Hudson v. McMillian: Rejecting the Serious Injury Requirement, But Embracing the Malicious-and-Sadistic Standard

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**HUDSON V. MCMILLIAN: REJECTING THE SERIOUS INJURY REQUIREMENT, BUT EMBRACING THE MALICIOUS-AND-SADISTIC STANDARD**

Prisons, as institutions of punishment and reform, were not a prominent fixture in the American criminal justice system until the nineteenth century. With the inception of the prison system, prisoners encountered degrading and inhumane treatment. State and federal courts, however, were often reluctant to criticize and rectify such treatment of prisoners. Instead, the courts adopted a hands-off policy toward prisoners' complaints of excessive

1. **DAVID RUDOVSKY ET AL., THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO PRISONERS' RIGHTS xi-xii (1988)** (stating that prisons were originally intended to be a more humane alternative to corporal and capital punishment, but they quickly evolved into inhumane institutions). "[P]risons were also built with the idea of reformation: the penitentiary was intended to serve as a place for reflection in solitude leading to repentance and redemption." *Id.* at xii. "Imprisonment was thought to be a deterrent to criminal activity . . . and was considered more humane than corporal punishment[,] . . . [b]ut these prisons served in reality only to punish—physically and mentally." *Id.* at xi-xii; see also Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 949 (1970) (noting that the penitentiary was considered a novel penal institution advocated by enlightened American penologists who sought to reform prisoners).

2. See **RUDOVSKY, supra note 1**, at xii. Prior to the creation of a penal penitentiary system, convicts faced, as retribution for their crimes, either corporal or capital punishment. Prisons did not become commonplace until the mid-1800s. *Id.* at xi; see also Special Project, *supra* note 1, at 949 (stating that America's English heritage caused the colonies to base their punishments on retribution and deterrence). Prior to the institution of the prison system, criminal punishments were severely cruel. *Id.*


4. See, e.g., *United States ex rel Knight v. Ragen*, 337 F.2d 425, 426 (7th Cir. 1964) ("Except under exceptional circumstances, internal matters in state penitiataries are the sole concern of the states and federal courts will not inquire concerning them.") (footnote omitted), *cert. denied*, 380 U.S. 985 (1965); *Kirby v. Thomas*, 336 F.2d 462, 464 (6th Cir. 1964) ("[F]ederal courts do not have the power to regulate ordinary internal management and discipline of prisons operated by the states . . . ."); *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir.) ("[I]t is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."). *cert. denied*, 342 U.S. 829 (1951); see also **RUDOVSKY, supra note 1**, at xii (discussing judicial reluctance to intervene).
force and other grievances with prison life. One legacy of the hands-off policy, which persists today, is the showing of extreme deference toward prison officials and administrators.

5. See Rudovsky, supra note 1, at xi-xiii (discussing the courts’ use of the hands-off doctrine toward prisoner complaints).

The courts concurred with the notion that incarceration in prison was for punishment and adopted a “hands-off” policy which prevented prisoners from securing any rights except those their jailers allowed. Few persons, including lawyers, attempted to challenge this policy. . . .

The practical effect of the “hands-off” policy was to place all decisions concerning internal affairs of the prison within the discretion of the prison officials, no matter how arbitrary and inhumane the results. The courts continually deferred to the so-called expertise of the prison administration in refusing even to hear complaints by prisoners concerning violations of their most fundamental rights.

Id. at xii-xiii; David J. Gottlieb, The Legacy of Wolfish and Chapman: Some Thoughts About “Big Prison Case” Litigation in the 1980s, in 1 Prisoners and the Law 2-3, at 2-4 (Ira P. Robbins ed., 1990) (stating that the hands-off doctrine endured because of the theory that prisoners are slaves of the state, separation of powers, federalism, lack of judicial knowledge and expertise in prison issues, fear of opening the doors to increased litigation, and concern for state finances); Michael C. Friedman, Note, Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard, 45 Vand. L. Rev. 921, 927 (1992) (noting that throughout the period during which the hands-off doctrine prevailed, courts almost exclusively deferred to prison administrators and officials when deciding cases dealing with abuse or deprivations of prisoners); see also The Supreme Court, 1990 Term: Leading Cases, 105 Harv. L. Rev. 177, 235-36 (1991) [hereinafter Leading Cases] (noting that courts maintained their hands-off attitude toward prisoners' complaints about prison conditions until the 1970s). "The 1970's saw a general shift in prisoners' rights jurisprudence away from the traditional 'hands-off' doctrine mandating deference to prison officials toward less acquiescent standards under which courts lent a more receptive ear to prisoners' constitutional grievances." Id. See generally Stuart B. Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause, 7 Fordham Urb. L.J. 1, 7-12 (1978).

6. See, Whitley v. Albers, 475 U.S. 312, 321-22 (1986). The Court stated: "[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators" . . . “Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline.

The Supreme Court did not apply the Eighth Amendment to the states until 1962. Consequently, federal courts did not begin to apply the Eighth Amendment to the general treatment of prisoners in American prisons until the late 1960s and early 1970s. In 1986, the Supreme Court first stated that the use of excessive force in prisons falls under the Eighth Amendment's ban against cruel and unusual punishments. Today, the Cruel and Unusual Punishments Clause protects prisoners in the United States from physical attacks by their guards. The scope and effectiveness of this protection,

for Eighth Amendment Prison Condition Law, 41 AM. U. L. REV. 1339, 1346 n.33 (1992) (commenting that "[o]ne recurring theme in Supreme Court cases restricting constitutional protection for the incarcerated is that courts should defer to the judgment of state legislators and prison officials").

7. Robinson v. California, 370 U.S. 660, 666 (1962). The Court applied the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment. Id. The Court, in Robinson, held that imprisoning someone because of his status as a drug addict violated the Constitution's prohibition against cruel and unusual punishments. Id. at 667. The justices struck down a California law that sentenced anyone convicted of being addicted to the use of narcotics to a 90-day jail term. Id. at 667-68. The Court reasoned that drug addiction is an illness and imprisoning a drug addict because of his illness is a punishment disproportionate to the offense. Id. at 667.

8. See Gray, supra note 6, at 1344; see also Leon Friedman, New Developments in Civil Rights Litigation and Trends in Section 1983 Action, in 1 SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEYS' FEES 1992: CURRENT DEVELOPMENTS 325 (PLI Litig. & Admin. Practice Course Handbook Series No. H-448, 1992) (stating that the Supreme Court has recognized five types of actionable wrongs committed by government officials against prisoners). The use of excessive force, the denial of medical treatment, the creation of improper conditions, the denial of claims of entitlement without due process, and the restriction of the right to communicate and worship constitute the five areas of cases involving government officials invading or denying the constitutional rights of prisoners. Id.

9. Whitley, 475 U.S. at 327; see Friedman, supra note 5 (stating that before the 1960s, no federal courts regulated the use of excessive force by prison guards); see, e.g., Johnson v. Glick, 481 F.2d 1028, 1030-31 (2d Cir.) (discussing whether or not "an unprovoked attack on a prisoner by a state prison guard" is one of the rights protected by the Eighth Amendment), cert. denied, 414 U.S. 1033 (1973); see also Ingraham v. Wright, 430 U.S. 651, 664-71 (1977) (holding that the Eighth Amendment only applies to claims of excessive force after the victim has been convicted of a crime).

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

11. Whitley, 475 U.S. at 327. The Court stated, "[w]e think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified." Id. The Court further stated that the Eighth Amendment, rather than the Fourth Amendment, applies to prison excessive force cases "[b]ecause [these] case[s] involve[] prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty . . . . [T]he Due Process Clause affords respondent[s] no greater protection than does the Cruel and Unusual Punishments Clause." Id.; see Ira. P. Robbins, The Legal Dimensions of Private Incarceration, 38 AM. U. L. REV. 531, 717 n.858 (1989) (noting that "[t]he eighth amendment provides post-conviction protection against excessive force"); see also Bradley M. Campbell, Comment, Excessive Force Claims: Removing the Double Standard, 53 U. CHI. L. REV. 1369, 1370 (1986) (noting that
however, is determined by judicial interpretations of the Eighth Amendment.  

In 1976, the Supreme Court established that prison officials violate the Eighth Amendment if they show "deliberate indifference" toward a prisoner's physical needs. The Supreme Court did not, however, adopt the deliberate indifference standard in its first excessive force case, because in that case the alleged excessive force occurred during a prison riot. The Court determined that in dangerous conditions, such as those of a prison riot, a guard's use of excessive force violates the Eighth Amendment only if the guard acted "maliciously and sadistically for the very purpose of causing harm." In 1991, the Court synthesized its prior Eighth Amendment prison jurisprudence by requiring that plaintiffs prove an Eighth Amendment violation by establishing that both the amendment's objective component, whether the violation was sufficiently serious, and its subjective component, whether the guard acted with a sufficiently culpable state of mind, are met. The Court determined that a showing that the prison official acted with deliberate indifference satisfies the Eighth Amendment's subjective component. Thus, while the Court seemed to hold that the deliberate indifference standard is the applicable standard in all Eighth Amendment cases concerning the conditions of prison life, the Court did not announce what level of severity of injury, if any, was necessary to satisfy the Eighth Amendment's objective component in an excessive force case. In addition, the Court never determined if the malicious-and-sadistic standard applied to prison excessive force cases absent precarious, riotous circumstances.

To fill the vacuum left by the Supreme Court's lack of definitive guidance on this issue, the United States Court of Appeals for the Fifth Circuit develope-

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"[m]ost courts consider police use of excessive force in both arrest and detention as violative of the guarantee of due process under the fourteenth amendment").

12. Compare Huguet v. Barnett 900 F.2d 838, 841 (5th Cir. 1990) (holding that significant injury is an element in prison excessive force cases) and Bennett v. Parker, 898 F.2d 1530, 1533 (11th Cir. 1990) (maintaining that "the prisoner must offer some evidence of injury beyond a minimal one"), cert. denied, 111 S. Ct. 1003 (1991) and Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988) (stating that "the extent of the injury is but one of the factors to be considered") with McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990) (holding that "a prisoner alleging an eighth amendment violation need not prove that he suffered a serious physical injury") and Williams v. Boles, 841 F.2d 181, 182 (7th Cir. 1988) (requiring no "severe injury").


14. Whitley v. Albers, 475 U.S. 312 (1986); see infra notes 96-110 and accompanying text.

15. Whitley, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (1973)).


17. Wilson, 111 S. Ct. at 2326.
opposed a significant injury requirement in Eighth Amendment excessive force cases. This doctrine mandated that a prisoner prove that he suffered a significant injury as a result of a guard's use of excessive force. If the prisoner's injury was not considered "significant," courts denied his Eighth Amendment claim against abusive guards. Subsequently, the United States Supreme Court granted certiorari in *Hudson v. McMillian* to determine whether the significant injury requirement "accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted."

In *Hudson*, two prison guards punched and kicked inmate Keith Hudson while he was handcuffed and shackled. The supervisor on duty watched the beating, telling the two guards "'not to have too much fun.'" Even though Hudson suffered only minor injuries as a result of the attack, he brought suit in federal district court under 42 U.S.C. § 1983. In this civil

18. See infra notes 130-38 and accompanying text.
19. Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (en banc); see infra notes 130-39 and accompanying text.
20. See, e.g., Wesson v. Oglesby, 910 F.2d 278, 283 (5th Cir. 1990) (stating that a prisoner who alleged that he suffered a black out as a result of a guard's chokehold, did not meet the serious injury requirement); see also Williams v. Luna, 909 F.2d 121, 124 (5th Cir. 1990) (discussing the serious injury requirement).
23. Id. at 997. Keith Hudson was an inmate and Jack McMillian and Marvin Woods were corrections security officers at the state penitentiary in Angola, Louisiana. Id. Following a verbal argument between McMillian and Hudson, the two guards handcuffed and shackled Hudson and led him toward administrative lockdown. While the prisoner was still handcuffed and shackled, "McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind." Id. For further background on the circumstances surrounding the Hudson case, see David Margolick, *At the Bar: From a Lonely Prison Cell, an Inmate Wins an Important Victory for Civil Liberties*, N.Y. TIMES, Mar. 6, 1992 at B8 (explaining that the guards were angered because Hudson was washing his clothes in the toilet in his cell).
25. Id. The guards' blows bruised Hudson's face, split his lip, cracked his teeth, and loosened his dental plate. Id.; see also Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (describing Hudson's minor injuries), rev'd, 112 S. Ct. 995 (1992).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Individual prisoners may sue abusive guards under § 1983 if the guards' abuse violates federal laws or the Constitution. Id.; see also Monroe v. Pape, 365 U.S. 167, 195 (1961) (maintaining that § 1983 applies even if there is a remedy available under state law and holding that state officials act under color of law even when they exceed their authority); PAUL M. BATOR ET AL., HART & WECHLER'S THE FEDERAL COURTS AND THE FED-
rights action, Hudson alleged that the guards' use of excessive force violated his Eighth Amendment right to be free from cruel and unusual punishment.27 A federal magistrate ruled that the guards used unnecessary physical force.28 On appeal, the United States Court of Appeals for the Fifth Circuit reversed the magistrate's decision and held that Hudson could not prevail on his Eighth Amendment claim because he did not suffer a significant injury.29

The United States Supreme Court reversed the decision.30 The Court rejected the Fifth Circuit's requirement that a prisoner prove he suffered a significant injury to successfully bring an excessive force claim against physically abusive guards.31 At the same time, the Court held that guards are liable for their acts of excessive force only if the guards act "maliciously and sadistically to cause harm."32 In sum, the Court adopted the state-of-mind standard that it had previously reserved for allegations of excessive force.
occurring during a prison riot. The Supreme Court reversed the court of appeals' dismissal and rejected the lower court's adoption of the significant injury requirement.

Justices Stevens and Blackmun, concurring separately, each agreed with the majority's rejection of the significant injury requirement and concurred in the majority's reversal of the court of appeals' decision. Justice Stevens concurred, however, because he thought that the majority's application of the malicious-and-sadistic standard to all Eighth Amendment excessive force cases was harsh and inappropriate. Justice Stevens advocated applying the unnecessary and wanton infliction of pain standard. Justice Blackmun also disagreed with the majority's use of the malicious-and-sadistic standard. Justice Blackmun wrote separately to stress that courts should not implement Eighth Amendment judicial doctrines, like the significant injury requirement, as docket-management measures. Justice Blackmun also clarified that the Eighth Amendment protects against the infliction of psychological as well as physical harm.

Justice Thomas, in his dissent, agreed with the Fifth Circuit that Hudson's case should be dismissed, and argued that there should be a serious injury requirement in excessive force cases. Justice Thomas based his conclusions on the Eighth Amendment's historical role as a protection against harsh criminal sentences, not a protection against harsh treatment of prisoners. Consequently, Justice Thomas does not believe force that results in only mi-

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33. See Whitley, 475 U.S. at 320 (adopting the malicious-and-sadistic standard for cases of excessive force during a prison riot); supra notes 96-107 and accompanying text. The Hudson majority held that applying Whitley's adoption of the malicious-and-sadistic standard to all claims of prison excessive force "works no innovation." Hudson, 112 S. Ct. at 999.

34. Hudson, 112 S. Ct. at 997.

35. Id. at 1002.

36. Id.

37. Id. (Stevens, J., concurring).

38. Id. Justice Stevens remarked that the standard he advocated was "less demanding" than the malicious-and-sadistic standard advocated by the majority. Id.

39. Id. at 1003 (Blackmun, J., concurring). Justice Blackmun wrote, "[b]ecause I was in the dissent in Whitley . . . I do not join the Court's extension of Whitley's malicious-and-sadistic standard to all allegations of excessive force, even outside the context of a prison riot." Id.

40. Id. at 1003.

41. Id. at 1004. Justice Blackmun commented, "I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm . . . that might prove to be cruel and unusual punishment." Id.

42. Id. at 1004-05 (Thomas, J., dissenting). Justice Thomas' dissent was joined by Justice Scalia. Id.

43. Id. at 1005. "For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." Id.
nor injuries to the prisoner violates the Cruel and Unusual Punishments Clause. Justice Thomas also reasoned that the Eighth Amendment contains inherent objective and subjective components. According to Justice Thomas, the Eighth Amendment's objective component is measured by the severity of the harm alleged. In the context of excessive force cases, the dissent concluded that the Eighth Amendment's objective component is satisfied only by a serious injury.

This Note first examines Eighth Amendment jurisprudence prior to Hudson v. McMillian by tracing the historical development of the scope and substance of the ban against cruel and unusual punishments. This Note then analyzes the legal standards which were available to the Court in prison excessive force cases. Next, this Note discusses the reasoning behind the Justices' disagreement over the necessity of a significant injury requirement and the applicability of the malicious-and-sadistic standard. This Note concludes that the Court was correct in rejecting the significant injury requirement, but that the proper state of mind standard in prison excessive force cases is "deliberate indifference" to a prisoner's bodily security, rather than the majority's malicious-and-sadistic standard.

I. THE EVOLUTION OF EIGHTH AMENDMENT JURISPRUDENCE

The Eighth Amendment's prohibition against cruel and unusual punishments was not an original idea of the framers of the Constitution. The prohibition originated in the English Bill of Rights of 1689. Early American judicial interpretations of the Cruel and Unusual Punishments Clause
limited the prohibition to a ban on torturous or barbarous punishments.\textsuperscript{50} This definition of cruel and unusual punishments, however, was far from definite.\textsuperscript{51}

\textbf{A. Expanded Protections Under the Eighth Amendment}

\textit{1. The Eighth Amendment Develops from a Ban on Torturous Punishments to a Ban on Disproportionate Punishments}

Courts originally interpreted the Eighth Amendment as a ban only on torturous punishments. The first expansion of the Eighth Amendment was the interpretation that it also prohibited disproportionate punishments. In \textit{Weems v. United States},\textsuperscript{52} a majority of the Supreme Court held, for the first time,\textsuperscript{53} that a punishment violated the Cruel and Unusual Punishments Clause because it was disproportionate to the crime.\textsuperscript{54} Weems was convicted by a Philippine trial court of falsifying a public and official document.\textsuperscript{55} The Philippine court sentenced Weems to 15 years imprisonment at

\textsuperscript{50} See \textit{Weems v. United States}, 217 U.S. 349, 368 (1910) (commenting that “the terms [cruel and unusual punishment] imply something inhuman and barbarous, torture and the like”); \textit{In re Kemmler}, 136 U.S. 436, 447 (1890) (stating that “[p]unishments are cruel when they involve torture or a lingering death”); see also \textit{Wilkerson v. Utah}, 99 U.S. 130, 135-36 (1879) (stating that “punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]”). The \textit{Wilkerson} Court followed this reasoning in holding that a sentence of death by public shooting did not violate a convicted murderer’s Eighth Amendment rights. \textit{Id.} at 134-35. \textit{But cf.} \textit{Granucci, supra} note 49, at 843-44 (asserting that these early interpretations “seriously misinterpreted English law... Great Britain developed, prior to 1689, a general policy against excessiveness in punishments, but it did not prohibit ‘barbarous’ punishments that were proportionate to an offense”).

\textsuperscript{51} See \textit{Weems}, 217 U.S. at 368-69 (“What constitutes a cruel and unusual punishment has not been exactly decided. . . . No case has occurred in this court which has called for an exhaustive definition.”); \textit{Wilkerson}, 99 U.S. at 135-36 (stating that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted”).

\textsuperscript{52} 217 U.S. 349 (1910).

\textsuperscript{53} Prior to \textit{Weems}, one dissenting opinion broadened the Eighth Amendment’s ban past its confines of merely protecting against torturous punishments. O’\textit{Neil v. Vermont}, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (commenting that the Eighth Amendment’s “inhibition is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged”).

\textsuperscript{54} \textit{Weems}, 217 U.S. at 377. The Court stated that the statute under which the plaintiff was sentenced, “is cruel in its excess of imprisonment . . . . Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.” \textit{Id.}

\textsuperscript{55} \textit{Id.} at 357. Weems was an “acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands.” \textit{Id.}
hard and painful labor.\textsuperscript{56} In addition, Weems' sentence precluded him from ever holding public office or voting in the Philippines.\textsuperscript{57}

The Supreme Court held that Weems' sentence was disproportionate to the crime committed. By comparing it with the more lenient sentence imposed by Philippine courts for the falsification of bank notes, the Court determined that Weems' sentence violated the Eighth Amendment.\textsuperscript{58} Thus, the Court moved the Cruel and Unusual Punishments Clause a step away from its historical position as a mere protection against torturous punishments, adding a ban on disproportionate punishments to the clause's protections.\textsuperscript{59} The Court, however, still failed to provide a precise definition of the cruelty sought to be avoided by the Eighth Amendment.

\textbf{2. A Prohibition Against the Unnecessary and Wanton Infliction of Pain}

The Supreme Court continued its expansion of the Eighth Amendment beyond the mere recognition that the Cruel and Unusual Punishments Clause forbids disproportionate punishments. The second significant expansion was the prohibition against the unnecessary and wanton infliction of pain on prisoners.\textsuperscript{60} In \textit{Louisiana ex rel Francis v. Resweber},\textsuperscript{61} the Supreme Court held that the malfunction of an electric chair was an unforeseeable accident and not within the scope of the Cruel and Unusual Punishments Clause's prohibition.\textsuperscript{62} \textit{Resweber} involved a proposed second attempt to electrocute a prisoner after the chair malfunctioned on the first attempt.\textsuperscript{63} For the first time, the Court used the expressions "forbids the infliction of

\begin{itemize}
    \item \textsuperscript{56} Id. at 358, 364. The prison sentence fell within the statute's 12 year and one day minimum and 20 year maximum period of incarceration for falsifying a public document. \textit{Id.} at 364.
    \item \textsuperscript{57} Id. at 364. The Court noted that these features of Weems' sentence amounted to "a perpetual limitation of his liberty." \textit{Id.} at 366. The Court also stated that "[s]uch penalties for such offenses amaze those who ... believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." \textit{Id.} at 366-67.
    \item \textsuperscript{58} \textit{Id.} at 380-81. The sentence for the falsification of bank notes was a fine of not more than 10,000 pesos and a prison term of no longer than 15 years. \textit{Id.} at 380. The Court stated, "this contrast ... condemns the sentence in this case as cruel and unusual." \textit{Id.} at 381.
    \item \textsuperscript{59} See \textit{Coker v. Georgia}, 433 U.S. 584, 591 (1977) (citing \textit{Weems} to support the proposition that the Eighth Amendment prohibits punishments that are excessive to the crime committed); \textit{Estelle v. Gamble}, 429 U.S. 97, 103 n.7 (1976) (citing \textit{Weems} as the oldest case supporting the statement that "[t]he [Eighth] Amendment ... proscribes punishments grossly disproportionate to the severity of the crime") (citation omitted); \textit{Robinson v. California}, 370 U.S. 660, 666-67 (1962) (holding that a statute which imposed a 90 day jail term for the crime of being a drug addict was unconstitutional because the punishment was disproportionate to the crime).
    \item \textsuperscript{60} \textit{Louisiana ex rel Francis v. Resweber}, 329 U.S. 459, 463 (1947).
    \item \textsuperscript{61} 329 U.S. 459 (1947).
    \item \textsuperscript{62} \textit{Id.} at 464.
    \item \textsuperscript{63} \textit{Id.} at 460.
\end{itemize}
unnecessary pain” 64 and “[p]rohibition against the wanton infliction of pain” 65 in defining the Eighth Amendment’s protections. 66 The Court reasoned that the unintended malfunction of the electric chair was not a willful infliction of pain, and, therefore, not a violation of the Cruel and Unusual Punishments Clause. 67 The Court maintained that an accident is not violative of the Eighth Amendment. 68 Thus, the Court expanded the focus of the Eighth Amendment from a prohibition against torture to a prohibition against the unnecessary and wanton infliction of pain. 69 The amendment, however, still provided no protection against the cruel and unusual conditions faced by inmates or the pain inflicted on prisoners through the use of excessive force by their guards.

3. The Move Beyond Punishments Formally Meted Out by Judges or Sentencing Statutes

A third expansion of the Eighth Amendment resulted in the application of the Cruel and Unusual Punishments Clause beyond punishments formally meted out by judges or sentencing statutes. 70 This expansion of the clause’s scope enabled the Supreme Court to apply the Cruel and Unusual Punishments Clause to the general conditions of confinement in a prison. 71 In Estelle v. Gamble, 72 for example, the Court held that a prison administrator’s deliberate indifference toward an inmate’s medical needs violated the Cruel and Unusual Punishments Clause. 73 The Court, for the first time, applied

64. Id. at 463.
65. Id.
66. Id.
67. Id. at 464. The Court stated that:
   [t]here is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.
   Id.
68. Id.
69. See supra notes 60-68 and accompanying text.
71. See, e.g., Wilson v. Seiter, 111 S. Ct. 2321 (1991) (deciding whether overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, dirty bathrooms, unsanitary dining areas, and sharing cells with mentally ill inmates were conditions that violated the Cruel and Unusual Punishments Clause); Rhodes v. Chapman, 452 U.S. 337 (1981) (deciding whether housing two inmates in one cell at one particular prison violated the Cruel and Unusual Punishments Clause); Hutto v. Finney, 437 U.S. 678, 685 (1978) (stating that conditions of confinement are “subject to scrutiny under Eighth Amendment standards”); see also Whitley v. Albers, 475 U.S. 312, 319 (1986) (stating that “harsh ‘conditions of confinement’ may constitute cruel and unusual punishment”) (quoting Rhodes, 452 U.S. at 347).
73. Id. at 104-05.
the Eighth Amendment to a hardship not contained in the prisoner's sentence.\(^7\) In *Estelle*, the prisoner alleged that prison officials\(^7\) did not provide adequate medical treatment for a back injury he received while on a prison work assignment.\(^6\) Justice Marshall, writing for the majority, explained that the Eighth Amendment prohibits punishments that transgress "the evolving standards of decency that mark the progress of a maturing society."\(^7\) Justice Marshall also noted that states have the duty to provide health care to their prisoners.\(^7\) Justice Marshall then surmised that denying medical treatment to a prisoner would be a violation of the Eighth Amendment because such "deliberate indifference" to a prisoner's physical needs is an "unnecessary and wanton infliction of pain."\(^7\) After conducting an Eighth Amendment analysis of Gamble's claims using the deliberate indifference standard,\(^8\) the Court denied the prisoner's claim against the prison doctor because the doctor had merely exercised medical judgment\(^8\) rather than exhibited a deliberate indifference to Gamble's medical needs.\(^8\)

Even though the prisoner in *Estelle* was not successful in proving an Eighth Amendment violation, he did help to expand the arena of Eighth Amendment protections recognized by the Supreme Court. After *Estelle*, the Court continued to expand the scope of the Cruel and Unusual Punish-

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\(^7\) Id. \; see Hudson v. McMillian, 112 S. Ct. 995, 1006 (1992) (Thomas, J., dissenting) (stating that "[i]t was not until 1976—185 years after the Eighth Amendment was adopted—that this court first applied it to a prisoner's complaint about a deprivation suffered in prison").

\(^7\) *Estelle*, 429 U.S. at 98. Gamble sued the Director of the Texas Department of Corrections, his prison's warden, and his prison's chief medical officer. *Id.*

\(^7\) *Id.* at 98-101. On November 9, 1973, a bale of cotton fell on Gamble. On November 10, 1973, a prison doctor diagnosed Gamble as suffering from a lower back strain. The prison doctor prescribed various pain relievers and muscle relaxants, but Gamble continued to experience severe back pain through February 11, 1973 when Gamble wrote his complaint. *Id.* During this period, the prison disciplinary committee placed Gamble in "administrative segregation" and eventually solitary confinement because he refused to work. *Id.* at 99-101.

\(^7\) *Id.* at 102. Justice Marshall also stated, "[t]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' against which we must evaluate penal measures." *Id.* (citation omitted).

\(^8\) *Id.* at 103.

\(^8\) *Id.* at 103-04 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Justices Stewart, Powell, and Stevens)). The Court clarified its conclusion by noting that an "accident" or "inadvertent failure to provide adequate medical care" or negligence should not be "characterized as wanton infliction of unnecessary pain." *Id.* at 105. The Court did state, however, that punishments that are without penological justification amount to an "unnecessary and wanton infliction of pain." *Id.* at 103-04 (quoting Gregg, 428 U.S. at 173).

\(^8\) *Id.* at 106-08.

\(^8\) *Id.* at 107-08 (distinguishing matters within medical judgment from violations of the Cruel and Unusual Punishments Clause).

\(^8\) *Id.* at 108. The Court remanded the case to the court of appeals to consider the claims against the Director of the Texas Department of Corrections and the prison's warden. *Id.* The Court felt that the lower court had not decided these claims. *Id.*
ments Clause in *Hutto v. Finney.* In *Hutto,* the Court affirmed a district court ruling that conditions at two Arkansas prisons constituted cruel and unusual punishment and upheld the district court's order to limit periods of punitive isolation to 30 days. In *Hutto,* the Court reiterated that conditions of confinement are reviewable by federal courts under the Eighth Amendment. In light of the *Estelle* and *Hutto* cases, many federal courts began to review and remedy the conditions of confinement faced by the nation's prisoners. This judicial intervention, however, was soon curtailed by the Supreme Court.

**B. A Retreat From Eighth Amendment Protections and Prohibitions**

During the 1980s, the Supreme Court retreated significantly from its previous expansion of the prohibitions promulgated under the Cruel and Unusual Punishments Clause. The first retreat occurred in *Rhodes v. Chapman.* In *Rhodes,* the Court held that the “double celling” of prisoners did not violate the Eighth Amendment. Two inmates from an Ohio state prison filed a complaint against prison administrators seeking an injunction prohibiting the practice of double celling at their prison. The prisoners

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83. 437 U.S. 678 (1978). Bill Clinton, as Arkansas' Attorney General, was on the state's brief for *Hutto v. Finney*; however, an assistant attorney general argued the case before the Supreme Court. *Hutto,* 437 U.S. at 679.

84. *Id.* at 681.

85. *Id.* at 685. The Court stated, “[c]onfinement in a prison... is a form of punishment subject to scrutiny under Eighth Amendment standards.” *Id.*

86. See generally, Gray, supra note 6; see also Douglas W. Dunham, Inmates' Rights and the Privatization of Prisons, 86 COLUM. L. REV. 1475, 1482-83 (1986) (explaining the rationale for courts' applying the Eighth Amendment to general conditions of confinement).


88. “Double celling” means housing two prisoners in a single cell. *Rhodes,* 452 U.S. at 339-40. Each cell at the Southern Ohio Correctional Facility is approximately 63 square feet regardless of whether it houses one or two inmates. *Id.* at 341.

89. *Id.* at 352.

90. The plaintiffs were Kelly Chapman and Richard Jaworski. *Id.* at 339.

91. *Id.* at 340. The Court noted that “[a] relief, respondents sought an injunction barring petitioners, who are Ohio officials responsible for the administration of SOCF [Southern Ohio Correctional Facility], from housing more than one inmate in a cell, except as a temporary measure.” *Id.* The district court agreed with the prisoners, holding that “double celling is
claimed that double celling confined the inmates too closely causing overcrowding in the facility, which increased tensions and hostilities. Though the Court conceded that the practice might inflict pain, the justices concluded that the plaintiffs had not introduced facts that proved that double celling unnecessarily and wantonly inflicted pain. Therefore, double celling did not violate the Eighth Amendment.

*Whitley v. Albers* represents the Court's next major retreat from Eighth Amendment principles. This case arose after a guard shot a prisoner in the leg during a prison riot. The prisoner claimed that the guard used excessive force and thus violated the prisoner's Eighth Amendment rights. Ruling against the prisoner, the *Whitley* Court concluded that, in the context of a prison riot, "deliberate indifference" to a prisoner's bodily security did cruelt and unusual punishment under the circumstances at [Southern Ohio Correctional Facility]." *Id.* at 344.

92. *Id.* at 340, 349 n.14.
93. *Id.* at 349.
94. *Id.* at 348. The Court concluded, "there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." *Id.* The Court added that "the Constitution does not mandate comfortable prisons." *Id.* at 349. The Court also reasoned that harsh conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347. The Court expressed its deference to the state legislatures and state prison officials in administrating each states' prison system. *Id.* at 349-50, 352.

95. *Id.* at 348. Sensing the tone of Justice Powell's majority opinion, Justice Brennan wrote a concurring opinion, "to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions." *Id.* at 353 (Brennan, J., concurring). But see Elizabeth Alexander, *The Overall Context of Prison Litigation, in 2 SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES 1992, supra* note 8, at 413 (stating that "[t]he major result of cases like Rhodes is that totality of conditions cases, including overcrowding cases, are virtually impossible to win, and generally should not be attempted").

96. 475 U.S. 312 (1986).
97. *Id.* at 316.
98. *Id.* at 317.
99. *Id.* at 320. Justice O'Connor stated, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged". *Id.* The Court stated that during a prison riot, "deliberate indifference" should not constitute an Eighth Amendment violation because, under such tense and dangerous circumstances, guards are faced with "competing obligations" of ensuring the safety of prison staff and inmates. *Id.* The Court upheld the proposition in *Wilson v. Seiter*, stating that "[w]here (as in Whitley) officials act in response to a prison disturbance, their actions are necessarily taken 'in haste, under pressure,' and balanced against 'competing institutional concerns for the safety of prison staff or other inmates.'" *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) (quoting *Whitley*, 475 U.S. at 320). "In such an emergency situation,.... wantonness consisted of acting 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* (quoting *Whitley*, 475 U.S. at 320-21) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) cert. denied, 414 U.S. 1033 (1973)).
not constitute an Eighth Amendment violation. Although the Court declared that prison excessive force claims are Eighth Amendment subject matter, the majority denied the prisoner's claim.

The majority reasoned that under the tense and dangerous circumstances present during a prison riot, guards face competing obligations of ensuring the safety of prison staff, inmates, and themselves. A guard, therefore, must act "maliciously and sadistically for the very purpose of causing harm" to be found liable for the use of excessive force against a prisoner during a riot. In determining whether a guard acted maliciously and sadistically, a judge may examine "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." The dissent in Whitley, called the majority's adoption of the malicious-and-sadistic standard "especially onerous." The dissent instead advocated applying the "unnecessary and wanton" standard to all Eighth Amendment cases, with the jury considering the factors and circumstances of each case.

After the Whitley excessive force case, the Supreme Court's next major Eighth Amendment ruling on the treatment of prisoners came in Wilson v. Seiter, a case concerning the conditions of confinement. In Wilson, an inmate at Hooking Correctional Facility in Ohio filed a complaint against

100. Whitley, 475 U.S. at 320. 
100. Whitley, 475 U.S. at 320. 
101. Whitley, 475 U.S. at 327. 
102. Id. at 327. The Court stated, "[w]e think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified." Id. The Court added, "[b]ecause this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty ... the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause." Id.
103. Id. at 326.
104. Id. at 320.
105. Id. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).
106. Id.
107. Id. at 321 (quoting Johnson, 481 F.2d at 1033). Judge Friendly, writing for the majority in Johnson, stated, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates a prisoner's constitutional rights." Johnson, 481 F.2d at 1033.
his prison’s warden and the Director of the Ohio Department of Rehabilitation and Correction. The complaint alleged several inhumane conditions at the prison and prayed for injunctive relief as well as $900,000 in damages. The Court held that prisoners who allege that their conditions of confinement violate the Cruel and Unusual Punishments Clause must show that prison officials acted with a culpable state of mind when creating the conditions about which the prisoners complained. The Court further held that a prison official acting with deliberate indifference is culpable for Eighth Amendment purposes.

Justice Scalia, writing for the majority, reasoned that the Court’s previous Cruel and Unusual Punishments Clause cases turned on either an objective component—whether the deprivation was sufficiently serious or a subjective component—whether the officials acted with a sufficiently culpable state of mind. Justice Scalia attempted to “synthesize” prior Eighth Amendment cases.

Wilson, 111 S. Ct. 2323. The warden was Carl Humphreys. Id.

Richard P. Seiter was the Director of the Ohio Department of Rehabilitation and Correction. Id.

The complaint listed “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” as inhumane treatment. Id.; cf. Hutto v. Finney, 437 U.S. 678, 681-82 (1978) (finding that conditions, such as 100-man barracks, prevalent homosexual rape, frequent stabbings, and an eight-by-ten foot punitive isolation cell, violated the Cruel and Unusual Punishments Clause).

Wilson, 111 S. Ct. at 2327. Justice Scalia stated that “[w]hether one characterizes the treatment received . . . as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the “deliberate indifference” standard.” Id. (quoting LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987)). See generally Gray, supra note 6 (providing background on prison conditions cases and the impact of Wilson v. Seiter on prison law). In Wilson, the Supreme Court “articulated for the first time a state-of-mind requirement for establishing that prison conditions violate the Eighth Amendment. It is no longer enough for a prisoner to demonstrate that he is confined in squalor. He must prove the squalor to be the product of a ‘deliberately indifferent’ official.” Id. at 1341.

Wilson, 111 S. Ct. at 2324. The Court held that conditions violate the Eighth Amendment’s objective component if they deny prisoners an “identifiable human need.” Id. at 2327.


Hudson v. McMillian, 112 S. Ct. 995, 1006 (1992) (Thomas, J., dissenting); see Alexander, supra note 95, at 413 (calling the Court’s approach in Wilson an attempt to “rationalize and harmonize” its previous Eighth Amendment decisions).
Amendment jurisprudence by stating that all Eighth Amendment claims must satisfy both an objective and subjective component test. Justice Scalia also urged that the Eighth Amendment contains an inherent intent requirement. The majority remanded the case because the district court improperly decided it under the very high malicious-and-sadistic standard, rather than the deliberate indifference standard.

Justice White, concurring only in the judgment, strongly disagreed with Justice Scalia's analysis in Wilson. In particular, Justice White disputed Justice Scalia's conclusion that the Eighth Amendment contains an implicit intent requirement. Justice White stated that excessive force cases involve an intent requirement, but conditions of confinement cases do not. Thus, Justice White believed that since the case at bar was a conditions of confinement case, the Court should not require that the plaintiff meet an intent requirement.

121. Wilson, 111 S. Ct. at 2324-25; see also Hudson, 112 S. Ct. at 1006 (1992) (stating that "an inmate seeking to establish that a prison deprivation amounts to cruel and unusual punishment always must satisfy both the 'objective component' . . . and the 'subjective component' . . . . Both are necessary components; neither suffices by itself"); see Alexander, supra note 95, at 414-15 (noting that the adoption of the objective and subjective components to Eighth Amendment analysis substantially narrowed the scope of the Cruel and Unusual Punishments Clause).

122. Wilson, 111 S. Ct. at 2325 ("The source of the intent requirement is . . . the Eighth Amendment itself . . . . If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer . . . .").

123. Id. at 2326.

124. Id. at 2328 (White, J., concurring) (acknowledging that applying the "more lenient 'deliberate indifference' standard" might not change the outcome of the case because the plaintiffs proved at most mere negligence, which does not amount to a Cruel and Unusual Punishments Clause violation); see Whitley v. Albers, 475 U.S. 312, 320-21 (1986); see also Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).


126. Id. at 2328-31; see also Leading Cases, supra note 5, at 236 (commenting that "by defining 'punishment' in an artificially narrow way, the Court effectively placed prison conditions outside the purview of the Eighth Amendment and circumscribed the opportunities for courts to play a role in prison reform").

127. Wilson, 111 S. Ct. at 2329-30. Justice White stated that when a court hears "challenges to conditions of confinement[,] . . . [judges] examine only the objective severity, not the subjective intent of government officials." Id. Justice White went on to distinguish conditions of confinement cases, which have no intent element, from excessive force or medical deprivation cases, which include the prisons official's intent as one of the factors in determining whether conduct amounted to a cruel and unusual punishment. Id. at 2330.

128. Id. at 2329-30.

129. Id. at 2328.
C. The Significant Injury Requirement: A Fifth Circuit Anomaly

Like Wilson's objective and subjective components, the significant injury requirement is a relatively recent addition to Eighth Amendment jurisprudence. In 1989, the Fifth Circuit first articulated the significant injury requirement in Johnson v. Morel,130 a Fourth Amendment excessive force case.131 In Johnson, the Fifth Circuit held that an arrestee who received cuts on his wrists from tightly applied handcuffs did not suffer a sufficiently significant injury for Fourth Amendment purposes.132 The court reasoned that the judicial inquiry in Fourth Amendment excessive force cases is an objective inquiry.133 Therefore, the purely objective significant injury requirement is appropriate.134 The Eighth Amendment controls in excessive force cases only if the force occurred after the prisoner was convicted.

In 1990, the Fifth Circuit fused its Fourth and Eighth Amendment excessive force cases by adding the Fourth Amendment's significant injury requirement to its Eighth Amendment standard.135 In Huguet v. Barnett,136 the Fifth Circuit held that the lower court was correct to dismiss a prisoner's Eighth Amendment claim since the prisoner only suffered a slightly fractured elbow as a result of a scuffle with two guards.137 The court reasoned that excessive force claims under the Eighth Amendment, like those under the Fourth Amendment, require a showing of a significant injury.138 A major distinction, however, between Fourth and Eighth Amendment jurisprudence is that judicial inquiry into the guard's intent, ancillary to Fourth

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130. 876 F.2d 477 (5th Cir. 1989) (en banc).
131. Id. The Fourth Amendment provides that "[t]he rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. Previously, the Fourth and Fourteenth Amendments governed allegations of excessive force occurring prior to conviction. Johnson, 876 F.2d at 479. After the Supreme Court decided Hudson, however, the Fifth Circuit announced that courts should apply the Whitley malicious-and-sadistic standard to allegations of excessive force brought by pre-trial detainees. Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).
132. Id. at 480.
133. Id. at 479.
134. Id. at 479-80.
135. Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990) (holding that a convicted prisoner, like the arrestee in Johnson v. Morel, must prove that he suffered a significant injury in order to prevail on an Eighth Amendment excessive force claim). Prior to Huguet v. Barnett, the Supreme Court held that the Fourth and Eighth Amendments embody distinct areas of jurisprudence, and courts should judge claims brought under these two amendments by distinct standards. Graham v. Connor, 490 U.S. 386 (1989); see Whitley v. Albers, 475 U.S. 312, 327 (1986) (stating that "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified").
136. 900 F.2d 838 (5th Cir. 1990).
137. Id. at 840-42.
138. Id.
Amendment excessive force cases, is the primary focus of Eighth Amend-
ment excessive force cases.139

After Whitley and Wilson, the federal courts were uncertain about the
proper standard to apply to excessive force cases. In Whitley, the Supreme
Court applied the malicious-and-sadistic standard when the excessive force
occurred during a prison riot, but offered no general standard applicable to
such cases in a non-riot context.140 Furthermore, Wilson added the objec-
tive and subjective component analysis to Eighth Amendment conditions of
confinement cases, but did not state the nature of the objective and subjective
components in prison excessive force cases.141 In particular, the Supreme
Court had not decided whether, as the Fifth Circuit asserted, prison exces-
sive force claims required a significant injury to satisfy the Eighth Amend-
ment's inherent objective component. The Supreme Court sought to answer
these open questions in Hudson v. McMillian.142

II. HUDSON v. MCMILLIAN: REJECTING THE SIGNIFICANT INJURY
REQUIREMENT

A. The Majority Opinion

In Hudson v. McMillian, the Court clarified the role of objective factors in
deciding prison excessive force cases.143 Justice O'Connor, writing for the
majority, held that the extent of a prisoner's injuries may be one factor that
courts consider, but that a significant injury to the prisoner should not be a
threshold requirement for a successful cruel and unusual punishments claim
against an abusive guard.144 Thus, a guard's use of excessive force against a

139. See Graham, 490 U.S. at 397 (stating that "[a]n officer's evil intentions will not make
a Fourth Amendment violation out of an objectively reasonable use of force; nor will an of-
icer's good intentions make an objectively unreasonable use of force constitutional"); see also
R. Wilson Freyermuth, Comment, Rethinking Excessive Force, 1987 DUKE L.J. 692, 693 (stat-
ing that in excessive force cases, the Fourth Amendment judicial inquiry is "wholly
objective").

140. See supra notes 96-107 and accompanying text.
141. See supra notes 118-22 and accompanying text.
143. Id. at 998.
144. Id. at 999. The Court stated that "[t]he absence of serious injury is . . . relevant to the
Eighth Amendment inquiry, but does not end it." Id. The Court further explained, "[w]hat is
necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause
depends upon the claim at issue . . . with due regard for differences in the kind of conduct
against which an Eighth Amendment objection is lodged." Id. at 1000 (quoting Whitley v.
Albers, 475 U.S. 312, 320 (1986)). The majority also stated that the Eighth Amendment
"draw[s] its meaning from the evolving standards of decency that mark the progress of a
maturing society," and so admits of few absolute limitations." Id. (quoting Rhodes v. Chap-
prisoner may constitute cruel and unusual punishment even if the prisoner’s injuries are minor.\textsuperscript{145}

In deciding to uphold the magistrate’s $800 award of damages to Hudson,\textsuperscript{146} the Court rejected the Fifth Circuit’s argument that Hudson’s lack of a significant injury precluded him from obtaining a judgment against the guards who beat him.\textsuperscript{147} The Court explained that the scope and meaning of the Cruel and Unusual Punishments Clause is “responsive to ‘contemporary standards of decency.’”\textsuperscript{148} The majority reasoned that guards transgress contemporary standards of decency whenever they intentionally cause pain to prisoners by engaging in unwarranted violence.\textsuperscript{149} The Court determined that guards who violate contemporary standards of decency thereby violate the Eighth Amendment, irrespective of the severity of the victim’s injuries.\textsuperscript{150} Thus, the majority held that in prison excessive force cases, the objective inquiry into the extent of injury is not controlling.\textsuperscript{151} The guard’s subjective intent is more significant.\textsuperscript{152}

The Court further clarified the law surrounding prison excessive force cases by holding that the Whitley standard\textsuperscript{153} now governs all excessive

\textsuperscript{145.} Id. at 999. The Court acknowledged that the “prohibition of ‘cruel and unusual’ punishment necessarily excludes from constitutional recognition \textit{de minimis} uses of physical force, . . . [but that Hudson’s injuries were] not \textit{de minimis}.” Id. at 1000. Subsequent to the \textit{Hudson} decision, courts have used the \textit{de minimus} exception to deny claims of excessive force. \textit{See}, e.g., Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that a guard who sprayed plaintiff with a fire extinguisher engaged in only a \textit{de minimus} use of force and was not liable); Olson v. Coleman, 804 F. Supp. 148, 150 (D. Kan. 1992) (stating that a single blow to a prisoner’s head was not a violation of the Eighth Amendment because it was a \textit{de minimus} use of pain); Candelaria v. Coughlin, 787 F. Supp. 368, 374 (S.D.N.Y.) (finding that a guard’s pushing his fist against a prisoner’s neck was a deminimum use of force that did not violate the Eighth Amendment), aff’d, 979 F.2d 845 (2d Cir. 1992).

\textsuperscript{146.} \textit{Hudson}, 112 S. Ct. at 1002; see \textit{Hudson} v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (describing the $800 award as a “modest judgment”), \textit{rev’d}, 112 S. Ct. 995 (1992).

\textsuperscript{147.} \textit{Hudson}, 112 S. Ct. at 999-1000. The Fifth Circuit held that even though the guards “physically mistreated” Hudson, his “minor” injuries, which “required no medical attention,” were “insufficient” to constitute a violation of the Cruel and Unusual Punishments Clause. \textit{Hudson}, 929 F.2d at 1014-15.

\textsuperscript{148.} \textit{Hudson}, 112 S. Ct. at 1000 (quoting \textit{Estelle} v. \textit{Gamble}, 429 U.S. 97, 103 (1976)).

\textsuperscript{149.} Id. The Court explained that “[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.” Id.

\textsuperscript{150.} Id. The Court stated that prison officials violate contemporary standards of decency “whether or not significant injury is evident.” Id.

\textsuperscript{151.} Id. at 999. The Court stated that “[t]he absence of serious injury . . . does not end [an Eighth Amendment inquiry].” Id.

\textsuperscript{152.} Id. The Court stated that “whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the \textit{core judicial inquiry is} . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Id. (emphasis added).

\textsuperscript{153.} Id. The Court in \textit{Whitley} held that “whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of
The majority followed precedent by stating that the unnecessary and wanton infliction of pain violates the Cruel and Unusual Punishments Clause. The majority then maintained that what constitutes the unnecessary and wanton infliction of pain depends upon the nature of the allegations. The majority concluded that when allegations concern excessive force, the malicious-and-sadistic standard should apply, whether the alleged excessive force occurred while the prisoners are holding hostages and rioting or while the prisoners are handcuffed, shackled, and completely within the guards' control.

B. Justice Stevens' Concurring Opinion

In his concurring opinion, Justice Stevens criticized the majority's application of the malicious-and-sadistic standard to all prison excessive force cases. Justice Stevens argued that when there are allegations of a guard's use of excessive force against a prisoner and the tense and precarious circumstances of a riot are absent, the Court should apply the less demanding un-causing harm.'

154. Hudson, 112 S. Ct. at 999.

155. Id. at 998. The Court stated that "the unnecessary and wanton infliction of pain... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Id. (quoting Whitley, 475 U.S. at 319 (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977))).

156. Id., The Court noted that deliberate indifference is the proper standard when a prisoner alleges inadequate medical care, but that "application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance." Id. at 998-99.

Many of the concerns underlying our holding in Whitley arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively.

157. Id. at 998-99.

The majority reasoned further that "[t]his Court derived the Whitley test from one articulated by Judge Friendly in Johnson v. Glick, a case arising out of a prisoner's claim to have been beaten and harassed by a guard." Id. at 999 (citation omitted). But see Johnson v. Glick, 481 F.2d 1028 (2d Cir.) (involving alleged force against a pre-trial detainee, and, therefore, normally governed by the Fourth Amendment's Due Process Clause), cert. denied, 414 U.S. 1033 (1973). The Court declined to decide whether an isolated and unauthorized assault by a guard constitutes punishment prohibited by the Eighth Amendment. Hudson, 112 S. Ct. at 1001. Justice Thomas commented, "[i]f we ultimately decide that isolated and unauthorized acts are not 'punishment,' then today's decision is a dead letter." Id. at 1007 n.2 (Thomas, J., dissenting).

158. Id. at 1002 (Stevens, J., concurring). Justice Stevens commented that "the Court's reliance on the malicious and sadistic standard is misplaced." Id. Because Justice Stevens believed that McMillian's and Woods' conduct met even the high malicious-and-sadistic standard, Justice Stevens concurred in all of the majority's opinion, save the application of the Whitley standard to non-riotous circumstances. Id. Thus, Justice Stevens agreed with the majority's conclusion that a prisoner need not prove a serious or significant injury to maintain a cognizable excessive force claim under the Cruel and Unusual Punishments Clause. Id.
necessary and wanton infliction of pain standard. Justice Stevens offered no further standard to define what constituted the unnecessary and wanton infliction of pain in excessive force cases, as opposed to conditions, disproportionate sentence, or deprivations cases. Despite his disagreement with the Court's choice of standard, Justice Stevens nonetheless agreed with the majority's conclusion that a significant injury is not a threshold requirement for a prisoner's successful cruel and unusual punishments claim.

C. Justice Blackmun's Concurring Opinion

Justice Blackmun, like Justice Stevens, did not agree with the majority's selection of standard of review. Otherwise, Justice Blackmun agreed with the majority's conclusion that a significant injury is not a prerequisite to bringing an excessive force claim under the Cruel and Unusual Punishments Clause. Justice Blackmun wrote his concurring opinion to address two personal concerns that were not mentioned in either the majority opinion or Justice Stevens' concurring opinion. First, responding to the argument, advanced by five states filing an amicus curiae brief, that requiring prisoners to prove a significant injury reduces the number of cases that are presently clogging the judicial system, Justice Blackmun explained that the Court would not permit such docket-management concerns to diminish the power of the express constitutional protection against cruel and unusual punish-

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159. Id. Justice Stevens had advocated the use of this standard in previous cruel and unusual punishments cases. Id.; see Estelle v. Gamble, 429 U.S. 97, 104 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.).

160. Hudson, 112 S. Ct. at 1002; see also Barbara Kritchevsky, Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation, 60 GEO. WASH. L. REV. 417, 462 n.229 (1992) (commenting that in the context of the Cruel and Unusual Punishments Clause, "Justice Stevens is the one member of the Court who argues that subjective motivation should not determine whether the Constitution has been violated"). But cf. Hudson, 112 S. Ct. at 998 (arguing that the unnecessary and wanton infliction of pain always violates the Eighth Amendment, but what constitutes the unnecessary and wanton infliction of pain "varies according to the nature of the alleged constitutional violation").

161. Hudson, 112 S. Ct. at 1002.

162. Id. at 1003 (Blackmun, J., concurring). Justice Blackmun was one of the original dissenters in Whitley. Id.; Whitley v. Albers, 475 U.S. 312, 328 (1986). Thus, Justice Blackmun was opposed to the application of the malicious-and-sadistic standard even in the context of a prison riot. Id., at 328-34.

163. Hudson, 112 S. Ct. at 1003. Justice Blackmun stated that he joined "the Court's solid opinion and judgment that the Eighth Amendment does not require a showing of 'significant injury' in the excessive-force context." Id.

164. Id.

165. Id. (citing Brief for Texas, Hawaii, Nevada, Wyoming, and Florida as amicus curiae at 15, Hudson v. McMillian, 929 F.2d 1014 (5th Cir. 1990) (No. 90-6531), rev'd, 112 S. Ct. 995 (1992)). The brief argued that the "'significant injury requirement has been very effective in the Fifth Circuit in helping to control its system-wide docket management problems.'" Id. Justice Blackmun called this an "audacious approach to the Eighth Amendment." Id.
ments.\textsuperscript{166} To further discount the docket-management argument, Justice Blackmun added that the Court's ruling did not open the floodgates for a deluge of claims from prisoners.\textsuperscript{167}

Justice Blackmun's second concern was that the protection afforded by the Eighth Amendment should not be limited to mere physical harm, but should also include psychological harm.\textsuperscript{168} He conceded that the case at bar did not contain the issue of psychological harm because the prisoner did not claim that the guards' acts of violence had caused him to feel anguished, fearful, or severely despondent.\textsuperscript{169} Justice Blackmun noted, however, that in the process of rejecting the significant injury requirement, the Court stated that the Cruel and Unusual Punishments Clause is a protection against pain, not injury.\textsuperscript{170} Thus, he reasoned that unlike injury, the word pain connotes both physical and psychological harm,\textsuperscript{171} and courts recognize psychological harm as creating a cause of action in both tort and constitutional law.\textsuperscript{172}

Justice Blackmun concluded that courts should not label psychological pain as \textit{de minimis} pain, which, according to the majority opinion, the Cruel and Unusual Punishments Clause does not protect.\textsuperscript{173} Justice Blackmun claimed that the infliction of psychological pain can qualify as the kind of unnecessary

\begin{itemize}
\item \textsuperscript{166} Id. Justice Blackmun stated that the brief's approach "assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. . . . [T]his inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right." Id. A circuit judge for the United States Court of Appeals for the Fifth Circuit agreed with Justice Blackmun and commented that docket management was one factor that led to the development of the significant injury requirement. See Carolyn D. King, \textit{A Matter of Conscience}, 28 \textit{Hous. L. Rev.} 955, 963-64 (1991) (arguing that the significant injury requirement is an example of combating an excessive case load by disadvantaging plaintiff prisoners rather than squarely confronting the problem).
\item \textsuperscript{167} \textit{Hudson}, 112 S. Ct. at 1003.
\item By statute, prisoners—alone among all other § 1983 claimants—are required to exhaust administrative remedies. Moreover, prison officials are entitled to a determination before trial whether they acted in an objectively reasonable manner, thereby entitling them to a qualified immunity defense. Additionally, a federal district court is authorized to dismiss a prisoner’s complaint \textit{in forma pauperis} "if satisfied that the action is frivolous or malicious." These measures should be adequate to control any docket-management problems that might result from meritless prisoner claims.
\item \textit{Id.} at 1003-04 (quoting 28 U.S.C. § 1915(d) (1988)) (citations omitted).
\item \textsuperscript{168} Id. at 1004.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. Justice Blackmun stated, "[a]s the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.'" Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id. In the context of prison excessive force cases, the Eighth Circuit held that a prisoner who alleged receiving death threats at gunpoint from a guard stated an adequate claim under the Cruel and Unusual Punishments Clause, even though the prisoner did not allege receiving any physical injuries. Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986).
\item \textsuperscript{173} \textit{Hudson}, 112 S. Ct. at 1004.
\end{itemize}
sary and wanton infliction of pain prohibited by the Cruel and Unusual Punishments Clause.\textsuperscript{174}

\textbf{D. Justice Thomas’ Dissent}

In his dissent, Justice Thomas argued that a prisoner must first establish that he suffered a significant injury in order to prove that a guard’s use of force violated the Cruel and Unusual Punishments Clause.\textsuperscript{175} Justice Thomas based his argument on a study of the Eighth Amendment’s history\textsuperscript{176} and an examination of the objective and subjective components inherent in the Cruel and Unusual Punishments Clause.\textsuperscript{177}

According to Justice Thomas, since the Eighth Amendment historically applied only to sentences that amounted to torturous punishments,\textsuperscript{178} courts did not apply it to alleviate general conditions of confinement or to compensate individual prisoners when guards mistreated them.\textsuperscript{179} Justice Thomas further argued that because Eighth Amendment jurisprudence has historically exhibited a judicial reluctance to interfere with prison administration,\textsuperscript{180} this reluctance should continue as the norm today.\textsuperscript{181}

Justice Thomas also argued that requiring a prisoner to prove that he suffered a serious injury limits the scope of the Eighth Amendment\textsuperscript{182} and, in

\textsuperscript{174} Id. Justice Blackmun noted that “psychological pain can be more than \textit{de minimis}. Psychological pain often may be clinically diagnosed and quantified through well established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded.” \textit{Id.}

\textsuperscript{175} Id. at 1004-05 (Thomas, J., dissenting). Justice Thomas’ dissent was joined by Justice Scalia. \textit{Id.} at 1004. Justice Thomas commented that “a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not ‘cruel and unusual punishment.’” \textit{Id.} at 1005.

\textsuperscript{176} Id. at 1005-07; see supra notes 48-51 and accompanying text.

\textsuperscript{177} \textit{Hudson}, 112 S. Ct. at 1006-08; see supra notes 118-122 and accompanying text.

\textsuperscript{178} \textit{Hudson}, 112 S. Ct. at 1005.

\textsuperscript{179} Id. Justice Thomas stated that “[f]or generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration.” \textit{Id.}

\textsuperscript{180} Id. Justice Thomas noted that “historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.” \textit{Id.; see also} Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.) (stating that “it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined”), \textit{cert. denied}, 342 U.S. 829 (1951).

\textsuperscript{181} \textit{Hudson}, 112 S. Ct. at 1006-07; see Paul McGreal, \textit{Back to the Future: The Supreme Court’s Retroactivity Jurisprudence}, 15 \textit{HARV. J.L. & PUB. POL’Y} 595, 615 (1992) (commenting that Justices Thomas and Scalia were “the lone voices for a strict, historically-faithful reading of the Constitution” in \textit{Hudson v. McMillian}).

\textsuperscript{182} \textit{Hudson}, 112 S. Ct. at 1007.
turn, acts as a necessary limit on the administrative remedies that a trial judge can order.\textsuperscript{183} The serious injury requirement therefore ensures that judges will not use the Eighth Amendment as a vehicle to personally implement prison administration reforms.\textsuperscript{184} Justice Thomas stated that the serious injury requirement represents a judicial recognition that prisoners, by virtue of being in prison, will not be free from all hazard, difficulty, and discomfort.\textsuperscript{185} Thus, the dissenting opinion argued that a violation of the Cruel and Unusual Punishments Clause is predicated on the plaintiff's suffering a significant injury,\textsuperscript{186} and the judicial inquiry into this injury should be limited to whether it was sufficiently serious.\textsuperscript{187} Justice Thomas concluded that the majority's decision—that no serious deprivation is required to bring a cruel and unusual punishments claim—went beyond the bounds of the judiciary's role and was essentially an interference with prison administration.\textsuperscript{188}

Justice Thomas also reasoned that only sufficiently serious injuries satisfy the objective component inherent in the Cruel and Unusual Punishments Clause.\textsuperscript{189} Justice Thomas stated the objective component inquiry as

\begin{quote}
We made it clear in \textit{Estelle} that the Eighth Amendment plays a very limited role in regulating prison administration. . . . We rejected the claim because the inmate failed to allege 'acts or omissions sufficiently harmful to evidence \textit{deliberate indifference} to \textit{serious} medical needs.' From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but only that narrow class of deprivations involving 'serious' injury inflicted by prison officials . . . .
\end{quote}

\textit{Id.} at 1006 (quoting \textit{Estelle v. Gamble}, 429 U.S. 97, 106 (1976)).

\textsuperscript{188} Id. at 1007. Justice Thomas commented that when a serious injury was required, "a court's task . . . was not, as the Court's interpretation today would have it, to determine whether a 'serious' deprivation \textit{is required at all}." \textit{Id.}

\textsuperscript{189} Id. at 1006. Justice Thomas stated, "[t]hese subjective and objective components, of course, are implicit in the traditional Eighth Amendment jurisprudence, which focuses on penalties meted out by statutes or sentencing judges." \textit{Id.; see Wilson v. Seiter}, 111 S. Ct. 2321, 2324 (1991) (articulating the doctrine of an objective and subjective component inherent in the Eighth Amendment).
whether the deprivation was sufficiently serious.\textsuperscript{190} Under Justice Thomas' analysis, a prisoner alleging a Cruel and Unusual Punishments Clause violation must always satisfy this objective component by proving a serious injury.\textsuperscript{191}

The dissent believed that the majority counteracted its disregard of the Eighth Amendment's objective component requirement\textsuperscript{192} by demanding an unnecessarily high subjective component standard.\textsuperscript{193} When analyzing the existence of the subjective component in a particular Eighth Amendment case, Justice Thomas would replace the majority's malicious-and-sadistic standard with the deliberate indifference standard.\textsuperscript{194} Thus, under Justice Thomas' analysis of excessive force cases, a prisoner would have to show that he suffered a sufficiently serious injury to satisfy the objective component of an Eighth Amendment inquiry.\textsuperscript{195} In addition, the prisoner would also have to prove that the guard acted with deliberate indifference toward his bodily safety and security in order to satisfy the subjective component.\textsuperscript{196} Only upon establishing both elements could a prisoner prevail under the Cruel and Unusual Punishments Clause.\textsuperscript{197}

The dissent's explicit adoption of the objective/subjective component analysis represents a stark and definite addition to excessive force jurisprudence.\textsuperscript{198} The majority's approach, however, while appearing to be a moderate-
Hudson v. McMillian

ate change, will restrict the ability of prisoners to be recompensed under the Eighth Amendment for excessive force used against them. 199

III. IN SEARCH OF A JUST STANDARD WITHOUT AN UNJUST INJURY REQUIREMENT

The first question the Hudson court faced was whether a prisoner alleging that guards used excessive force against him, in violation of his Eighth Amendment right to be free from cruel and unusual punishments, is required to prove that he suffered a significant injury. 200 The Court's rejection of the significant injury requirement will have positive effects on future excessive force jurisprudence. However, although the Court's rejection of the significant injury requirement makes its opinion appear favorable to prisoners and supportive of a strengthened Eighth Amendment, in reality, the majority's adoption of the malicious-and-sadistic standard to all prison excessive force cases will serve as a barrier to Eighth Amendment protections. 201

A. No Significant Injury Requirement

The Supreme Court's rejection of the significant injury requirement ensures that judicial inquiries into excessive force cases will continue to focus on the guard's intent in using the force, rather than on the objective effect of that use of force. 202 The majority opinion followed established judicial precedent by focusing on intent in Eighth Amendment excessive force cases and stressing both intent and effect in conditions of confinement cases arising under the Eighth Amendment. 203 This judicial focus on the guard's intent distinguishes prison excessive force cases, decided under the Eighth Amendment's constitutional prohibition against cruel and unusual punishments, from ordinary tort cases. 204 This focus also precludes guards from inflicting

199. See infra notes 208-23 and accompanying text.
201. See infra notes 208-23 and accompanying text.
202. See Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (stating that "Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind").
204. See Kritchevsky, supra note 160, at 424-25 (noting that in Eighth Amendment cases, as opposed to ordinary tort cases, the courts conduct a judicial inquiry into the defendant's state of mind). “Emphasizing that the Constitution protects against injuries attributable to abuse of power, not to the lack of due care that defines tortious conduct, the Court has held
inhumane forms of torture and punishment on prisoners without violating the Cruel and Unusual Punishments Clause.\textsuperscript{205}

By maintaining that the extent of a prisoner's injury is one of many factors courts should consider in prison excessive force cases,\textsuperscript{206} the Supreme Court also granted judges additional discretion in deciding Eighth Amendment cases. Unlike the dissent, the majority's approach affords a judge the discretion to find culpability despite less severe injury if the prison guards caused such injury in a particularly egregious manner.\textsuperscript{207} Thus, the Court chose a practical and reasoned approach when it allowed the extent of a prisoner's injury to be one of the factors, but not the determinative factor, that courts consider when deciding excessive force cases.

\textbf{B. Selecting A Standard That Fits The Circumstances}

The dissenting and concurring opinions' disagreement with the majority's application of the malicious-and-sadistic standard reflects a genuine legal concern over a misplaced\textsuperscript{208} standard. The Whitley court expressly adopted the demanding\textsuperscript{209} malicious-and-sadistic standard because of the counter-
vailing pressures on guards during riotous situations. The guards' use of excessive force in *Hudson* occurred while a single prisoner was handcuffed, shackled, and under the control of two guards. In contrast, the alleged use of excessive force in *Whitley* occurred during a guard-led forceful intervention into a prison riot, after inmates had taken one guard hostage, beaten a fellow inmate, and threatened to kill the hostage with a homemade knife. As the facts in the two cases are quite disparate, the state-of-mind standard that the court applied to each set of facts should have been distinct as well.

The majority may have applied the malicious-and-sadistic standard to all excessive force cases in order to provide consistency in its excessive force decisions or, perhaps, to counteract its holding that a significant injury is

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> [w]here a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied . . . maliciously and sadistically for the very purpose of causing harm."

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

211. See *Williams* v. *Mussomelli*, 722 F.2d 1130, 1132 (3d Cir. 1983) (stating that "precedents established in one context [of Eighth Amendment jurisprudence] do not always transfer comfortably to another"); Martin A. Schwartz, *Supreme Court Review: Section 1983 Litigation October 1991-June 1992*, in *1 Section 1983 Civil Rights Litigation and Attorney's Fees 1992*, supra note 8, at 10 (commenting that it makes little sense to apply the malicious-and-sadistic standard to alleged uses of excessive force outside a prison disturbance context); Urbonya, *supra* note 6, at 229-30 (arguing that plaintiffs should not have to meet the burden of the malicious-and-sadistic standard in excessive force claims against state officials).

While it may be appropriate to require a prisoner to prove malice for a claim arising from the use of force during a prison riot, such a strict standard would not be necessary absent the heightened exigencies of a riot. When interpreting eighth amendment personal security claims, courts should not hesitate to distinguish between those cases involving the state's substantial interest in maintaining prison order, as found in *Whitley*, and those cases devoid of this compelling state interest.

*Id.* at 231-32; see *Freyermuth*, *supra* note 139, at 704 n.74 (stating that prison excessive force exerted without a legitimate purpose should be governed by the deliberate indifference standard).


214. See *id.* at 320 ("The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.").

215. See *id.* at 323-24 (adopting the malicious-and-sadistic standard the first time the Supreme Court decided an Eighth Amendment excessive force case). Since 1986, the federal courts have been very inconsistent about which standard to apply in prison excessive force
not an essential requirement of an excessive force case. Whatever the reason, the malicious-and-sadistic standard is inappropriate when guards handcuff, shackle, and then beat a prisoner. The Cruel and Unusual Punishments Clause is an express constitutional protection of the people and, therefore, an implied constitutional limit on the government. The malicious-and-sadistic standard, which requires a high level of evil intent on the part of a guard, does not reflect the language of the Eighth Amendment, which protects against state imposed harm.

On the other hand, the deliberate indifference standard implicitly acknowledges that the Eighth Amendment provides an express protection against state imposed excessive force. In Whitley, the Court considered applying the deliberate indifference standard, but rejected it in favor of the malicious-and-sadistic standard, which allowed guards some flexibility when they face the tense and dangerous circumstances of a prison riot. In ex-
cessive force cases outside of the prison riot context, however, whether a guard exhibited deliberate indifference to a prisoner's bodily safety and security should determine whether a guard violated the Cruel and Unusual Punishments Clause. Substituting the deliberate indifference standard for the malicious-and-sadistic standard would re-institute the Cruel and Unusual Punishments Clause's protective component and would partially correct the Supreme Court's recent retreat from the express grant of protection afforded by the clause.\(^{223}\)

\section*{C. The Role of the Court}

Reluctance to intervene has long marked the judiciary's approach to prison excessive force cases.\(^{224}\) This reluctance has been largely based on a show of deference to state legislators and prison officials.\(^{225}\) To some extent, judicial reluctance to disturb the penal environment created by prison officials is still in existence.\(^{226}\) The \textit{Hudson} dissents criticized judicial intervention into prison administration, especially when judges claim to have a constitutional justification for their intervention.\(^{227}\) The dissent warned that judges should not use the Eighth Amendment as a "National Code of Prison Regulation."\(^{228}\)

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{223} See Laurence H. Tribe, \textit{The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics}, 103 \textit{Harv. L. Rev.} 1, 20 (1989) (commenting that "[t]he results courts announce . . . will . . . have continuing effects that reshape the nature of what the courts initially undertook to review, even beyond anything they directly order anyone to do or refrain from doing").
\item \textsuperscript{224} See supra note 5.
\item \textsuperscript{225} See supra note 6.
\item \textsuperscript{226} See \textit{Leading Cases}, supra note 5, at 236 ("[I]n \textit{Wilson v. Seiter} [1991], the Supreme Court took a large step in the direction of reinstating a policy of deference to prison administrators."); Friedman, supra note 5, at 927 (stating that the policy of showing deference to prison officials by refusing to intervene in the internal affairs of prisons continues to some degree today).
\item \textsuperscript{227} \textit{Hudson v. McMillian}, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting). Justice Thomas stated, "[t]oday's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. . . . [T]he primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various States." \textit{Id. But see United States v. Carolene Products}, 304 U.S. 144, 152 n.4 (1938) (commenting that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments"). The \textit{Carolene Products} Court continued by suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." \textit{Id.}
\item \textsuperscript{228} \textit{Hudson}, 112 S. Ct. at 1010 (Thomas, J., dissenting).
\end{itemize}
\end{footnotesize}
Prisoners, however, need a societal institution that protects and preserves their rights. In addition to the moral reasons advanced for preserving prisoners' rights, if prisoners need are not protected by a societal institution, prisoners may resort to rioting, their historical method of calling attention to their grievances and mandating reforms.229 Prisoners, unlike ordinary citizens, cannot rely on state legislatures to represent their interests.230 State legislatures focus on pleasing citizens who can vote, rather than prisoners whose right to vote is often revoked by state statute.231 Additionally, the general public does not display a strong urge to reform America's prisons and protect those incarcerated from unwarranted physical attacks by their guards.232 Accordingly, the courts, which are insulated from the politics of anti-prisoner sentiment, have the strongest duty to protect prisoners, and should assume this role in an effort to balance popular anti-prisoner sentiment.233 In addition, this role is mandated by the judiciary's function as

229. See William C. Collins, The Defense Perspective on Prison-Conditions Cases, in 1 PRISONERS AND THE LAW, supra note 5, at 7-7 (warning that "one potential effect of reduced court intervention may be to return to those unfortunate days when prison reform occurred only as the intermittent result of prison riots and other institutional scandals"); Klein, supra note 5, at 9 (stating that news coverage of the violent riots at Attica and San Quentin caused a change in both public and judicial attitudes toward the plight of prisoners); Friedman, supra note 5, at 921 (noting that the general public takes no notice of prison cruelties unless prisoners riot).

230. See Rhodes v. Chapman, 452 U.S. 337, 377 (1981) (Marshall, J., dissenting) (stating that "[i]n the current climate" of rising crime rates and the prevailing view that "we lock the prison door and throw away the keys," it is "unrealistic" to expect state legislators to protect or advance the rights of prisoners); Friedman, supra note 5, at 941 ("Today's crime rates have created a hardened political climate toward crime and criminals . . . .").

231. See Scott D. Anderson et al., Note, A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983, 11 U. RICH. L. REV. 803, 806 n.13 (1977) (stating that in most states, prisoners convicted of serious crimes become disenfranchised during their period of incarceration); Walter M. Grant et al., Special Project, The Collateral Consequences of Criminal Conviction, 23 VAND. L. REV. 929, 975 (1970) ("The state . . . provisions disenfranchising persons convicted of criminal offenses are . . . diverse . . . . Despite this diversity, the result in the overwhelming majority of states is that citizens convicted of serious crimes, usually felons, lose their right to vote . . . ."); see, e.g., VA. CODE ANN. § 24.1-42 (Michie 1985); see also Leading Cases, supra note 5, at 243 n.56 (stating that state legislators, "conscious of the existence of dilapidated prisons may nonetheless shy away from increasing prison funding for fear of appearing to be reluctant players in the war on crime").

232. See Friedman, supra note 5, at 935 (commenting that there is a pervasive view in society that prisoners are treated too well because they receive better treatment than the worst-off non-criminals in our society). "Many citizens feel that we coddle, rather than punish, convicts." Id.

233. See Rhodes, 452 U.S. at 359 ("Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied . . . .") (Brennan, J. concurring); Rudovsky, supra note 1, at xi (stating that "[p]ublic attention is directed only sporadically toward the subhuman conditions that prevail in these institutions, and usually only because the prisoners . . . dramatize their situation by protest"). The authors further note that during the decades that the judicial system viewed the prisons with a hands-off policy, the "abdication of judicial responsibility reinforced the status quo of prison life and, because no other political or
protector of the rights espoused in the Constitution and by the Supreme Courts' own articulation of its role in protecting "discrete and insular minorities." Prisoners, by virtue of their inability to vote and their physical isolation from the rest of society, represent the quintessential "discrete and insular minority" whose claims, under the Eighth Amendment, should be heard and addressed by the courts without the judicial restrictions of the significant injury requirement and the malicious-and-sadistic standard. Application of the deliberate indifference standard to excessive force cases outside of the prison riot context would not represent an unwarranted judicial intrusion into the administration of prisons. Likewise, the deliberate indifference standard would not overly expose prison guards to liability, since their negligent acts would still be immune from Eighth Amendment liability.

social institutions responded to the prisoners' complaints, the penal system became isolated from public scrutiny." Id. at xii (emphasis added); Friedman, supra note 5, at 927 (arguing that courts, which are outside the political process, are in a strong position to rectify the injustices suffered by prisoners in prisons).

234. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); see Tribe, supra note 203, § 16-34 at 1625 n.41.

In effect, the Supreme Court has held that the law's responsiveness and accountability, both to those it affects, [convicts], and to those in whose name it is imposed, requires a structure of decision increasingly open to individual, purposive argument as the groups injured increasingly resemble discrete and insular minorities, or as the interests sacrificed increasingly parallel those otherwise entitled to special judicial protection . . . .

Id. (citation omitted); King, supra note 166, at 964 (calling prisoners some of the nation's "most vulnerable citizens" and arguing that the significant injury standard "materially disadvantaged" prisoners in order to decrease the number of prisoner-filed complaints).

235. See Lois G. Forer, The Prisoner and the Psychiatrist, 31 Emory L.J. 61, 69 (1982) ("Most prisoners are poor, ignorant, and disadvantaged people. Few are articulate and many are minorities. Many are unloved and unlovable. They are very different form the educated, middle class . . . .").

236. See Klein, supra note 5, at 14 (noting that by adopting the deliberate indifference standard, the Estelle court "did not choose the most liberal alternative").

237. See Estelle v. Gamble, 429 U.S. 97, 105 (1976) (stating that negligence, even if it causes pain or anguish, is not actionable under the Cruel and Unusual Punishments Clause); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) (holding that a second attempt to execute a prisoner did not constitute cruel and unusual punishment when the chair malfunctioned in the first attempt); see, e.g., Kritchevsky, supra note 160, at 421 (positing a hypothetical in which a guard with insufficient training who injures a prisoner with a taser gun would not be liable under the deliberate indifference standard because the harm resulted from negligence, not evil intent). "The Constitution only protects against conscious governmental action, chiefly action that contains an element of oppression or abuse." Id. at 431. "[C]ourts have consistently held that a finding of deliberate indifference requires more than a lack of due care." Friedman, supra note 5, at 937.
IV. CONCLUSION

By eliminating the requirement that an inmate prove a significant injury to prevail in an excessive force claim, the Supreme Court took a positive step toward preserving prisoners' civil rights under the Cruel and Unusual Punishments Clause. By maintaining, however, that prisoners must prove that guards acted maliciously and sadistically for the very purpose of causing harm, the Court adopted a difficult and frequently insurmountable standard for prisoners to meet. The Court should instead require that prisoners prove that the guard who allegedly used excessive force did so with deliberate indifference for the prisoner's bodily security and safety. This standard is particularly appropriate in cases, such as *Hudson v. McMillian*, when the prisoner posed no security threat to the guards, other inmates, or himself.

Implementing such a standard would accurately reflect the express grant of protection from unnecessary harm accorded to prisoners under the Cruel and Unusual Punishments Clause. Stripped of the right to vote, segregated from society, and labeled a convict for life, a prisoner represents one of the most discrete and insular of all minorities. Prisoners should be able to depend on the courts to preserve their express constitutional protection by conducting a fair judicial inquiry. A judicial inquiry that utilizes a biased standard requiring that a guard act maliciously and sadistically for the very purpose of causing harm, intensifies the societal discrimination against prisoners, rather than alleviating it.

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