mane to inmates generally.[250] Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as "punishment," there must be a culpable, "wanton" state of mind on the part of prison officials.[251] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[252] in the context of emergency actions, *e.g.*, actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable.[253] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[254]

Beginning with *Holt v. Sarver*,[255] federal courts found prisons or entire prison systems to violate the Cruel and Unusual Punish-

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But even applying the Court's flawed Eighth Amendment jurisprudence, I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." Id. at 95 (internal quotation marks omitted).

[250] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

[251] Wilson v. Seiter, 501 U.S. 294 (1991).

[252] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994). In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 128 S. Ct. 1520, 1530–31 (emphasis added by the Court). This case is also discussed, *supra*, under Eighth Amendment, "Application and Scope."

[253] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[254] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate). *Accord* Wilkins v. Gaddy, 559 U.S. ___, No. 08–10914, slip op. (2010) (per curiam).

[255] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974). The Supreme Court ultimately sustained the decisions of the lower courts in Hutto v. Finney, 437 U.S. 678 (1978)).