No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, ET AL., PETITIONERS

v.

GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether petitioners, state prison officials sued in their individual capacities, may be held liable under 42 U.S.C. 1983 on the theory that they subjected respondent, a prison inmate, to cruel and unusual punishment because respondent was injured in the course of petitioners' efforts to quell a prison riot.

2. Whether petitioners are entitled to qualified immunity from damages liability under the standard established in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case concerns the liability under 42 U.S.C 1983 of individual state prison officials as a result of their actions in quelling a prison riot. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials may be held liable in many of the same circumstances in which state officials are liable under Section 1983. Since this Court's decision will affect the extent to which federal prison officials may be held personally liable for acts committed in the course of their official duties, the United States has a clear interest in this case.

STATEMENT

1. On June 27, 1980, respondent was an inmate in Cellblock A of the Oregon State Penitentiary.[1] That evening, some inmates in Cellblock A became upset by what they believed to be the mistreatment of inmates who were being taken to the penitentiary's segregation and isolation building. Apparently because of the inmates' agitation, the corrections officers on duty in Cellblock A ordered the inmates to return to their cells. The inmates normally would have been permitted to remain outside their cells for three more hours. One inmate, Richard Klenk, was particularly upset by the order to return to his cell. He assaulted one of the two corrections officers on duty and that officer left the cellblock. Several inmates then began to destroy furniture and construct a barricade to block access into the cellblock. Officer Walker Fitts, who remained in Cellblock A, was moved to an office within the cellblock and kept under the control of the inmates. Pet. App. 2, 17-18; Tr. 53, 55-56, 100-108, 489.

The prison authorities were immediately notified of the incident. Petitioner Harol Whitley, the prison security manager, climbed over the furniture barricade and entered Cellblock A (Pet. App. 2, 18; Tr. 56). He spoke to inmate Klenk in an effort to end the disturbance; Klenk responded by threatening to kill Officer Fitts (Tr. 369-370). Whitley then arranged for several inmates to go to the segregation and isolation building to ascertain the condition of the inmates who had been observed earlier in the

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[1] Cellblock A housed inmates with good disciplinary records. These inmates received privileges that were not accorded other prisoners, such as the right to spend more time outside their cells. Pet. App. 17; Tr. 55.

evening. They found that the inmates taken to isolation had been intoxicated. Whitley returned to Cellblock A and was permitted to speak to Officer Fitts, who appeared unharmed. Pet. App. 2-3, 18-19; Tr. 56-57, 370-372. At some point, inmate Klenk told Whitley that one inmate had been killed and that others would die (Pet. App. 3; Tr. 372). Whitley also became aware that Klenk had a homemade knife (Pet. App. 3, 19; Tr. 57).

Whitley later reentered the cellblock a third time to check on the condition of Officer Fitts after Fitts had been moved to a new location (Pet. App. 3, 19; Tr. 57). Respondent asked Whitley for the key to the cells housing elderly inmates so that these inmates could move to a safer location away from the disturbance. Whitley agreed to return with the key. Pet. App. 3, 19-20; Tr. 115-116.

Whitley left Cellblock A and conferred with petitioner Hoyt C. Cupp, the superintendent of the penitentiary, and petitioner J.C. Keeney, the assistant superintendent. They agreed that tear gas could not be used to quell the riot because the gas might not act quickly enough, could be ineffective because of the large area controlled by the inmates, and would cause discomfort to the inmates who had obeyed the order to return to their cells. The officials decided that the only feasible alternative was to enter the cellblock using armed force. Cupp ordered the squad to "shoot low." Pet. App. 3, 19; Tr. 372-375, 467-468, 511-512.

Respondent was waiting for Whitley when Whitley entered with the armed officers. Whitley ran up the cellblock stairs in pursuit of inmate Klenk, who had run toward the cell in which Officer Fitts was being held. Respondent began to run up the stairs after

Whitley and was hit in the knee by a shot discharged by petitioner Robert Kennicott, a corrections officer. Pet. App. 3-4, 20-21; Tr. 58, 118-119, 375-376. Kennicott testified that he believed that the inmates pursuing Whitley presented a danger both to Whitley and to Officer Fitts (Tr. 459; see also Tr. 375). Whitley subdued Klenk, and respondent was given medical care. Respondent suffered permanent damage to the nerve in his leg. Pet. App. 4, 21-22; Tr. 59, 67, 376.

2. Respondent commenced this action in the United States District Court for the District of Oregon seeking damages under 42 U.S.C. 1983. He asserted that petitioners' actions in quelling the riot subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

At the conclusion of the jury trial, the district court granted petitioners' motion for a directed verdict (Pet. App. 15-40). The court stated that in determining whether the officials' conduct amounted to cruel and unusual punishment, it was required to "examine such factors as the need for application of force, the relationship between the need and amount of force that was used, and the extent of the injury inflicted" (*id.* at 25). Observing that "[p]rison officials must be free to deal firmly with outbreaks and uncontrolled situations" (*id.* at 26), the court concluded that the use of force to quell the riot in this case was justified because negotiations had failed to restore order, a guard was being held hostage, and a leader of the riot had "claimed to have killed one inmate and threatened others" (*id.* at 27). The court also found that the level of force used by petitioners was reasonable (*id.* at 30):

> Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that [petitioners'] actions were not reasonably necessary.

The district court also held that petitioners were entitled to qualified immunity from damages. Applying the test set forth in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the court found that petitioners could not have reasonably known that their actions to suppress the disturbance and rescue the hostage would violate any prisoner's Eighth Amendment rights. It noted that no reported case had held that a prisoner could recover damages for prison officials' actions in this context and that the applicable decisions "provided great discretion to prison officials to take necessary action to maintain and control prison situations" (Pet. App. 35).[2]

3. The court of appeals reversed by a divided vote (Pet. App. 1-14). The court held that there was sufficient evidence from which a jury could have found that respondent's constitutional rights had been violated. It stated (*id.* at 6-7 (citation omitted)):

> [A] proper standard deems [the] eighth amendment to have been violated when the force used

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[2] The district court stated that it "[did] not understand [respondent] to assert an independent violation of fourteenth amendment due process" (Pet. App. 23 n.1). The court also held (*id.* at 35-39) that respondent's state law tort claims were barred because petitioners were immune from liability under state law.

> is "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time." Thus if a prison official deliberately shot [respondent] under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary, [respondent's] constitutional right would have been infringed.

The court observed that there was evidence that the riot was subsiding at the time petitioners acted and that "[t]he jury might have believed that conditions were so improved that it was or should have been apparent to [petitioners], and have called for less force" (*id.* at 8). The court noted that each side had presented testimony concerning the propriety of petitioners' actions and "[i]t was the jury's function to weigh the experts' testimony" (*id.* at 9). The court therefore remanded for a new trial (*id.* at 9-10).

The court of appeals also addressed petitioners' qualified immunity defense. It stated that a finding of a violation of an inmate's Eighth Amendment rights is "inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive" (Pet. App. 10). Thus, "[i]f an eighth amendment violation is found, there is no qualified immunity defense available" (*id.* at 11).[3]

Judge Wright dissented (Pet. App. 11-14). He agreed with the district court that "no triable issue existed because the prison officials responded in good faith to a genuine emergency," stating that "[c]lose judicial scrutiny is inappropriate where prison officials react in good faith to a true crisis" (*id.* at 12). With respect to the qualified immunity issue, Judge

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[3] The court of appeals affirmed the district court's dismissal of respondent's state law tort claims (Pet. App. 11).

Wright observed that the majority had "merge[d]" the question whether there was a violation of Eighth Amendment rights with "the question whether a right is 'clearly established' for qualified immunity purposes" (*id.* at 13). He concluded that these constitutional rights were not clearly established, noting (*ibid.*) that "[n]o court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled."

SUMMARY OF ARGUMENT

A. Prison officials are charged with the "monumental task[]" (*Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 9) of maintaining the safety and security of institutions housing proven lawbreakers, in which violence is an unavoidable fact of life. In the incident at issue here, for example, inmates took control of a cellblock, assaulted one guard, and held another guard hostage and threatened his life. Petitioners were required to use force to rescue the hostage and reestablish control over the cellblock.

The question in this case is whether petitioners' actions violated respondent's constitutional rights. This Court consistently has adhered to the view that prison officials' determinations regarding prison security are entitled to "wide-ranging deference," both because of these officials' expertise and because the operation of prisons is a matter within the province of the executive and legislative branches. Such deference is especially appropriate when security decisions are evaluated under the Eighth Amendment because the Amendment only establishes a minimum

standard for prison officials' actions, barring the "'unnecessary and wanton infliction of pain.'" *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976).

A prison security measure that is a reasonable response to security concerns does not constitute "punishment" under the Due Process Clause (*Bell* v. *Wolfish*, 441 U.S. 520, 539-540 (1979)), and therefore cannot violate the Eighth Amendment's prohibition against cruel and unusual punishment. Moreover, even a security measure that is unreasonable may not result in the "unnecessary and wanton infliction of pain"; the Eighth Amendment is violated only if the measure does inflict pain upon an inmate and is so grossly excessive in view of the security concerns it is designed to address that it can fairly be said to have a punitive component unrelated to the maintenance of security.

The court below plainly erred by holding that respondent had raised a jury question concerning the propriety of petitioners' conduct under the Eighth Amendment. In view of the serious threat that the riot posed to the safety of both corrections officers and inmates, the district court correctly concluded that petitioners' use of force to quell the riot did not constitute cruel and unusual punishment. Respondent's evidence at most created an issue as to whether petitioners made the best possible decisions under the circumstances; it did not show that petitioners' actions were grossly excessive or amounted to the wanton infliction of pain.

B. Even if petitioners' actions did violate respondent's Eighth Amendment rights, petitioners are immune from liability for damages. This Court held in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that monetary liability is appropriate only if a public

official violates a constitutional right that was "clearly established" at the time of his unlawful conduct. Since no decisions had addressed the propriety under the Eighth Amendment of the use of force to quell a prison riot, respondent's rights in this context obviously were not clearly established.

The court of appeals' rejection of petitioners' immunity defense apparently rested on its view that an official is not entitled to immunity if the relevant general legal standard is clearly established at the time of the challenged conduct. This rule ignores the fact that it often is not at all clear how a general standard applies to the particular situation in which the official is required to act. Here, for example, standards such as "cruel and unusual punishment" or "deliberate indifference" to inmates' rights provide no guidance concerning the application of the Eighth Amendment to petitioners' conduct. Thus, the court of appeals' approach is fundamentally at odds with this Court's repeated statements that an official is entitled to immunity unless he reasonably could have known that his conduct was unlawful. Since petitioners had no basis even to question the constitutionality of their actions, they are entitled to immunity from liability for damages.

ARGUMENT

RESPONDENT CANNOT RECOVER DAMAGES UNDER 42 U.S.C. 1983 FOR PETITIONERS' CONDUCT IN QUELLING A PRISON RIOT

The parties and the courts below have characterized the question in this case as whether petitioners' conduct in quelling the prison riot violated the Eighth Amendment's prohibition of "cruel and unusual punishments." [4] As a threshold matter, we are not certain that petitioners' action should be evaluated under the Eighth Amendment.

There is no evidence that petitioners intended to inflict "punishment" on respondent or any other inmate. Respondent argues only that, in restoring prison security, petitioners used force that was excessive under the circumstances. In addition, respondent's claim does not rest upon the breach by prison officials of an affirmative obligation arising solely as a result of respondent's incarceration, such as the obligations to provide sanitary living conditions and access to medical care discussed in this Court's previous Eighth Amendment cases. See *Rhodes* v. *Chapman*, 452 U.S. 337, 347-348 (1981); *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976). The right relied upon by respondent in this case is not unique to persons who are incarcerated after being convicted of a criminal offense; all persons are protected by the Constitution against the use of excessive force by law enforcement officers. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787 (1966); *Screws* v. *United States*, 325 U.S. 91 (1945). The conduct

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[4] This Court has held that the Eighth Amendment is made applicable to the states by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

challenged by respondent similarly is not by its nature restricted to the prison setting; law enforcement officers are confronted with riots and hostage-takings on urban streets and in office buildings.

These factors suggest to us that the Eighth Amendment may not govern the conduct at issue in this case. Cf. *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). The constitutionality of petitioners' actions might more properly be measured by the standard that applies to law enforcement officers' conduct generally: whether petitioners violated respondent's due process rights because they used excessive force in responding to the threat to prison security and safety posed by the riot. 481 F.2d at 1033; see also *Norris* v. *District of Columbia*, 737 F.2d 1148, 1150-1152 (D.C. Cir. 1984); *United States* v. *Harrison*, 671 F.2d 1159, 1161-1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); *Putman* v. *Gerloff*, 639 F.2d 415, 420-421 (8th Cir. 1981).[5] In view of the approach taken by the parties and the courts below, however, we have framed our argument in Eighth Amendment terms.

A. Respondent Was Not Subjected To Cruel And Unusual Punishment By Petitioners' Actions In Suppressing The Prison Riot

1. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct" (*Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 8). There is an "ever-present potential for violent confrontation and conflagration" (*Jones* v. *North Carolina Prisoners' Labor Union*,

[5] Petitioners' actions plainly did not violate this standard (see pages 22-24, *infra*).

Inc., 433 U.S. 119, 132 (1977)). The close quarters in which inmates live and work and the constant supervision of inmates by corrections officers combine to create a volatile atmosphere of tension, frustration, resentment, and despair. The violent conduct by inmates that all too often results—directed against prison officials as well as fellow inmates—is an unfortunate, but unavoidable, fact of life in our Nation's prisons. See *Hudson* v. *Palmer*, slip op. 8; *Wolff* v. *McDonnell*, 418 U.S. 539, 562 (1974).[6]

Prison administrators are charged with the "monumental task[]" (*Hudson* v. *Palmer*, slip op. 9) of protecting the security of the institution and the safety of guards and other prison officials, inmates, and visitors in the face of these difficult conditions. As this Court has emphasized, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974); see also *Bell* v. *Wolfish*, 441 U.S. 520, 546-547 (1979). Thus, the issue presented here—the limits imposed by the Eighth Amendment upon prison officials' actions to protect safety and security in correctional institutions—is of overriding practical importance to prison administration.

2. This Court has made clear that the Eighth Amendment's prohibition of cruel and unusual pun-

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[6] Recent statistics concerning prison violence confirm this Court's observations in *Hudson* (slip op. 8) regarding the seriousness of this problem. During 1983 and the first half of 1984 there were over 30 riots or similar disturbances in the Nation's prisons, over 150 killings of inmates by other prisoners, nine killings of prison personnel by inmates, and several thousand assaults by inmates upon prison personnel. See *Prison Violence*, 9 Corrections Compendium 1, 6-10 (April 1985).

ishment "proscribes more than physically barbarous punishments" (*Estelle* v. *Gamble*, 429 U.S. at 102). Penal measures that involve the " 'unnecessary and wanton infliction of pain' " have been found to violate the Eighth Amendment. *Id.* at 103, quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). For example, deliberate indifference to the medical needs of prison inmates constitutes cruel and unusual punishment because it can be the equivalent of physical torture or result in "pain and suffering which no one suggests would serve any penological purpose" (*Gamble*, 429 U.S. at 103). Similarly, the conditions of prison inmates' confinement—their living and working environment and the punishment inflicted upon them for misconduct—may violate the Eighth Amendment if the conditions are such that they amount to cruel and unusual punishment. *Rhodes* v. *Chapman*, 452 U.S. at 346-347; *Hutto* v. *Finney*, 437 U.S. 678, 685 (1978).

On the other hand, the Eighth Amendment plainly does not bar prison officials from taking measures to protect the safety and security of correctional institutions, even if such actions result in the infliction of pain upon inmates. The Amendment reaches only punitive official action that is "unnecessary and wanton"; security measures further the "central" correctional goals of safety and security. This Court recently observed in the Fourth Amendment context that a prisoner has no legitimate expectation of privacy in his cell because "society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security" (*Hudson* v. *Palmer*, slip op. 10). Similarly, the Eighth Amendment does not bar

prison officials from acting to protect the institution's security and safety.

This is not to say that any rule, practice, or act will pass constitutional muster—assuming that the Eighth Amendment supplies the relevant standard—simply because it is labeled a security measure. For example, the wholly unjustified infliction of severe injuries upon an inmate by a corrections officer might well amount to cruel and unusual punishment. See, *e.g.*, *Williams* v. *Mussomelli*, 722 F.2d 1130 (3d Cir. 1983); *King* v. *Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 23-24 (2d Cir. 1971). The relevant factors are whether the challenged action was motivated by genuine security concerns and whether it was so wholly excessive in view of the concerns it was designed to address that it rose to the level of cruel and unusual punishment.

This is not the first context in which this Court has been called upon to delineate the proper scope of judicial oversight of prison security decisions. The Court previously has rejected challenges to prison security measures under the First Amendment, the Fourth Amendment, the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment, repeatedly affirming 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" (*Bell* v. *Wolfish*, 441 U.S. at 547). This deference "is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the op-

eration of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548; see also *Hudson* v. *Palmer*, slip op. 9-10; *Block* v. *Rutherford*, No. 83-317 (July 3, 1984), slip op. 8-9; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 126, 128; *Pell* v. *Procunier*, 417 U.S. at 826-827.

In *Bell* v. *Wolfish*, *supra*, the Court addressed a challenge under the Fifth Amendment to several rules and practices designed to promote the security of a correctional institution housing pretrial detainees.[7] The Court observed that the Fifth Amendment, rather than the Eighth Amendment, supplied the relevant constitutional standard because "a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law" (441 U.S. at 535 (footnote omitted)). It held that "[r]estraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment" (*id.* at 540) and therefore do not violate due process. If, on the other hand, the restraints are "arbitrary or purposeless," they cannot be justified as security measures and amount instead to impermissible punishment (*id.* at 539).

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[7] At issue in *Bell* were (1) a rule permitting inmates to receive hardback books only if the books were mailed directly from a publisher, bookstore, or book club; (2) a rule barring inmates from receiving packages containing food or personal property except for one package of food at Christmas; (3) the practice of conducting unannounced searches of inmate living areas; and (4) a rule requiring inmates to expose their body cavities for inspection in the course of a strip search following a contact visit with a person from outside the institution. See 441 U.S. at 548-560.

Under the standard set forth in *Bell*, the party challenging a prison security measure bears the "heavy burden of showing that [prison] officials have exaggerated their response to the genuine security considerations that actuated [the challenged] restrictions and practices" (441 U.S. at 561-562), taking into account the "wide-ranging" deference accorded to prison officials' determinations in this area (*id.* at 562, 540-541 n.23). The Court in *Bell* held that this standard had not been met and upheld the challenged security measures.

Recently, in *Block* v. *Rutherford*, *supra*, the Court again rejected a due process challenge to security measures applicable to pretrial detainees. The district court in that case declared unconstitutional the prison's policy barring contact visits between inmates and their relatives and friends, holding that the policy was an excessive response to security concerns. This Court rejected that conclusion. It found that the relevant inquiry was whether the policy was "reasonably related to the security of [the] facility" (slip op. 10). Observing that the district court had recognized that many security considerations weighed in favor of the prison's policy, this Court held that "[w]hen the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of [the prison] for that of the experienced administrators of that facility" (*id.* at 12-13).[8]

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[8] This Court discussed the application of this type of reasonableness standard in a somewhat related context in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). *Youngberg* concerned the constitutional rights of mentally retarded persons involun-

In our view, the test applied in *Bell* and *Block* provides an appropriate starting point for assessing a security measure under the Eighth Amendment.[9] The administration of a prison is "at best an extraordinarily difficult undertaking" (*Wolff* v. *McDonnell*, 418 U.S. at 566), and, as discussed above (see pages 11-12 and note 6, *supra*), where security and safety are concerned the task facing prison officials is

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tarily committed to state facilities. The Court held that the conditions under which such persons are confined—their freedom of movement, their safety within the institution, and the training provided by the state—must satisfy a reasonableness standard: " 'the courts [are required to] make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made' " (*id.* at 321). Relying in part upon its prior decisions in the prison context (*id.* at 322 n.29), this Court stated that "courts must show deference to the judgment exercised by a qualified professional" (*id.* at 322). It concluded that "the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment" (*id.* at 323 (footnotes omitted)).

[9] The ultimate inquiry in *Bell* and *Block*—whether a particular condition of confinement constitutes "punishment" and is, simply by virtue of that fact, prohibited—is not relevant in this context because, unlike pretrial detainees, convicted inmates such as respondent can be punished. Indeed, the determination that the Eighth Amendment supplies the standard applicable to petitioners' actions carries with it the conclusion that security measures of the sort at issue here are an element of punishment analogous to the size and sanitary condition of an inmate's cell (see pages 10-11, *supra*). The question is whether a security measure violates the Eighth Amendment because it is "cruel and unusual."

"monumental" (*Hudson* v. *Palmer*, slip op. 9). The deference accorded to prison administrators' security decisions in other contexts is just as appropriate when such decisions are reviewed under the Eighth Amendment. See *Rhodes* v. *Chapman*, 452 U.S. at 349 n.14 ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators").[10]

Furthermore, even if a security measure fails to satisfy this standard because it is not reasonably related to the need to maintain order, the measure does not necessarily constitute *cruel and unusual* punishment. Cruel and unusual punishment is the "'unnecessary and wanton infliction of pain.'" *Gamble*, 429 U.S. at 103; see also *Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977). The challenged conduct thus must result in pain analogous to that caused by physical torture or indifference to inmates' serious medical needs. Cf. *Gamble*, 429 U.S. at 103-104.

The official action also must be "wanton." In other words, the action must depart from the bounds of reasonable conduct to a degree that fairly indicates the presence of a punitive component unrelated to

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[10] The present case differs from *Bell* and *Block* in that what is challenged here is a decision by prison officials to take emergency action in response to a specific threat to prison security; this Court's previous decisions addressed security policies of general application. The emergency nature of the situation obviously is relevant in determining whether the officials acted reasonably. Even the court of appeals acknowledged that "[prison] authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis." Pet. App. 6; see also *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). Thus, in determining whether a particular security measure is reasonable, a court must give due consideration to any exigent circumstances facing the prison officials.

the maintenance of prison security.[11] Just as prison medical care violates the Eighth Amendment only if it is so grossly improper that it evidences deliberate indifference to the inmate's serious medical needs, a prison security measure is unconstitutional only if it is a grossly excessive response to legitimate security concerns.[12]

3. a. Although the court below used terms such as "disproportionate" and "excessive" to describe the relevant legal standard (Pet. App. 6), it did not apply those concepts to the facts of this case. The court instead adopted a rule that tightly restricts the discretion of prison officials. It stated that an

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[11] The Eighth Amendment establishes a lower limit upon the permissible range of prison officials' conduct; it does not set particular standards amounting to a model code of prison administration. Cf. *Rhodes* v. *Chapman*, 452 U.S. at 347, 348-349 n.13. Specific standards for the operation of prisons are supplied by the statutory and regulatory rules that govern the actions of prison officials. For example, at the time of the events at issue in this case the State of Oregon had an established policy concerning the use of force to maintain security and safety in correctional institutions (see Tr. 236-237).

[12] The courts of appeals generally have followed a similar approach in evaluating claims that prison security measures violated an inmate's Eighth Amendment rights. For example, in *Williams* v. *Mussomelli*, *supra*, the court of appeals approved a jury instruction stating that the inmate had a right "not to be subjected to unnecessary, unreasonable, and grossly excessive force by prison officials" and that such officials could not use force that "violates the standards of decency more or less universally accepted." 722 F.2d at 1132; see also *Soto* v. *Dickey*, 744 F.2d 1260 (7th Cir. 1984), cert. denied, No. 84-1327 (Mar. 25, 1985); *Jones* v. *Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), cert. denied, No. 83-6480 (June 4, 1984); *Sampley* v. *Ruettgers*, 704 F.2d 491, 495-496 (10th Cir. 1983); cf. *Johnson* v. *Glick*, 481 F.2d at 1033.

Eighth Amendment violation would be established if the prison officials "knew or should have known that it was unnecessary" to use armed force in order to quell the riot (Pet. App. 6-7).

The court of appeals appears to have based its rule upon the tort standard governing the use of force. Compare Restatement (Second) of Torts § 132 (1965) (use of force to effect an arrest "is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary"); see also *id.* § 70(1). This Court already has rejected the view that the Eighth Amendment constitutionalizes state tort law. In *Gamble*, the Court held that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 106; cf. *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981); *Baker* v. *McCollan*, 443 U.S. 137, 142, 146 (1979).

Moreover, the court of appeals' rule provides for considerably more judicial intrusion into prison security decisions than the tests previously applied by this Court, and therefore violates this Court's repeated injunction that prison officials' decisions must be accorded broad deference (see pages 14-16, *supra*). Indeed, the standard resembles the "compelling necessity" test that this Court in *Bell* deemed overly restrictive of prison officials' discretion (see 441 U.S. at 531-540). Thus, the court of appeals failed to apply the correct legal standard in evaluating respondent's claim.

b. The court of appeals also stated that an Eighth Amendment violation could be established by a show-

ing that the prison officials acted with "deliberate indifference" to respondent's right "to be free of cruel and unusual punishment" (Pet. App. 7). Acknowledging that this standard was developed by this Court in *Gamble* to identify situations in which the denial of medical care to inmates constitutes cruel and unusual punishment, the court of appeals found that the same standard "may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners" (Pet. App. 7).

The court below erred by utilizing this standard in the present context. The deliberate indifference test was designed to measure claims that prison officials had not fulfilled their affirmative obligation to provide medical care to inmates (see *Estelle* v. *Gamble*, 429 U.S. at 103). In selecting an appropriate security measure, by contrast, prison officials take into account much more than a single affirmative obligation. They must balance a number of competing factors, such as the safety of guards, the safety of inmates, and the institutional interest in restoring order, and consider as well the adverse effect that a proposed security measure might have upon the interests of inmates, guards, and the institution itself. An allegation that prison officials were "deliberately indifferent" to one of these factors—the infliction of pain upon inmates—may be relevant to determining whether the security action was appropriate, but is not by itself sufficient to show that a prison official acted wantonly in carrying out his obligation to maintain the safety and security of the institution. That determination can only be made on the basis of an assessment of all of the relevant factors. Therefore, the deliberate indifference standard simply is not a

proper measure of the constitutionality of prison security actions.

c. Judged against the appropriate standard, it is clear that petitioners' actions did not violate the Eighth Amendment. Petitioners confronted a situation in which one guard had been assaulted, threats had been made against a guard who was being held hostage and against other inmates, one inmate was known to have a knife, an inmate reportedly had been killed, and attempts to negotiate an end to the disturbance had proven unsuccessful. These facts unquestionably justified some security response by petitioners, including the use of force; viewing the evidence in the light most favorable to respondent,[13] a jury could not reasonably find that petitioners' actions were grossly excessive or wanton.

It is undisputed that petitioners evaluated possible courses of action, reasonably determined that certain alternatives—such as the use of tear gas—were not appropriate in this situation because they might jeopardize the safety of the hostage, and concluded that the use of force was necessary to protect the hostage and the other inmates. Although it is unfortunate that respondent was injured, the officials understandably believed that he posed a threat to both the hostage and the rescue party. See Pet. App. 26-30 (district court opinion). The district court correctly concluded that "[e]ven in hindsight, it cannot be said that [petitioners'] actions were not reasonably necessary" (*id.* at 30).

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[13] In evaluating the propriety of a decision to grant a motion for a directed verdict, "all reasonably possible inferences [should be drawn in favor of] the party whose case is attacked." *Galloway* v. *United States*, 319 U.S. 372, 395 (1943); see generally 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971).

The court of appeals held that there was a jury question concerning the lawfulness of petitioners' conduct on the basis of respondent's contentions that the riot had begun to subside and that prison officials could have reasserted control by using a lesser amount of force (see Pet. App. 8-9). Respondent's expert witnesses testified that petitioners "were possibly a little hasty in using" armed force (Tr. 314) and that petitioners should have attempted to quell the riot using alternative methods short of the use of force (Tr. 266-270).

This Court has emphatically rejected precisely this type of second-guessing of prison administrators' decisions, and it should do so again here. As we have discussed, it is clear that petitioners acted reasonably in response to a crisis posing unquestionably grave security concerns; even respondent's experts, viewing the matter with two years' hindsight, did not testify that petitioners' actions were grossly excessive or clearly arbitrary.[14] In view of these facts, the court's "inquiry should have ended" (*Block* v. *Rutherford*, slip op. 13). The dispute over whether petitioners' actions constituted the ideal response under the circumstances is not sufficient to create an issue for the jury under the Eighth Amendment, especially in view of the fact that petitioners acted in the face of immediate threats to the lives of inmates and a cor-

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[14] Petitioners' expert witnesses testified that petitioners' actions were the most reasonable response to the situation. See Tr. 436-439, 547-554. In any event, it is the "public attitude" toward the challenged conduct, not the subjective views of experts, that is relevant in determining whether the conduct violates the Eighth Amendment. *Rhodes* v. *Chapman*, 452 U.S. at 348-349 n.13; *Gregg* v. *Georgia*, 428 U.S. at 173 (plurality opinion).

rections officer. Petitioners' actions clearly fell within "[t]he wide range of 'judgment calls' that * * * are confided to officials outside of the Judicial Branch of Government" (*Bell* v. *Wolfish*, 441 U.S. at 562). They plainly did not amount to the grossly excessive conduct that constitutes "unnecessary and wanton infliction of pain" violative of the Eighth Amendment.

B. Petitioners Are Immune From Liability For Damages Under This Court's Decision In *Harlow* v. *Fitzgerald*

It is settled that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18; *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 7. The court of appeals concluded that a finding on remand that petitioners violated respondent's Eighth Amendment rights automatically would defeat petitioners' qualified immunity defense. It stated that "[a] finding of deliberate indifference [to respondent's right to be free of cruel and unusual punishment] is inconsistent with a finding of good faith or qualified immunity." Pet. App. 10.

Even if the court of appeals correctly concluded that petitioners might have violated respondent's Eighth Amendment rights, it erred by holding that a state official is never entitled to immunity in an action based upon a violation of the Eighth Amendment. Indeed, the court's decision reflects a funda-

mental misconception of the rule established by this Court in *Harlow*.[15]

Harlow rests upon the principle that a public official should be held liable in damages only if he reasonably could have known that the law forbade his conduct. The official who acts unlawfully in such circumstances "should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action" (*Harlow*, 457 U.S. at 819 (footnote omitted)). If, on the other hand, "an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Ibid.* (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)).

Petitioners could not possibly have been aware in June 1980 that their actions violated respondent's Eighth Amendment rights. We have not located a single appellate decision discussing the circumstances in which the Eighth Amendment might be violated by the use of armed force to control a prison riot. Indeed, the decisions of that time concerning Eighth Amendment challenges to prison officials' actions in quelling disturbances indicated that officials had broad discretion in such circumstances to act to eliminate the threat to security and safety. *Poindexter* v. *Woodson*, 510 F.2d 464 (10th Cir.), cert. denied, 423 U.S. 846 (1975); *Clemmons* v. *Greggs*, 509 F.2d

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[15] This case does not present a question concerning the relationship between qualified immunity from liability for damages under 42 U.S.C. 1983 and criminal liability under 18 U.S.C. 242. Cf. *United States* v. *Gillock*, 445 U.S. 360, 372-373 (1980); *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976).

1338, 1339-1340 (5th Cir.), cert. denied, 423 U.S. 946 (1975); *Davis* v. *United States*, 439 F.2d 1118 (8th Cir. 1971); cf. *Spain* v. *Procunier*, 600 F.2d 189, 196 (9th Cir. 1979) (modifying district court order to reduce restrictions on use of tear gas).

Decisions finding violations of the Eighth Amendment in the prison context were restricted to claims of unjustified assaults upon inmates by prison guards. See, *e.g.*, *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d at 23-24. Thus, the district court correctly found that "there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage" (Pet. App. 34) and that petitioners therefore "could not have reasonably known that actions taken to quell the disturbance and rescue the hostage would violate any prisoner's constitutional rights" (*id.* at 35).[16]

The court of appeals did not question the district court's holding that the decided cases provided no

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[16] A court should require especially strong evidence before holding that a right was clearly established if the right involves limitations upon official action in life-threatening emergency situations, such as the prison riot confronted by petitioners in this case. As this Court observed in an analogous context, "[w]hen a condition of civil disorder in fact exists, there is obvious need for prompt action" (*Scheuer* v. *Rhodes*, 416 U.S. 232, 246 (1974)). Moreover, "[d]ecisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy" (*id.* at 246-247). Since public officials who must act in such situations necessarily have less time to evaluate all of the implications of their chosen course of action, a right would have to be quite clearly established to inform a reasonable person that his action would be unlawful.

guidance concerning the application of the Eighth Amendment in this context. The court of appeals' conclusion that qualified immunity is never a defense to an Eighth Amendment claim appears to be based upon the view that all Eighth Amendment rights became clearly established when this Court adopted the "deliberate indifference" test in *Gamble*.[17] Even if the relevant legal standard is settled, however, the application of that standard in a particular factual setting often will be uncertain; the right in question cannot be deemed "clearly established" in that circumstance. For example, in *Davis* v. *Scherer*, *supra*, the question was whether state officials' failure to hold a hearing prior to the termination of the plaintiff's employment violated the plaintiff's clearly established due process rights. This Court observed that its previous decisions required " 'some kind of a hearing' " in this context, but concluded that the plaintiff's right to a pre-termination hearing was not clearly established because the Court had not yet "specif[ied] any minimally acceptable procedures for termination of employment" (*Davis* v. *Scherer*, slip op. 8 n.10). *Davis* makes clear that the existence of a general legal standard is irrelevant under *Harlow*; the unconstitutionality of the official's conduct in the particular situation at issue must be clearly estab-

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[17] Alternatively, the court of appeals' statement that "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity" (Pet. App. 10) could mean that an official who acts with deliberate indifference necessarily does not act in subjective good faith, and therefore is not entitled to an immunity defense. The flaw in this reasoning is that it ignores this Court's determination in *Harlow* that an official's subjective intent is irrelevant in ascertaining whether he is entitled to immunity (457 U.S. at 815-819).

lished in order to defeat an immunity claim. Cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 22-24 & n.23.

The premise of *Harlow* is that the imposition of monetary liability is appropriate when an official violates a clearly established right because the official "could be expected to know that [his] conduct would violate statutory or constitutional rights" (457 U.S. at 819). Broad standards such as "due process," "equal protection," or "cruel and unusual punishment" do not by themselves provide sufficient information to enable a reasonable public official to conform his conduct to the requirements of the Constitution. Therefore, the fact that a legal standard is settled cannot alone deprive an official of qualified immunity. *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, No. 84-1139 (Mar. 25, 1985) (stating that an interpretation of *Harlow* requiring only that the broadly-defined right be clearly established "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic") (emphasis in original); see also *Floyd* v. *Farrell*, 765 F.2d 1, 5-6 (1st Cir. 1985); *Zook* v. *Brown*, 748 F.2d 1161, 1164-1165 (7th Cir. 1984); *Evers* v. *County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984); *Bailey* v. *Turner*, 736 F.2d 963, 970, 972 (4th Cir. 1984); *Brockell* v. *Norton*, 732 F.2d 664 (8th Cir. 1984); *O'Hagan* v. *Soto*, 725 F.2d 878, 879 (2d Cir. 1984); but see *Bass* v. *Wallenstein*, No. 83-2392 (7th Cir. July 30, 1985), slip op. 22; *Bates* v. *Jean*, 745 F.2d 1146, 1151-1152 (7th Cir. 1984); *Trejo* v. *Perez*, 693 F.2d 482, 488 & n.10 (5th Cir. 1982).[18]

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[18] In some cases in which courts of appeals have rejected an immunity claim on the ground that the legal standard was

If the adoption of a legal standard such as "deliberate indifference" or "clearly excessive force" were by itself sufficient to deprive prison officials of qualified immunity in every case in which that standard applied, these officials would have no way of knowing in advance whether their decisions might later be the basis of a successful action for money damages. This result "would undoubtedly deter even the most conscientious [prison administrator] from exercising his judgment independently, forcefully, and in a manner best serving" the correctional system (*Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1975)). It would "contribute not to principled and fearless decision-making but to intimidation" (*Pierson* v. *Ray*, 386 U.S. at 554)—the very result that qualified immunity is designed to prevent.

We do not contend that a right is clearly established only after the precise factual situation has been addressed authoritatively in judicial decisions. The proper inquiry is whether a reasonable person would have known that the challenged conduct was unlawful on the basis of the existing case law. As discussed above, petitioners are entitled to immunity because a reasonable prison official could not have known of the limits imposed by the Eighth Amendment upon the use of force to quell a prison riot.

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clearly established, immunity might have been barred under the proper legal test. See *Bates* v. *Jean*, *supra* (use of completely unwarranted force).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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