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Cruel and Unusual Punishment: The Ninth Circuit Analyzes Prison Security Policy with "Deliberate Indifference" to Penological Needs in Jordan v. Gardner

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CRUEL AND UNUSUAL PUNISHMENT: THE NINTH CIRCUIT ANALYZES PRISON SECURITY POLICY WITH "DELIBERATE INDIFFERENCE" TO PENOLOGICAL NEEDS IN *JORDAN v. GARDNER*

The Eighth Amendment[1] of the United States Constitution provides prisoners with broad protections against "cruel and unusual punishments."[2] Originally proscribing only cruel methods of punishment,[3] the Eighth Amendment has been extended to pro-

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[1] U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

[2] *Id.*; *see* JAMES J. GOBERT & NEAL P. COHEN, RIGHTS OF PRISONERS § 11.02, at 314 (1981).

> Cruel and unusual is generally treated as a phrase, a three word term of art; there appears to be little attempt to examine separately the meaning of either of the two principal words. This is perhaps just as well, for major conceptual difficulties might arise if the term "unusual" were interpreted to have independent definitional significance. For example, if all prison guards routinely beat inmates for the sheer sadistic pleasure of the experience, it could hardly be said that such beatings were unusual. Yet surely courts would agree that the practice violates the Eighth Amendment.

Id.

In Bell v. Wolfish, 441 U.S. 520, 537-38 (1979), the Supreme Court listed several factors which indicate whether a governmental act is punitive in nature: whether it involves an "affirmative disability or restraint"; whether the act has traditionally been thought of as punishment; whether it fosters "traditional aims of punishment—retribution and deterrence"; and whether the governmental act is itself response to crime. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). *See generally* GOBERT & COHEN, *supra*, § 11.01, at 310-12 (defining punishment in general terms and contrasting *Bell* Court's position); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6, at 360-66 (2d ed. 1992) (reviewing several Supreme Court cases related to issue of punishment).

[3] *See* GOBERT & COHEN, *supra* note 2, § 11.02, at 312; Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 847 (1969) (postulating that original meaning of Eighth Amendment came from misinterpretation of British law).

The Supreme Court began to apply the Cruel and Unusual Punishment Clause to penalties that were disproportionate to the crime committed after Weems v. United States, 217 U.S. 349, 373 (1910) (finding 15 years hard labor cruel and unusual punishment for falsifying public document). *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that denationalization was cruel and unusual punishment for crime of military desertion). For a discussion of Eighth Amendment history, see Gregg v. Georgia, 428 U.S. 153, 169-76 (1976); Ronald H. Rosenberg, *Constitutional Law—The*

tect against unwarranted uses of force[4] and serious deprivations of basic needs—such as medical attention[5] and reasonable sanitation[6]—suffered during imprisonment.[7] The obstacle to prisoners' Eighth Amendment claims, however, has been the difficult legal standard that must be satisfied.[8] In particular, the plaintiff must show that the defendant not only injured the plaintiff, but did so in a manner evincing a culpable state of mind.[9] In this regard, culpability is measured under one of two applicable standards: "deliberate indifference,"[10] which applies when inmates allege harmful conditions of confinement,[11] or malicious intent,[12] which

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Eighth Amendment and Prison Reform, 51 N.C. L. REV. 1539, 1540-50 (1973); Granucci, *supra*.

4 *See infra* notes 77-80 and accompanying text (discussing application of Eighth Amendment to excessive force claims); *see also infra* note 7 (contrasting low objective requirement, i.e., significant injury not required in excessive force cases, with serious deprivation necessary to state conditions of confinement claim).

5 *See infra* notes 53-59 and accompanying text (discussing Eighth Amendment application to medical needs).

6 *See infra* note 89 and accompanying text (recognizing sanitation as basic need implicating Eighth Amendment).

7 *See* GOBERT & COHEN, *supra* note 2, § 11.02, at 312-14; Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991) (citing Estelle v. Gamble, 429 U.S. 97 (1976) (first instance in which Eighth Amendment applied to injury suffered during imprisonment but was not part of sentence)).

The Supreme Court has held that a serious deprivation is required to state a claim based on conditions of confinement. *See infra* note 45 and accompanying text (discussing extent of physical harm required in Eighth Amendment challenge of prison conditions). Moreover, the deprivation must be of a specific human need. *Wilson*, 111 S. Ct. at 2327; *see infra* note 76 (listing some of the needs that qualify); *infra* note 89 (same). By contrast, "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992). Thus no serious injury need be claimed. *Id. See generally* Diana L. Nelson, Note, *Hudson v. McMillian: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force Against Prison Inmates*, 71 N.C. L. REV. 1814, 1836 (1993) (stating that *Hudson* Court's decision not to require serious injury overshadowed continuation of burdensome mens rea requirement).

8 *See, e.g.*, *Wilson*, 111 S. Ct. at 2331 (White, J., concurring) ("The ultimate result of today's decision, I fear, is that 'serious deprivations of basic human needs' will go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.' "(citation omitted)); Whitley v. Albers, 475 U.S. 312, 329-30 (1986) (Marshall, J., dissenting) ("[T]he 'unnecessary and wanton' standard . . . establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation.").

9 The culpable state of mind is typically referred to as "wantonness," originating from the phrase "unnecessary and wanton infliction of pain." *Whitley*, 475 U.S. at 319; *Estelle*, 429 U.S. at 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)); *see Hudson*, 112 S. Ct. at 998; Ingraham v. Wright, 430 U.S. 651, 670 (1977).

10 *Estelle*, 429 U.S. at 104.

11 *See Wilson*, 111 S. Ct. at 2326-27.

applies when use of force is challenged as excessive.[13] When the challenged action does not conform neatly to either of the categories—"condition" or "force"—the method for choosing which standard applies is unclear.[14] Recently, in *Jordan v. Gardner*,[15] the United States Court of Appeals for the Ninth Circuit applied the deliberate indifference standard to a prison security policy that required male guards to conduct random clothed-body searches of female inmates. Concluding that such policy evinced the "unnecessary and wanton" infliction of pain,[16] the court held that the prisoners' Eighth Amendment rights were violated.[17]

In *Jordan*, inmates at the Washington Corrections Center for Women challenged a policy which mandated that both male and female guards perform random clothed-body searches of inmates.[18] According to the facility's superintendent,[19] the policy had been implemented to stem the steadily rising flow of contra-

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[12] *See Hudson*, 112 S. Ct. at 998 ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'") (quoting *Whitley*, 475 U.S. at 320-21, in turn quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973)).

[13] *Hudson*, 112 S. Ct. at 998-99.

[14] *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc). The *Jordan* court treated a search policy as a condition rather than a use of force because it "was developed over time, with ample opportunity for reflection." *Id.* Moreover, stated the court, such a policy would "not inflict pain on a one-time basis; instead, as with substandard conditions of confinement, the policy [would] continue to inflict pain upon the inmates indefinitely." *Id. But see id.* at 1559 (Trott, J., dissenting) (arguing that deliberate indifference is inapplicable where, in official's judgment, equally important governmental responsibilities exist).

[15] 986 F.2d 1521 (9th Cir. 1993).

[16] *Id.* at 1525 (quoting *Whitley*, 475 U.S. at 319, in turn quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)).

[17] *Id.* at 1530-31.

[18] *Id.* at 1523. The *Jordan* court described the search procedure as follows:

> [T]he male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to "[u]se a flat hand and pushing motion across the [inmate's] crotch area." The guard must "[p]ush inward and upward when searching the crotch and upper thighs of the inmate." All seams in the leg and the crotch area are to be "squeez[ed] and knead[ed]." Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be "flattened." Superintendent Vail estimated that a typical search lasts forty-five seconds to one minute. A training film, viewed by the court, gave the impression that a thorough search would last several minutes.

Id. (alterations in original) (citations omitted).

[19] *See id.*

band in the prison.[20] After one inmate suffered an adverse emotional and physical reaction to a search,[21] the inmates filed a civil rights action contending that the searches violated their First, Fourth, and Eighth Amendment rights.[22] The district court agreed with each of the inmates' constitutional arguments.[23] On appeal, the Ninth Circuit reversed in a panel decision,[24] rejecting each of the constitutional claims.[25] Sitting en banc, the Ninth Circuit vacated the panel decision[26] and affirmed the district court's finding of an Eighth Amendment violation.[27]

Writing for the court, Judge O'Scannlain first noted that an Eighth Amendment violation requires that there be an " 'unnecessary and wanton infliction of pain.' "[28] After finding that the searches produced an "infliction of pain,"[29] he then concluded that

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[20] *See infra* notes 113-14 (noting large increase in contraband discoveries); *cf. infra* note 112 (element of surprise major reason for search policy).

The superintendent's decision to permit male as well as female guards to conduct the searches was also based on the potential threat of lawsuits by female guards if a same-gender search policy remained in effect. *Jordan*, 986 F.2d at 1553 (Trott, J., dissenting). When he was hired, the superintendent discovered that the correctional officers' union had filed a grievance against a policy that required female guards to conduct all routine pat searches. *Id.* Before actually implementing the challenged search policy, the superintendent created a training video, a "two officers present" policy, and a grievance procedure for inmate complaints. *Id.* at 1549-52. In addition, the superintendent sought information on civil rights law concerning exceptions to gender-neutral employment; he was told by several persons that "bona fide occupational qualifications" would not be approved. *Id.* at 1553 (quoting 42 U.S.C. § 2000e-2(e)(1) (1988)).

[21] *Jordan*, 986 F.2d at 1523. The inmate, "who had a long history of sexual abuse by men, unwillingly submitted to a cross-gender clothed-body search and suffered severe distress; she had to have her fingers pried loose from the bars she had grabbed during the search, and she vomited after returning to her cell block." *Id.*

[22] *Id.* at 1524, n.3. The inmates filed the lawsuit pursuant to 42 U.S.C. § 1983 (1988). *Id.* at 1523.

[23] *Id.* at 1522 (referring to Jordan v. Gardner, No. C89-339TB (W.D. Wash. Feb. 28, 1990)).

[24] Jordan v. Gardner, 953 F.2d 1137, 1138 (9th Cir. 1992), *vacated*, 986 F.2d 1521 (9th Cir. 1993) (en banc).

[25] *Id.* at 1144. The three-judge panel stated that, in finding an Eighth Amendment violation, the district court had failed to give the prison officials' decisions appropriate deference. *Id.* at 1143. In light of this statement, the court found that the searches were not "without penological justification," *id.* (quoting Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)), and did not "violate 'evolving standards of decency.' " *Id.* (quoting Baumann v. Arizona Dep't of Corrections, 754 F.2d 841, 846 (9th Cir. 1985)).

[26] *Jordan*, 986 F.2d at 1522.

[27] *Id.* at 1530-31.

[28] *Id.* at 1525 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

[29] *Jordan*, 986 F.2d at 1526; *see infra* note 85 and accompanying text (discussing outer limit of injury requirement in cruel and unusual punishment cases).

the searches were unnecessary since they had no impact on prison security concerns or equal employment opportunities for male guards.[30] The court then addressed the issue of which mental state standard should be used to determine culpability. After concluding that the search policy was analogous to "substandard conditions of confinement,"[31] the court applied the deliberate indifference standard.[32] Because it found a violation of the Eighth Amendment, the court did not address the plaintiffs' other constitutional claims.[33]

In a concurring opinion, Judge Reinhardt agreed that the searches violated the Eighth Amendment. He stated, however, that because the "fundamental conduct at issue" was a search,[34] the court should rely on the Fourth Amendment[35] as the proper basis for its holding.[36]

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30 *Jordan*, 986 F.2d at 1526-27. Specifically, the court pointed out that prison officials had not argued that security had been impaired since the district court's injunction. *Id.* The court further noted that security concerns had been met through the exclusive use of female guards in random and routine searches of inmates. *Id.* at 1527. As to employment concerns, the court found that the search policy did not function to advance the employment opportunities of male guards. *Id.*

31 *Id.* at 1528.

32 *Id.*; *see supra* note 14 (outlining court's application of deliberate indifference standard).

33 *Jordan*, 986 F.2d at 1531.

34 *Id.* at 1541 (Reinhardt, J., concurring).

> Here, the fundamental conduct at issue is a search. The searches of the female inmates, not the pain those searches inflict, is the conduct challenged by the plaintiffs. Similarly, the cross-gender searches, not the infliction of pain, are what the district court's injunction prohibits. Pain is simply an incident of the unreasonable searches, not, as Judge O'Scannlain would have it, "[t]he gravamen of the inmates' charge."

Id. (alteration in original).

The concurrence also stated that a Fourth Amendment analysis would be more objective, and thus easier to work with than an Eighth Amendment analysis. *Id.* at 1542. Fourth Amendment analysis also would be more efficient, Judge Reinhardt noted, because "while no search of prisoners' bodies could violate the [E]ighth [A]mendment without also violating the [F]ourth, the converse is not true." *Id.*

35 U.S. CONST. amend. IV. The Fourth Amendment reads in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

36 *Jordan*, 986 F.2d at 1532 (Reinhardt, J., concurring). Thus, *Jordan* is only a plurality opinion insofar as it relies on an Eighth Amendment violation for its holding. *Id.* at 1532 n.2.

Judge Reinhardt based his Fourth Amendment argument on four factors: first, whether there was a "valid, rational connection" between the regulation and the government interest purported to justify it; second, whether the inmates were able to assert their affected constitutional right in some other manner; third, the extent to which the accommodated right would impact staff, inmates, and resources; and

In a dissenting opinion, Judge Trott noted that the prison administrators were confronted by numerous competing considerations.[37] Thus, he argued, the malicious intent standard should have been applied rather than the deliberate indifference standard.[38] Even assuming the deliberate indifference standard was appropriate, he added, the defendants still had no culpable mental state because the search policy was a carefully considered choice.[39] Having failed to find an actual wanton state of mind, Judge Trott argued, the court was wrong to impute one to the defendants.[40]

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fourth, whether there was a practicable alternative which would preserve the inmate's constitutional right while having minimal impact on prison interests. *Id.* at 1535-37 (outlining factors adopted in Turner v. Safley, 482 U.S. 78, 89-91 (1987)). He then applied a balancing test obtained from Bell v. Wolfish, 441 U.S. 520, 559 (1979), and concluded that the searches were not " 'reasonably related' to legitimate penological objectives [and] represent[ed] an 'exaggerated response' to those concerns." *Id.* at 1540 (first alteration in original) (quoting *Turner*, 482 U.S. at 87). For a view opposed to this Fourth Amendment analysis, see *infra* note 42.

[37] *Jordan*, 986 F.2d at 1560 (Trott, J., dissenting) ("[The] Superintendent . . . is *engulfed* in constraints, cross currents, competing values, labor unions, government regulations, statutes, exposure to lawsuits, personal liability, and in this case, differing views of what constitutes equal protection and opportunity for women in the workplace.").

[38] *Id.* at 1558-60 (Trott, J., dissenting). The dissent put forth four reasons why the higher standard of wantonness should govern the case. *Id.* at 1558. First, the dissent argued that the policy had a valid penological purpose, given a dangerous atmosphere in which hardened inmates purposefully hide contraband in or near their private parts in order to "use our cultural sensitivity to touching each other in certain areas as a shield for their misconduct." *Id.* Second, because there were competing considerations when the officials instituted the policy, the challenged policy should not be treated as a condition of confinement. *See id.* at 1558-59. The dissent further noted that the policy did not necessarily clash with the needs of prisoners since its purpose was, at least in part, to protect the inmates from drugs, hypodermic needles, and other noxious contraband. *Id.* at 1559. Third, the dissent pointed to Hudson v. McMillian, 112 S. Ct. 995, 1008 (1992) (Thomas, J., dissenting), which extended the malice standard to excessive force cases even absent competing penological or institutional concerns, and found it illogical to ease the inmates' burden of proof in the instant case where officials were confronted with competing considerations. *Jordan*, 986 F.2d at 1559 (Trott, J., dissenting). Fourth, the dissent contended that the court should defer to the judgment of prison officials where security and discipline are concerned. *Id.* at 1559-60.

[39] *Id.* at 1561-62 (Trott, J., dissenting).

[40] *Id.* at 1562 (Trott, J., dissenting). Judge Trott argued that the court had misapplied the law by accepting certain conclusions made by the district court. *See id.* at 1557. He noted that *Wilson* had not yet been decided when the district court concluded that the plaintiffs had a valid Eighth Amendment claim. *Id.* Accordingly, the district court applied the wrong law by balancing the search policy against its alternatives, rather than looking for a culpable state of mind. *Id.* The district court found that the searches were unnecessary, and thus were "without penological justification."

In a separate dissent, Chief Judge Wallace also found the searches not violative of the Constitution.[41] In addition, he stated that the political branches, rather than the judiciary, are best suited to make decisions relating to the searches due to the fact-intensive nature of the subject matter.[42]

It is submitted that the *Jordan* court erred in holding that the policy of random, cross-gender searches constituted cruel and unusual punishment. It is suggested that by applying the deliberate indifference standard to find a prison security measure unconstitutional, the *Jordan* court extended the standard beyond the use intended by the Supreme Court. Further, it is submitted that this expansion will erode the predictive value of Eighth Amendment jurisprudence and allow judges to imprudently substitute their own values for the experience and expertise of prison officials.

Part I of this Comment first describes the development of the relevant Supreme Court authority. It then analyzes the two culpable mental state standards utilized in Eighth Amendment jurisprudence. Next, Part II summarizes the *Jordan* Court's selection of deliberate indifference as the appropriate test. Finally, Part III criticizes the *Jordan* court's selection of deliberate indifference and proposes that the malice standard be extended to Eighth Amendment review of prison security policy.

I. SYNTHESIS OF SUPREME COURT CASES

Recent Supreme Court cases have recognized the complexity and intractability of prison issues.[43] The Court has emphasized

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Id. But it also found that there was a "valid, rational connection" between the aim of the search policy and legitimate governmental interest in maintaining prison security. *Id.* Trott concluded that while the court purported to reject a reasonableness approach to the question of Eighth Amendment violations, it in fact tacitly adopted that approach as taken by the district court. *See id.*

41 *Id.* at 1566 (Wallace, C.J., dissenting).

42 *Jordan*, 986 F.2d at 1566 (Wallace, C.J., dissenting). The Chief Judge filed a separate dissent because he disagreed with Judge Trott's tacit acceptance of the concurring opinion's Fourth Amendment standard. *Id.* The Chief Judge explained that the balancing test employed by the concurrence was irrelevant to *Turner*'s analysis. *Id.* at 1566-67. He noted that none of the *Turner* factors "justifies a court in evaluating the constitutionality of a prison policy by weighing its effects on prisoners against the institutional interests it serves." *Id.* at 1567. The balancing test, he argued, as prescribed by *Bell* and fused with *Turner* by the concurrence, *see supra* note 32, was employed in *Turner* in a First Amendment context only. *Id.*

43 *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 547-48 (1979). The Court in *Bell* held that the Fourth Amendment rights of pre-trial detainees were not violated when restraints were reasonably related to a nonpunitive governmental objective. *Id.* at 540.

that criminal offenders are incarcerated because their behavior is antisocial or dangerous to society[44] and thus, as prisoners, they can expect to live in some discomfort for as long as they are confined.[45] Though offenders do not forfeit all constitutional protections, they are entitled to more limited rights due to the exigencies of their confinement as well as the legitimate purposes and policies of prisons.[46] Since courts are not in a position to supervise the workings of prisons, the Court has concluded that deference should be accorded prison officials in their choice and execution of policies that, in their judgment, are needed to maintain institutional order, security, and discipline.[47] This deference applies not only to emergency situations involving riotous inmates,[48] but also extends to "prophylactic or preventive measures intended to reduce . . . breaches of prison discipline."[49]

The Supreme Court determines whether deprivations suffered during imprisonment violate the Eighth Amendment by asking whether they amount to the "unnecessary and wanton infliction of pain."[50] In *Estelle v. Gamble*,[51] the Court for the first time applied the Cruel and Unusual Punishment Clause to punishment that was not specifically meted out as part of the prisoner's sen-

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44 *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 526-27 (1983). In *Hudson*, the Court held that the Fourth Amendment prohibition of unreasonable searches did not apply to prison cells. *Id.* at 525-26.

45 *Cf.* Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) ("[To run afoul of the Eighth Amendment with respect to prison conditions], a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) ("[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981))); *cf.* Whitley v. Albers, 475 U.S. 312, 319 (1985) ("Harsh 'conditions of confinement' may constitute cruel and unusual punishment unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.'" (quoting *Rhodes*, 452 U.S. at 347)).

46 *See, e.g.*, *Wolfish*, 441 U.S. at 545-46 (citations omitted).

47 *Whitley*, 475 U.S. at 321-22 (citing *Wolfish*, 441 U.S. at 547).

48 *Id.* at 322.

49 *Id.*; *see* Hudson v. McMillian, 112 S. Ct. 995, 999 (1992) (holding plaintiff complaining of excessive physical force must show intent to "maliciously and sadistically . . . cause harm"); *Whitley*, 475 U.S. at 320-22 (stating court will hesitate to criticize decisions made by prison officials "in haste . . . under pressure").

50 Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

51 429 U.S. 97 (1976).

tence.[52] The plaintiff in *Estelle* claimed he required medical attention for an injury he sustained while performing a prison work assignment.[53] He was given pain killers on a number of occasions; subsequently, he refused to work, claiming he was in too much pain.[54] Because of his refusal, the plaintiff was placed in solitary confinement, where he was denied access to a doctor for almost twelve hours.[55] The Court stated that a mental state of actual intent to inflict pain was not required to prove an Eighth Amendment violation,[56] but that mere negligence would not be enough.[57] The Court posited that "deliberate indifference to [a prisoner's] serious medical needs" would violate the Eighth Amendment[58] if the illness or injury transgressed contemporary, "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[59]

In *Rhodes v. Chapman*,[60] the Court found that "double celling" inmates did not constitute the "unnecessary and wanton" infliction of pain[61] even if the celling inflicted pain.[62] The Court rea-

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52 *Hudson*, 112 S.Ct. at 1001 (citing Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991)).

53 *Estelle*, 429 U.S. at 98.

54 *Id.* at 98-101.

55 *Id.* at 101.

56 *Estelle*, 429 U.S. at 104. But the Court has said "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before [the pain] can qualify [as punishment]." Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991).

57 *Estelle*, 429 U.S. at 106. ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

58 *Id.* at 106. The *Estelle* Court cited several deliberate indifference cases involving medical needs, one of which held that a "doctor's choosing the 'easier and less efficacious treatment' of throwing away the prisoner's ear and stitching the stump may be attributable to 'deliberate indifference . . . rather than an exercise of professional judgment.' " *Id.* at 104 n.10 (quoting Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974)). The court summarized another deliberate indifference case in which a "prison physician refuse[d] to administer the prescribed pain killer and render[ed] leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon." *Id.* (citing Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1971)).

59 *Id.* at 102. (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1988)). The Court provided no further insight into the types of injuries or illnesses that might be considered "serious," and this issue remains open today. *See, e.g.*, Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 946-49 (1992).

Justice Stevens, the lone dissenter in *Estelle*, argued that "whether the constitutional standard [for cruel and unusual punishment] has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle*, 429 U.S. at 116.

60 452 U.S. 337 (1981).

61 *Id.* at 348.

62 *Id.* at 348-49.

soned that only deprivations that deny the "minimal civilized measure of life's necessities"[63] would be severe enough to form the basis of an Eighth Amendment violation.[64]

The next important Eighth Amendment case, *Whitley v. Albers*,[65] involved a claim by an inmate who had been shot by guards during a prison riot in which a prison official was taken hostage.[66] The Court posited that the mental state requirement in an Eighth Amendment case should be determined by reference to the circumstances surrounding the conduct challenged.[67] The Court rejected *Estelle*'s deliberate indifference standard because in that case "the State's responsibility . . . [would] not ordinarily clash with other equally important governmental responsibilities," and consequently, deliberate indifference could "be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates."[68] Noting the competing considerations present in a prison emergency,[69] and that prison administrators should be given deference in the area of security,[70] the Court held that the applicable mental state inquiry should focus on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[71]

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63 *Id.* at 347.

64 Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (citing *Rhodes*, 452 U.S. at 377); Whitley v. Albers, 475 U.S. 312, 319 (1986) ("[H]arsh 'conditions of confinement' may constitute cruel and unusual punishment unless such conditions are part of the penalty that criminal offenders pay for their offenses against society.") (quoting *Rhodes*, 452 U.S. at 347).

65 475 U.S. 312 (1985).

66 *Id.* at 314-17.

67 *Id.* at 320.

68 *Id.*

69 *Id.* at 320-21.

70 *Id.* at 321-22. ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in *their* judgment are needed to preserve internal order and discipline and to maintain institutional security.") (emphasis added) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1978)).

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

The *Whitley* court was split 5-4 on the issue of whether the malicious intent standard should be applied. *Id.* at 328. The dissent argued that the malice standard was too onerous for the plaintiff and not justified by precedent. *Id.* at 328-30 (Marshall, J., dissenting). Further, the dissent argued that the requirement set forth by the majority for applying the standard, that there be a disturbance posing "significant risks," was itself a question of fact properly left for the jury to decide. *Id.* The dissent also disagreed with the majority's result in applying the malice standard; the dissent

In *Wilson v. Seiter*,[72] an inmate alleged that certain prison conditions, which included inadequate heating and cooling, unclean restrooms, and unsanitary dining facilities, constituted cruel and unusual punishment.[73] Reasoning as in *Whitley* that the applicable mental state depends upon the "constraints facing the official," and analogizing to the facts of *Estelle*, the Court found such nonmedical "conditions of confinement" tantamount to medical conditions because, under both circumstances, similar constraints face the official.[74] Based on this conclusion, the Court held that the deliberate indifference standard applied.[75] The

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stated that the situation may have improved when force was used, and that the force used may have been unreasonable. *Id.* at 330-34 (Marshall, J., dissenting).

For lower courts applying the *Whitley* standard, see *infra* note 121 (summarizing lower court holdings using *Whitley* test).

[72] 111 S. Ct. 2321 (1991).

[73] *Id.* at 2322-23. ("The complaint alleged overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates").

[74] *Id.* at 2326-27. ("[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement' .... There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions.").

[75] *Id.* at 2327. The Court broadly concluded that, " '[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*.' " *Id.* (quoting Lafaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987)).

Four justices concurred with the result in *Wilson*, but did not agree that the subjective intent of government officials should measure Eighth Amendment challenges to conditions of confinement. *Id.* at 2330 (White, J., concurring). They argued that "inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time." *Id.* In those situations, "it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue .... In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." *Id.*

For lower court decisions applying deliberate indifference test, see generally Moore v. Tartler, 986 F.2d 682, 686-87 (3d Cir. 1993) (delay and release of plaintiff not due to defendant's deliberate indifference); Gibson v. Foltz, 963 F.2d 851, 853-54 (6th Cir. 1992) (assault on inmate result of defendant's deliberate indifference); Caldwell v. Moore, 968 F.2d 595, 601 (6th Cir. 1992) (prison not deliberately indifferent to plaintiff's medical needs); Johnson v. United States, 816 F. Supp. 1519, 1523 (N.D. Ala. 1993) (housing plaintiff with AIDS infected inmate not due to deliberate indifference); Payne v. Monroe County, 779 F. Supp. 1330, 1333-34 (S.D. Fla. 1991) (failure to protect plaintiff from other inmates not deliberate indifference under facts of case); *see also* Farmer v. Brennan, 114 S. Ct. 1970, 1979-84 (1994) (adopting subjective deliberate indifference standard in accordance with majority of circuit courts). For a

Court limited its holding to conditions that produce the deprivation of a "single, identifiable human need."[76]

In *Hudson v. McMillian*,[77] the Court, faced with an excessive force claim from an inmate who had been beaten by guards,[78] applied the malice standard developed in *Whitley* even though the beating occurred in the absence of a prison emergency.[79] The Court held that the use of excessive physical force could constitute cruel and unusual punishment even though the inmate suffered no "significant injury."[80]

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general discussion of the deliberate indifference standard, see Fred Cohen, *Captives' Legal Right to Mental Health Care*, 17 LAW & PSYCHOL. REV. 1 (1993) (theoretical discussion of deliberate indifference standard and its application in different circuits).

[76] *Wilson*, 111 S. Ct. at 2327. "To say that some prison conditions may interact [to create an Eighth Amendment violation] is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* The court identified food, warmth and exercise as such needs. *Id.*

[77] 112 S. Ct. 995 (1992).

[78] *Id.* at 997.

[79] *Id.* at 998. The court stated, "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. . . ." *Id.* at 999. The court specifically excluded de minimis uses of force from this formulation. *Id. See* Candelaria v. Coughlin, 787 F. Supp. 368, 374-75 (S.D.N.Y. 1992) (dismissing claim where plaintiff alleged officer "pushed his fist against my neck so that I couldn't move and I was losing my breath because of the pressure" but did not allege "any repeated or continuous grabbing of the throat, or any choking" or "any resulting physical injury"); Payton v. Vaughn, 798 F. Supp. 258, 261-62 (E.D. Pa. 1992) (dismissing claim where plaintiff submitted to strip search and alleged only embarrassment).

For lower court cases applying malice standard outside emergency context, see generally Cummings v. Malone, 995 F.2d 817, 822 (8th Cir. 1993) (holding that failure to require jury to apply malice standard in excessive force case was reversible error); Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992) (holding that unjustified beating violated Eighth Amendment under malice standard); Caldwell v. Moore, 968 F.2d 595, 601 (6th Cir. 1992) (upholding use of stun gun to maintain discipline); Cummings v. Caspari, 821 F. Supp. 1291, 1293 (E.D. Mo. 1993) (upholding forced cell transfer of inmate to punitive isolation).

For criticism of application of the malice standard to excessive forces outside the emergency context, see Doretha Van Slyke, Note, *Hudson v. McMillian and Prisoners' Rights: The Court Giveth and The Court Taketh Away*, 42 AM. U. L. REV. 1727, 1750-59 (1993) (arguing deliberate indifference as appropriate standard for excessive force claims). *But see* Diana L. Nelson, Note, *Hudson v. McMillian: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force Against Prison Inmates*, 71 N.C. L. REV. 1814, 1815-20 (1993) (arguing extension of *Whitley* standard is compatible with precedent).

[80] 112 S. Ct. at 998, 1000.

As in many Eighth Amendment cases, the court was divided. In his concurrence, Justice Stevens argued that the malice standard should only be applied in the context of prison disturbances. *Id.* at 1002 (Stevens, J., concurring). Another concurrence

A recent Supreme Court case, *Helling v. McKinney*,[81] involved the question of whether mere risk of injury is sufficient to implicate the Eighth Amendment.[82] The plaintiff, a nonsmoking inmate, had been assigned to a cell with an inmate who smoked five packs of cigarettes a day.[83] Stating that "reasonable safety"[84] was a basic human need, the Court held that the plaintiff could prove the injury requirement of an Eighth Amendment claim if he could show that the defendants unreasonably endangered his health in a manner "contrary to current standards of decency."[85] As in

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argued that the standard should not be applied under any circumstance. *Id.* at 1003 (Blackmun, J., concurring). Two justices dissented, arguing that "cruel and unusual punishment" claims should include proof of significant injury. *Id.* at 1007-08 (Thomas, J., dissenting). Justice Thomas stated, "a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.'" *Id.* at 1005. The dissent also pointed out that it was illogical to extend the malice standard to excessive force cases in which officials faced no constraints, and thus, had no plausible justification for using such force. *Id.* at 1008. Thomas' dissent was much criticized. *See, e.g.*, Alexander Wohl, *Where There's Smoke: Testing the Boundaries of Prisoner Rights*, 78 A.B.A. J. 55 (1992).

[81] 113 S. Ct. 2475 (1993).

[82] *Id.* at 2478.

[83] *Id.*

[84] *Id.* at 2480-81. (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989)).

[85] *Id.* at 2481. *See generally* Wohl, *supra* note 80, at 55 (discussing disagreement on merits of *McKinney* holding and prior application by lower courts of Eighth Amendment to smoking).

In *McKinney*, Justice Thomas wrote a dissenting opinion joined by Justice Scalia in which it was argued that "mere risk of injury" is not sufficient objective injury to implicate cruel and unusual punishment. 113 S. Ct. at 2482-83 (Thomas, J., dissenting). Moreover, the dissent expressed doubt as to whether exposure to the risk of cigarette smoke or any other conditions of confinement could be characterized as punishment at all. *Id.* at 2482-84. (Thomas, J., dissenting). Summarizing the dissent's argument, Justice Thomas wrote:

> [T]o state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment*. The text and history of the Eighth Amendment, together with pre-*Estelle* precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence.

Id. at 2485.

More recently, the Court has affirmed that actual injury need not have occurred to implicate the Eighth Amendment. Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994). A slight risk of injury is insufficient, however; there must be a "substantial risk of serious harm" to the inmate. *Id.*

other "conditions of confinement" cases, deliberate indifference was the applicable mental state standard.[86]

II. CHOOSING THE DELIBERATE INDIFFERENCE STANDARD

A. *Deliberate Indifference or Malicious Intent*

Supreme Court case law implies that the deliberate indifference standard is inapplicable when governmental responsibilities are of the same magnitude as the state's duty to attend to the needs of prisoners.[87] The Supreme Court has held that important governmental responsibilities include the safety of staff, administrative personnel, visitors, and inmates.[88] The needs of prisoners that may, if unmet, implicate cruel and unusual punishment include reasonably sanitary conditions,[89] medical requirements,[90] exercise,[91] and "reasonable safety" from known risks.[92] Typically, prison officials may satisfy these needs without having to consider significant competing interests.[93] Thus, for example, deliberate

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86 *McKinney*, 113 S. Ct. at 2481.

87 *See* Whitley v. Albers, 475 U.S. 312, 320 (1986) (stating that deliberate indifference applies when officials' decision implicates no other important governmental concerns). In this setting of competing institutional concerns, the Court states that "a deliberate indifference standard does not adequately capture the importance of such competing obligations . . . ." *Id.*; *see also supra* note 68 and accompanying text.

88 475 U.S. at 320.

89 *See* Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990) (forcing inmates to work in excrement without protective clothing implicates Eighth Amendment); Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989) (inmates entitled to reasonably sanitary conditions and adequate personal hygiene); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (state's obligation to furnish "reasonably adequate" sanitation), *cert. denied*, 450 U.S. 1041 (1981); Knop v. Johnson, 667 F. Supp. 467, 480 (W.D. Mich. 1987) (lack of toilet facilities). *But see* Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir.) (permitting only one shower per week amounts to deprivation of cultural amenity, not cruel and unusual punishment), *cert. denied*, 488 U.S. 908 (1988).

90 *See* Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991).

91 *Id.*

92 *See supra* note 85 and accompanying text.

93 *See* Farmer v. Brennan, 114 S. Ct. 1970, 1982-83 (1994) (reasonable response to risk exonerates official even if harm to inmate is not ultimately averted); Whitley v. Albers, 475 U.S. 312, 320 (1986); Redman v. County of San Diego, 942 F.2d 1435, 1442 (9th Cir. 1991) (stating that "availability of redress" and "existence of warning" cited as common factors in deliberate indifference analysis (quoting Berg v. Kincheloe, 794 F.2d 457, 481 (9th Cir. 1986)), *cert. denied*, 112 S. Ct. 972 (1992); DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) (noting deliberate indifference requires "actual knowledge of impending harm, easily preventable"); McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992); *cf.* Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1972) (holding doctor who ignored great danger, avoidable at nominal cost, was deliberately indifferent). *But see* Alberti v. Harris County, 978 F.2d 893, 895 (5th Cir. 1992) (finding deliberate indifference applied to prison overcrowd-

indifference would be the applicable standard if prison personnel knowingly refused to assist paraplegic inmates who, as a result, would be forced to sit in their own excrement.[94]

Deliberate indifference would also be the test when an inmate who is injured by another inmate claims he was inadequately protected by the institution holding him.[95] In *Redman v. County of San Diego*,[96] for example, an obviously weaker inmate was raped by his cellmate who officials knew to be sexually aggressive.[97] The Ninth Circuit stated that the prison officials' liability would be measured by the deliberate indifference standard since there existed "warning and availability of redress."[98] "Availability of redress" is significant in that it enables courts to evaluate post hoc institutional decisions without having to defer to the expertise of prison officials.[99]

By contrast, when prison officials are confronted with competing institutional constraints, and accordingly, no easy redress is available, their liability is typically measured by whether they ac-

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ing even though legislative funding and public safety were constraints), *cert. denied*, 113 S. Ct. 2996 (1993); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986) (considering inmate safety, availability of less dangerous alternatives, and measures taken to protect plaintiff when inmate sued after attack by fellow inmate).

94 *Cf.* Parrish v. Johnson, 800 F.2d 600, 604-05 (6th Cir. 1986) (analyzing paraplegic's position without entirely dismissing malicious intent standard).

95 The best-known case covering this subject matter was recently decided by the Supreme Court. *Farmer*, 114 S. Ct. at 1970. In *Farmer*, a transsexual inmate who had been raped and beaten after transfer to a federal penitentiary claimed that officials violated the Eighth Amendment since the penitentiary was notorious for its inmate assaults, to which the inmate, as a transsexual, would be especially vulnerable. *Id.* at 1975. The Court found that prison officials who knew of but failed to take reasonable steps to prevent a substantial risk of serious harm would violate the Constitution under a deliberate indifference standard. *Id.* at 1976-79.

Lower courts have also discussed inmates and violence in this context. *See* LaMarca v. Turner, 995 F.2d 1526, 1535-37 (11th Cir. 1993); King v. Fairman, 997 F.2d 259, 261 (7th Cir. 1993); *Alberti*, 978 F.2d at 895; Duane v. Lane, 959 F.2d 673, 675-76 (7th Cir. 1992); Morgan v. District of Columbia, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987).

96 942 F.2d 1435.

97 *Id.* at 1437-39.

98 *Id.* at 1442. The official in charge of the detention facility in *Redman* admitted that it was well known that the plaintiff's assailant was an "aggressive homosexual," and that the ideal remedy in such a case would have been to isolate the aggressive inmate. *Id.* at 1448.

99 *Cf. Estelle*, 429 U.S. at 103 (even in less serious cases, "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose"); *supra* notes 58, 67-71, 74-75, 79 and accompanying text (rule of deference conspicuously applied to excessive force situations in *Whitley* and *Hudson* but absent from conditions of confinement cases).

ted maliciously.[100] Though the standard is often applied to situations in which prison officials are compelled to make decisions without any chance for reflection, it is not limited to these circumstances.[101] The malice standard applies not only when an inmate is hurt in the context of a prison emergency or "lesser disruption," but also whenever a use of force is alleged to be excessive.[102] The commonality between these situations is that they implicate the notion that prison officials should be accorded deference in the area of prison security.[103]

B. *The Jordan Court's Methodology*

As a preliminary matter, the *Jordan* court found that the pat search policy inflicted pain.[104] It next asked whether the infliction

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100 *See* Hudson v. McMillian, 112 S. Ct. 995, 999 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986).

101 *See Hudson*, 112 S. Ct. at 999. The Court in *Hudson* stated as a justification for the malice test that prison riots and lesser disturbances "may require prison officials to act quickly and decisively." *Id.* The Court, however, found the malice standard applicable to all allegations of excessive force. *Id.* Thus, that officials had to take quick and decisive action is not a prerequisite to using the malice test. *See id.* at 1008 (Thomas, J., dissenting) ("The Court today extends the heightened mental state applied in *Whitley* to all excessive force cases, even where no competing institutional concerns are present.").

102 *Id.* at 999.

103 *Id.* The Court in *Hudson* stated that both prison riots and lesser disturbances implicate the notion that " '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " *Id.* (quoting *Whitley*, 475 U.S. at 321-22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979))). *See* Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir. 1988) ("[P]roper regard [must be given] for the limited competence of federal judges to micromanage prisons."), *cert. denied*, 491 U.S. 907 (1989); Stenzel v. Ellis, 916 F.2d 423, 427 (8th Cir. 1990).

104 Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993) (en banc). In finding the "infliction of pain," the court first described the search procedure, noting that although officials had estimated that a complete search should require no more than one minute, the training video suggested that a proper search would last for several minutes. *Id.* at 1523. For the court's description of the search, see *supra* note 18. The court then described in detail the reaction of one inmate to the search: "[S]he had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cellblock." *Jordan*, 986 F.2d at 1523. The court then recounted the district court's findings as to the personal histories of the inmates. *Id.* at 1525-26. It described some of the verbal, physical, and sexual abuse that some of the inmates had experienced, going into gruesome detail in a few instances. *Id.* at 1525. The court quoted a psychologist who testified that some of the women might be left 'revictimiz[ed].' *Id.* at 1526 (alteration in original). The court found it sufficient that although some expert testimony was uncertain as to the impact of the search

was "unnecessary and wanton."[105] Although the court acknowledged that the policy was " 'addressed' to security," it agreed with the district court that the searches were " 'without penological justification.' "[106] Having decided that the searches were unnecessary[107] and were undertaken in the absence of an emergency, the court determined that the superintendent acted under "no particular constraints."[108] The court further stated that unlike an excessive force situation, the search policy would inflict pain on in-

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policy, "the inmates' experts . . . were unanimously of the view that some would suffer substantially." *Id.*

For a view that casts doubt on the claim of substantial suffering, see *Jordan*, 953 F.2d at 1142. In that opinion, Chief Judge Wallace stated that the plaintiffs' experts "admitted uncertainty about the effect of the searches, and were largely without empirical data to substantiate their predictions." *Id.*

After modifying the search procedures, however, the superintendent may have found the policy more palatable. *Id.* at 1549-52 (Trott, J., dissenting). Both the Assistant Director and Director of the Division of Prisons of the State found cross-gender searches unremarkable. *Id.* at 1547 (Trott, J., dissenting); *see* Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1536 (7th Cir. 1988) (Easterbrook, J., dissenting) (noting difficulties due to wide disparity in expert testimony as to harmful or beneficial effects of male guards on female inmates' rehabilitation), *cert. denied*, 489 U.S. 1017 (1989); *cf.* Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) (indicating that very few, if any, male prisoners objected to cross-gender searches), *cert. denied*, 111 S. Ct. 2807 (1991); Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981) (same). In many other cases invasive search procedures related to security have passed constitutional muster. *See, e.g.*, Franklin v. Lockhart, 883 F.2d 654, 656 (8th Cir. 1989) (upholding "visual body cavity searches" as means of controlling contraband); Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988) (holding visual strip searches of male inmates by female guards did not violate Fourth Amendment); Campbell v. Miller, 787 F.2d 217, 228 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); Grummett v. Rushen, 779 F.2d 491, 495-96 (9th Cir. 1985) (holding clothed pat-down searches of male inmates by female guards that included groin area did not violate Fourth Amendment); Dufrin v. Spreen, 712 F.2d 1084, 1087 (6th Cir. 1983); Arruda v. Fair, 710 F.2d 886, 888 (1st Cir.), *cert. denied*, 464 U.S. 999 (1983).

105 *Jordan*, 986 F.2d at 1526.

106 *Id.* at 1527 (alteration in original). The court also found the searches were not necessary for security because security had not been adversely affected after the issuance of the injunction banning the search policy. *Id.* at 1526-27.

The *Jordan* court found the searches unnecessary with respect to the guards' equal employment opportunities, as "no bid had been refused, promotion denied, nor guard replaced" since the ban. *Id.* at 1527. The court stated that the conflict between the right of one gender to work and the privacy concerns of inmates " 'has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards.' " *Id.* (quoting Smith v. Fairman, 678 F.2d 52, 55 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983)). *See generally* Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327, 337-40 (1985).

107 *See supra* note 102 and accompanying text.

108 *Jordan*, 986 F.2d at 1528.

mates on an ongoing basis.[109] The court concluded that, as with "conditions of confinement" cases, the deliberate indifference standard was appropriate.[110]

III. Extending the Malicious Intent Test to Prison Security Policy

The *Jordan* court's decision that deliberate indifference was the proper test to determine the superintendent's liability reflects the court's failure to fully appreciate the complexity and problematic nature of prison administration.[111] The cross-gender searches, deemed by the court as unnecessary,[112] were arguably necessary and reasonable given the facts known to the superintendent at the time of the policy's implementation.[113] Moreover, the superintendent instituted the searches in accordance with his con-

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109 *Id.*

110 *Id.* at 1527-28; *see supra* notes 74-76 and accompanying text (discussing conditions of confinement cases).

111 One of the major reasons for implementing the cross-gender search policy was so that inmates could not predict when they would be searched; according to the superintendent, "from a security point of view, if an inmate knows that there's three male officers on [one] side of the institution, then that's the time to move the contraband. If there's no expectation . . . that they might be stopped for a pat search, then it gives them a green light to go and move." *Jordan*, 986 F.2d at 1554 (Trott, J., dissenting).

112 *See supra* note 107. The court mistakenly equated the lack of any change in prison security after the searches were stopped with the necessity of the policy. But this overlooks two key factors. First, the searches were conducted for only one day, a period of time much too brief to provide an accurate assessment of their effectiveness. Second, the policy was implemented to combat increasing contraband in prison, which is a valid penological concern.

113 *Jordan*, 986 F.2d at 1548-49 (Trott, J., dissenting). According to the superintendent, during the period from 1985 to 1988 the number of contraband discoveries and drug offenders incarcerated in the facility had doubled, and the amount of drugs and drug paraphernalia recovered had tripled. *Id.* Drug offenders constituted 31% of the prison population, while one-fifth of the population were serving sentences for homicide. *Id.* Violence committed by inmates against prison staff and other inmates—perhaps due in part to the availability of contraband weapons—had been on the increase. *Id.*

The superintendent took certain steps to mitigate the possible impact of the searches on the inmates. *See supra* note 20. He was also confronted with labor problems, and sought information on civil rights law concerning exceptions to gender neutral employment: he was told by several persons that "bona fide occupational qualifications" would not be approved. *Id.* at 1553. The public Health and Welfare laws allow an employer to legally hire an individual on the basis of gender, creed, or national origin when "religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise. . . ." 42 U.S.C. § 2000e-2(e)(1)(1988).

stitutional duty to protect inmates;[114] by subjecting them to some pain in his attempt to root out dangerous contraband, he was safeguarding them from its use.[115]

The *Jordan* majority neglected to give these concerns adequate weight. The deliberate indifference standard adopted by the court fails to capture the competing obligations that prison administrators encounter as part of their responsibility to maintain security.[116] By definition, the deliberate indifference test precludes consideration of other obligations; it only asks whether the defendant knew of, and could have prevented, the serious deprivation affecting the inmates.[117] This narrow inquiry does not incorporate the deference prescribed by the Supreme Court for Eighth Amendment review of actions plausibly related to security measures.[118]

Conversely, the malice standard properly incorporates the principle of deference to officials' expertise in choosing prison se-

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114 Farmer v. Brennan, 114 S. Ct. 1970 (1994); *see* McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991) (stating that constitutional duty to protect prisoners from each other is a "logical correlative of the state's obligation to replace the means of self-protection among its wards"), *cert. denied*, 112 S. Ct. 1265 (1992). *See generally supra* note 95 and accompanying text (recognizing that state has duty to protect inmates). This obligation is actually a negative duty that emanates from the Eighth Amendment which prohibits "cruel and unusual punishments." *See* 42 U.S.C. § 1983 (1988) (providing civil action for deprivation of constitutional rights); Alberti v. Harris County, 978 F.2d 893, 895 (5th Cir. 1992) (overcrowding in county jail exceeded constitutional capacity), *cert. denied sub nom.* Richards v. Alberti, 113 S. Ct. 2996 (1993).

115 *Cf.* Duane v. Lane, 959 F.2d 673, 677 (7th Cir. 1992); Bruscino v. Carlson, 854 F.2d 162 (7th Cir. 1988) ("Since the principal victims of murders and armed assaults in Marion penitentiary are inmates, the procedures that the plaintiffs describe as cruel and unusual punishment are the very procedures that are protecting them from murderous attacks by fellow prisoners."), *cert denied*, 491 U.S. 907 (1989).

116 *See* Hudson v. McMillian, 112 S. Ct. 995, 999 (1992); Whitley v. Albers, 475 U.S. 312, 321-22 (1986); Pell v. Procunier, 417 U.S. 817, 822-23 (1974) (primacy of internal security); Jordan v. Gardner, 986 F.2d 1521, 1560 (9th Cir. 1993) (Trott, J., dissenting). *But see* Tracy McMath, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?* 56 U. CIN. L. REV. 739, 748 (1987) (arguing that nonessential security interests often outweigh inmates' constitutional rights).

117 *See* Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); *see also supra* note 58 (discussing first and subsequent deliberate indifference cases). The *Whitley* Court noted that the deliberate indifference standard is appropriate only in situations where competing governmental responsibilities are absent. *See Whitley*, 475 U.S. at 320.

118 *See Hudson*, 112 S. Ct. at 999; *Jordan*, 986 F.2d at 1559-61; Bell v. Wolfish, 441 U.S. 520, 547 (1979); *see also supra* notes 43-49 and accompanying text (discussing Supreme Court's position on inmates' constitutional rights and deference owed to prison officials).

curity policy.[119] The "malicious and sadistic" state of mind requirement may appear onerous, but in effect, a finding of cruel and unusual punishment depends primarily on the reasonableness of the challenged act at the time of its commission.[120] The standard allows judges to consider several factors: the need for the force in question; the "relationships between the need and the amount of force that was used"; the seriousness of the injury;[121] the threat to staff and inmates "as reasonably perceived by the responsible officials"; and any efforts made to mitigate the effects of a forceful response.[122] By examining these factors, one may infer whether force may "plausibly have been thought necessary," or alternatively, evidenced a "knowing willingness" to inflict unjustified pain.[123] The malice standard is appropriate for review of a prison measure arguably instituted for security purposes because

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119 *See Hudson*, 112 S. Ct at 999; Turner v. Safley, 482 U.S. 78, 86 (1987) (primacy of judicial deference in area of prison security); *Whitley*, 475 U.S. at 320-21; *Jordan*, 986 F.2d at 1559-61; *see also* ROTUNDA & NOWAK, *supra* note 2, at 362 n.9 (noting high degree of deference required when scrutinizing prison conditions under Eighth Amendment).

120 *See Whitley*, 475 U.S. at 321 (indicating that reasonableness of perceived threat to safety is relevant factor in malice test) Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992); *see also, e.g.*, Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993) (use of "choke hold and other force" to subdue a "non-resisting" inmate evidenced malice), *cert. denied*, 113 S. Ct. 2998 (1993); Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992) (beating judged excessive when "provocation [by plaintiff] did not justify conduct of the . . . defendants"); Stenzel v. Ellis, 916 F.2d 423, 427 (8th Cir. 1990) (no Eighth Amendment violation because "jailers' perception of the potential security risk was reasonable"); Cooper v. Ellsworth Work Correctional Facility, 817 F. Supp. 84, 86 (D. Kan.) (malice not found when "officers used force only after plaintiff's repeated refusals to follow a reasonable order"), *aff'd*, 2 F.3d 1160 (10th Cir. 1993); Cummings v. Caspari, 821 F. Supp. 1291, 1293 (E.D. Mo. 1993) (pinning plaintiff down and "forcibly subdu[ing]" him after he rushed prison officials was "good faith effort to restore discipline"); Jones v. Huff, 789 F. Supp. 526, 536-37 (N.D. N.Y. 1992) (kicks administered by defendant were "unreasonable and excessive" and thus cruel and unusual punishment). *But see Whitley*, 475 U.S. at 319 ("[t]he infliction of pain in the course of a prison security measure . . . does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force unauthorized or applied . . . was unreasonable, and hence unnecessary in the strict sense."); Jasper v. Thalacker, 999 F.2d 353, 354 (8th Cir. 1993) (same).

By contrast, deliberate indifference is typically difficult to prove even where the defendant acted unreasonably. *See supra* note 75 (discussing cases applying deliberate indifference).

121 Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1972) (stating foundation for malice test later adopted by *Whitley* Court), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973).

122 *Whitley*, 475 U.S. at 321 (adapting *Johnson* court's analysis while adding additional factors).

123 *Id.*

it takes into account all the relevant information that might indicate a culpable state of mind.[124]

The inapplicability of the deliberate indifference standard to prison security policy is made obvious by the substantive limitations of the *Jordan* court's reasoning.[125] Agreeing that the search policy was "addressed to security," the court nevertheless disagreed with the means chosen by the superintendent.[126] The superintendent clearly faced numerous constraints involving penological, labor, and legal issues.[127] Yet, the court failed to give these constraints their proper recognition.[128] The *Jordan* court also conducted a shallow inquiry into whether the superintendent actually knew of the risks the searches posed before implementing them; the court never even inquired whether deliberate indifference is applicable with respect to risks to indeterminate prisoners.[129] Ultimately, the court attributed a culpable state of mind to

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124 *Cf. id.* (adding objective mental state element to *Johnson* analysis).

125 *See, e.g., Jordan*, 986 F.2d at 1558-61 (Trott, J., dissenting); *see also supra* note 37 (listing dissent's four reasons for concluding *Jordan* majority's reasoning faulty); *infra* notes 126-129 (discussing flaws in *Jordan* majority's reasoning).

126 *Cf. Jordan*, 986 F.2d at 1565 (Trott, J., dissenting) ("It is not appropriate to sweep away the testimony of [Superintendent Vail and other officials] as conjectural, speculative, and illusory. . . . If the prison officials' rationale is so transparent and flimsy, one wonders why they stick to it?") (citations omitted).

127 *See supra* note 37 (listing constraints on superintendent's judgment). *See generally* JAMES B. JACOBS & NORMA MEACHAM CROTTY, GUARD UNIONS AND THE FUTURE OF THE PRISONS 43-48 (1978) (discussing heightened effects of unions on penal policy).

128 *See supra* notes 117-20 and accompanying text (discussing deference principle).

129 *See Jordan*, 986 F.2d at 1529. The structure of the majority's argument supports the proposition that it did not inquire about the defendants' knowledge of serious injury: no such inquiry had been made by the time it postulated that the "[Superintendent]'s attempts to ensure that the searches were conducted in a professional manner do not negate the conclusion that he was deliberately indifferent to the inmates' pain when it became obvious that the pain would be inflicted no matter how professionally the searches were conducted." *Id.* All that is known is that the Superintendent had been warned of possible "psychological trauma." *Id.* at 1528. Given only that the Superintendent had been warned of the probability of some trauma, the court concluded that "[i]f a prison administrator decides to ignore *grave suffering* because of irrelevant or unimportant concerns, that administrator demonstrates [ ] deliberate indifference . . . ." *Id.* at 1529 (emphasis added). It may be that the inmates' "shocking" testimony "seeped" into the court's analysis of the subjective element. *Id.* at 1546 (Trott, J., dissenting).

Moreover, the *Jordan* court failed to consider the risk of injury with respect to a particular inmate; other courts have held that merely because injury to indeterminate inmates is inevitable in a prison setting, failure to prevent such injury is not tantamount to deliberate indifference. *See, e.g.*, Gibson v. Foltz, 963 F.2d 851, 854 (6th Cir. 1992) ("fact that [officers] knew that [facility] housed many violent prisoners and that prison violence did occur [was] not sufficient to constitute deliberate indifference . . . .

the superintendent because it disagreed with his choice of security measure.[130] In doing so, the court judged the superintendent's decisions under a reasonableness standard, which the deliberate indifference standard does not permit.

CONCLUSION

Although the *Jordan* court purported to apply the deliberate indifference standard in its Eighth Amendment analysis, it actually employed a balancing test. It could not have avoided doing so. The deliberate indifference standard is inappropriate when scrutinizing measures plausibly related to prison security policy. In this context, it is difficult to ever categorize a prison official as deliberately indifferent given the time and effort required to formulate and adopt security policies, especially when, as in *Jordan*, numerous attempts are made to allay inmates' concerns. In order to take into account all the constraints facing prison officials when they implement security policy, the *Jordan* court should have applied the malice standard. Had the court done so, it could have properly analyzed the means chosen by the superintendent for eliminating contraband in a manner consistent with the Supreme court's prescription that deference be accorded prison officials' expertise. In this way, the rights to which inmates are entitled

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Failure to lessen the *threat* of violence" in prisons does not constitute a culpable state of mind for Eighth Amendment purposes) (emphasis added); Edwards v. Gilbert, 867 F.2d 1271, 1274 (11th Cir. 1992) (failure of officials to prevent an inmate's suicide did not constitute deliberate indifference "in the absence of [same inmate's] previous threat or earlier attempted suicide"); McGill v. Duckworth, 944 F.2d 344, 347-48 (7th Cir. 1991) ("Once we equate 'recklessness' with intent . . . it becomes important to give recklessness a definition that separates 'punishment' . . . from the unwelcome injuries that occur when so many violent persons are locked up together"), *cert. denied*, 112 S. Ct. 1265 (1992); Payne v. Monroe County, 779 F. Supp. 1330, 1334 (S.D. Fla. 1991) (plaintiff who "failed to offer sufficient evidence that any defendant was aware . . . of a strong likelihood that *plaintiff* would be assaulted" did not make out an Eighth Amendment claim) (emphasis added); *cf. Jordan*, 986 F.2d at 1561 (Trott, J., dissenting). According to the dissent,

> the [*Jordan* court's] opinion unleashes a management nightmare. It takes the characteristics of some and projects them onto the entire class . . . . Now . . . a male prisoner with a history of abuse as a child by a man—and our prisons are full of them—will surely be able to make a case against random pat-down searches by male officers. . . .

Id.; *cf.* Farmer v. Brennan, 114 S. Ct. 1970, 1982-83 (1994) (reasonable response to risk exonerates official even if harm to inmate is not ultimately averted).

130 *Cf. Jordan*, 986 F.2d at 1561 (Trott, J., dissenting) ("We may not favor this controversial practice . . . but as to Superintendent Vail it is . . . wrong . . . [and] highly unfair to conclude his behavior was obdurate and wanton. Even if we believe he has erred in his judgment, it cannot be said his error was not 'in good faith.' ").

would be enforced while still providing prison officials the ability to implement appropriate security measures.

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