution). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 306 (1988) (commenting that both Henry and Holmes concerned with unlimited power of Congress absent constitutional clause proscribing excessive punishments); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 828 n.214 (1975) (quoting Holmes's speech criticizing lack of governmental restrictions).

17. *Furman*, 408 U.S. at 261-63 (Brennan, J., concurring) (noting that Smith and Livermore of First Congress opposed to Cruel and Unusual Punishments Clause). Melancton Smith objected to the words as being too indefinite. *Id.* at 262. Samuel Livermore did not object to the clause, but merely felt that such a prohibition was unnecessary. *Id.* Livermore stated:

> [I]t [the Eighth Amendment] seems to have no meaning in it, I do not think it necessary . . . it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?

Weems, 217 U.S. at 368-69 (reiterating Smith and Livermore debate). *See generally* Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 830 & n.227 (1975) (noting Smith's and Livermore's concerns).

18. U.S. CONST. amend. VIII; *see* 1 W.& M., Sess. 2, c.2 (1689) (containing same language as federal constitution); *see also Gregg*, 428 U.S. at 169-70 (discussing adoption of Eighth Amendment). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839-42 (1969) (exploring historical basis for adopting Eighth Amendment); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 208-09 (1992) (discussing divergent interpretation of Eighth Amendment).

19. *See* O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (declaring Eighth Amendment directed at preventing excessive punishments); Whitten v. Georgia, 47 Ga. 297, 302 (1872) (stating that Eighth Amendment meant to prohibit barbarous punishments

Eighth Amendment phrase "cruel and unusual punishments" has evolved over time.[20] Early cases interpreted the clause to prohibit only those penalties deemed cruel and unusual at the time of the enactment of the Bill of Rights—torture and mistreatment.[21] The Supreme Court did not address the fact that the Eighth Amendment might have a broader meaning until 1892, and then only in a dissenting opinion.[22] Moreover, the modern era of

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such as castration, burning, and quartering); State v. Williams, 77 Mo. 310, 312-13 (1883) (defining meaning of Eighth Amendment as preventing tortuous punishments that would "shock the mind"). *See generally* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966) (commenting that during nineteenth century, Eighth Amendment directed only at prohibiting primitive punishments); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: A Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 794 (1975) (stating that both character and quantity of punishment make punishments susceptible to Eighth Amendment).

20. *See Gregg*, 428 U.S. at 171 (stating that Eighth Amendment has been interpreted in evolving and flexible manner); *Trop*, 356 U.S. at 101 (noting that Eighth Amendment not precise and scope of Eighth Amendment not static); *Weems*, 217 U.S. at 373 (commenting that constitutional principles not ephemeral and must be flexible to changes of time). Justice McKenna, writing for the *Weems* majority, aptly stated, "[T]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth." *Id. See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 307-10 (1989) (recognizing evolution of Eighth Amendment jurisprudence); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 211 (1992) (noting Supreme Court reasoning that Cruel and Unusual Punishments Clause not fastened to obsolete meanings, but instead progressive and shaped by humane justice).

21. *See, e.g.*, *Furman*, 408 U.S. at 264-65 (Brennan, J., concurring) (declaring that early Eighth Amendment jurisprudence narrowly construed clause to prohibit only torture or such atrocities); *In re* Kemmler, 136 U.S. 436, 447 (1890) (finding that punishments are cruel "when they involve torture or a lingering death . . . something inhumane and barbarous"); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (giving examples of cruel punishments such as being beheaded, emboweled alive, burned alive, and public dissection). *See generally* Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 210 (1992) (commenting that only extreme and inherently cruel punishments considered unconstitutional); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 790 (1975) (stating that modes of punishment found not to violate Eighth Amendment as long as not torturous or barbarous).

22. *See O'Neil*, 144 U.S. at 340 (Field, J., dissenting) (stating that entire Eighth Amendment prohibition directed against excessiveness—whether bail demanded, fine imposed, or punishment inflicted); *see also Kemmler*, 136 U.S. at 446-47 (holding that Eighth Amendment prevents Congress from prescribing manifestly cruel and unusual punishments such as burning at stake); *Wilkinson*, 99 U.S. at 135-36 (explaining that extent of Eighth Amendment difficult to define, but safe to declare that punishments involving torture or unnecessary cruelty are forbidden). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969) (reasoning that generally

Eighth Amendment jurisprudence did not begin until 1909 when the Supreme Court held that the scope of the Eighth Amendment's protection was broader than the mere proscription of torture and barbarism.[23] The Supreme Court found that any punishment could be considered "cruel and unusual" if the punishment was disproportionate to the crime.[24]

The next significant link in the Eighth Amendment evolutionary chain was forged by the Supreme Court's declaration that the Eighth Amendment extracts its meaning from "evolving standards of decency that mark the progress of a maturing society."[25] Recognizing that a punishment is "cruel and unusual" if it is harmful to the "dignity of man,"[26] the Court held that non-

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accepted view of Eighth Amendment declares that Cruel and Unusual Punishments Clause prohibits only certain modes of punishment); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 382 (1980) (opining that traditional view that Eighth Amendment only meant to prohibit cruel modes of punishment still legitimate).

23. *Weems*, 217 U.S. at 370-71. In *Weems*, the Court found that the Eighth Amendment protected against more than the tortures practiced by historical tyrants. *Id.* at 372-73; *see also Gregg*, 428 U.S. at 171 (interpreting expansive holding of *Weems* Court); *Trop*, 356 U.S. at 100-01 (recognizing precedential value of *Weems*). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 307-08 (1988) (describing facts and law of *Weems*); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 211 (1992) (explaining holding of *Weems*).

24. *Weems*, 217 U.S. at 379-80. The *Weems* Court held that a fifteen year sentence of hard labor was excessively disproportionate to the crime of falsifying documents. *Id.* at 380; *see also* Solem v. Helm, 463 U.S. 277, 284-85 (recognizing prohibition of disproportionate punishments relates back to English law); *Gregg*, 428 U.S. at 171 (noting that *Weems* Court focused upon proportion between sentence and crime). *See generally* Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 211 (1992) (reasoning that *Weems* proportionate analysis expanded Eighth Amendment doctrine of excessive punishments); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 795-99 (1975) (examining *Weems* decision).

25. *Trop*, 356 U.S. at 101; *see also* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (applying "evolving standards of decency" approach enacted in *Trop*); *Furman*, 408 U.S. at 270 (Brennan, J., concurring) (holding that power of state must be exercised within "limits of civilized standards"). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 309-10 (1989) (discussing *Trop* holding and evolution of Eighth Amendment); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 211-12 (1992) (examining Supreme Court's analysis in *Trop*).

26. *Trop*, 356 U.S. at 100. The "dignity of man" is the basic concept underlying the prohibition of excessive punishments. *Id.*; *see also Gregg*, 428 U.S. at 173 (reasoning that penalty must not violate "dignity of man"); *Furman*, 408 U.S. at 270 (Brennan, J., concurring) (stating that punishment violates Eighth Amendment if inconsistent with human dignity). *See generally* Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Con-*

physical punishments may be cruel and unusual.[27] The United States Supreme Court subsequently decided many cases based on these principles.[28] One of the most significant was *Gregg v. Georgia*,[29] in which the Supreme Court held that imposition of the death penalty in murder cases did not violate the Eighth Amendment.[30]

Gregg became the foundation of a complex line of authority which over time expanded the Eighth Amendment rights of criminals and convicts.[31]

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ditions of Confinement in the Ninth Circuit, 22 GOLDEN GATE U. L. REV. 207, 212 (1992) (recognizing *Trop* decision as progressive interpretation of Eighth Amendment); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 791 (1975) (reasoning that dignity of man concept from *Trop* arose from English tradition).

27. *Trop*, 356 U.S. at 101. The *Trop* Court recognized that non-physical punishments, such as denationalization, can be more damaging than torture. *Id.*; *see also Rhodes*, 452 U.S. at 346 (finding that punishments not physically barbarous prohibited if inflict "unnecessary and wanton" pain). *But see* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding that prisoners must demonstrate serious physical harm before lack of medical treatment violates Eighth Amendment rights). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 309-10 (1989) (commenting that after *Trop*, punishments void of physical abuse proscribed under Cruel and Unusual Punishments Clause of Eighth Amendment); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 792 (1975) (discussing ramifications of *Trop*).

28. *See Gregg*, 428 U.S. at 153 (holding that capital punishment for murder not cruel and unusual punishment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that 90 day jail sentence for offense of drug addiction cruel and unusual punishment). *But cf. Furman*, 408 U.S. at 305 (Brennan, J., concurring) (finding that capital punishment constitutes cruel and unusual punishment). *See generally* Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 309 (1989) (discussing concepts from *Trop* and *Weems* which were applied in *Gregg* decision); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 800-06 (1975) (analyzing Court's Eighth Amendment jurisprudence after *Weems* and *Trop*).

29. 428 U.S. 153 (1976).

30. *Id.* at 187. The *Gregg* Court declared that the Georgia death penalty system did not violate the Eighth Amendment's prohibition of cruel and unusual punishments. *Id.* at 207; *see also* Woolls v. State, 665 S.W.2d 455, 472 (Tex. Crim. App. 1984) (en banc) (holding death penalty does not violate Eighth Amendment). *But see Furman*, 408 U.S. at 305-06 (Brennan, J., concurring) (finding death penalty cruel and unusual punishment). *See generally* 24 C.J.S. *Criminal Law* § 1605 (1989) (stating that death penalty not per se violation of Eighth Amendment); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 34 WASH. U. J. URB. & CONTEMP. L. 231, 235-36 (1987) (discussing *Gregg* analysis).

31. *See Estelle*, 429 U.S. at 97 (holding that "deliberate indifference" to prisoner's serious medical needs constitutes Eighth Amendment violation). *But see* Whitley v. Albers, 475 U.S. 312, 321 (1986) (holding that guard's shooting of prisoner during inmate riot did not violate

Gregg provided a two-part test holding punishments unconstitutional if they (1) inflict "unnecessary and wanton" pain, and (2) are "grossly out of proportion" to the crime committed.[32] The Supreme Court further expanded the application of the Eighth Amendment in *Estelle v. Gamble*,[33] recognizing that the protections inherent in the Eighth Amendment may even preclude acts which are not "punishment."[34] The *Estelle* Court held that "deliberate indifference to a prisoner's serious illness or injury" may be cruel

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prisoner's Eighth Amendment rights); *Rhodes*, 452 U.S. at 337 (finding that "double celling" in prison cell was not cruel and unusual punishment). *See generally* Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 236-37 (1987) (analyzing *Gregg* and application of its principles in later cases); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 310-11 (1989) (discussing *Gregg*).

32. *Gregg*, 428 U.S. at 173; *see also Whitley*, 475 U.S. at 320 (providing "unnecessary and wanton infliction of pain" is general requirement in Eighth Amendment claims); *Rhodes*, 452 U.S. at 347 (applying *Gregg* test to conditions of confinement). However, the Supreme Court has since refused to extend the proportionality analysis to cases not involving capital sentencing. *See* Harmelin v. Michigan, __ U.S. __, __, 111 S. Ct. 2680, 2702, 115 L. Ed. 2d 836, 865 (1991) (holding that Eighth Amendment does not require strict proportionality, rather merely forbids sentences "grossly disproportionate" to crime). The *Harmelin* Court reasoned that the death penalty differs from all other modes of criminal punishment. *Id.* Therefore, the Supreme Court, in *Harmelin*, upheld the sentence of life imprisonment with no possibility of parole for the crime of drug possession. *Id.* To violate the Eighth Amendment, conditions need not be grossly disproportionate to offense committed, nor include the "unnecessary and wanton infliction of pain." *Rhodes*, 452 U.S. at 347; *see also Estelle*, 429 U.S. at 104 (holding that deliberate indifference to prisoner's serious medical needs constitutes "unnecessary and wanton infliction of pain"). *See generally* Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 236 (1987) (commenting that Eighth Amendment test involves "unnecessary and wanton infliction of pain" and proportionality of punishment to crime); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 310 (1989) (discussing two-part test promulgated by *Gregg* Court).

33. 429 U.S. 97 (1976).

34. *See id.* at 104 (holding that deliberate indifference to prisoner's serious medical needs involves unnecessary and wanton infliction of pain). Such deliberate indifference constitutes an Eighth Amendment violation whether it originates with the prison officials or prison doctors. *Id.*; *see also Rhodes*, 452 U.S. at 347 (noting that denial of medical care constitutes cruel and unusual punishment when "result[ing] in pain without any penalogical purpose"); Sampley v. Ruettgers, 704 F.2d 491, 494-95 (10th Cir. 1989) (interpreting *Estelle* as incorporating non-punishments under cruel and unusual punishments doctrine). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 214 (1987) (noting that conduct which is not "punishment" may nevertheless be prohibited under Eighth Amendment); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 213-14 (1992) (discussing rationale of *Estelle*).

and unusual and thus violate the Eighth Amendment.[35] Although the "deliberate indifference" standard was created to address prisoners' medical needs, the standard has been applied broadly to non-medical inmate situations as well.[36] *Rhodes v. Chapman*[37] continued the evolution of the Eighth Amendment by extending Eighth Amendment protections to prison conditions in general.[38] The *Rhodes* Court explained that the constitutionality of prison conditions must be determined both objectively and subjectively.[39]

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35. *Estelle*, 429 U.S. at 104. The *Estelle* Court limited its holding by recognizing that not all medical treatment lapses constitute an Eighth Amendment violation. *Id.* at 105; *see also* Wilson v. Seiter, __ U.S. __, __, 111 S. Ct. 2321, 2326, 115 L. Ed. 2d 271, 281 (1991) (expanding application of deliberate indifference standard to prison conditions). *But see Rhodes*, 452 U.S. at 347 (finding proper standard governing prison conditions is whether conditions "involve . . . the wanton . . . and unnecessary infliction of pain"). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-36 (Ira P. Robbins ed., 1992) (opining that deliberate indifference standard proper standard in cases involving deprivation of medical care); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1265-66 (1991) (reasoning that inadequate prison medical facilities may constitute deliberate indifference to inmate's medical needs).

36. *Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 281 (applying deliberate indifference standard to conditions of confinement). *But see Rhodes*, 452 U.S. at 346 (finding that no static test should exist when determining if prison conditions violate Eighth Amendment); Bell v. Wolfish, 441 U.S. 520, 545 (1979) (recognizing presence of limits to constitutional guarantees of prison conditions). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 214 (1987) (commenting that Eighth Amendment may include preclusion of certain non-punishments); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 237-38 (1987) (comparing holding of *Estelle* and *Bell*).

37. 452 U.S. 337 (1981).

38. *Id.* at 346. Prison conditions violate the Eighth Amendment when they are grossly disproportionate to the offense committed and involve the "unnecessary and wanton infliction of pain." *Id.* (quoting *Gregg*). The *Gregg* Court held that incarcerating two inmates in a single cell was not cruel and unusual punishment. *Id.* at 352; *see also Bell*, 441 U.S. at 539 (holding that prison conditions will not violate Eighth Amendment if conditions are reasonably related to legitimate government interest). *But see Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 281 (applying deliberate indifference standard to cases involving prison conditions). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1441-42 (1990) (advising courts to examine prisoners' total living conditions before deciding constitutionality of conditions); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 293 (1991) (analyzing *Rhodes* decision).

39. *Rhodes*, 452 U.S. at 346. The *Rhodes* Court advocated the use of objective factors instead of reliance upon the subjective views of judges. *Id.* Examples of these objective factors include history of jurisprudence, state statutes, and jury sentences. *Id.* at 346-47; *see also* Rummel v. Estelle, 445 U.S. 263, 275 (1980) (holding that Eighth Amendment judgments should not merely reflect subjective views of judges). *But see Whitley*, 475 U.S. at 320-21 (emphasizing subjective requirements in inmate's Eighth Amendment excessive force claim). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Viola-*

More recent cases have attempted to mold the varying Eighth Amendment standards into a more cohesive legal doctrine.[40] One such case was *Whitley v. Albers*,[41] an excessive force case, in which the Supreme Court adopted a new analytical approach first used by the Second Circuit in *Johnson v. Glick*.[42] The new approach established four factors which judges should consider to determine whether force is "unnecessary and wanton."[43] Justice O'Connor, writing for the *Whitley* majority, did not precisely mirror

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tion of the Fourth, Eighth, and Fourteenth Amendments, 51 ALB. L. REV. 173, 216 (1987) (advising judges to examine both objective and subjective factors in Eighth Amendment jurisprudence); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 314 (1989) (reasoning that contemporary standards governing cruel and unusual punishments analysis are objective standards).

40. *See, e.g.*, Wilson v. Seiter, __ U.S. __, __, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 282 (1991) (expanding deliberate indifference standard by application to Eighth Amendment claims involving prison conditions); Whitley v. Albers, 475 U.S. 312, 327 (1986) (adopting new approach for excessive force cases involving prison disturbances, yet continuing to endorse all previous Eighth Amendment standards); Henderson v. DeRobertis, 940 F.2d 1055, 1060 (7th Cir. 1991) (clarifying requirement of deliberate indifference approach), *cert. denied*, __ U.S. __, 112 S. Ct. 1578, 118 L. Ed. 2d 220 (1992). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-44 to 2-47 (Ira P. Robbins ed., 1992) (analyzing recent cruel and unusual punishments cases); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 224-30 (1992) (discussing recent decisions applying deliberate indifference standard).

41. 475 U.S. 312 (1986).

42. 481 F.2d 1028 (2d Cir.), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973).

43. *Whitley*, 475 U.S. at 320 (affirming *Estelle* standard of deliberate indifference, but finding inapplicable in prison disturbance decisions); *Glick*, 481 F.2d at 1033. The four factors considered in Eighth Amendment excessive force claims are: (1) the need for force; (2) whether the force used was reasonably related to the need for force; (3) the extent of the inflicted injury; and (4) whether the force was applied in good faith to maintain order and discipline, or maliciously and sadistically solely to inflict harm. *But cf.* Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (per curiam) (applying variation of *Glick* approach to Fourth Amendment). There are three required elements in Fourth Amendment excessive force claims: (1) significant injury; and (2) force that was clearly excessive to the need; and (3) objectively unreasonable. *See* McHenry v. Chadwick, 896 F.2d 184, 187-88 (6th Cir. 1990) (finding seriousness of prisoner's injury only one factor to consider in Eighth Amendment excessive force cases). *But see* Wise v. Carlson, 902 F.2d 417, 417 (5th Cir. 1990) (holding prisoners required to demonstrate serious injuries before Eighth Amendment excessive force claims will succeed). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (discussing *Whitley* incorporation of *Glick* factors); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 239-42 (1987) (discussing *Whitley* and *Glick* factors).

the *Glick* analysis but instead emphasized the "good faith" factor.[44] In *Whitley*, Justice O'Connor stated that the determination of whether a punishment inflicted unnecessary and wanton pain ultimately turns on a subjective determination of "whether force was applied in a good faith effort . . . or maliciously and sadistically."[45] The *Whitley* Court further deviated from *Glick* by adding additional factors which award considerably greater deference to prison officials.[46]

Prisoners' Eighth Amendment rights were next addressed in *Wilson v.*

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44. *Compare Whitley*, 475 U.S. at 320-21 (emphasizing subjective element of malice which prisoners must prove) *with Glick*, 481 F.2d at 1033 (considering whether force was applied in good faith or maliciously to cause harm as merely one factor). *But see* Graham v. Connor, 490 U.S. 386, 397 (1989) (rejecting *Whitley* subjective malice/sadistic requirement in Fourth Amendment excessive force claims); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (holding malicious intent not required to show cruel and unusual punishment). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (reasoning that *Whitley* decision transformed malice factor from *Glick* into "general requirement"); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220 (1992) (commenting that *Whitley* confirmed requirement of mental element in Eighth Amendment jurisprudence).

45. *Whitley*, 475 U.S. at 320-21. The *Whitley* Court raised the discretionary factor of malice to the level of a subjective requirement. *Id.* But the *Whitley* Court stated that "[a]n express intent to inflict unnecessary pain is not required" to demonstrate cruel and unusual punishment. *Id.* at 319 (citing *Estelle*); *see also* Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988) (applying *Whitley's* malice standard to excessive force situation outside riot context); Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987) (holding prisoner must prove malice on part of prison guards who beat him, even absent prison riot). *But see* Unwin v. Cambell, 863 F.2d 124, 130 (1st Cir. 1988) (rejecting Whitley's malice requirement absent "an actual disturbance"). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1444-45 (1990) (stating that wanton force considered unconstitutional); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160-62 (1988) (analyzing *Whitley's* addition of subjective requirement to cruel and unusual punishments doctrine).

46. *See Whitley*, 475 U.S. at 321. These additional factors include the threat to the safety of the prison officials as seen from the official's perspective, plus any efforts the officials make to temper the extent of force used. *Id.*; *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 282 (holding that what is wanton depends upon situation faced by prison officials). *But see Glick*, 481 F.2d at 1033 (analyzing excessive force claim without considering factors which defer to prison guards or officials). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 223 (1987) (noting that additional factors give significant deference to prison officials); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 240-41 (1987) (discussing additional factors in *Whitley* decision).

Seiter[47] when the Court rejected the application of *Whitley's* "good faith/malice" standard to cases involving prison conditions.[48] The *Wilson* Court held that the applicable standard for prisoner conditions-of-confinement challenges, as opposed to excessive force claims, was the "deliberate indifference" standard set out in *Estelle*.[49] Writing for the *Wilson* majority, Justice Scalia declared that an intent requirement—whether deliberate indifference, malice, or merely wantonness—is implicit in the Eighth Amendment.[50] Besides adding this subjective intent requirement to cases involving conditions of confinement, Justice Scalia reaffirmed the objective requirement found in *Rhodes* which dictates that only "serious" deprivations will trigger Eighth Amendment scrutiny.[51]

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47. __ U.S. __, 111 S. Ct. 2321, 115 L. Ed. 2d 281 (1991).

48. *Id.* at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 281. The *Wilson* Court attempted to limit the very high subjective standard of *Whitley* to emergency situations within prisons. *Id.*; *see also Whitley*, 475 U.S. at 320-21 (holding that malice requirement must be met in excessive force cases involving prison disturbances). *But see Rhodes*, 452 U.S. at 347 (applying "wanton and unnecessary infliction of pain" standards to prison conditions). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-36 (Ira P. Robbins ed., 1992) (opining that deliberate indifference standard from *Estelle* more appropriate than maliciousness standard in *Whitley*); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 207-08 (1992) (discussing deliberate indifference analysis in *Wilson*).

49. *Compare Wilson*, __ U.S. at __, 111 S. Ct. at 2327, 115 L. Ed. 2d at 282 (holding that deliberate indifference standard applies to general conditions of confinement within prisons) *with Estelle*, 429 U.S. at 106 (applying new deliberate indifference standard to delinquent medical care situations). The *Wilson* Court found no distinction between adverse prison conditions and the lack of medical treatment. *Wilson*, __ U.S. at __ n.1, __, 111 S. Ct. at 2324 n.1, 2326, 115 L. Ed. 2d at 279 n.1, 282. *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-39 to 2-47 (Ira P. Robbins ed., 1992) (analyzing deliberate indifference jurisprudence); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 238-39 (1991) (reasoning that *Wilson* lumped all Court's prior prison decisions into classification of "prison deprivation").

50. *Wilson*, __ U.S. at __, 111 S. Ct. at 2327, 115 L. Ed. 2d at 282 (holding that prison officials must be deliberately indifferent to conditions of prison). There is a mental requirement in all cruel and unusual punishments claims in which "the pain inflicted is not formally meted out as punishment by the statute or sentencing judge." *Id.* at __, 111 S. Ct. at 2325, 115 L. Ed. 2d at 280. *But see Whitley*, 475 U.S. at 319 (holding no intent requirement when claiming Eighth Amendment violation); *Parrish*, 800 F.2d at 605 (holding no malicious intent requirement exists for Eighth Amendment excessive force claims). *See generally* Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220 (1992) (reasoning that *Whitley* confirmed that mental element required in prison condition cases); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 240 (1991) (commenting that prisoners making Eighth Amendment claims must prove some culpable intent on part of prison officials).

51. *See Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 279 (asking "was the deprivation serious enough"); *Rhodes*, 452 U.S. at 346 (holding that double celling of inmates

The Supreme Court, in *Whitley* and *Wilson*, tried to synthesize the judicial standards of the Eighth Amendment.[52] The *Whitley* Court attempted to create a new subjective test for excessive force analysis while affirming the multiple standards used in past Eighth Amendment jurisprudence.[53] Conversely, the *Wilson* Court expanded the preexisting deliberate indifference standard, emphasizing the objective requirement of serious injury or deprivation.[54] The *Whitley* Court required the demonstration of malice,

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not objectively serious enough to constitute "unnecessary and wanton infliction of pain"). However, the *Rhodes* Court favored objective standards over the uncertainty of subjective views. *Id. But cf. Whitley*, 475 U.S. at 321 (finding objective intent of prisoner's injury only one factor to consider in excessive force claims). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 216 (1987) (advising judges to examine both objective and subjective criteria when deciding Eighth Amendment decisions); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 207-08 (1992) (recognizing two hurdles, objective and subjective, prisoners must overcome to have successful Eighth Amendment lawsuits).

52. *See Wilson*, __ U.S. at __, 111 S. Ct. at 2326-27, 115 L. Ed. 2d at 282 (expanding deliberate indifference standard by application to Eighth Amendment claims involving prison conditions); *Whitley*, 475 U.S. at 318-22 (examining precedent to create new approach for excessive force cases involving prison disturbances); *Glick*, 481 F.2d at 1033 (originating four-factor approach adopted by Supreme Court in *Whitley*). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-44 to 2-47 (Ira P. Robbins ed., 1992) (analyzing recent trend in cruel and unusual punishments cases); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 224-30 (1992) (discussing ramifications of *Wilson* and *Whitley* with recent decisions applying deliberate indifference standard).

53. *See Whitley*, 475 U.S. at 320-21 (refusing to apply *Estelle* standard of deliberate indifference because staff and inmate safety are additional factors for consideration); *Glick*, 481 F.2d at 1033 (listing factors of force analysis). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (noting that *Whitley* Court added requirement of good faith conduct); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 239-42 (1987) (noting that *Glick* factors incorporated into *Whitley* decision).

54. *Compare Wilson*, __ U.S. at __, 111 S. Ct. at 2327, 115 L. Ed. 2d at 282 (holding that deliberate indifference standard applies to general conditions of confinement within prisons) *with Estelle*, 429 U.S. at 106 (applying new deliberate indifference standard to inadequate medical care situations). The *Wilson* Court found no distinction between adverse prison conditions and the lack of medical treatment. *Wilson*, __ U.S. at __ n.1, __, 111 S. Ct. at 2324 n.1, 2326, 115 L. Ed. 2d at 279 n.1, 282. *But see Rhodes*, 452 U.S. at 347 (addressing prison conditions in Eighth Amendment context without utilizing deliberate indifference standard). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-39 to 2-47 (Ira P. Robbins ed., 1992) (discussing deliberate indifference jurisprudence); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 238-39 (1991) (opining that *Wilson* lumped all of Court's prior prison decisions into classification of "prison deprivation").

with an objective showing of injury being only one factor for the Court to consider.[55] In contrast, the *Wilson* Court required both deliberate indifference and an objectively serious deprivation to establish an Eighth Amendment claim.[56] These efforts were made to clarify the doctrine of cruel and unusual punishments; however, the divergent interpretations of these decisions rendered Eighth Amendment jurisprudence far from clear.[57]

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55. *Whitley*, 475 U.S. at 320-21. The *Whitley* Court raised the discretionary factor of malice to the level of a subjective requirement. *Id.* However, the *Whitley* Court stated that "[a]n express intent to inflict unnecessary pain is not required" to demonstrate cruel and unusual punishment. *Id.* at 319 (citing *Estelle*); *see also* Jackson v. Crews, 873 F.2d 1105, 1108 (8th Cir. 1989) (holding that serious or "shocking" harm not required in § 1983 Eighth Amendment claims). *But see* Bennett v. Parker, 898 F.2d 1530, 1533 (11th Cir. 1990) (holding that prisoner beaten by guard required to show severe injuries to survive directed verdict at trial), *cert. denied*, __ U.S. __, 111 S. Ct. 1003, 112 L. Ed. 2d 1085 (1991). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160-62 (1988) (analyzing *Whitley's* addition of subjective requirement to cruel and unusual punishments doctrine); Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1444-45 (1990) (discussing the *Whitley* holding).

56. *See Wilson*, __ U.S. at __, 111 S. Ct. at 2324-25, 115 L. Ed. 2d at 279-80. For a prisoner to challenge prison conditions, he must show that the deprivation suffered was sufficiently serious and the conditions resulted from prison officials' deliberate indifference. *Id.* Once malice is subjectively established, the court will consider other factors including the extent of the inmate's injury. *Id.*; *see also Glick*, 481 F.2d at 1033 (holding that subjective intent of prison officials and objective extent of inmate's injuries are only factors to consider in excessive force cases). *But see Whitley*, 475 U.S. at 320-21. (requiring prisoners to prove maliciousness of prison officials when claiming officials used excessive force). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 220-26 (1987) (discussing *Whitley's* interpretation of *Glick* factors); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 239 (1991) (recognizing only deprivations of "life's necessities" serious enough to constitute Eighth Amendment violations under *Wilson* approach).

57. *Compare Wilson*, __ U.S. at __, 111 S. Ct. at 2326-27, 115 L. Ed. 2d at 281-82 (finding that prison officials' deliberate indifference to prison conditions constitutes wantonness) *with Whitley*, 475 U.S. at 320 (holding that maliciousness is ultimate factor when determining wantonness in prison disturbance situations). The *Whitley* Court stated that "[i]t is obduracy and wantonness, not inadvertence or error in good faith" that is proscribed by the Eighth Amendment. *Id.* at 319. However, the *Whitley* Court found no intent element is required in cruel and unusual punishments cases. *Id.* at 319; *see also Brown*, 813 F.2d at 1188 (requiring showing of malice in Eighth Amendment excessive force case). *But see Parrish*, 800 F.2d at 605 (finding malicious intent not indispensable in proving cruel and unusual punishment). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-44 to 2-47 (Ira P. Robbins ed., 1992) (analyzing recent cruel and unusual punishments cases); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 226-29 (1987) (examining post-*Whitley* excessive force jurisprudence); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN

The Supreme Court was faced with these divergent standards in *Hudson v. McMillian*[58] and held that the use of excessive force against an inmate may constitute cruel and unusual punishment even though the prisoner does not suffer significant injury.[59] Justice O'Connor, writing for the majority, recognized that the extent of an inmate's injury should be considered in an excessive force claim.[60] However, Justice O'Connor warned that the seriousness of an injury is but one factor to consider.[61] The Court rejected any rigid objective injury requirement for excessive force claims brought against prison officials.[62] Rather, the Court proposed that the objective injury component be "contextual and responsive to 'contemporary standards of decency.' "[63] Justice O'Connor emphasized that the "core judicial inquiry" in excessive force claims is the subjective determination of whether the force was applied in a good faith attempt to restore prison order, or maliciously and sadistically to inflict harm.[64]

The Court went on to distinguish this new excessive force standard from the deliberate indifference standard applied to claims involving medical care and conditions of confinement.[65] In those cases, *Wilson* requires the demonstration of both deliberate indifference and a serious deprivation.[66] Conversely, in excessive force claims, the only requirement is the subjective showing of malice, and seriousness of injury is merely a factor for consideration.[67] Justice O'Connor conceded that not all malevolent touches will con-

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GATE U. L. REV. 207, 224-30 (1992) (discussing recent decisions applying *Wilson* deliberate indifference standard involving prison conditions).

58. __ U.S. __, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

59. *Id.* at __, 112 S. Ct. at 997, 117 L. Ed. 2d at 164.

60. *Id.* at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166.

61. *Id.* The *Hudson* Court reasoned that the extent of injury is only one factor to consider when determining whether the force was necessary or was an unjustified and wanton infliction of harm. *Id.* Other determinate factors include whether the force was necessary, the relationship between that necessity and the amount of force applied, the threat to the prison officials' safety, and "any efforts made to temper the severity of a forceful response." *Id.*; *see also* Whitley v. Albers, 475 U.S. 312, 321 (1986) (adopting *Glick* multi-factor test).

62. *Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167.

63. *Id.*

64. *Id.* at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166.

65. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167. Justice O'Connor explained that medical treatment and condition-of-confinement cases require a showing of serious deprivation because prison inadequacies and discomfort are "part of the penalty that criminal offenders pay for their offenses against society." *Id.* However, Justice O'Connor reasoned that excessive force cases do not require such objective proof because the malicious and sadistic use of force to inflict harm will always violate contemporary standards of decency. *Id.*

66. *Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167.

67. *Id.* at __, 112 S. Ct. at 999-1000, 117 L. Ed. 2d at 166-67. The *Hudson* Court cautioned that if this standard were otherwise, the Eighth Amendment would permit any physical punishments, no matter how barbarous or diabolic, that inflicted less than an arbitrarily set "significant injury." *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167.

stitute cruel and unusual punishments because de minimis uses of physical force are not prohibited by the Eighth Amendment.[68] Nonetheless, the Court rejected the Fifth Circuit's holding requiring the prisoner to show a significant injury before recovering under Section 1983.[69]

Justices Stevens and Blackmun wrote separate concurring opinions.[70] Justice Stevens' concurrence endorsed the judgment of the Court, but disagreed with Justice O'Connor's analysis in reaching that judgment.[71] Justice Stevens contended that a prisoner's claim based on injuries received during a prison disturbance should require a showing that the force was applied maliciously.[72] However, Justice Stevens opposed elevating the good faith/malice factor to a requirement absent such a disturbance.[73] Justice Stevens reasoned that without those special circumstances present in *Whitley*, good faith/malice should only be a factor used to determine whether prison officials were guilty of "unnecessary and wanton infliction of pain."[74]

Justice Blackmun likewise opposed Justice O'Connor's extension of *Whitley's* good faith/malice requirement outside the prison riot context.[75] Justice Blackmun agreed, however, that there should not be a significant injury requirement in prisoners' Eighth Amendment claims.[76] Justice Blackmun warned that the majority opinion validated future Eighth Amendment claims based on psychological pain inflicted upon prisoners.[77]

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68. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 168 (finding that Hudson's bruises, swelling, loosened teeth, and fractured dental plate, were not de minimus injuries).

69. *Id.*

70. *Hudson*, __ U.S. at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 169-170 (1992) (Stevens & Blackmun, JJ., concurring).

71. *See id.* (questioning rationale of majority opinion).

72. *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 169 (Stevens, J., concurring). During actual unrest and conflict, prison officials should be permitted to consider the real threats to themselves and the inmates. *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 169-70 (Stevens, J., concurring).

73. *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 170 (Stevens, J., concurring) (citing lower court decisions which limited subjective standard of *Whitley* to situations of prison disorder).

74. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 170 (Stevens, J., concurring) (citing *Estelle* as authority to support stance that subjective factors are merely considerations, rather than requirements).

75. *See id.* at __, 112 S. Ct. at 1003, 117 L. Ed. 2d at 170-71 (Blackmun, J., concurring) (citing *Whitley* dissent in which Justice Blackmun joined).

76. *Id.* at __, 112 S. Ct. at 1002-03, 117 L. Ed. 2d at 171 (Blackmun, J., concurring). Justice Blackmun was concerned that a significant injury requirement may permit prison officials to lash their prisoners with leather whips, beat them with rubber hoses, shock them with electricity, expose them to extreme heat or cold, bludgeon them with naked fists, inject them with adverse drugs, or inflict any other pain upon the prisoners which left no significant injury. *Id.*

77. *See id.* at __, 112 S. Ct. at 1004, 117 L. Ed. 2d at 172 (Blackmun, J., concurring) (finding majority holding not limited to physical injury). Justice Blackmun stated that the

Justice Thomas, joined by Justice Scalia, dissented from the majority by supporting the objective standard which requires that the prisoner show significant injury.[78] Justice Thomas, asserting that *Wilson* and *Estelle* were controlling precedent in *Hudson*, applied the deliberate indifference standard to Hudson's excessive force claim and proposed that this standard apply to most Eighth Amendment claims.[79] The dissent made no distinction between excessive force claims and medical treatment or condition of confinement claims.[80] Rather, Justice Thomas found that a requirement of serious injury is analogous to a requirement of serious deprivation.[81] Justice Thomas rejected the majority's claim that the only requirement for excessive force cases is a subjective one and instead argued that the appropriate excessive force standard requires a showing of deliberate indifference and serious injury.[82] Justice Thomas contended that the majority's subjective standard would burden inmates' efforts to establish Eighth Amendment violations.[83] Finally, Justice Thomas suggested that a proper legal avenue for excessive force claimants lacking serious injuries is state remedies, and if state remedies are not constitutionally adequate, a Fourteenth Amendment Due Process claim is an appropriate remedy.[84]

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prohibition of "unnecessary and wanton infliction of pain" may encompass psychological pain. *Id.*

78. *Hudson*, __ U.S. at __, 112 S. Ct. at 1011, 117 L. Ed. 2d at 180 (Thomas, J., dissenting).

79. *Id.* at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting). Justice Thomas stated " 'deliberate indifference' is the baseline mental state required to establish an Eighth Amendment violation." *Id.* Justice Thomas considered the only justified departure from this standard is an emergency situation, such as in *Whitley*, and then the malicious and sadistic standard would apply. *Id.* However, Justice Thomas found that the majority extended the malice/sadistic standard to all excessive force claims. *Id.*

80. *Id.* at __ n.4, 112 S. Ct. at 1009 n.4, 117 L. Ed. 2d at 178 n.4 (Thomas, J., dissenting). Justice Thomas found no distinction between "specific acts" of excessive force and general "conditions" of confinement. *Id.* (citing McCarthy v. Bronson, __ U.S. __, __, 111 S. Ct. 1737, 1742, 114 L. Ed. 2d 194, 200 (1991)).

81. *See id.* at __ & n.3, 112 S. Ct. at 1006-07 & n.3, 117 L. Ed. 2d at 174-76 & n.3 (Thomas, J., dissenting) (finding no substantive difference between significant injury required by Fifth Circuit and serious deprivation required in Supreme Court's precedents). By contrast, the *Hudson* majority felt that precedent and the clarity of the Framers' intent mandated the distinction between excessive force claims which do not require a showing of serious injury and medical treatment and prison conditions claims which require serious deprivation. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167.

82. *Hudson*, __ U.S. at __, 112 S. Ct. at 1006, 117 L. Ed. 2d at 175 (Thomas, J., dissenting).

83. *Id.* at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (recognizing majority's simultaneous raising of subjective standard and elimination of objective standard).

84. *Id.* at __ & n.5, 112 S. Ct. at 1010-11 & n.5, 117 L. Ed. 2d at 179-80 & n.5 (Thomas, J., dissenting). Justice Thomas reasoned that the majority decision was an unjustified intrusion

While both the majority and the dissent present strong precedential support for their contentions, both attempt to expand precedent beyond its original meaning.[85] Justice O'Connor correctly found that the extent or seriousness of an inmate's injury is only one factor for consideration in an excessive force claim against prison officials.[86] Justice O'Connor's finding was true to the precedent of *Whitley* and *Glick* which held that the extent of injury was only a factor to be considered and not a requirement that must be satisfied.[87] The Fifth Circuit's attempt to change the "factors" into "re-

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into American society and assisted in transforming the Eighth Amendment into a "National Code of Prison Regulation." *Id.* at __, 112 S. Ct. at 1009-10, 117 L. Ed. 2d at 179 (Thomas, J., dissenting).

85. *Compare* Hudson v. McMillian, __ U.S. __, __, 112 S. Ct. 995, 1006-07, 117 L. Ed. 2d 156, 174-75 (1992) (Thomas, J., dissenting) (applying deliberate indifference standard to excessive force claims) *and* Wilson v. Seiter, __ U.S. __, __, 111 S. Ct. 2321, 2326-27, 115 L. Ed. 2d 271, 281-82 (1991) (holding that deliberate indifference to prison conditions constitutes Eighth Amendment violation) *with Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 176 (finding that core judicial inquiry in all excessive force claims is whether force applied maliciously and sadistically to inflict harm or in good faith to maintain order or discipline) *and* Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (holding that maliciousness is ultimate factor when determining cruel and unusual punishments in prison disturbance situations). The *Whitley* Court stated that "[i]t is obduracy and wantonness, not inadvertence or error in good faith" that is proscribed by the Eighth Amendment. *Id.* at 319. *See generally The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 237-38 (1991) (meaning of wantonness depends upon context of constitutional violation); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1265 (1991) (quoting *Whitley* standard for cruel and unusual punishments).

86. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (reciting precedent as basis for holding). The extent of injury is but one factor to consider in determining whether the force was necessary or an unjustified and wanton infliction of harm. *Id.* Other determinate factors include the relationship between that necessity and the amount of force applied, the threat to the prison officials' safety, and "any efforts made to temper the severity of a forceful response." *Id.*; *see also Whitley*, 475 U.S. at 320-21 (adopting multi-factor test from Second Circuit); McHenry v. Chadwick, 896 F.2d 184, 188 (6th Cir. 1990) (holding that inmate beaten by prison officials not required to show serious injury to succeed in Eighth Amendment claim). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (discussing *Whitley* requirements of additional factors such as amount of force used and need for that force); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 240-42 (1987) (analyzing *Whitley* approach to excessive force claims).

87. *See Hudson*, __ U.S. at __, 112 S. Ct. at 998-99, 117 L. Ed. 2d at 166 (rejecting objective requirement of Fifth Circuit); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (reasoning that courts must look at multitude of factors to determine violation of prisoner's Eighth Amendment rights), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973). *See also* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 217-20 (1987) (discussing

quirements" was properly reversed.[88] Had the Court held otherwise, the Eighth Amendment would have been reduced to a tort provision that would grant remedies only to those with actual damages.[89] Such a ruling would not deter prison officials from abusing inmates, but would encourage these officials to devise punishments which leave little objective evidence upon a prisoner's body.[90]

Glick factors and subsequent litigation attempting to apply *Glick* factors); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (noting that Justice O'Connor adopted *Glick* approach in *Whitley*).

88. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167 (1992) (rejecting any objective requirements for excessive force claims); *see also* Jackson v. Crews, 873 F.2d 1105, 1108 (8th Cir. 1989) (holding that prisoner need not show serious or "shocking" harm to succeed in § 1983 claim); Parrish v. Johnson, 800 F.2d 600, 611 (6th Cir. 1986) (holding that serious injury not required in Eighth Amendment excessive force claims). *But see* Wise v. Carlson, 902 F.2d 417, 417-18 (5th Cir. 1990) (finding that prisoners claiming Eighth Amendment violation involving excessive force must prove serious injury and minor bruises are insufficient). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 220-26 (1987) (discussing Supreme Court's interpretation of *Glick* factors); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1268 (1991) (discussing *Whitley's* holding and effect on Eighth Amendment excessive force jurisprudence); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 34 WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (analyzing application of *Glick* analysis).

89. *Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167. The *Hudson* Court cautioned that if this standard were otherwise, the Eighth Amendment would allow any physical punishments, no matter how barbarous or diabolic, which inflicted less than an arbitrarily set significant injury. *Id.*; *see also Whitley*, 475 U.S. at 322 (distinguishing between Eighth Amendment violations and actions of negligence); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976) (finding that negligence is improper standard when determining if doctor's acts or omissions amounted to deliberate indifference to inmate's Eighth Amendment rights); *cf. McHenry*, 896 F.2d at 187-88 (holding that inmate beaten by prison officials does not have to show serious injury to claim Eighth Amendment violation). *See generally* ROBERT E. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984) (recognizing that actual harm must be demonstrated to obtain successful negligence action); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 161 (1988) (criticizing Court's analysis which did not distinguish between negligence and constitutional challenge of Eighth Amendment).

90. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167 (stating that to hold otherwise would permit "diabolic or inhuman" punishments which inflict less than some "arbitrary quantity of injury"); *cf.* McRorie v. Shimoda, 795 F.2d 780, 785 (9th Cir. 1986) (applying *Glick* factors to excessive force claim and holding that extent of injury only one factor). If an objective requirement for serious injury existed, the inmate in *McRorie* would have had little legal recourse to the guard's inappropriate action involving violating the prisoner with a nightstick. *See id.* (reasoning that if no objective injury, no Eighth Amendment claim even though offensive to human dignity). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1445 (1990) (restating that extent of

At first glance, Justice O'Connor appears to be protecting the interests of prisoners by rejecting the significant injury requirement and thus lowering the burden of proof.[91] This appearance is only partially accurate.[92] The *Hudson* decision does encourage prisoners to pursue excessive force claims even though they have suffered no serious harm.[93] However, the subjective requirement upon those prisoners to prove malice or absence of good faith is

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injury only one factor to consider); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment*: Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (recognizing that *Whitley* approach favors officials over prisoners).

91. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167 (proscribing barbarous punishment and torture as Framers' intent). Justice Blackmun reasoned that the majority opinion protects inmates from state sponsored tortures. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 170 (Blackmun, J., concurring). Likewise, Justice Thomas argued that the majority holding makes it harder for prisoners to establish Eighth Amendment claims. *Id.* at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting); *see also* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (viewing objective factors as more favorable than subjective views); *Wise*, 902 F.2d at 417 (requiring showing of serious injury which excludes prisoners with superficial injuries from successful Eighth Amendment claims). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 167-68 (1988) (stating that *Whitley* approach not beneficial to Eighth Amendment jurisprudence); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 244-45 (1987) (viewing subjective approach adopted by *Whitley* as more effective in dealing with prison disturbances).

92. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 168 (holding that minor injuries, such as Hudson's, fall within scope of prohibition against cruel and unusual punishments). The majority decision lowers the objective burden of proof inmates must overcome in excessive force cases. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167. *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1445 (1990) (discussing factors for consideration in Eighth Amendment excessive force claims); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 159-61 (analyzing *Whitley's* multi-factor approach).

93. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 168 (holding that inmates with only minor injuries may recover under § 1983). The majority decision will prevent decisions such as *Bennett v. Parker* which held that a guard's beating of an inmate with a nightstick is not violative of the Eighth Amendment. *See* Bennett v. Parker, 898 F.2d 1530, 1534 (11th Cir. 1990) (holding prisoners must show severe injury to survive directed verdict at excessive force trial), *cert denied*, __ U.S. __, 111 S. Ct. 1003, 112 L. Ed. 2d 1085 (1991); *see also Jackson*, 873 F.2d at 1108 (finding serious or "shocking" injury not required in prisoner's excessive force claim). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 230 (1987) (analyzing excessive force factor including extent of injury); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 240-41 (1987) (discussing factors involved in excessive force claims).

so great that the likelihood of successful claims is slim.[94] Initially in *Whitley* and later in *Hudson*, the Court actually raised the burden of proof that prisoners must meet when seeking Eighth Amendment protection.[95] The *Hudson* Court declared that the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[96] By raising the *Glick* factor of maliciousness to the level of a requirement, the Court created inconsistent law.[97]

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94. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (arguing that subjective standard of majority increases burden of proof which prisoners must overcome). Justice Stevens found the subjective requirement espoused by the majority was too high a standard for all excessive force claims. *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 170; *see also* Unwin v. Cambell, 863 F.2d 124, 130 (1st Cir. 1988) (rejecting *Whitley* malice/good faith standard when no "actual disturbance" occurred); *Parrish*, 800 F.2d at 605 (rejecting malicious intent requirement for Eighth Amendment claims). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 226-29 (1987) (analyzing Justice O'Connor's high subjective standard); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (noting that *Whitley* approach favors prison officials).

95. *Compare Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (finding that majority holding creates more difficulty for prisoners in proving subjective component in Eighth Amendment cases) *with Whitley*, 475 U.S. at 329 (Marshall, J., dissenting) (contending that *Whitley* approach put more "onerous burden" upon inmate/plaintiff attempting Eighth Amendment claim). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1440-41 (1990) (discussing *Whitley* approach to Eighth Amendment claims); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160-61 (1988) (analyzing subjective requirement to cruel and unusual punishments doctrine).

96. *Compare Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (extending malice standard to all excessive force claims) *and Whitley*, 475 U.S. at 320-21 (emphasizing subjective element of malice which prisoners must prove in excessive force situations involving prison disturbances) *with Glick*, 481 F.2d at 1033 (considering whether force was applied in good faith or maliciously to cause harm as merely one factor to consider) *and Parrish*, 800 F.2d at 605 (holding that malicious intent only one factor to consider in Eighth Amendment analysis). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (opining that *Whitley* decision transformed malice factor from *Glick* into "general requirement"); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220 (1992) (reasoning that *Whitley* confirmed that mental element required in Eighth Amendment jurisprudence).

97. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (finding *Glick* holding consistent with extreme force). Justice O'Connor claimed that the deliberate indifference standard does not extend to medical treatment and prison conditions cases. *Id.* At the same time, Justice O'Connor extended her new malice requirement beyond its original scope of prison riots to all excessive force situations. *Id.*; *see also Whitley*, 475 U.S. at 319 (finding

The majority chastised the dissent for attempting to alter Eighth Amendment precedent while simultaneously conducting nearly identical alterations.[98] The majority imposed the good faith/malice requirement despite valid precedent that an intent requirement is improper for Eighth Amendment claims.[99] Proving a malicious state of mind is arguably more challenging than pointing to a broken arm or leg.[100] Also, because the burden of

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"express intent to inflict unnecessary pain is not required" to demonstrate cruel and unusual punishment); *Glick*, 481 F.2d at 1033 (promulgating malice/good faith element as factor, not requirement). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 230 (1987) (noting that Judge Friendly, in *Glick* decision, never indicated that question of malice was Eighth Amendment requirement); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO L.J. 1253, 1268 (1991) (recognizing that prisoner's injury only one factor to consider in excessive force decisions).

98. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (transforming malice factor into requirement for all excessive force claims). However, Justice Thomas would apply the deliberate indifference standard, with objective requirements, to excessive force situations. *Id.* at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting); *see also Unwin*, 863 F.2d at 130 (rejecting malice standard without showing of "actual disturbance"); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988) (applying malice standard outside prison disorder context). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-39 to 2-47 (Ira P. Robbins ed., 1992) (analyzing deliberate indifference jurisprudence); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 238-39 (1991) (discussing *Wilson* Court's application of deliberate indifference standard).

99. *Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166. The *Whitley* Court raised the discretionary factor of malice to the level of a subjective requirement. *Whitley*, 475 U.S. at 320-21. However, the *Whitley* Court stated that "[A]n express intent to inflict unnecessary pain is not required" to demonstrate cruel and unusual punishment. *Id.* at 319; *see also* Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979) (holding that prisoners claiming Eighth Amendment violations need not prove prison officials' wrongful state of mind). *But see* Wilson v. Seiter, __ U.S. __, __, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 282 (1991) (holding that prison officials must be deliberately indifferent to conditions of prison for those conditions to violate Eighth Amendment). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1444-45 (1990) (discussing the *Whitley* holding); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160-62 (1988) (analyzing *Whitley's* addition of subjective requirement to cruel and unusual punishments doctrine).

100. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1009, 117 L. Ed. 2d at 178 (Thomas, J., dissenting) (recognizing that subjective concepts of decency or goodness difficult to determine, so objective factors should be utilized as much as possible); *Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 279 (examining whether deprivation was objectively "serious" enough to merit Eighth Amendment scrutiny); *Rhodes*, 452 U.S. at 346 (finding that objective factors more reliable and favorable than subjective views). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 216 (1987) (advising judges to examine both objective and

proving malice is subjective rather than objective, the *Hudson* requirement will be a significant hurdle inmates must overcome to prove excessive force claims.[101]

In addition to upgrading the subjective *Glick* factor, Justice O'Connor supported additional factors that give significant deference to prison officials.[102] These factors include (1) the threat as perceived by the prison officials, and (2) any efforts made by the officials to temper the forceful response.[103] These additional factors also increase the difficulty prisoners

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subjective criteria when deciding Eighth Amendment decisions); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 207-08 (1992) (recognizing that prisoners must overcome both objective and subjective factors to have successful Eighth Amendment lawsuits).

101. *Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting); *see also* Brown v. Smith, 813 F.2d 1187, 1188 (9th Cir. 1986) (holding that fact inmate refused to return to cell failed to prove guards acted with malice when forcibly transporting inmate back to cell). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 230-32 (1987) (discussing requirement of malice and subjective malice standard); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (finding *Whitley* approach more favorable to prison officials than to prisoners).

102. *Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166; *accord Whitley*, 475 U.S. at 321 (granting considerable deference to prison officials); *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 282 (giving prison officials deference by determining "wanton" from examination of situation faced by officials). *But see Glick*, 481 F.2d at 1033 (analyzing excessive force claim without considering factors which defer to prison guards or officials). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (finding that additional factors give significant deference to prison officials); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 240-41 (1987) (discussing additional factors in *Whitley* decision).

103. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (stating that factors to consider include those that give considerable deference to prison officials); *Whitley*, 475 U.S. at 321 (granting prison officials wide-ranging deference); Bell v. Wolfish, 441 U.S. 520, 547 (1979) (recognizing need to defer to prison officials in matters of discipline and security). *See generally* David J. Gottlieb, *The Legacy of* Wilson *and* Chapman: *Some Thoughts About "Big Prison Case" Litigation in the 1980s*, *in* PRISONERS AND THE LAW 2-3, 2-4 to 2-5 (Ira P. Robbins ed., 1992) (analyzing Supreme Court's earlier "hands off" approach to Eighth Amendment jurisprudence as granting considerable deference to prison officials through mid-1960s); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1253 n.2400 (1991) (discussing wide ranging deference given to today's prison officials); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 235-40 (1991) (recognizing recent return of Supreme Court's hands-off doctrine mandating deference to prison officials).

will face when bringing these claims.[104]

The majority further digressed from precedent by expanding the scope of the heightened subjective standard of malice.[105] The *Whitley* Court applied this high standard only to circumstances of extreme disorder and violence, but the majority in *Hudson* extended this standard to include all excessive force cases.[106] The dissent correctly argued that such an extension is unjustified by *Whitley* or any other precedent.[107] The justification in *Whitley* for

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104. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (stating that factors to consider include those that give considerable deference to prison officials); *Whitley*, 475 U.S. at 321 (granting prison officials wide-ranging deference); *cf. Rhodes*, 452 U.S. at 348-49 (holding that double celling was not cruel and unusual punishment because prison officials' best response to overcrowding should be given deference). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222-23 (1987) (reasoning that under Justice O'Connor's *Whitley* approach, prisoner must first demonstrate malice, remaining three factors in *Glick* analysis, and additional factors which benefit prison officials); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 235-40 (1991) (tracing Supreme Court's recent Eighth Amendment decisions regarding prison officials).

105. *See Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (applying standard of malice to all excessive force claims). Justice O'Connor asserted that the extension of this standard "works no innovation." *Id.*; *see also Brown*, 813 F.2d at 1188 (applying malice standard outside prison riot context). *But see Unwin*, 863 F.2d at 130 (limiting *Whitley* approach to prison disturbances). *See generally* Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (analyzing Justice O'Connor's addition of high standard of malice to cruel and unusual punishments doctrine); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (discussing majority holding in *Whitley*).

106. *Compare Hudson*, __ U.S. at __, 112 S. Ct. at 999, 117 L. Ed. 2d at 166 (extending malice standard to all excessive force claims) *and Whitley*, 475 U.S. at 320-21 (emphasizing subjective element of malice which prisoners must prove in excessive force situations involving prison disturbances) *with Parrish*, 800 F.2d at 605 (holding malicious intent only one factor to consider in Eighth Amendment analysis) *and Glick*, 481 F.2d at 1033 (considering whether force was applied in good faith or maliciously to cause harm as merely one factor to consider). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (noting that *Whitley* decision transformed malice factor from *Glick* into "general requirement"); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220 (1992) (stating that *Whitley* confirmed that mental element required in Eighth Amendment jurisprudence).

107. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1007, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (arguing that subjective standard of malice should not apply to all excessive force claims). Justice Stevens would limit the *Whitley* holding to facts involving "actual unrest and conflict." *Id.* at __, 112 S. Ct. at 1002, 117 L. Ed. 2d at 169-70 (Stevens, J., concurring); *see also Unwin*, 863 F.2d at 130 (rejecting malice/good-faith standard absent "an actual distur-

the subjective requirement of malice was to protect prison officials who apply force to quell prison disorder.[108] Subjecting these officials to liability for deliberate indifference might cause the officials to hesitate in applying necessary and justified force during emergency situations.[109] Despite lacking these policy considerations in *Hudson*, Justice O'Connor expanded the *Whitley* approach beyond its original scope.[110]

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bance" within the prison); *Parrish*, 800 F. 2d at 605 (finding no requirement of malicious intent exists for any Eighth Amendment claim). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1444-45 (1990) (limiting good faith/malice standard to context of prison disturbance); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (recognizing that *Glick* did not require showing of malice).

108. *See Hudson*, __ U.S. at __, 112 S. Ct. at 998-99, 117 L. Ed. 2d at 165-66 (finding malice standard appropriate in cases when prison officials must confront threats quickly and decisively); *Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 281 (recognizing that malice/good faith standard should be used when prisoners' rights conflict with important government responsibilities); *Whitley*, 475 U.S. at 320 (holding that prisoners bringing excessive force claims deriving from prison riot must prove that prison officials acted maliciously and sadistically, in haste and under pressure). *See generally* Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 222 (1992) (explaining that *Whitley* subjective standard should be applied when prison officials respond to threatening circumstances).

109. *See Hudson*, __ U.S. at __, 112 S. Ct. at 998-99, 117 L. Ed. 2d at 165-66 (finding deliberate indifference standard inappropriate in cases when prison officials must confront threats quickly and decisively). The malice/good faith standard facilitates prison officials' decisions which involve balancing the need for order against the risks to inmates. *Id.*; *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2326, 115 L. Ed. 2d at 281 (recognizing that deliberate indifference standard should not be used when prisoners' rights conflict with important government responsibilities); *Whitley*, 475 U.S. at 320 (finding deliberate indifference standard inadequate when dealing with decisions prison officials necessarily make in haste and under pressure). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye, in* PRISONERS AND THE LAW 2-33, 2-39 to 2-46 (Ira P. Robbins ed., 1992) (examining deliberate indifference standard); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 222 (1992) (explaining that *Whitley* subjective standard should be applied when prison officials respond to threatening circumstances).

110. *See Hudson*, __ U.S. at __, 112 S. Ct. at 997, 117 L. Ed. 2d at 164. Hudson was not involved in a prison disturbance; instead he was a lone, shackled inmate who was beaten by two prison guards during an isolated incident. *Id.*; *see also Glick*, 481 F.2d at 1033 (originating reasoning that malice/good faith standard only one factor for consideration in Eighth Amendment decisions). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 222 (1987) (noting that *Whitley* decision transformed malice factor from *Glick* into general requirement); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220 (1992) (stating that *Whitley* confirmed mental element requirement in Eighth Amendment jurisprudence).

Justice Thomas's dissent, like Justice O'Connor's majority opinion, has both strong and weak contentions.[111] The deliberate indifference standard Justice Thomas advocated emphasized both subjective and objective factors when determining whether an act or a condition is cruel and unusual.[112] The majority's standard, however, virtually eliminated the objective criteria in favor of a purely subjective test.[113] In the dissent, Justice Thomas cor-

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111. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting). Justice Thomas's argument involved a single standard, deliberate indifference, which would govern the vast majority of Eighth Amendment jurisprudence. *Id.* Additionally, Justice Thomas endorsed the Fifth Circuit's objective requirement of significant injury for Eighth Amendment excessive force claims. *Id.* at __, 112 S. Ct. at 1011, 117 L. Ed. 2d at 180 (Thomas, J., dissenting); *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2326-27, 115 L. Ed. 2d at 282 (extending deliberate indifference standard to situations involving prison conditions); *Whitley*, 475 U.S. at 321 (finding seriousness of prisoner's injury only one factor to consider when determining whether prison officials used excessive force). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 216 (1987) (advising judges to examine both objective and subjective criteria when deciding Eighth Amendment decisions); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 207-08 (1992) (examining development of Supreme Court's standard for review of Eighth Amendment claims involving prison officials).

112. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1006, 117 L. Ed. 2d at 175 (Thomas, J., dissenting) (holding that inmate claiming infliction of cruel and unusual punishment must satisfy both subjective requirement of deliberate indifference and objective requirement of serious injury); *Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 279 (confirming that there are both objective elements and subjective elements that prisoners must overcome in Eighth Amendment jurisprudence); *Rhodes*, 452 U.S. at 346 (applying objective and subjective criteria in determining whether prison conditions violate Eighth Amendment). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 216 (1987) (noting that Supreme Court considers both objective and subjective criteria when deciding Eighth Amendment decisions); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 207-08 (1992) (recognizing that standard to determine if confinement violates Eighth Amendment includes both objective and subjective elements).

113. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167 (1992) (rejecting Fifth Circuit's reasoning that no Eighth Amendment claim existed due to lack of serious injury); *see also Jackson*, 873 F.2d at 1108 (applying *Glick* factors and holding that prisoner need not show serious or "shocking" harm to succeed in § 1983 claim). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 220-26 (1987) (discussing *Whitley* application of *Glick* factors); Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1268 (1991) (discussing Supreme Court's determination of whether excessive force applied in good faith analysis of possible Eighth Amendment violation); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32

rectly maintained objective elements within his analysis, but may have overemphasized these objective factors.[114] There is support for the proposition that the objective factors are favorable, but this support does not extend to Justice Thomas's contentions that a successful Eighth Amendment claim is contingent upon the satisfaction of objective requirements.[115]

The weaknesses in Justice Thomas's argument involve his attempt to equate the serious injury requirement with the long-accepted serious deprivation requirement of cases involving medical care and conditions of confinement.[116] Unlike the majority, Justice Thomas finds no rationale for

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WASH. U. J. URB. & CONTEMP. L. 231, 242 (1987) (noting great deference afforded to prison officials by Supreme Court).

114. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1011, 117 L. Ed. 2d at 180 (holding that objective requirement of serious injury must be satisfied before excessive force Eighth Amendment claim will succeed). *But see, e.g., Whitley*, 475 U.S. at 321 (considering other factors such as threat to safety of staff and inmates); *Parrish*, 800 F.2d at 604-05 (holding that serious injury not required for prisoner to recover under § 1983 cruel and unusual punishment claim); *Glick*, 481 F.2d at 1033 (originating multi-factor test and considering extent of inmate's injury as one factor in Eighth Amendment analysis). *See generally* Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1268 (1991) (interpreting excessive force precedent to require subjective showing of malice, but seriousness of inmate's injury merely factor to be considered); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (noting *Whitley* applied standard of good faith or wantoness); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 340-42 (1987) (analyzing *Whitley* approach).

115. *See, e.g., Hudson*, __ U.S. at __, 112 S. Ct. at 1007-08, 117 L. Ed. 2d at 177-78 (Thomas, J., dissenting) (finding objective factors more favorable than inconclusive standards of decency); *Wilson*, __ U.S. at __, 111 S. Ct. at 2323, 115 L. Ed. 2d at 278 (requiring that prison conditions must be objectively serious before amounting to Eighth Amendment violation); *Rhodes*, 452 U.S. at 346 (favoring objective standards over uncertainty of subjective views); *Estelle*, 429 U.S. at 104 (concluding that deliberate indifference to prisoners' medical needs constitutes cruel and unusual punishment). *But see Whitley*, 475 U.S. at 321 (finding that extent of inmate's injury only one factor to consider when determining whether prison officials used excessive force in violation of the Eighth Amendment). *See generally* David J. Gottlieb, *The Legacy of* Wilson *and* Chapman*: Some Thoughts About "Big Prison Case" Litigation in the 1980s, in* PRISONERS AND THE LAW 2-3, 2-15 (Ira P. Robbins ed., 1992) (noting that test for prison conditions objectively measured); David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye, in* PRISONERS AND THE LAW 2-33, 2-39 (Ira P. Robbins ed., 1992) (analyzing deliberate indifference standard and objective components).

116. *See Hudson*, __ U.S. at __ & n.3, 112 S. Ct. at 1006-07 & n.3, 117 L. Ed. 2d at 174-76 & n.3 (Thomas J., dissenting) (finding no substantive difference between the significant injury required by Fifth Circuit and serious deprivation required in Supreme Court's precedents). *Compare Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 279 (requiring serious deprivation before prison conditions constitute cruel and unusual punishment) *with Wise*, 902 F.2d at 417 (requiring showing of significant injury in prisoner excessive force claims). *See generally* Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1267-68 (1991) (analyzing Eighth Amendment excessive force jurisprudence); Amanda Rubin,

distinguishing the two.[117] Yet, deliberate indifference precedent, the main support for Justice Thomas's assertions, provides specific reasons for the need objectively to quantify deprivation claims.[118] This precedent does not suggest that non-deprivation cases, such as those involving excessive force, must meet this objective requirement.[119] Consequently, Justice Thomas's

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Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 213-15 (1992) (discussing Eighth Amendment prison condition cases).

117. *Hudson*, __ U.S. at __ n.4, 112 S. Ct. at 1009 n.4, 117 L. Ed. 2d at 178 n.4 (Thomas, J., dissenting) (citing McCarthy v. Bronson, __ U.S. __, __, 111 S. Ct. 1737, 1742, 114 L. Ed. 2d 194, 200 (1991)). Justice Thomas found no distinction between the "specific acts" of excessive force and the general "conditions" of confinement. *Hudson*, __ U.S. at __ n.4, 112 S. Ct. at 1009 n.4, 117 L. Ed. 2d at 178 n.4. By contrast, the majority felt that precedent and the clarity of the Framers' intent mandated distinguishing between excessive force claims which do not require a showing of serious injury. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167; *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2325, 115 L. Ed. 2d at 280 (making no distinction between "conditions of confinement" and "specific acts" directed at inmates). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-35 to 2-36 (Ira P. Robbins ed., 1992) (discussing Justice Scalia's rejection of any distinction between shooting prisoner and denying prisoner medical treatment); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 220-21 (1992) (recognizing *Wilson's* rejection of distinction between specific acts or omissions aimed at prisoners and general conditions of confinement).

118. *See, e.g.*, *Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 278-79 (following *Rhodes* and finding objective requirement necessary to determine if deprivation grave enough to warrant Eighth Amendment consideration); *Rhodes*, 452 U.S. at 349 (holding that "Constitution does not mandate comfortable prisons"); *Estelle*, 429 U.S. at 105 (reasoning that only serious medical need deprivations are cruel and unusual punishments because Constitution does not prohibit every accident, inadvertence, or anguish). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-34 to 2-36 (Ira P. Robbins ed., 1992) (analyzing prison condition and medical treatment deprivation decisions); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 240-41 (1991) (examining objective and subjective components of deliberate indifference standard).

119. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167. Justice O'Connor, quoting *Rhodes*, explained that medical treatment and condition-of-confinement cases require a showing of serious deprivation because prison inadequacies and discomfort are "part of the penalty that criminal offenders pay for their offenses against society." *Id.*; *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2324, 115 L. Ed. 2d at 279 (limiting objective requirement of deliberate indifference standard to wanton or deliberate Eighth Amendment violations of prison conditions and medical deprivation); Furman v. Georgia, 408 U.S. 238, 264-65 (Brennan, J., concurring) (recognizing that purpose of Cruel and Unusual Punishments Clause was to prevent torturing and victimizing prisoners). *See generally* Lynn Saunders McIntosh & James C. Adams, II, *Prisoners' Rights*, 78 GEO. L.J. 1429, 1442-43 (1990) (noting that Eighth Amendment limits affirmative duty of prison officials to remedy certain violative conditions); Amanda Rubin, Note, *Before and After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207, 213-19 (1992) (analyzing prison conditions precedent).

analogy is a logical leap with insufficient support.[120] However, the general concept of a single Eighth Amendment standard—deliberate indifference—is an admirable suggestion.[121] Such a unified standard would clarify the confusing multiple standards applied to cruel and unusual punishments.[122]

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120. *See Hudson*, __ U.S. at __ & n.3, 112 S. Ct. at 1006-07 & n.3, 117 L. Ed. 2d at 174-76 & n.3 (Thomas, J., dissenting) (finding no substantive difference between significant injury required by Fifth Circuit and serious deprivation required in Supreme Court precedent). However, Justice Thomas recognized the distinction between situations concerning indirect deprivations involving prisoners and situations involving direct physical attacks by prison officials. *Id.* at __, 112 S. Ct. at 1000, 117 L. Ed. 2d at 167 (Thomas, J., dissenting). *But see Whitley*, 475 U.S. at 321 (noting that many factors must be considered to determine presence of Eighth Amendment violation); *Glick*, 481 F.2d at 1033 (originating multi-factor test and considering extent of inmate's injury as but one factor in Eighth Amendment analysis). *See generally* Timothy D. Zick & Jeff Trask, *Prisoners' Rights*, 79 GEO. L.J. 1253, 1268 (1991) (interpreting excessive force precedent to require subjective showing of malice, but seriousness of inmate's injury merely factor to be considered); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 160 (1988) (noting *Whitley* Court applied objective standard considering factors such as extent of injury); Ellen K. Lawson, Note, *Extending Deference to Prison Officials under the Eighth Amendment:* Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 239-42 (1987) (analyzing *Whitley* and concluding *Whitley* Court applied *Glick* factors).

121. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (considering deliberate indifference "the baseline mental state required to establish an Eighth Amendment claim."); *see also Wilson*, __ U.S. at __, 111 S. Ct. at 2327, 115 L. Ed. 2d at 282 (extending deliberate indifference to prison conditions decisions). *See generally* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 226-229 (1987) (analyzing conflicting interpretations of Eighth Amendment jurisprudence); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 168 (1988) (recognizing lack of clear standard to determine cruel and unusual punishment); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 305-314 (1989) (discussing fluid, evolving standards governing cruel and unusual punishments doctrine).

122. *See Hudson*, __ U.S. at __, 112 S. Ct. at 1008, 117 L. Ed. 2d at 177 (Thomas, J., dissenting) (disagreeing with application of malice/good faith standard to all excessive force cases). *But see Wilson*, __ U.S. at __, 111 S. Ct. at 2327, 115 L. Ed. 2d at 282 (recognizing that deliberate indifference standard applies only to prison conditions and medical treatment decisions); Gregg v. Georgia, 428 U.S. 153, 173 (holding that action is cruel and unusual punishment only if involves "the unnecessary and wanton infliction of pain"); *Glick*, 481 F.2d at 1033 (promulgating multi-factor test to determine Eighth Amendment violations). *See generally* David J. Gottlieb, Wilson v. Seiter: *Less than Meets the Eye*, *in* PRISONERS AND THE LAW 2-33, 2-46 to 2-47 (Ira P. Robbins ed., 1992) (concluding that extension of deliberate indifference standard will not adversely effect Eighth Amendment jurisprudence); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 226-29 (1987) (analyzing conflicting inter-

In *Hudson*, the Court correctly concluded that prisoners need no significant injury to invoke Eighth Amendment protection. However, the majority's reliance on the *Whitley* malice requirement exposes the decision to critical attack. The continued expansion of this subjective standard will increase the difficulty prisoners face in bringing suit against prison officials. Moreover, instead of clarifying the confusing standards applied to the Eighth Amendment, *Hudson* has merely added to the chaos. Certain concepts espoused by Justice O'Connor, Justice Thomas, and the concurring Justices in the *Hudson* decision do suggest a solution to this chaos. Although both the majority and the dissenting opinions contain faults, both also contain valuable concepts. The majority properly rejected an objective requirement of injury and the dissent properly rejected the high subjective malice requirement endorsed by the majority. The dissent also recommended a uniform standard for all Eighth Amendment jurisprudence. Perhaps a combination of these ideas can be greater than the sum of the separate parts.

A uniform Eighth Amendment standard could be fashioned from the preexisting deliberate indifference model with slight modifications derived from Justice O'Connor's analysis in *Hudson* and *Whitley*. This standard would better maintain the lower subjective deliberate indifference standard endorsed by Justice Thomas, but, like Justice O'Connor's *Hudson* majority opinion, would reject the objective requirement of serious injury. Thus, the extent of an inmate's injury would be only one factor to consider in determining Eighth Amendment violations. The advantage of the subjective element of this uniform standard is that it would lower the burden of proof prisoners would be required to overcome. Because prisoners would be able to recover more easily, cruel and unusual punishments would be discouraged. The objective injury element, as a factor instead of a requirement, would also lower the burden prisoners must meet. This objective standard would give judges additional discretion when determining Eighth Amendment violations. Consequently, this new standard would better effectuate the Framers' intent to prohibit the cruel and unusual punishment of prisoners.

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pretations of Eighth Amendment jurisprudence); Melissa Whish Coan, Note, Whitley v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155, 168 (1988) (recognizing lack of clear standard to determine cruel and unusual punishment).