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Hudson v. McMillian and Prisoners' Rights in the 1990s: Is the Supreme Court Now More Responsive to "Contemporaneous Standards of Decency"?

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**HUDSON v. MCMILLIAN AND PRISONERS' RIGHTS IN THE 1990s: IS THE SUPREME COURT NOW MORE RESPONSIVE TO "CONTEMPORANEOUS STANDARDS OF DEENCY"?**

I. INTRODUCTION

The Eighth Amendment prohibits, among other things, "cruel and unusual punishment." In the prison context, the United States Supreme Court historically applied this clause solely to protect prisoners from unfair sentences. It was not until 1976, 185 years after the adoption of the Eighth Amendment that the Supreme Court found cruel and unusual punishment protections to apply to events or conditions experienced by prisoners during incarceration.

In *Estelle v. Gamble*, the Court granted Eighth Amendment protections to a prisoner alleging deprivations during imprisonment. After 1976, the Court seemed to move away from the "hands-off" doctrine, which traditionally granted deference to prison officials, and began to recognize more rigid standards controlling the conduct of prison officials in an effort to protect prisoners' rights. However, with the emergence of the Rehnquist Court, prisoners began to see the erosion of some of their newfound protections, primarily by two decisions. The Court's recent decision in *Hudson v. McMillian* is a significant victory for prisoner's rights, and an indication that the present Court is not completely willing to adopt the hands-off doctrine.

While the *Hudson* decision preserved the subjective element of the Eighth Amendment's test for cruel and unusual punishment claims, the

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2. U.S. Const. amend. VIII.
5. See Estelle, 429 U.S. at 97.
6. The hands-off doctrine provides that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771, 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954); see also Kenneth C. Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Det. C. L. Rev. 795.
Court abandoned the objective component of the test, which formerly required that a claimant prove "serious injury" before a constitutional violation could be found. However, the remaining subjective element of the test for excessive force cases could still pose problems for prisoners who are disciplined unnecessarily. In fact, prisoners who are beaten in situations where force was unnecessary now are faced with the burden of proving that a prison official acted "maliciously and sadistically with the intent to cause harm." Despite the Court's adherence to the subjective standard, the *Hudson* decision signals that the Eighth Amendment is a dynamic, evolving area of the law which affords prisoners who have been disciplined with excessive force greater protection than ever. This Eighth Amendment jurisprudence comes as a surprise since the Rehnquist Court has typically been a steadfast opponent of prisoners' rights. Perhaps even more eye opening, however, was the dissent written by recently appointed Justice Thomas and joined only by Justice Scalia, which aggressively attacked the majority's rejection of the serious injury requirement.

This Casenote, while primarily focusing on *Hudson*, also discusses the precedent which *Hudson* followed as well as what the future may hold for prisoners' rights in the United States in light of this decision. Specifically, Part II examines the history of the Eighth Amendment and its treatment by the Supreme Court in relation to prisoners' rights. Part III examines how the *Whitley v. Albers* and *Wilson v. Seiter* decisions restricted prisoners' rights under the Eighth Amendment. Part IV analyzes the lower federal courts' treatment of *Hudson* as well as the Supreme Court's ruling. Finally, Part V predicts the effect that *Hudson* will have on prisoners and prison officials. Generally, this Casenote argues that the *Hudson* opinion is an important step by the Court toward protecting prisoners' rights but that, at the same time, the Court still applies an inappropriate standard to excessive force cases.

II. THE EIGHTH AMENDMENT AND PRISONERS' RIGHTS

Traditionally, the Eighth Amendment prohibition against cruel and unusual punishment was applied only to sentences imposed by federal judges. However, the Supreme Court gradually recognized that the

10. Id. at 999.
12. See infra notes 18-40 and accompanying text.
13. See infra notes 43-59 and accompanying text.
14. See infra notes 60-76 and accompanying text.
15. See infra notes 77-126 and accompanying text.
16. See infra notes 127-164 and accompanying text.
17. See *Hudson* v. McMillian, 112 S. Ct. 995, 1006 (Thomas, J., dissenting); *Weems* v. United States, 217 U.S. 349 (1910) (reviewing the framers' intent and the history of the Eighth Amendment). One author has stated that the reasons for applying the Eighth
Eighth Amendment is not a static safeguard, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{18} It decided in 1962 that the Eighth Amendment should apply to the states through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{19} In Robinson \textit{v. California}, the Court invalidated a California statute which made narcotic addiction a criminal offense.\textsuperscript{20} Despite recognizing a state's interest in monitoring narcotic drug traffic, the Court, which categorized drug addiction with other diseases, found that the statute was comparable to a law which punished a person for being mentally ill.\textsuperscript{21} The Court added that "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be . . . unusual punishment in violation of the Eighth and Fourteenth Amendments."\textsuperscript{22}

In 1976, for the first time, the Court applied its Eighth Amendment analysis to deprivations that were not part of a criminal sentence, but nonetheless were suffered by prisoners while incarcerated.\textsuperscript{23} In Estelle \textit{v. Gamble}, the Court created a standard making unconstitutional "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."\textsuperscript{24} J.W. Gamble, a Texas inmate, injured his back while performing a prison work assignment\textsuperscript{25} and filed a section 1983 action alleging that the medical treatment he received following his injury violated his Eighth Amendment rights by subjecting him to cruel and unusual punishment.\textsuperscript{26} The Court acknowledged that the government has an implicit obligation to provide medical care to inmates.\textsuperscript{27} In Gamble's situ-

\textsuperscript{19} 370 U.S. 660, 666 (1962).
\textsuperscript{20} Id. at 667.
\textsuperscript{21} Id. at 666.
\textsuperscript{22} Id.
\textsuperscript{24} \textit{Estelle}, 429 U.S. at 106. The Court equated deliberate indifference to a prisoner's serious medical needs to the "unnecessary and wanton infliction of pain" standard promulgated in Gregg \textit{v. Georgia}, 428 U.S. 153 (1976) (joint opinion). \textit{Id.} at 104. The Court has recognized that the "deliberate indifference" standard is a lesser standard than express intent. \textit{See} Whitley \textit{v. Albers}, 475 U.S. 312, 319 (1986).
\textsuperscript{25} \textit{Estelle}, 429 U.S. at 99.
\textsuperscript{26} Id. at 101.
\textsuperscript{27} Id. at 103. The Court drew this conclusion after relying primarily on language from Gregg \textit{v. Georgia}, 428 U.S. 153 (1976) and Trop \textit{v. Dulles}, 356 U.S. 86 (1958).
ation, prison doctors concluded that his injury was a lower back strain and recommended bed rest and medication.\textsuperscript{28} The Court found that while prison officials may have failed to properly diagnose and treat Gamble’s injury, their conduct did not evince a deliberate indifference to Gamble’s condition, thereby falling short of an Eighth Amendment violation.\textsuperscript{29} Despite this finding, the Court displayed new concerns over the treatment of prisoners during incarceration.

Five years later, in \textit{Rhodes v. Chapman}, the Court reiterated part of the test created in \textit{Estelle}, requiring the plaintiff, who alleged that double-celling was a constitutional violation, to demonstrate objective harm (serious injury) before receiving relief under the Eighth Amendment.\textsuperscript{30} An Ohio inmate, Kelly Chapman, was held, along with another inmate, in a cell which measured approximately sixty-three square feet.\textsuperscript{31} While the prisoners were double-celled, they were not deprived of “essential food, medical care, or sanitation”\textsuperscript{32} or other basic needs. The Court, in keeping with \textit{Estelle}, acknowledged that substandard prison conditions can rise to an Eighth Amendment violation if they do not comport with “contemporary standard[s] of decency.”\textsuperscript{33} However, in reversing both of the lower courts, the Court found that Chapman’s allegations failed to prove that double-celling “inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.”\textsuperscript{34} In discussing what constitutes serious injury, the Court emphasized that “[t]o the extent that such conditions are restrictive or even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”\textsuperscript{35} While maintaining the serious injury requirement, the Court stated that the Eighth Amendment should be interpreted “in a flexible and dynamic manner.”\textsuperscript{36}

While \textit{Estelle} and \textit{Rhodes} established standards designed to protect the rights of prisoners, the Court continued to defer to prison officials after these decisions. As the Court backed away from the “hands-off” doctrine by not deferring completely to state prison administrators, it appeared that the Court’s newly created standards had peculiarly the same effects. After \textit{Rhodes}, in order to show a constitutional violation in depri-

\begin{itemize}
  \item \textsuperscript{28} \textit{Estelle}, 429 U.S. at 99.
  \item \textsuperscript{29} Id. at 107.
  \item \textsuperscript{30} 452 U.S. 337 (1981). The Court never discussed the states of mind of the prison officials because the plaintiff failed to show first that he sustained serious injury. Id. at 348. The two elements of the test were not labeled objective and subjective until 1991. See Wilson v. Seiter, 111 S. Ct. 2321 (1991).
  \item \textsuperscript{31} \textit{Rhodes}, 452 U.S. at 341.
  \item \textsuperscript{32} Id. at 348.
  \item \textsuperscript{33} Id. at 347.
  \item \textsuperscript{34} Id. at 348.
  \item \textsuperscript{35} Id. at 347.
  \item \textsuperscript{36} Id. at 345 (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion)).
\end{itemize}
vation cases, prisoners needed to demonstrate first, a serious injury and second, that the prison official acted with deliberate indifference.\textsuperscript{37} Although the language of contemporaneous standards of decency became the recurring theme, the Court refused to substitute its judgment for that of prison officials.\textsuperscript{38} Despite claiming that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"\textsuperscript{39} the Court, after creating limited exceptions in \textit{Estelle} and \textit{Rhodes}, still allowed the administration of the country's prisons to lie firmly in the hands of prison officials.

III. \textbf{MORE STRINGENT STANDARDS: PRISONERS' RIGHTS AFTER WHITLEY AND WILSON}

Any support that was exhibited by the Court for prisoners' rights cases during the 1970s and early 1980s was significantly curtailed by an increasingly conservative Court. Bolstered by the addition of Justice O'Connor in 1981, the Court undertook efforts to define more precisely the rights of prisoners in an area of law where litigation was rapidly increasing.\textsuperscript{40} Although both parts of the test were reviewed, the Court seemed more critical of the subjective element since several Justices openly supported great deference to the administrative judgment of prison officials.\textsuperscript{41}

A. \textit{Whitley v. Albers}

In 1986, in an opinion by Justice O'Connor, the Supreme Court decided \textit{Whitley v. Albers}.\textsuperscript{42} In 1980, Gerald Albers was confined to an Oregon state penitentiary when several prisoners became upset over the treat-

\begin{footnotesize}
37. \textit{See supra} notes 24-36 and accompanying text.
38. This attitude was displayed by Justice Rehnquist's majority opinion in \textit{Bell v. Wolfish}:
   In determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."
41. \textit{See supra} note 38 and accompanying text. Joining Justice Rehnquist in his majority opinion in \textit{Bell v. Wolfish} were Justices Stewart, White and Blackmun as well as Chief Justice Burger.
42. 475 U.S. 312 (1986). The Court asserted in \textit{Whitley} that claims challenging excessive force must be brought under the Eighth Amendment. \textit{Id.} at 327. However, there are occasions when substantive due process challenges are proper. \textit{See, e.g.} \textit{Bell v. Wolfish}, 441 U.S. 520 (1979) (holding that pretrial detainees are constitutionally protected from punishment).
\end{footnotesize}
ment of several intoxicated inmates by prison guards. A guard was taken hostage before officials determined that direct armed intervention was required to restore order. Guards fired several warning shots and then began firing on prisoners whom the guards believed were trying to escape to other areas of the prison. Albers was shot in the left knee as he tried to flee up a flight of stairs.

The Court mandated that prisoners, in order to show an Eighth Amendment violation during prison riot situations, must prove that force was not used in good faith but was applied “maliciously and sadistically for the very purpose of causing harm.” The Court added that “[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.” The Court further noted that “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 the injury inflicted” should be considered in evaluating a prison official’s conduct. After considering such factors, “inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.” In addition, the Court noted that Eighth Amendment claims should be evaluated contextually “with due regard for differences in conduct.”

Specifically, the Whitley Court determined that the prison guard’s firing on the prisoner during the riot was made in a good faith effort to quell the disturbance and therefore did not violate the prisoner’s

43. Whitley, 475 U.S. at 314.
44. Id. at 314-15.
45. Id. at 316.
46. Id.
47. Id.
48. Id. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973)). The standard enunciated in Johnson and applied in Whitley makes the prison official’s subjective state of mind a controlling issue when excessive force is alleged. In Graham v. Connor, the Court stated: We do not agree with the Court of Appeals suggestion . . . that the “malicious and sadistic” inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between “malicious and sadistic” behavior and objective unreasonableness may be, the fact remains that the “malicious and sadistic” factor puts in issue the subjective motivations of the individual officers . . . .
49. Whitley, 475 U.S. at 319.
50. Id. at 321 (quoting Johnson, 481 F.2d at 1033).
51. Id. (citing Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).
52. Id. at 320.
Eighth Amendment rights. This finding was made despite evidence which indicated that the prisoner was unarmed and not directly involved in the disturbance.

The standard created in *Whitley* was tailored specifically to an excessive force case, while prior Supreme Court applications of the Eighth Amendment concerned deprivation cases. In his dissent in *Whitley*, Justice Marshall, joined by three other justices, argued that a riot situation should not "lessen the constraints imposed upon prison authorities by the Eighth Amendment." Marshall commented that *Estelle* rejected "express intent" as a requirement for Eighth Amendment claims, and that the majority essentially reinstated the express intent standard when requiring the plaintiff to demonstrate that force was applied "maliciously and sadistically for the very purpose of causing harm." Marshall believed that the proper standard to apply in excessive force cases was the "unnecessary and wanton" standard, "which establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation." Marshall felt the "malicious and sadistic intent" test, which is to be applied only when a disturbance "poses significant risks," required lower courts to make factual determinations typically reserved for juries.

**B. Wilson v. Seiter**

In 1991, in *Wilson v. Seiter*, the United States Supreme Court applied the deliberate indifference test formulated in *Estelle* to allegations made by a prisoner complaining of substandard confinement conditions in an Ohio prison. The prisoner alleged, among other things, overcrowding, unsanitary conditions and inadequate heating and cooling. In adopting the deliberate indifference standard, the Court rejected the lower court's application of the *Whitley* test. The Court insisted that "some mental element must be attributed to the inflicting officer before it can qualify" as an Eighth Amendment violation. In addition to this subjective element, the Court required the plaintiff to demonstrate objectively a "sufficiently serious deprivation" before receiving relief under the Eighth Amendment. Thus, *Wilson* was the Court's first decision where the

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53. *Id.* at 326.
54. *Id.* at 332 (Marshall, J., dissenting).
55. *Id.* at 328.
56. *Id.* at 328-29.
57. *Id.* at 329.
58. *Id.*
60. *Id.* at 2323.
61. *Id.* at 2323.
62. *Id.* at 2325.
63. *Id.* at 2324.
claimant was required to prove objective harm and subjective intent to successfully litigate an Eighth Amendment claim.

Justice White, joined by Justices Blackmun, Marshall and Stevens, concurred in the judgment but criticized the majority for adopting the deliberate indifference test. White argued that in prior deprivation cases, such as Estelle and Rhodes, the Court determined that the denial of a basic human need should be a Constitutional violation. White added that the deliberate indifference standard was pulled by the majority from dictum in the Whitley decision, an excessive force case, and was inappropriate to a deprivation case. The concurrence observed that a prisoner could have a very difficult time proving intent because prison administration is often not at the direction of one person. Justice White also suggested that as a result of the Court's decision requiring a showing of deliberate indifference, prison officials may now plead insufficient funding as a valid defense to Eighth Amendment challenges regarding substandard prison conditions.

Whitley and Wilson appear to have been a retreat by the Court as to the rights of prisoners, allowing prison officials to act, in certain situations solely as they see fit. Commentators have criticized the decisions as reversions to the "hands-off" doctrine. The holding in Whitley was an effort by the Court to defer to prison officials who, when faced with riotous situations, often must make split second decisions which may affect the lives of guards, prisoners and perhaps even third parties. Now, a guard who believes he is acting in good faith to halt a riot may proceed at his own discretion. According to Wilson, a similar burden is placed on prisoners who allege substandard prison conditions. The Wilson test requires a prisoner to show that a prison official acted not only in bad faith, but with a deliberate indifference to his welfare. The standard dictated in Wilson puts the plaintiff in a difficult evidentiary position.

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64. Id. at 2328-31 (White, J., concurring).
65. Id. at 2329.
66. Id. at 2330.
67. Id.
68. Id. at 2330-31 (White, J., concurring).
71. The Whitley decision has led one author to say, "[i]f there is a disturbance, prisoners beware." Blackburn, supra note 69, at 405.
72. Wilson v. Seiter, 111 S. Ct. 2321, 2328 (1991); see Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1986), cert. denied, 479 U.S. 816 (1986) ("The infliction of punishment is a deliberate act intended to chastise or deter. . . . [I]f a guard accidentally stepped on a prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word.").
73. See Wilson, 111 S. Ct. at 2330-31 (White, J., concurring).
ally, Justice Scalia's majority opinion in *Wilson* partially collapses the distinction between cases involving specific acts of force and cases involving insufficient prison conditions. Realistically, a prison official's culpable state of mind is a requisite element of proof for both types of cases.

After *Whitley* and *Wilson*, prisoners who alleged constitutional violations under the Eighth Amendment were faced with satisfying a difficult test. First, under the objective element of the test that emerged from *Rhodes* and *Wilson*, the prisoner was required to prove that he or she suffered serious injury. The Court made it clear that double-ceiling, unsanitary eating conditions and inadequate heating and cooling were not sufficiently serious injuries to give rise to an Eighth Amendment violation. The rationale supporting this requirement was that prisons are not in the business of providing comfort for inmates, and only when a “minimal civilized measure of life’s necessities” is denied will a serious deprivation be found.\(^{74}\) Second, under the subjective element of the test, which emerged from *Estelle*, *Rhodes*, *Whitley* and *Wilson*, a prisoner must demonstrate that a prison official, in the infliction of serious injury upon the prisoner, acted with some culpable state of mind or wantonness. In *Whitley*, the Court established that in order to show the requisite wantonness in excessive force cases, a claimant must prove that the prison official acted maliciously and sadistically to cause harm. In *Wilson*, the Court followed *Estelle* and *Rhodes* by requiring a prisoner to show that the prison guard acted with deliberate indifference to the prisoner’s basic human needs before meeting the subjective element of the test.

Thus, by 1992, a year after *Wilson* and sixteen years following *Estelle*, the Eighth Amendment had weathered a flurry of litigation before an active Supreme Court. While the Eighth Amendment was evolving during this time, in reality the Court had strictly defined what constituted an Eighth Amendment violation, thereby limiting successful claims brought by prisoners to a scant few. Indeed, all four of the prisoners in *Estelle*, *Rhodes*, *Whitley* and *Wilson* saw their claims lost before the Supreme Court. Now the Court, with the two-part test firmly in place, had placed high hurdles in the paths of prisoners who believed their constitutional rights had been infringed. *Estelle* and *Rhodes* were hailed as victories for prisoners’ rights. However, *Whitley* and *Wilson* signaled that the Court was returning to the days of deferring to prison officials, refusing to become too involved in what the Rehnquist Court perceived as being a state interest.\(^ {75}\) Especially after *Wilson*, the Court seemed to have a strict ideology in place that was particularly harsh on prisoners. With the addition of Justice Thomas in 1991, the question remained if the Court would re-

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74. *Id.* at 2324 (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)).
75. See *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976) (“The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.”).
verse its trend or whether the Eighth Amendment was doomed as a static, weak safeguard of the rights of our country’s prisoners.

IV. Hudson v. McMillian

Hudson v. McMillian proved to be the case that pulled the Court out of its standstill. With the abandonment of the objective component of its test for excessive force cases, the Court appeared to recognize that prisoners’ rights should be afforded greater protection, particularly when a prisoner is needlessly beaten by prison officials. What is interesting is that the Court modified the test despite a scathing dissent by Justice Thomas. Perhaps it was the utter cruelty and outright disregard for human dignity demonstrated by three Louisiana prison guards which caught the Court’s attention.77

A. The Lower Courts

On October 30, 1983, three prison guards took Keith Hudson from his cell in Louisiana’s Angola Prison to an administrative lockdown area.78 While en route, Hudson and Jack McMillian, a corrections officer, engaged in an argument.79 McMillian responded by beating Hudson “in the mouth, eyes, chest, and stomach while [Marvin] Woods [another corrections officer] held him.”80 Woods then kicked Hudson.81 Arthur Mezo, the correction officers’ supervisor, who witnessed the incident but did not participate in the beating, merely cautioned the guards not to “have too much fun.”82 As a result of the beating, Hudson suffered bruises, loosened teeth and a cracked dental plate.83

Hudson subsequently filed a section 1983 action against the guards, alleging that his Eighth Amendment rights had been violated.84 A Louisiana district court found for Hudson, concluding that “defendants Woods

77. See infra notes 79-84 and accompanying text.
78. Hudson, 112 S. Ct. at 997.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. at 1014. Section 1983, which provides a civil action for deprivation of rights, states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. . . .

and McMillian used force on the plaintiff when there was no need.” The
district court made its ruling despite finding that Hudson’s injuries were
only minor. The Fifth Circuit Court of Appeals agreed with the district
court that unnecessary force on prisoners is deplorable. Nevertheless it
reversed, holding Hudson had not met the requirements set out in its
earlier decision of Huguet v. Barnett. Specifically, the Fifth Circuit
stated that Hudson’s claim did not meet the “significant injury” require-
ment since the district court had found Hudson’s injuries to be minor. The
court seemed unmoved by the fact that the force was “objectively
unreasonable.”

B. The Supreme Court

1. The Majority

On the heels of the Wilson decision, an increasingly conservative Su-
preme Court reversed the Fifth Circuit. Interestingly, Justice O’Connor,
who wrote the Whitley opinion, also delivered the opinion of the Court in
Hudson. In finding for Hudson, the Court drew two significant
conclusions.

First, the Court adopted the “maliciously and sadistically to cause
harm” standard set out in Whitley for all Eighth Amendment excessive
force claims. In adopting this subjective standard, the Court stated that
unnecessary and wanton infliction of pain is expressly forbidden by the
Eighth Amendment. However, what is required to show unnecessary
and wanton infliction of pain varies according to the “nature of the al-
leged constitutional violation.” Citing Whitley, the Court stated that of-

85. Hudson, 929 F.2d at 1015.
86. Id.
87. Id.
88. Id. (citing Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990)). In Huguet, the Fifth
Circuit established that the following four requirements must be met in excessive force
cases: “1. a significant injury, which, 2. resulted directly and only from the use of force that
was clearly excessive to the need, the excessiveness of which was, 3. objectively unreasona-
able, and, 4. the action constituted an unnecessary and wanton infliction of pain.” Huguet,
900 F.2d at 841.
89. Hudson, 929 F.2d at 1015.
90. Id. (“Hudson’s claim . . . founders on the significant injury prong.”).
92. Id.
93. Id. at 999. The Court stated its holding as follows:

[We] hold that whenever prison officials stand accused of using excessive physical
force in violation of the Cruel and Unusual Punishments Clause, the core judicial
inquiry is that set out in Whitley: whether force was applied in a good-faith effort to
maintain or restore discipline, or maliciously and sadistically to cause harm.

94. Id. at 998.
95. Id. (citing Whitley v. Albers, 475 U.S. 312, 320 (1986)).
ficials who are confronted with prison disturbances must "balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force." The Court then discussed the concerns enumerated in Whitley. Those concerns included balancing the need for discipline against the risk of injury to inmates and the importance of affording proper deference to prison officials so that they may execute policies that are needed to maintain discipline and security.

The Court believed that these administrative concerns exist at times of prison unrest or whenever force is used to discipline prisoners. Since similar concerns exist at times of riot and at other times when disciplinary force is applied, the Court found it could extend the Whitley standard to all excessive force cases. The Court felt the extension of Whitley was not a tremendous leap since numerous lower federal courts had previously applied it to non-riot situations. The Court added that the determination of whether or not disciplinary conduct was unnecessary depends on the balancing of the concerns outlined in Whitley. Those factors include "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'

The Court's second conclusion was that a plaintiff need not suffer a serious injury at the hands of a prison official to recover under the Eighth Amendment. The Court stated that whether a serious injury was sustained is relevant to Eighth Amendment violations but is not the linchpin. The objective component of an Eighth Amendment inquiry must be based on "'differences in the kind of conduct against which an Eighth Amendment objection is lodged.'" In revisiting Estelle, Rhodes and Whitley, the Court argued that the objective component of an Eighth Amendment claim is defined by the situation. For instance, the Court asserted that medical needs and substandard conditions in prisons must rise to the level of extreme deprivation to satisfy an Eighth Amendment

96. Id.
97. Id. at 999.
98. Id.
99. Id. at 998-99.
100. Id. at 999 (citations omitted).
101. Id.
102. Id. (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).
103. Id. at 1000.
104. See id.
106. Hudson, 112 S. Ct. at 1000.
claim because physical comfort and unqualified health care are not part and parcel of prison life. The Court found that excessive force cases are different. Whenever force is used maliciously and sadistically to cause injury, society's expectations concerning decent treatment of prisoners are offended. Still, the amount of force used remains a factor the Court must evaluate because "[t]he Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force. . ." Anticipating criticism concerning its rejection of the serious injury rule, the Court took issue with the dissent's failure to accept differences between physical abuse of a prisoner and substandard conditions in a prison. Thus, the Court rejected the serious injury requirement for excessive force cases claiming that it did not comport with contemporary standards of decency.

2. The Dissent

In his controversial dissent, Justice Thomas criticized the Court for its rejection of the serious injury requirement. He first engaged in a lengthy discourse, discussing the historical applications of the Eighth Amendment to "torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." Justice Thomas also noted that it was not until Estelle that the Court first agreed to apply the Eighth Amendment to deprivation cases. Justice Thomas concluded that the Court made a monumental mistake when it "cut the Eighth Amendment loose from its historical moorings." He pointed out that the Court in Estelle, Rhodes and Wilson held in each instance that the prisoner must allege a serious injury before recovering under an Eighth Amendment claim. Given this precedent, Thomas argued, the Court had no business dismissing the serious injury rule. He claimed that the objective component of Whitley is not contextual, but rather it is the "culpability of an official's state of mind [which] depends on the context in which he acts."
Justice Thomas was also concerned that the majority was unjustifiably using *Hudson* as an extension of the *Whitley* standard to all excessive force cases. He supposed that the rejection of the objective component in excessive force cases is now compensated for by a stricter requirement in the subjective component. Thomas disagreed with the application of *Whitley*, arguing that in some excessive force cases "no competing institutional concerns are present" and use of excessive physical force is not always accompanied by a "malicious and sadistic" state of mind.

Additionally, Justice Thomas found fault with the Court's distinguishing *Estelle*. He wondered why the Court would require injury to be serious for deprivation cases but not for excessive force cases. After all, Thomas supposed, society does not expect prisoners to be comfortable at all times and likewise to be free from occasional force, "since forcibly keeping prisoners in detention is what prisons are all about."

V. **What Happens to Prisoner's Rights in the 1990s?**

In deprivation cases such as *Estelle, Rhodes* and *Wilson*, both the objective and subjective elements of the Eighth Amendment test must still be proved. This remains true despite the holding in *Hudson*. However, for excessive force cases, the Court's rejection of the serious injury rule is a step in the right direction. The Court has indicated that unnecessary and wanton acts of violence directed at prisoners should not be a component of prison life. Importantly, the "contemporary standards of decency" phrase has new meaning. Rejection of the serious injury rule also dissolves the argument over what is and what is not a "serious" injury. Prisoners may now allege constitutional violations involving force which caused severe pain but did not cause permanent or significant injury. Fur-

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120. *Hudson*, 112 S. Ct. at 1008. (Thomas, J., dissenting).
121. *Id.*
122. *Id.*
123. *Id.* at 1009 (Thomas, J., dissenting).
124. *Id.*
125. *Id.*
128. *See* Adams v. Hansen, 906 F.2d 192, 194 (5th Cir. 1990) (lacerated fingers constituted significant injury); Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir. 1990), cert. denied, 111 S. Ct. 309 (1990) (no significant physical injury when a police officer placed a gun in the mouth of the plaintiff and threatened to blow his head off); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (arm injury requiring surgery and resulting in loss of earning capacity constituted severe injury).
thermore, psychological injuries may be within the realm of Eighth Amendment claims, if they are caused maliciously and sadistically.129

Already the Hudson opinion appears to have protected another Louisiana inmate. In Flowers v. Phelps,130 Alfred Flowers, an inmate at Angola prison (the same prison where Keith Hudson was detained) was handcuffed at the hands and legs and then beaten in an unprovoked attack.131 He suffered swelling in his ankle and abrasions.132 The district court found for Flowers because the force used was deliberate and unnecessary.133 The Fifth Circuit, this time bound by Hudson and not by Huguet, affirmed the district court’s finding that “there is no degree-of-injury threshold for Eighth Amendment claims of excessive force.”134

Without the serious injury requirement, one would think it would be easier for prisoners such as Flowers to successfully litigate excessive force cases. Indeed, recognizing that the elimination of the serious injury requirement will, in all likelihood, lead to an increase in the filing of excessive force claims, several states filed amicus curiae briefs in Hudson arguing that the serious injury requirement has merit.135 In his concurrence, however, Justice Blackmun stated that caseload concerns have no place in evaluating Eighth Amendment claims.136 Blackmun argued that concern over an increase in the federal docket is inappropriate where an individual’s substantive constitutional rights are at stake.137 Although Justice Blackmun is philosophically correct, the reality is that federal judges may view the influx of excessive force cases with skepticism, and consequently could make it more difficult for prisoners to satisfy the requisite intent threshold. After all, it was the distinction between non-serious injury and serious injury cases which allowed the federal bench to lighten its caseload in the past by eliminating “frivolous” claims. It is submitted that cases which may have met the serious injury requirement in the past may now be jeopardized if the federal bench subversively limits its caseload by imposing stricter intent requirements.

In addition, courts may, as one federal district court has done, avoid the Hudson analysis altogether by classifying the force as de minimis. In

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129. See Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992); id. at 1002-03 (Blackmun, J., concurring).
130. 956 F.2d 488 (5th Cir. 1992).
131. Id. at 489.
132. Id. at 489-90.
133. Id. at 491.
134. Id.
135. Hudson, 112 S. Ct. at 1003 (Blackmun, J., concurring).
136. Id.
137. Id. One commentator has argued that Hudson is an unjustifiable expansion of prisoners’ rights and will initially lead to an increase in frivolous claims filed by prisoners in the federal court system. See Gregory P. Taxin, The Eighth Amendment in Section 1983 Cases: Hudson v. McMillian, 15 HARV. J.L. & PUB. POL’Y 1050 (1992).
Juan Candelaria, a former New York state inmate, alleged that he was assaulted unnecessarily when a guard cut a string from around the claimant’s neck in order to remove an identification card. The prisoner alleged that when he tried to remove the card himself, the guard pushed his fist against the prisoner's neck causing the prisoner to have difficulty breathing. The district court found no Eighth Amendment violation because the force was de minimis. The court based its conclusion on the fact that a physician’s assistant who examined the prisoner found no “redness, bruising, swelling or other indication of physical injury to his ears or neck.” The court made no mention of whether the force was necessary or the intent of the guard. The court also seemed unconcerned with the possibility that air flow through the prisoner's throat may have been cut off. In Hudson, the Court dictated that de minimis force would not constitute an Eighth Amendment violation unless the force was “‘repugnant to the conscience of mankind.’” Suppose a prison guard choked a prisoner unnecessarily five seconds from his death without leaving any major physical marks on the prisoner. Would that be conduct which is “repugnant to the conscience of mankind”? What we may see from courts, such as the one in Candelaria, is a tendency to throw out cases when only de minimis injury is demonstrated, thereby putting a new premium on what is and what is not de minimis injury.

The extension of the Whitley malicious and sadistic test to all excessive force cases should clear up some of the confusion the lower federal courts had concerning the appropriate instances in which to apply Whitley. Less clear is why Whitley itself was extended when it was significantly narrow in scope. What is also troubling about the application of the malicious and sadistic test is that Whitley was a five to four vote, indicating that the test was highly contested and stands on somewhat unstable

139. Id. at 371.
140. Id. at 375.
141. Id. at 374-75.
143. See Al-Jundi v. Mancusi, 926 F.2d 235, 239-40 (2nd Cir. 1991) (applying Whitley standard during riotous circumstances, but the deliberate indifference standard once order had been restored); Moore v. Winebrenner, 927 F.2d 1312, 1316 (4th Cir. 1991) (inmate's stabbing by a fellow inmate governed by the Whitley standard, but the dissent argued that Whitley is limited to riotous situations); Wyatt v. Delaney, 818 F.2d 21, 23 (8th Cir. 1987) (finding that when the case does not involve a prison security measure to resolve disturbance, Court should not apply malice factor).
144. See Whitley v. Albers, 475 U.S. 312, 314 (1986) (“This case requires us to decide what standard governs a prison inmates’ claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.”).
The Whitley test makes sense in situations such as riots where violent force directed at inmates may be appropriate to quell the disturbance. Still, force violates a prisoner's constitutional safeguards when it is applied unnecessarily and with the intent to cause harm. But why should there be a subjective requirement (culpable state of mind) when, in a non-riotous situation, force was unnecessary from the outset? With Hudson, the Court has placed the burden on a plaintiff to show why a prison official acted in an uncalled for manner regardless of the official's state of mind. Basically, the Court still believes that some deference should be afforded to a prison official's state of mind in the cruel and unusual standard.

It is unclear how onerous a burden now faces a plaintiff when he or she attempts to show a prison official's culpable state of mind. An intentional act, such as the beating administered to Hudson, will meet the threshold requirement. More insular, discreet acts could pose problems for prisoners who assert that their Eighth Amendment rights have been violated. Will mistake or negligence be punishable under Eighth Amendment safeguards? Certainly, the intent hurdle will bar some claims when, as in Wilson, the culpable state of mind of the official cannot be proved.

Justice Stevens, in his Hudson concurrence, argued that the less demanding standard of "unnecessary and wanton infliction of pain" should be applied when the riotous circumstances of Whitley are not present. Supporting this proposition, Justice Stevens cited Unwin v. Campbell, a First Circuit Court of Appeals opinion, as a pertinent example of why the unnecessary and wanton infliction of pain test is more appropriate for excessive force cases in non-riotous situations than the one advocated by the Hudson majority. In Unwin, a prisoner who was an innocent bystander was beaten and required medical attention. The Court did not address whether the beating was intentional or not.

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145. See id. at 313; see also Thomas Barth, Perception and Acceptance of Supreme Court Decisions at the State and Local Level, 17 J. PUB. L. 308, 314 (1968) ("A five-four vote is likely to increase the opportunity for attack upon the decision. Such a vote indicates a difference of opinion on the Court itself; if experts cannot agree on questions of law, it is reasonable to assume others will also disagree.").

146. See Hudson, 112 S. Ct. at 999.

147. The Court's analysis of Hudson's beating and whether the guard's conduct satisfied the malicious and sadistic requirement is sparse. Thus, one is left to assume that any unjustified physical force, short of de minimus uses of physical force, which may be considered "repugnant to the conscience of mankind" will meet the burden. Hudson, 112 S. Ct. at 1000 (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986)).


149. Hudson, 112 S. Ct. at 1002 (Stevens, J., concurring) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). One commentator has agreed with Justice Stevens' approach. See Neisser, supra note 126, at 21. The unnecessary and wanton standard was also the test supported by Justice Marshall in his dissent in Whitley. See supra note 58 and accompanying text.

150. 863 F.2d 124 (1st Cir. 1988).

151. Hudson, 112 S. Ct. at 1002 (Stevens, J., concurring).
stander to a fight between two other prisoners was beaten by state troopers who rushed into a day room to quell the disturbance. The troopers argued that their efforts were a good faith attempt to subdue the prisoners. The troopers were not given the benefit of the *Whitley* test because the court found that the "previous disturbance may have subsided by the time the law enforcement officials arrived at the prison." However, under *Hudson*, the plaintiff in *Unwin* would have had to prove that the troopers acted with malicious and sadistic intent, which he probably could not have done because of the troopers' claim that they acted in good faith to quell the disturbance. Thus, there is a window of opportunity for prison officials who are charged with using excessive force. In the future, prison officials who can demonstrate that they acted in good faith, despite acting maliciously and sadistically with the intent to inflict harm, will be protected under *Hudson*.

While Justice Thomas' dissent seems extreme, it is noteworthy since it reveals inconsistencies in the majority's opinion. Thomas noted that the Court ignored precedent when it adopted *Estelle*’s contemporary standards of decency as the appropriate yardstick when measuring the objective component of the Eighth Amendment test. He is partially correct in revealing the Court's break with precedent concerning the objective component of the Eighth Amendment. The precedent upon which Thomas primarily relies is *Estelle, Rhodes* and *Wilson*, yet all three of these cases are deprivation cases. Justice Thomas refused to acknowledge the distinction between excessive force cases and prison deprivation suits, which won him sharp criticism from Justice O'Connor. Importantly, Thomas noted: "After today, the 'necessity' of a deprivation is apparently the only relevant inquiry beyond the wantonness of official conduct."

Justice Thomas' observation could prove to be an accurate forecast for excessive force cases. In situations such as the one in *Hudson*, when no constraints face the prison guard, unnecessary violence will be a

152. *Unwin*, 863 F.2d at 126-27.
153. Id. at 129-30.
154. Id. at 130.
156. *Hudson*, 112 S. Ct. at 1007 (Thomas, J., dissenting).
158. *Hudson*, 112 S. Ct. at 1001 ("To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment.").
159. *Id.* at 1010 (Thomas, J., dissenting). Whether or not something is wanton "depends upon the constraints facing the official." *Wilson*, 111 S. Ct. at 2326 (emphasis in original).
violation of a prisoner’s fundamental rights. However, as noted above, when an official uses excessive force mistakenly, but in good faith, that official will be protected by *Hudson*.

Finally, the *Hudson* case provided the general public with its first glimpse of Justice Thomas’ interpretive approach to the Constitution while on the Supreme Court. Although Thomas’ greatest criticism of the majority centers around its abandonment of the serious injury requirement, he does spend a significant amount of time retracing the history of the Eighth Amendment in order to show that the Eighth Amendment historically did not protect prisoners, such as Keith Hudson, during incarceration. From language such as “[w]hen we cut the Eighth Amendment loose from its historical mooring and applied it to a broad range of prison deprivations ...” it is apparent that Thomas does not approve of the Eighth Amendment’s modern applications. Thomas’ originalist perspective shows disdain for the Court’s slogan of “contemporaneous standards of decency.” In fact, Thomas’ desire to maintain the serious injury requirement has drawn the wrath of one commentator, who called his views “frightening.” As an originalist in theory, Thomas’ vote in *Hudson* is not surprising, yet what is shocking is his vigorous dissent in a case where the rights of an insular, discreet minority are at stake. Many believed that Thomas would strive to protect such rights, particularly after testifying during his confirmation hearings that almost every day he watched from his District of Columbia office as Afro-American prisoners were bussed to prison and said to himself “but for the grace of God, there go I.” In light of his dissent, one must wonder if Justice Thomas now chooses to ignore this image.

VI. Conclusion

The Eighth Amendment, while it purports to condemn “cruel and unusual punishment,” has a rather poor history of doing just that. The Supreme Court undertook efforts to change the scope of the Amendment during the 1970s, and while *Estelle* and *Rhodes* were groundbreaking cases, it is questionable whether prisoners’ rights were actually expanded. Whatever hopes prisoners had were quickly diminished by *Whitley* and *Wilson*, which set high burdens of proof for prisoners alleging that their constitutional rights had been violated.

In lieu of the Court’s past treatment of Eighth Amendment claims, *Hudson v. McMillian* is a significant victory for prisoners’ rights. The elimination of the serious injury requirement abolishes an inhumane, out-

161. Id. at 1007 (Thomas, J., dissenting).
162. Neisser, supra note 126, at 21.
dated and confusing rule. As is evidenced by Candelaria, the objective component of the test will now focus on what is and what is not de minimis injury. Injuries, such as those sustained by Keith Hudson, clearly are not de minimis and will receive full protection under the Eighth Amendment.

While the application of the subjective malicious and sadistic test created in Whitley is flawed, it should not adversely affect many prisoners’ rights cases, since the intent element does not now appear to be too high of a hurdle. Nevertheless, in situations such as Hudson’s, where force was unnecessary to begin with, the intent of the prison official is really irrelevant. The test that should have been applied, as Justice Stevens argued, was the deliberate indifference test. However, with the malicious and sadistic test in place, prisoners may have difficulty prevailing in excessive force claims when prison officials argue that they acted in good faith.

Despite this, Hudson is a significant step away from the “hands-off” doctrine that appeared to be coming back into vogue with the Whitley and Wilson decisions. Hudson also indicates that the Rehnquist Court, no matter how rigidly it relies on precedent, may be willing to comply with contemporary standards of decency. The Court seems to remember, as one commentator has noted:

Prisoners are the starkest form of a “discrete and insular minority” — despised and politically powerless. It is easy to forget them and their problems — until they are released from prison and prey upon society again. We proceed at our own peril if we forget Dostoyesky’s warning that: “The degree of civilization in a society is revealed by entering its prisons.”

L. Allan Parrott, Jr.

164. Neisser, supra note 126, at 21, 25 (citation omitted).