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Extending Deference to Prison Officials Under the Eighth Amendment: Whitley v. Albers {106 S. Ct. 1078}

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EXTENDING DEFERENCE TO PRISON OFFICIALS UNDER THE EIGHTH AMENDMENT: *WHITLEY v. ALBERS*

The Constitution's eighth amendment "cruel and unusual punishment" clause guarantees prisoners the right to be free from excessive punishment.[1] Eighth amendment claims historically were based on physical punishment and the infliction of pain.[2] Courts recently have expanded the clause's application to provide protection against more subtle forms of punishment.[3] Prisoners are now using the eighth amendment to obtain healthier and safer living conditions during the course of their confinement.[4] At the same time, however, prison offi-

1. The eighth amendment provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

2. *See, e.g.,* Furman v. Georgia, 408 U.S. 238 (1972) (physical pain and suffering beyond what civilized people can tolerate); Weems v. United States, 217 U.S. 349 (1910) (hard labor in chains and constant surveillance); *In re* Kemmler, 136 U.S. 436, 446 (1890) (burning at the stake, crucifixion, breaking on the wheel); *cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (second preparation of execution after previous unsuccessful attempt due to mechanical failure was not cruel and unusual punishment).

3. Federal courts have achieved "sweeping reforms" in reviewing constitutional challenges to the prison system. Federal courts no longer apply the eighth amendment only to specific acts of punishment inflicted upon specific individuals. Courts instead apply the eighth amendment equally to the general conditions of prison confinement. Comment, *Challenging Cruel and Unusual Conditions of Prison Confinement: Refining the Totality of Approach*, 26 HOW. L.J. 227 (1983) (needlessly inflicted pain and suffering did not fulfill valid penological purposes). *See* Rhodes v. Chapman, 452 U.S. 337 (1981). In *Rhodes* the Court adopted a totality of conditions approach to determine if double-celling constituted cruel and unusual punishment. *Id.* at 348. The *Rhodes* Court reasoned that double-celling would violate the eighth amendment if the situation inflicted "unnecessary or wanton pain" or was "grossly disproportionate to the severity of crimes warranting imprisonment." *Id.* The Court also noted, however, that the Constitution does not require comfortable prisons. *Id.* at 349. As a result, courts retain broad discretion in making such findings. *See infra* notes 21-23 (discusses the evolving standards of decency).

4. *See, e.g.,* Hutto v. Finney, 437 U.S. 678 (1978) (length of confinement in isolation cell considered together with inmates' diet, continued overcrowding, rampant violence, and security personnel's poor jurdgment); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (combination of factors including lack of sufficient space, inadequate temperature

cials can discipline prisoners and inflict pain upon them if such force is necessary to effectively operate the prison.[5] In *Whitley v. Albers*[6] the Supreme Court held that a prisoner who was shot while prison officials were quelling a prison riot did not suffer cruel and unusual punishment.[7]

In *Whitley* a prison riot began when an armed inmate assaulted a security officer[8] and took a second security officer hostage.[9] The prison security manager devised a plan to free the hostage by approaching the inmate and hostage unarmed, while security officers, armed with shot-

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control and ventilation, sewage problems, and unsanitary kitchen facilities led to conclusion that prison was unfit for human habitation). See *infra* notes 40-41 and accompanying text for discussion of prisoners' rights to safe prison conditions.

5. See *infra* notes 9, 36 and accompanying texts for discussion of the amount of force prison officials may use to maintain order and control.

6. 106 S. Ct. 1078 (1986). Albers was an inmate at Oregon State Penitentiary living with 200 other prisoners in cellblock "A." *Id.* at 1081. Whitley was the prison security manager. See *infra* notes 8-13 and accompanying text for discussion of the facts.

7. *Id.* at 1087-88. The Court found that the prison official shot the prisoner in a good faith effort to restore the internal order and security of the prison. *Id.* at 1087. The Court stressed the necessity of deferring to the judgment of prison officials responding to "an actual confrontation with riotous inmates" and taking "preventive measures" to reduce the likelihood of similar disturbances. *Id.* at 1085. See infra notes 43-44 and accompanying text for additional discussion of deference accorded prison officials in operating prisons.

8. *Id.* at 1082. The inmates in cellblock "A" lived on the lower and upper (second floor) tiers. *Id.* at 1081. A stairway connecting the two tiers was the only feasible way to move from one tier to another. *Id.* The assault occurred when an inmate, after disobeying orders to return to his prison cell, jumped from the upper tier of cells onto a prison official below. *Id.* at 1082.

9. *Id.* at 1082. The inmate proceeded up the stairs to the second tier of jail cells with the hostage and threatened to kill the hostage if the remaining officers formed an assault squad. *Id.* Shortly thereafter, the kidnapper told Whitley that another inmate had already been killed and that others would die. *Id.* Although no inmate had been killed, one had been beaten. *Id.* Albers, who lived on the upper tier, testified that he then went down the stairs to check on the elderly inmates on the lower tier in the event that the guards used tear gas to quell the riot. *Id.* Whitley contemplated using tear gas but decided against it. *Id.*

Prisons officials may use mace, tear gas, or other chemical agents without violating the cruel and unusual punishment clause if reasonably necessary to prevent riots or to subdue recalcitrant prisoners. Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984) (mace properly used against prisoners who refused to obey direct orders during security measures). Use of such chemicals to control an inmate may be a safer and more effective alternative than a physical confrontation. Norris v. District of Columbia, 614 F. Supp. 294 (D.D.C. 1985) (use of mace is an appropriate alternative to physical force when other means of controlling the prisoner are futile).

guns, covered him.[10] The security manager gave a prison officer orders to fire a warning shot and to shoot low at any prisoner who attempted to interfere with the rescue.[11] Albers, a prisoner, followed the security manager shortly after he began his rescue attempt.[12] After two warning shots, the covering officer fired a shot at Albers that struck his knee.[13] Albers brought suit against the prison officer under 42 U.S.C. § 1983,[14] alleging a deprivation of rights under the eighth amendment.[15] The District Court for the District of Oregon directed a verdict for the prison officer.[16] On appeal, the Ninth Circuit Court of Appeals reversed in part.[17] The Supreme Court reversed in a 5-4 deci-

10. 106 S. Ct. at 1082.

11. *Id.* Whitley made this order out of concern for both his and the hostage's safety. *Id.* Prison administrators are entitled to take all steps necessary to ensure the prison staff's safety. *Soto*, 744 F.2d at 1268. *See infra* notes 42-49 and accompanying text (discusses the boundaries of permissible prison conditions and restrictions established in Bell v. Wolfish, 441 U.S. 520 (1979)).

12. 106 S. Ct. at 1083.

13. *Id.* The security officer's first shot was a warning shot in the opposite direction of the cellblock, while his next shot was fired towards the stairway. The officer's third and final shot hit Albers while he was on the stairs. *Id.*

14. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress.

42 U.S.C. § 1983 (1982).

15. Albers v. Whitley, 546 F. Supp. 726 (D. Or. 1982). Albers originally claimed that his constitutional rights had been violated under the eighth and fourteenth amendments. *Id.* at 732. The district court acknowledged that the eighth amendment applies to the states through the fourteenth amendment. *Id. See* Solem v. Helm, 463 U.S. 277 (1983) (life imprisonment for prisoner charged with issuing a "no-account" check was cruel and unusual punishment under eighth and fourteenth amendments); Robinson v. California, 370 U.S. 660 (1962) (state law under which a narcotics addict with a clean record in that state was imprisoned inflicted cruel and unusual punishment in violation of the fourteenth amendment). Albers, however, had to rely solely on the eighth amendment because he failed to assert an independent violation of due process under the fourteenth amendment. 546 F. Supp. at 732 n.1.

16. 546 F. Supp. at 729. The court found that the prison official's use of force in his attempt to quell the riot, aid in the rescue plan, and restore prison security was appropriate and necessary, and that a reasonable jury could not have concluded differently. *Id.* at 734.

17. 743 F.2d 1372 (9th Cir. 1984), *rev'd*, 106 S. Ct. 1078 (1986). The court concluded from the record that a jury could have found that the prison disturbance had subsided prior to the use of deadly force, thereby rendering such force excessive. 743 F.2d at 1376.

sion[18] and held that the infliction of pain during a prison riot, whether due to inadvertence or good faith error, does not constitute cruel and unusual punishment under the eighth amendment.[19]

The phrase "cruel and unusual" punishment[20] originally was used in the United States[21] to forbid torturous and barbaric methods of inflicting pain upon criminals.[22] Beginning in the twentieth century courts no longer isolated the punishment from the crime to determine in the abstract whether the punishment was fair or cruel.[23] Courts instead began to consider a punishment fair if it was proportionate to the crime committed.[24]

In order to allege cruel and unusual punishment under the eighth amendment, a prisoner must first state a cause of action under 42

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18. Justice O'Connor delivered the majority opinion. Chief Justice Burger and Justices White, Powell, and Rehnquist joined.

19. 106 S. Ct. at 1087-88.

20. *See supra* note 1.

21. Trop v. Dulles, 356 U.S. 86 (1958). The basic concept underlying the eighth amendment is preservation of the dignity of man and the need for the states to adhere to civilized standards of punishment. *Id.* at 100-01. The phrase "cruel and unusual" was taken verbatim from the English Declaration of Rights of 1689, *id.* at 100, and was eventually included in the eighth amendment to the United States Constitution in 1791. Granucci, *'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

The "cruel and unusual" clause in the English Bill of Rights was intended, however, to incorporate an earlier common law prohibition against excessive punishments. *Id.* at 847. Critics found it paradoxical that the American colonists "omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law." *Id.*

22. Eighth amendment scrutiny is appropriate only after the courts have adjudicated someone guilty of a crime, thereby acquiring the power to punish the criminal. *See* City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983) (police officer denying liability for hospital bill after injuring robbery suspect did not inflict cruel and unusual punishment); Ingraham v. Wright, 439 U.S. 651, 672-73 n.40 (1977) (the eighth amendment does not apply to disciplinary punishment in public schools). See *supra* note 2 for various methods of cruel and unusual punishment.

23. *See, e.g., Trop*, 356 U.S. at 101 (punishment is cruel and unusual when it is incompatible with the "evolving standards of decency that mark the progress of a maturing society").

24. Weems v. United States, 217 U.S. 349 (1910) (defendant convicted of falsifying official document was sentenced to fifteen years of hard labor with ankle chains). The Court's decision in *Weems* for the first time invalidated a statute because the punishment it imposed following imprisonment was cruel and excessive. *Id.* at 382. A criminal sentence must be proportionate to the crime committed. Solem v. Helm, 463 U.S. 291 (1983).

U.S.C. § 1983.[25] Under this provision, the prisoner must prove that a person acting under the color of state law[26] caused the conduct complained of and that this conduct deprived the prisoner of his constitutional rights.[27] Although prisoners have a clearly established eighth amendment right to be free from cruel and unusual punishment, the section 1983 burden of proof is difficult to satisfy because governmental officials usually invoke a good faith defense against claims arising from the performance of discretionary functions.[28]

One of the first cases to develop a test to determine whether punishment was cruel and unusual was *Gregg v. Georgia*.[29] In *Gregg* the Supreme Court held that the death penalty for a convicted murderer did not invariably violate the eighth amendment.[30] The Court first examined Georgia's statutory scheme,[31] which required the Georgia

25. Byrd v. Clark, 783 F.2d 1002, 1006 (11th Cir. 1986) (victim has burden of proving that injuries inflicted "exceeded the boundaries . . . redressable under tort law"). See *supra* notes 26-27 and accompanying text for additional discussion of claims under § 1983.

26. "Under the color of" state law refers to the actions of state officers performing their duties pursuant to state authority. Monroe v. Pape, 365 U.S. 167, 184 (1960). *See, e.g.,* Parratt v. Taylor, 451 U.S. 527 (1981) (state prison officials act under the color of state law).

27. Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir. 1985) (prisoner failed to state a cause of action under § 1983 because he was unable to prove denial of eighth or fourteenth amendment rights); *cf.* Parratt v. Taylor, 451 U.S. 527, 535 (1981) (although prison officials satisfied "under color of state law" requirement, availability of state post-deprivation remedies available from the state precluded a constitutional claim under the fourteenth amendment).

28. Harlow v. Fitzgerald, 457 U.S. 800 (1982). The *Harlow* Court stated that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights." *Id.* at 818. *Cf.* Miller v. Solem, 728 F.2d 1020 (8th Cir. 1984). In *Miller* the Court stated that "[p]rison officials are not entitled to a good faith defense if they are aware of the risk of injury to an inmate and nevertheless fail to take appropriate steps to protect the inmate from that known danger." *Id.* at 1024. *See* Joseph v. Brierton, 739 F.2d 1244, 1250 (7th Cir. 1984) (prison officials showing "willful neglect" of prisoners' medical needs are not entitled to good faith defense under § 1983).

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

30. *Id.* at 207. The Court recognized that under Georgia's statute the state retained the death penalty for six categories of crime. *Id.* at 162-63. These categories are: murder, kidnapping for ransom or when the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-2201, 26-3301 (1972).

31. *Id.* at 186-87. In its review of the Georgia statute, the *Gregg* Court first noted that each state legislature has the authority to conduct a "moral census" of its citizens

Supreme Court to review jury decisions recommending the death penalty. The Court concluded that Georgia's scheme was constitutional if the jury decision was proportionate to the punishment usually imposed in similar cases.[32] The Court then applied a two part test for determining whether a punishment was cruel and unusual.[33] First, a punishment must not be an "unnecessary and wanton" infliction of pain.[34] Second, a punishment must not be "grossly out of proportion" to the severity of the offense.[35] The Court's development of this two part test represented a significant step towards more precisely identifying those forms of excessive punishment the Court would regard as cruel and unusual.[36]

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regarding the death penalty. *Id.* The Court approved of Georgia's statute because its provision for appellant review "serves as a check against the random or arbitrary imposition of the death penalty." *Id.* at 206.

32. *Id.* at 206-07. The Court agreed with the theory of focusing the jury's attention on the nature of the crime and the characteristics of the individual defendant. *Id.* at 206. *Cf.* Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty for the crime of rape is grossly disproportionate and, therefore, forbidden under the eighth amendment) (plurality opinion).

33. 428 U.S. at 173. See *supra* notes 20-24 and accompanying text for discussion of early interpretations of "cruel and unusual" punishment.

34. 428 U.S. at 173. Punishment is unnecessary if an alternative exists that is both significantly less severe punishment and adequate to achieve the same purpose. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

35. 428 U.S. at 173. *See* Solem v. Helm, 463 U.S. 277 (1983). In *Solem* the Supreme Court developed a three step analysis for reviewing the proportionality of the sentence. The three criteria are: (1) the gravity of the offense and the harshness of the penalty; (2) the comparison of sentences imposed in the same jurisdiction; and (3) the comparison of sentences imposed on criminals in other jurisdictions. 463 U.S. at 290-92. *See also* Hutto v. Finney, 437 U.S. 678 (1978) (thirty day limitation imposed on sentences of punitive isolation inside prison prevents disproportionate penalties); United States v. Wilson, 787 F.2d 375 (8th Cir. 1986) (fifty year sentence for criminal who held a family hostage at gunpoint and robbed a bank was not grossly disproportionate to the severity of the offense).

36. 428 U.S. at 173. The Court in *Gregg* recognized the necessity for an objective test because "public perceptions of standards of decency with respect to criminal sanctions are not conclusive." *Id.* In other words, an individual retains the right to be free of excessive punishment, even if the result is contrary to public opinion. *Id.* The Court emphasized that the eighth amendment precludes punishment that fails to sustain "the dignity of man." *Id.* Trop v. Dulles, 356 U.S. 86, 100 (1958). *See* Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984) (high-pressure water hoses, tear gas, and billy clubs used indiscriminately against a defenseless prisoner locked in a cell constituted cruel and unusual punishment). *See generally* Comment, *The Effect of Rhodes v. Chapman on the Prohibition Against Cruel and Unusual Punishment*, 35 ARK. L. REV. 731 (1982) (discusses the "dignity of man" concept).

Courts determine whether pain is inflicted in an unnecessary and wanton manner

The Supreme Court further defined the protective scope of the *Gregg* test in *Estelle v. Gamble*[37] when it acknowledged that deprivation of essential health needs inside a jail may constitute cruel and unusual punishment.[38] In *Estelle* a prison doctor treated a prisoner's back injury with various medications, but chose not to use X-rays. The Court held that the physician's treatment did not violate the eighth amendment.[39] The Court reasoned that only "deliberate indifference to a prisoner's serious illness or injury" constituted a basis for a cause of action under section 1983.[40] The Court emphasized that mere negli-

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from the circumstances of each case. Note, *Applying the Eighth Amendment to the Use of Force Against Prison Inmates*, 60 B.U.L. REV. 332, 339 (1980) (discusses judicial approaches to applying the eighth amendment to cases involving the use of force against prisoners). The same degree of force reasonably necessary to quell a prison disturbance that may lead to a riot is clearly unreasonable for purposes of placing a recalcitrant prisoner in an isolation cell. *Id. See* Newby v. Serviss, 590 F. Supp. 591 (W.D. Mich. 1984). In *Newby* the court held that deadly force used to stop a convict's escape from prison was not excessive. *Id.* at 596. The court noted that although firing warning shots and shooting only to disable are preferable, deadly force is appropriate when other alternatives would be ineffective. *Id.*

37. 429 U.S. 97 (1976).

38. *Id.* at 102-03. During incarceration, a prisoner must rely solely upon prison officials to treat his medical needs. *Id.* at 103. Denial of medical care, which could lead to pain and suffering or even death, is "inconsistent with contemporary standards of decency," and serves no penological purpose. *Id. See, e.g.*, Joseph v. Brierton, 739 F.2d 1244 (7th Cir. 1983) (prison officials who willfully neglected prisoner's serious mental illness by allowing him to remain in "bestial" conditions were not entitled to § 1983 immunity).

39. 429 U.S. at 107-08. Noting that the doctors treated the prisoner's back injury with "bed rest," muscle relaxants and pain relievers," the Court held that a medical decision not to obtain an X-ray "does not represent cruel and unusual punishment. At most it is medical malpractice." *Id.*

40. *Id.* at 105. Deliberate indifference to a prisoner's serious medical needs occurs when "prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment." Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). In general, deliberate indifference may manifest itself through either actual intent or recklessness. Little v. Walker, 552 F.2d 193, 197 n.8 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). *See* Lewis El v. O'Leary, 631 F. Supp. 60, 62-63 (N.D. Ill. 1986) (prison officials' awareness of only a "mere possibility" of a risk that fellow inmates would attack the prisoner did not constitute deliberate indifference).

The scope of the Court's holding in *Estelle* was not limited to the protection of prisoners' health. Prison officials also have the duty to protect prisoners from unwarranted physical injury such as violent attacks and sexual assaults by other inmates. *See, e.g.*, Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985) (prisoner suffered head injury in prison gym when barbell slipped off of bar); Little v. Walker, 552 F.2d 193 (7th Cir. 1977) (prisoner suffered violent attacks and sexual assaults by inmates in protective segregation area); Hanna v. Lane, 610 F. Supp. 32 (N.D. Ill. 1985) (prisoner became

gence or "inadvertent failure to provide adequate medical care" alone was not an unnecessary and wanton infliction of pain.[41]

Although *Estelle* prohibited prison officials from showing deliberate indifference for prisoners' health, in *Bell v. Wolfish*[42] the Court stated that prison inmates were not necessarily entitled to unlimited constitutional rights.[43] The *Bell* Court declared that prison officials could impose any condition or restriction that was reasonably related to a "legitimate nonpunitive governmental objective."[44] The Court noted that incarceration alone was a justified limitation on an inmate's constitutional rights.[45] The Court stressed that the necessity of maintaining

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blind after prison doctor failed to administer diagnostic tests); *cf.* Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986) (prison guards, who mistakenly put inmate in same jail cell with second inmate who had made a death threat to the first inmate, were not guilty of conscious indifference after stabbing incident occurred); Watts v. Laurent, 774 F.2d 168 (7th Cir. 1985) (prison official must first have knowledge of risks to victim to be liable under 42 U.S.C. § 1983). See *supra* note 25 and accompanying text for discussion of government officials' liability under § 1983.

41. 429 U.S. at 105. In *Estelle* the Court found that the prison doctor's negligence in treating the prisoner's back injury did not state a valid claim under the eighth amendment. *Id.* at 107. *See* Estate of Davis v. Johnson, 745 F.2d 1066 (7th Cir. 1984) (prison officials, without knowledge of "strong likelihood" of risk of attack to prisoner, lacked callous indifference when placing decedent in same cell with murderer); *see also* Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) (gross negligence by prison officials is insufficient to violate the eighth amendment); *but cf.* Massop v. Coughlin, 770 F.2d 299 (2d Cir. 1985) (in appropriate circumstances, even a merely negligent act may give rise to a cause of action under § 1983).

42. 441 U.S. 520 (1979). The prisoners brought a class action suit challenging the prison conditions at the newly-built Metropolitan Correctional Center (MCC) in New York City. *Id.* at 524. The majority of the prisoners incarcerated at MCC were pretrial detainees. *Id.* at 523. Because of an "unprecedented" increase in pretrial detainees, the MCC had to place two prisoners in cell originally built for one, more commonly known as "double-celling." *Id.* at 525-26.

43. *Id.* at 545. *See* Hudson v. Palmer, 468 U.S. 517 (1984) (random searches of prison cells essential for effective prison security); *cf.* Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) (unwarranted use of tear gas in dangerous quantities violates the eighth amendment). Because the eighth amendment's purpose is to protect convicted persons it will always guarantee prisoners full protection of their rights during incarceration. *Id.* at 193-94.

44. 441 U.S. at 561-62. The *Bell* court specifically mentioned institutional security. The Court stated that body cavity inspections is one example of a condition of confinement reasonably related to prison security. *Id.* at 560. The Court noted that maintaining security in a prison qualifies as a "permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates or both." *Id.* at 561.

45. *Id.* at 545-46. Prisoners retain only their basic liberty rights. *Id.* at 545. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984) (right to privacy); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (right to unionize); Wolff v. McDonnell,

internal prison security both to ensure the safety of prisoners and prison officials and to prevent escapes justified further limitations on inmates' constitutional rights.[46]

To facilitate effective pursuit of these ends, the *Bell* Court maintained that prison officials must be afforded wide-ranging deference in adopting and executing prison policies and practices and enforcing internal order and discipline.[47] The Court recognized that prison officials, not the courts, are the experts in prison operations.[48] The Court concluded that for this reason, the oversight of prison operations is the proper responsibility of the legislative and executive branches, not the judicial branch.[49]

In *Johnson v. Glick*[50] the Second Circuit established guidelines to determine whether prison officials used unnecessary force in discipli-

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418 U.S. 539 (1974) (right to open mail in private); Price v. Johnston, 334 U.S. 266 (1948) (right to personally argue appeal or to be present at appellate court); Weber v. Dell, 630 F. Supp. 255 (W.D.N.Y. 1986) (fourth amendment protection from strip/body cavity searches).

46. 441 U.S. at 547.

47. *Id.* at 547. Block v. Rutherford, 468 U.S. 576 (1984). *See* Procunier v. Martinez, 416 U.S. 396 (1974). The Court in *Procunier* stated that prison officials were responsible for maintaining order and discipline inside the prison, for safeguarding the prison against illegal entry or escape, and for rehabilitating the prisoners "to the extent that human nature and inadequate resources allow. . . ." 416 U.S. at 404-05. Thus, because the problems in America's prisons "are complex and intractable [they] are not readily susceptible to resolution by decree." *Id. See also* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (prisoners prohibited from soliciting other inmates and from holding group meetings due to potential for disruption of prison administration); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) (prison officials not liable for prisoner's injuries following an unexpected prison bus fire).

48. 441 U.S. at 547. Courts defer to the professional expertise of prison officials in the absence of any substantial evidence indicating that the officials have exaggerated their response to security considerations. Pell v. Procunier, 417 U.S. 817, 827 (1974). *See* Block v. Rutherford, 468 U.S. 576 (1984) (random searches of prison cells "reasonably related" to prison security concerns); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (burden on prisoners to prove that prison officials' fears that prisoners' union would pose a danger to security were unreasonable). Prison officials frequently must exercise discretion quickly and in dangerous situations. *See* Norris v. District of Columbia, 614 F. Supp. 294, 299 (D.D.C. 1985) (use of mace to control prisoner is within discretion of prison officials).

49. 441 U.S. at 548. *See, e.g.,* Solem v. Helm, 463 U.S. 277 (1983) (legislatures possess broad authority to determine the types and limits of punishments for crimes); Procunier v. Martinez, 416 U.S. 396 (1974) (expertise, comprehensive planning, and the commitment of resources are within province of the legislative and executive branches of government); Cruz v. Beto, 405 U.S. 319 (1972) (federal courts do not supervise prisons, they only enforce prisoners' constitutional rights).

50. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). In *Johnson* a prison

nary action and addressed whether certain limitations on prisoner rights were constitutional.[51] The court held that a prison officer committed a cruel and unusual act when he brutally and without provocation attacked a pretrial detainee, but that the act did not violate the eighth amendment because it was not for punishment purposes.[52] The court, however, listed four factors to consider when prison officials use force in a disciplinary fashion for punishment purposes:[53] (1) whether force was necessary, (2) whether the amount of force used was reasonably related to the need for force, (3) the extent of injury inflicted, and (4) whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically solely to cause harm.[54] Courts have since used these guidelines to determine whether a use of force constituted cruel and unusual punishment.[55]

Whitley v. Albers[56] presented the Court with an opportunity to review the standards of behavior that constitute cruel and unusual punishment during incarceration.[57] In *Whitley* the Court delegated wide

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guard struck the plaintiff, a pretrial detainee, with an object enclosed in the guard's fist, causing the plaintiff to suffer severe head pain. *Id.* at 1029-30.

51. *Id.* at 1033. The court recognized the difficulty involved when only a few guards are responsible for managing large numers of prisoners. *Id.* In order to maintain control, the court stated that prison officials may resort to intentional force. *Id.* See *supra* notes 9, 36 and accompanying texts for discussion of the amount of force prison officials may use to maintain order and control.

52. 481 F.2d at 1032. The eighth amendment refers to "punishment" imposed upon prisoners for penal or disciplinary purposes. *Id.* *See* Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985) (eighth amendment applies only to convicted persons); Williams v. Mussomelli, 722 F.2d 1130 (3d Cir. 1983) (due process clause of the fifth and fourteenth amendment protects pretrial detainees). *See generally* Note, *supra* note 36 (eighth amendment applies to prison discipline).

53. 481 F.2d at 1033.

54. *Id.* Such factors determine whether a constitutional violation has occurred. *Id.* *See also* Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982) (determination whether the use of force is unconstitutional is a question of fact).

55. Sampley v. Ruetgers, 704 F.2d 492 (10th Cir. 1983). In *Sampley* the court utilized the *Johnson* guidelines to determine whether a prison guard's use of force against a prisoner was wanton and unnecessary. *Id.* at 495-96. *See* Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984) (*Johnson* guidelines incorporated in jury instructions to help jurors decide if prison guard's use of mace was excessive and unjustified force); *supra* notes 37-41 and accompanying text (discusses standards of conduct constituting cruel and unusual punishment).

56. 106 S. Ct. 1078 (1986). See *supra* notes 6-11 for detailed outline of the facts.

57. 106 S. Ct. at 1084. *See supra* notes 38-41 (discussion of pertinent standards of culpability for prison officials under the eighth amendment).

ranging deference to prison officials.[58] Justice O'Connor, writing for the majority, reaffirmed that only unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.[59] The Court then applied this standard[60] to the security manager's order to shoot low at any prisoner who interfered with the rescue attempt.[61] The Court reasoned that because the prison official shot Albers in the knee while he was running towards the security manager, the prison official's action was not wanton.[62] The majority affirmed the Court's *Estelle* holding that prison officials who are merely negligent in areas that serve no penological purpose, such as treating prisoners' medical needs[63] or providing prisoners with adequate living conditions,[64] do not violate the eighth amendment.[65] The Court further recognized that safety measures employed in quelling a prison disturbance also serve no penological purpose[66] and concluded that conduct more culpable than negligence was required to impose liability.[67]

58. 106 S. Ct. at 1085. The Court cited both Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), and Rhodes v. Chapman, 452 U.S. 337 (1981), to support this contention. *See supra* notes 43-45, 47-49 and accompanying texts (discusses constitutional parameters of acceptable prison official conduct).

59. 106 S. Ct. at 1084-85. *See supra* note 34 (defines unnecessary punishment).

60. 106 S. Ct. at 1086. *See infra* note 66 and accompanying text (Court found infliction of pain during prison security measure was a constitutional use of force).

61. 106 S. Ct. at 1087. The Court emphasized that Whitley's order to shoot only to disable those prisoners interfering with the rescue attempt indicated his intent to avoid inflicting pain "in a wanton [or] unnecessary fashion." *Id.*

62. *Id.* The Court found that the prison official had a plausible basis for believing that Albers posed a threat to Whitley and the hostage. Because the prison official was under orders to shoot in these circumstances, the shooting amounted to a "good faith effort to restore prison security." *Id.* The Court also recognized that the prison officials were faced with an emergency situation with very little time to react. *Id. See* Newby v. Serviss, 590 F. Supp. 591 (W.D. Mich. 1984) (prison officials may use deadly force as last resort to prevent prison escape).

63. 106 S. Ct. at 1084. See *supra* notes 38-41 and accompanying text for discussion of constitutional guarantees concerning treatment of prisoners' medical needs.

64. 106 S. Ct. at 1084. See *supra* notes 3-4 and accompanying text for discussion of prisoners' constitutional right to adequate living conditions during incarceration.

65. 106 S. Ct. at 1084. The Court explained that a prison official's conduct that "does not purport to be punishment at all" must demonstrate more than a negligent disregard for the prisoner's safety to constitute cruel and unusual punishment. *Id.*

66. *Id.* The Court warned that infliction of pain during a prison security measure, such as quelling a riot, does not constitute cruel and unusual punishment even if hindsight reveals that the degree of force used was unreasonable. *Id.*

67. *Id.* See *supra* notes 38-41 and accompanying text for discussion of the negligence standard.

Justice O'Connor distinguished safety measures, however, from medical treatment and confinement conditions for purposes of judicial review.[68] In particular, the Court stressed that safety measures taken during a prison disturbance protect inmates and prison officials alike,[69] but medical treatment and healthy confinement conditions aid prisoners only.[70] In making this distinction, the majority emphasized the necessity of extending optimum deference to prison officials during a riot because of their increased risk of being harmed.[71]

After establishing these standards of liability and deference, Justice O'Connor concluded that the prison officials acted in good faith.[72] In reaching this conclusion, the Court examined several factors present prior to the shooting, such as the hostage situation, the fact that numerous inmates were outside of their cells, and the added vulnerability of the security manager.[73] The majority applied the *Johnson* guidelines and found the presence of these factors sufficient to decide in favor of the prison officials.[74]

Justice Marshall, in his dissent, accepted the majority's position that prison authorities are entitled to deference during prison disturbances.[75] He disagreed, however, with the majority's opinion that the safety of the prison staff and other inmates warrants greater deference

68. 106 S. Ct. at 1084.

69. *Id.*

70. *Id.* at 1084-85.

71. *Id.* at 1085. The Court explained that the eighth amendment applies in two situations. The first situation concerns prison officials' responsibilities towards the inmates. *Id.* The second situation involves the choice between protecting inmates versus prison officials when officials must take immediate action during prison unrest. *Id.* Referring to the first situation, the Court added that "a deliberate indifference standard does not adequately capture the importance of such completing obligations." *Id. See supra* notes 9, 47-48 (discusses limits of constitutionally permissible safety measures).

72. 106 S. Ct. at 1085. The majority recognized the conflicting testimony of Albers and the security manager regarding the atmosphere inside the prison prior to the Albers' shooting. *Id.* at 1086. Albers testified that the prison disturbance had subsided before the shooting occurred. *Id.* at 1090. Albers further testified that he stopped running and froze in place when he noticed the prison official looking at him. *Id.* at 1087. The prison official testified that "he saw several inmates running . . . [after] Whitley, and that he fired at their legs." *Id.* See *supra* notes 25-28 and accompanying text for a discussion of "good faith" immunity under 42 U.S.C. § 1983.

73. 106 S. Ct. at 1086.

74. *Id.* at 1085. The Court applied the *Johnson* guidelines and decided that the security officer had used force in good faith to restore discipline. *Id.* at 1087.

75. *Id.* at 1088-89 (Marshall, J., dissenting).

to the officials.[76] The dissent's central theme found error with the district court's issuance of a directed verdict.[77] The dissent argued that reasonable persons could differ on whether the prison officer's use of force was "unnecessary and wanton."[78]

The majority's decision that Albers did not suffer cruel and unusual punishment was correct for two reasons. First, the Court held that the infliction of pain was not unnecessary and wanton in accordance with the *Whitley* facts and prior case history.[79] Second, the force used was not excessive, considering that a more violent riot may have erupted if the security officer had not stopped Albers from obstructing the rescue attempt, and that the security manager's and hostage's lives were at stake.[80]

Whitley illustrates the Court's ardent belief that prison officials, not the court, should operate the jails.[81] The Court's reasoning is both realistic and practical. Only with freedom to respond quickly and instinctively to prison disturbances, particularly when their own lives may be in danger, can prison officials effectively control disobedient prisoners and prevent further violence.[82] The Court further explained

76. *Id.* at 1089 (Marshall, J. dissenting). Justice Marshall criticized the majority for increasing the evidentiary burden on prisoners who now must prove that the prison disturbance posed risks to the safety of the prison staff and inmates. *Id.*

77. *Id.* Justice Marshall contended that the district court was incorrect in deciding to send the constitutional claim to the jury based upon judicially determined facts, rather than let the jury reach its own determination of the facts. *Id.* See *supra* note 16 for discussion of the district court's issuance of a directed verdict. Justice Marshall vigorously urged instead that a critical question of fact existed which warranted a trial by jury. 106 S. Ct. at 1089-90. The dissent argued that the district court and the majority failed to properly look favorably towards Albers' testimony. *Id.* at 1090. Albers testified that the "riot" had quieted down and that Whitley knew that the hostage was out of danger before shooting Albers. *Id.* Moreover, the dissent mentioned that the prison officials failed to give Albers sufficient warning of their potential use of force. *Id.*

78. 106 S. Ct. at 1090-91 (Marshall, J., dissenting). *See supra* note 77 (discusses conflicting testimony).

79. 106 S. Ct. at 1084-86. See *supra* notes 34, 36 for discussion of unnecessary and wanton punishment.

80. 106 S. Ct. at 1086. See *supra* notes 50-55 and accompanying text for discussion of the *Johnson* guidelines.

81. 106 S. Ct. at 1085. *See supra* notes 47-49 and accompanying text (discusses deference accorded prison officials).

82. 106 S. Ct. at 1084. The Court explained that inflicting pain for security purposes does not constitute cruel and unusual punishment "simply because in retrospect the degree of force . . . was unreasonable." *Id. See supra* note 62 (prison official acts in good faith if conduct founded on plausible basis). The Court recognized that decisions in emergency situations are often made "in haste, under pressure, and frequently with-

that such deference applies to prison officials both when responding to actual prison disturbances and when taking measures to prevent potential disturbances.[83] Furthermore, because the Court utilized a negligence standard under which any behavior more culpable than negligence subjects a prison officials to potential liability,[84] officials will have difficulty abusing this discretion.

Whitley recognized order and control as essential goals in prison management[85] and established a practical test for determining when prison officials will be liable under 42 U.S.C. § 1983.[86] *Whitley* thus enables prison officials to exude greater confidence when protecting and defending themselves and their fellow officers during a riot.[87] As long as prison officials demonstrate a good faith and no more than negligent attempt to discipline prisoners and maintain order, they will enjoy immunity from liability under the eighth amendment.[88] Prison officials, faced with overcrowding and limited resources, will thus be

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out the luxury of a second chance." 106 S. Ct. at 1085. *See supra* note 62 and accompanying text (constitutional propriety of response must account for limited reaction time). See *supra* notes 47-49 and accompanying text for discussion of deference extended to prison officials.

83. 106 S. Ct. at 1085.

84. *Id.* at 1084-85. See *supra* notes 38-41 and accompanying text for discussion of the negligence standard.

85. *Id.* at 1085-86. See *supra* notes 44-47 and accompanying text.

The dissent objected strongly to the majority's position on substantive and procedural issues. As to the substantive issues of liability, the dissent was fearful that the majority opinion may be abused in subsequent cases. 106 S. Ct. at 1090-91. The dissent expressed concern that the majority was insensitive to expert testimony in support of Albers. *Id.* Justice Marshall's dissent began with a rejection of the negligence standard that the majority purported to adopt. The dissent asserted that the majority would permit prison officials to act recklessly during the prison disturbance and still enjoy immunity from § 1983 liability. *Id.* at 1089. Justice Marshall pointed to language in the majority opinion that he understood to require "express intent" to violate the eighth amendment before prison officials would be subject to liability. *Id.* The dissent's procedural criticism maintained that a jury should have decided the outcome. *Id.* at 1089-92.

The dissent's mocking of the prison officials' reactions to the prison disturbance revealed its unrealistic view of the prison official's plight. *See, e.g., id.* at 1090-91. An armed inmate, who had already told Whitley that he had killed another inmate earlier, was holding a security officer hostage. *Id.* at 1086-87. Thus, the prison officials had every reason to be agitated and to act quickly to quell any violent uprising.

86. 106 S. Ct. at 1086-87. See *supra* notes 65-67 and accompanying text for discussion of the majority's negligence standard.

87. See *supra* note 71 and accompanying text for relevant discussion of applying the eighth amendment.

88. 106 S. Ct. 1087-88. See *supra* notes 25-28, 34-37 and accompanying texts for discussion of governmental immunity under § 1983 and the negligence standard.

better able to effectively operate prisons in situations in which the prison officials themselves may be in actual or potential danger. Yet, the Court's affirmance of the negligence standard[89] leaves an upper limit on prison officials' discretionary actions in prison violence situations.

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89. See *supra* notes 38-41 and accompanying text for discussion of the negligence standard.