Hudson v. McMillan: The Eighth Amendment Gets a Push and a Shove

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The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State... and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.¹

I. INTRODUCTION

Until the middle of the twentieth century, prisoners in the United States were regarded as slaves of the state, persons who had forfeited not only their liberty but all of their personal and constitutional rights,² persons who could be punished at the discretion of prison officials “by stripes, or the iron mask, or the gag, or the dungeon.”³ Acting under the judiciary’s commitment to what became known as the “hands-off” doctrine,⁴ federal courts refused to accept jurisdiction over complaints of convicts who challenged the actions of prison officials.⁵ The judiciary attributed its hands-off

². See, e.g., Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871). Excluding prisoners from the protection of the Virginia Bill of Rights, the Virginia Supreme Court stated:
   A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death . . . is for the time being the slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man. The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead.
   Id. at 795-96.
³. Id. at 796.
⁴. One court justified the hands-off doctrine by stating that “courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.” Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944) (per curiam).
⁵. See, e.g., United States ex rel. Knight v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) (per curiam) (noting that state penitentiary issues are the sole concern of the state and would be addressed by federal courts only under exceptional circumstances), cert. denied, 380 U.S. 985 (1965); Kirby v. Thomas, 336 F.2d 462, 464 (6th Cir. 1964) (finding that federal courts do not have authority to regulate ordinary internal management and disci-
attitude to a lack of expertise in penology, a tradition of deference to the authority of prison officials, and a lack of federal remedies. In the 1960s, because courts and commentators realized that inadequate prison conditions demanded some intervention and because section 1983 of the Civil Rights Act emerged as an effective remedy of prisons); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.) (holding that "it is not the function of the courts to superintend the treatment and discipline of prisoners"), cert. denied, 342 U.S. 829 (1951).


7. For a thorough analysis of the hands-off doctrine, see David J. Gottlieb, The Legacy of Wolffish and Chapman: Some Thoughts About "Big Prison Case" Litigation in the 1980s, in 1 PRISONERS AND THE LAW 2-3 to 2-4 (Ira P. Robbins ed., 1990) [hereinafter Gottlieb] (noting that the reasons for the hands-off doctrine include the theory that prisoners are slaves of the state, the demands of federalism and separation of powers, lack of judicial expertise in prison affairs, a lack of federal remedies, the potential for a flood of litigation, and the need to conserve financial resources). For a different perspective, see Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506, 508-09 (1963) (arguing that the courts' nonintervention cannot be attributed to the limitations of remedies, but instead can be explained by the courts' unquestioning acceptance of the assertion that judicial scrutiny will subvert the authority and independence of prison officials and the discipline of prisons).


[W]hen . . . the responsible prison authorities . . . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly—to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.

Id.; see also Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973) (noting that "the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience"). See generally Joseph C. Kearfott, Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 VA. L. REV. 841, 884 (1971) ("[P]risoners possess the constitutional right to fairness and decency in their treatment and . . . if no other body will ensure this right, the courts will stand ready to do so. No less can be expected of our judicial system."); Eugene N. Barkin, The Emergence of Correctional Law and the Awareness of the Rights of the Convicted, 45 NEB. L. REV. 669, 673 (1966) (advocating that "a prisoner should not be stripped of any rights other than those which would be detrimental to the administration and discipline of the institution"); Martin W. Spector, Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. PA. L. REV. 985, 985 (1962) (stating that incarceration "does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment").

9. The relevant portion of § 1983 of the Civil Rights Act of 1871 provides:

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.

In the 1960s, prisoners gained substantial access to federal courts through the decisions of the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), and Robinson v. California, 370 U.S. 660 (1962). Monroe expanded the availability of § 1983 to claims against officials who, clothed with the authority of state law, misuse their power to deprive individuals of constitutional rights. Monroe, 365 U.S. at 185-87. Robinson extended the applicability of the Eighth Amendment to the states via the Due Process Clause of the Fourteenth Amendment. Robinson, 370 U.S. at 666-67; see also Gottlieb, supra note 7, at 2-5 (discussing the Supreme Court's revival of the Civil Rights Act and the use of the Act to encompass abuse of state-delegated authority within federal court jurisdiction under § 1983); James Rosenzweig, State Prison Conditions and the Eighth Amendment: What Standard for Reform Under Section 1983?, 1987 U. CHI. LEGAL F. 411, 428 (1987) (noting that "[p]rison reform suits are a modern phenomenon").

In each of the two prison cases involving religious rights, the Court recognized the prisoners' rights. See Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (holding that a Buddhist prisoner must be afforded a "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts"); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (holding that a prisoner's claim that he was denied access to religious literature stated a cause of action under § 1983).


11. See, e.g., Sostre v. McGinnis, 334 F.2d 906, 912 (2d Cir.) (requiring state authorities to alter rules "insofar as possible within the limits of prison discipline" to minimize interference with the rights of prisoners to practice their Muslim religion), cert. denied, 379 U.S. 892 (1964); Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961) (granting prisoners a hearing on their request for injunctive relief against alleged discriminatory treatment based solely on religious beliefs); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962) (holding that a prisoner "is not to be discriminated against because of his religion").

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13. See, e.g., Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) (holding that states have an affirmative constitutional duty to furnish inmates with law libraries or with professional or quasi-professional legal assistance); Johnson v. Avery, 393 U.S. 483, 485 (1969) (holding that prison officials may not prevent inmates from helping other inmates with habeas corpus petitions unless the state provides constitutionally adequate alternative access to courts); Ex parte Hull, 312 U.S. 546, 548-49 (1941) (striking down a regulation prohibiting prisoners from filing legal documents without prescreening by prison officials).

14. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). The court granted the inmate injunctive relief, holding that 12 consecutive days of solitary confinement in a "strip" cell as a sanction for misconduct constituted cruel and unusual punishment. Id. at 683-84. The cell was approximately six feet by eight, had no furnishings except a toilet, had no interior source of light, was not cleaned regularly, and contained no means for the prisoner to clean himself. Id. at 676-77.
States Constitution.\textsuperscript{15} Two years later, in the landmark case of Jackson v. Bishop,\textsuperscript{16} the Eighth Circuit declared the practice of whipping prisoners unconstitutional.\textsuperscript{17} In 1974, after years of prisoners' rights litigation in the lower federal courts, the Supreme Court repudiated the hands-off policy\textsuperscript{18} and announced that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."\textsuperscript{19} Finally, in 1976, in Estelle v. Gamble,\textsuperscript{20} the Court considered the applicability of the Cruel and Unusual Punishments Clause in the prison context for the first time.

Beginning with its Estelle decision, the Supreme Court has attempted to define appropriate legal standards to determine whether prisoners' deprivations constitute "cruel and unusual punishments" prohibited by the Eighth Amendment.\textsuperscript{21} In 1991, in Wilson v. Seiter,\textsuperscript{22} the Court clarified its Eighth Amendment doctrine by expressly dividing the analysis of all prisoners' claims into objective and subjective components.\textsuperscript{23}

On the basis of the two-prong analysis established in Wilson, the

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  \item \textsuperscript{15} The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). The language of the Eighth Amendment manifests "an intention to limit the power of those entrusted with the criminal-law function of government." Ingraham v. Wright, 430 U.S. 651, 664 (1977). Thus, the Cruel and Unusual Punishments Clause applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Id. at 671 n.40 (citing United States v. Lovett, 328 U.S. 303, 317-18 (1946)).
  \item \textsuperscript{16} 404 F.2d 571 (8th Cir. 1968).
  \item \textsuperscript{17} Id. at 579. Justice Blackmun, then serving on the U.S. Court of Appeals for the Eighth Circuit, wrote: "Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. . . . Whipping creates other penological problems and makes adjustment to society more difficult." Id. at 580. \textit{See generally Comment, The Role of the Eighth Amendment in Prison Reform, 38 U. Chi. L. Rev. 647, 658 (1971)} (noting that "Jackson departed from the mainstream").
  \item \textsuperscript{19} Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). In \textit{Wolff}, the Court held that certain minimum due process protections must be provided if a disciplinary hearing could deprive a prisoner of good time credits or result in disciplinary segregation. \textit{Id.} at 557-58.
  \item \textsuperscript{20} 429 U.S. 97 (1976); \textit{see also infra} notes 58-65 and accompanying text.
  \item \textsuperscript{21} U.S. Const. amend. VIII.
  \item \textsuperscript{22} 111 S. Ct. 2321 (1991).
  \item \textsuperscript{23} \textit{See infra} notes 81-87 and accompanying text.
\end{itemize}
Court decided *Hudson v. McMillian* on February 25, 1992. In *Hudson*, the Court ruled that the beating of a prisoner by prison guards violated the Cruel and Unusual Punishments Clause even though the lower court had found that the prisoner had not suffered a "significant injury." The decision also established that inmates must demonstrate that prison officials acted with "malicious and sadistic" intent in order to establish an Eighth Amendment excessive-force violation. The *Hudson* decision stirred considerable controversy and received extensive press coverage, largely because of the dissenting opinion in which Justice Thomas, joined only by Justice Scalia, argued that *Hudson* extended Eighth Amendment protection "beyond all reasonable limits."

This Note juxtaposes the opinions in *Hudson* against the analytical framework of recent Eighth Amendment prison cases decided by the Supreme Court. It begins by tracing early interpretations of the Eighth Amendment and identifying the development of the analysis that led to the formulation of the standards announced in *Hudson*. The Note then presents the facts of *Hudson* and discusses the holdings of the Court and the issues raised by the dissent. Finally, the Note analyzes the reasoning of the majority, evaluates the criticisms of the dissent, and reaches two conclusions: First, the majority properly rejected the notion that a prisoner must show significant injury in order to satisfy the objective component in Eighth Amendment excessive-force cases. Second, the majority erred in ruling that prisoners must show that their

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25. Id. at 1000. This holding refers to the "objective component" of the test formulated in *Wilson*.
26. Id. at 999. This holding refers to the "subjective component" of the test formulated in *Wilson*.

[T]here were two important themes in Justice Thomas's dissenting opinion in . . . *Hudson v. McMillian*. One was the emphasis on the original understanding of the Constitution's framers as the only valid measure of the document's meaning today. . . . The other theme was the willingness to discard precedents in which the Court departed from the search for the original understanding.

Id.
29. See infra part II.
30. See infra part III.
31. See infra parts IV and V.
abusers acted with malicious and sadistic intent in order to satisfy the subjective component.

II. BACKGROUND

The Supreme Court's analysis in Hudson was rooted in the Court's earlier interpretations of the Cruel and Unusual Punishments Clause in nonprison contexts. This section summarizes (1) the development of Eighth Amendment doctrine outside of the prison context prior to Estelle v. Gamble and (2) the development of Eighth Amendment standards within the prison context from Estelle to Wilson v. Seiter, in which the Court divided its analysis into objective and subjective components and thus cast the mold for all subsequent Eighth Amendment claims by prisoners.

A. The Eighth Amendment

Before the 1970s, the Supreme Court took few opportunities to review or define "cruel and unusual punishment." For example, it was not until 1972, in Furman v. Georgia, that the Court considered the constitutionality of the death penalty. In early Eighth Amendment cases, the Court had focused on particular methods of execution, on challenges to the relative harshness of sentences.

34. See infra notes 81-87 and accompanying text.
35. For a history of pre-1972 applications of the Cruel and Unusual Punishments Clause, see Furman v. Georgia, 408 U.S. 238, 264-69 (1972) (Brennan, J., concurring); see also Note, What Is Cruel and Unusual Punishment, 24 HARV. L. REV. 54, 56 (1910) ("[C]ourts have considered not only the kind and degree of punishment and the magnitude of the crime, but the special conditions in a particular locality, and even the customs and beliefs of a particular class of individuals . . . .").
36. 408 U.S. 238 (1972). Furman held that although the death penalty is not per se unconstitutional, statutes that leave juries with untrammeled discretion to impose or withhold the death penalty violate the Cruel and Unusual Punishments Clause. 408 U.S. at 253-57. In concurring opinions, Justice Brennan recognized that "death is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity," id. at 287 (Brennan, J., concurring), and Justice Douglas condemned the arbitrariness and capriciousness in sentencing procedures. Id. at 256-57 (Douglas, J., concurring).
37. See, e.g., In re Kemmler, 136 U.S. 436 (1890). The Kemmler Court upheld a New York statute requiring execution by electrocution, deferring to the state legislature's finding that this method was "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." Id. at 444. Declaring that a judicial duty to adjudge penalties under the Eighth Amendment arose only when criminal punishments "were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like," the Court stated: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." Id. at
other than death, and on the implications of the Eighth Amendment for persons punished solely because of their status or condition.

In 1958, in *Trop v. Dulles*, the Court first recognized that an Eighth Amendment violation can occur without physical punishment. Confronted with a challenge to the penalty of denationalization for one day of wartime desertion, the *Trop* Court acknowledged that although it was difficult to articulate an exact or exhaustive definition of "cruel and unusual punishment," the basic concept underlying the Eighth Amendment is "nothing less

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447 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1878)). In *Wilkerson*, the Court upheld execution by firing squad on the ground that it did not involve the kind of torture as that in which the criminal "was embowelled alive, beheaded, and quartered," or cases "of public dissection . . . and burning alive." 99 U.S. at 135-36.

38. See *Trop v. Dulles*, 356 U.S. 86 (1958); see also *Weems v. United States*, 217 U.S. 349 (1910). Stating that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense," *id.* at 367, the *Weems* Court overturned a 12-to-20 year sentence of hard and painful labor in ankle and wrist chains, imposed for the crime of falsifying public records, finding it cruel in its excessiveness and unusual in its character. *Id.* at 380-82. The Court reaffirmed the principle of proportionality of sentencing in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) ("[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed.").

The Court, however, has been reluctant to conclude that individual sentences or multiple charges constitute cruel and unusual punishments. *See*, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (upholding a mandatory life sentence without possibility of parole given to a first-time offender for possession of cocaine); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) (reversing a grant of habeas corpus relief to a prisoner sentenced to 40 years imprisonment and a $20,000 fine for possession with intent to distribute less than nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding the application of a Texas recidivist statute that imposed a mandatory life sentence for a third property-related offense); *Badders v. United States*, 240 U.S. 391 (1916) (upholding a sentence of five years' imprisonment and a fine of $7,000 for mailing seven letters in attempted mail fraud). See generally Marc A. Paschke, *Harmelin v. Michigan: Punishment Need Not Fit the Crime*, 23 LOY. U. CHI. L.J. 273, 307 (1992) (concluding that the Court has "eviscerated the meaning and effect of the Eighth Amendment with respect to the proportionality principle in noncapital cases").

39. See *Robinson v. California*, 370 U.S. 660 (1962). Invalidating a statute that criminalized drug addiction, the Court stated: "The addict is a sick person. . . . We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime . . . . This age of enlightenment cannot tolerate such barbarous action." *Id.* at 676-78 (Douglas, J., concurring). The Court refused to extend this rationale when asked to invalidate the conviction of alcoholics for public drunkenness. *Powell v. Texas*, 392 U.S. 514 (1968) (holding that because the statute criminalized the behavior of public intoxication, not the status of being an alcoholic, it did not violate the Eighth Amendment).

40. 356 U.S. 86 (1958). In holding the penalty of denationalization cruel and unusual, the Court warned that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Id.* at 99.

41. *Id.* at 88-89. The Court had identified this challenge earlier in *Wilkerson*. 99 U.S. at 130 ("Difficulty would attend the effort to define with exactness the extent of the
than the dignity of man."\textsuperscript{42} The Court noted that although states have the power to punish, the Cruel and Unusual Punishments Clause assures that states will exercise their power within civilized limits.\textsuperscript{43} Thus, a state may punish criminals by imposing fines or by sentencing them to imprisonment or even execution, but "any technique outside the bounds of these traditional penalties is constitutionally suspect."\textsuperscript{44} The \textit{Trop} Court concluded that Eighth Amendment doctrine should evolve in a flexible and dynamic manner,\textsuperscript{45} drawing its meaning "from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{46}

In the 1970s, the Court relied on its decision in \textit{Trop} to extend Eighth Amendment protection to punishments\textsuperscript{47} that, although not physically barbarous, involve the "unnecessary and wanton infliction of pain."\textsuperscript{48} Such punishments include not only those meted out by judges or legislatures but also those that are "totally without penological justification."\textsuperscript{49}

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B. Eighth Amendment Standards Within the Prison Context

As a logical consequence of its extension of Eighth Amendment protection to cover penologically unjustified infliction of pain, the Court acknowledged that because confinement itself is punishment, the conditions of confinement are subject to scrutiny under Eighth Amendment standards. An overarching principle emerged: although a prisoner is placed in government custody, the Eighth Amendment does not permit the government to mistreat the prisoner.

Beginning with its first Eighth Amendment decision in the prison context, the Supreme Court has struggled to establish appropriate legal standards to determine whether the deprivations that prisoners suffer constitute "cruel and unusual punishments." Having determined that the test for Eighth Amendment claims is whether the state has inflicted pain that is unnecessary and wanton, the Court divided this test into two parts: Prisoners must satisfy (1) an "objective component" by demonstrating that they suffered an injury of sufficient severity, and (2) a "subjective component" by proving that the prison officials inflicting the abuse acted with the requisite intent. Depending on the context of the alleged Eighth Amendment violation, the Court has adopted different standards in applying this test. In formulating these standards, the Court has stressed that deference should be shown to the judgments of state legislatures and prison officials. Some of the commentators who have examined the policies that have shaped

50. See, e.g., Hutto v. Finney 437 U.S. 678, 685 (1978). By upholding remedial orders entered by the district court to correct unconstitutional conditions in the Arkansas prison system, the Court acknowledged that confinement conditions are subject to Eighth Amendment standards. See also Ingraham v. Wright, 430 U.S. 651 (1977). Ingraham involved the question of whether corporal punishment in a public school constituted cruel and unusual punishment. The Court held that the Cruel and Unusual Punishments Clause does not apply to disciplinary corporal punishment in public schools. Id. at 683. In distinguishing a prisoner from a schoolchild, the Court stated: "Prison brutality... is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'" Id. at 669 (quoting Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)).

51. Estelle, 429 U.S. 97 (1976); see also infra notes 58-65 and accompanying text.

52. See infra notes 58-87 and accompanying text.

53. See infra note 60 and accompanying text.

54. See infra notes 58-87 and accompanying text.

55. Id.

56. See, e.g., Whitley v. Albers, 475 U.S. 312, 321-22 (1986) (noting that neither judge nor jury should freely substitute its judgment for the considered choice of prison officials); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (commentsing that courts delegate the duty of dealing with prison discomfort to legislatures and prison administrations); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (warning that many federal courts have
the Court's decisions have characterized them as signaling a return to the hands-off doctrine.\footnote{See, e.g., James E. Robertson, The Role of Ideology in Prisoners' Rights Adjudication: Habilitative Prison Conditions and the Eighth Amendment, 1984 N. ILL. U. L. REV. 271. In discussing the role of penal ideologies in shaping the adjudication of prisoners' rights, the author wrote: The lower federal courts stood at the forefront of the judiciary's reform of the nation's jails and prisons. Hardly any aspect of prisoner life was considered to be beyond the ken of these courts during the 1970's [sic]. For a time, the Supreme Court accepted the views of the lower federal courts . . . . However, in recent years, this trend has been reversed as the Court has attempted to erect a new hands-off doctrine through a policy of broad deference to the conduct of correctional officials.}

In \textit{Estelle v. Gamble},\footnote{\textit{Id.} at 279-80 (footnotes omitted); see also Mark Berger, Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation, 47 UMKC L. REV. 1, 5 (1978) (stating that "[t]he developments in correctional litigation over the last decade demonstrate that the initial impetus toward wide-ranging reform of correctional law has given way to something akin to a holding action").} the Supreme Court first applied the Eighth Amendment to alleged deprivations that were not part of the prisoner's judicially imposed sentence, but which the prisoner had suffered during imprisonment. Inmate Gamble claimed that the inadequate medical care he had received for a back injury sustained while doing prison work amounted to cruel and unusual punishment.\footnote{\textit{Id.} at 97 (1976).} The Court concluded that the appropriate legal standard for establishing whether the plaintiff had suffered an unnecessary and wanton infliction of pain\footnote{\textit{Id.} at 98. Gamble was injured when a bale of cotton weighing 600 pounds fell on him while he was unloading a truck. \textit{Id.} at 99 n.3. Subsequently, medical personnel saw him on 17 occasions for treatment of his back injury, high blood pressure, and heart problems. \textit{Id.} at 107. He complained that physicians should have done more for the diagnosis and treatment of his back injury, contending that they did not pursue certain diagnostic techniques, such as taking an X-ray of his lower back. \textit{Id.}.} was whether the officers exhibited "deliberate indifference" to the serious medical needs of the prisoner.\footnote{\textit{Id.} at 104-05 (citations omitted). Relying on Louisiana \textit{ex rel. Francis v. Resweber}, 329 U.S. 459 (1947) as support for this subjective component, the Court stated: "An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." \textit{Estelle}, 429 U.S. at 105. In \textit{Resweber}, 329 U.S. at 464, the Court concluded that executing a prisoner by a second electrocution after a mechanical malfunction had thwarted the first attempt did not violate the Eighth Amendment. Central to the Court's reasoning was the unintentional failure of the first attempt. In finding no cruelty "in the constitutional sense," the}
not require proof that prison officials had acted with express intent to inflict unnecessary pain, the Court found that an inadvertent failure to provide adequate medical care did not constitute wanton-ness and did not offend societal standards of decency.

In addition to this subjective component, the standard required the prisoner to prove that the acts or omissions of prison officials caused him sufficient harm. The Court later referred to this requirement as the "objective component" of Eighth Amendment analysis.

The Court's subsequent decision in *Rhodes v. Chapman* turned on this objective component alone. In *Rhodes*, inmates contended that the confinement of two inmates in a single cell constituted cruel and unusual punishment. Rejecting their contention, the Court concluded that although double celling might cause pain, it is not unnecessary and wanton pain. The Court did not address the subjective intent of the prison officials who instituted the double celling.

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62. *Estelle*, 429 U.S. at 104-05. The Court stated that the deliberate-indifference standard applies "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* (footnotes omitted).

63. *Id.* at 105-06 (citations omitted). The Court explained that under this standard, a complaint of medical negligence did not state a valid claim under the Eighth Amendment. *Id.* at 106.

64. *Id.*


67. *Id.* at 339.

68. *Id.* at 349. This statement was an apparent concession to the findings of several detailed studies on which the district court had relied to conclude that for inmates serving long sentences, less than 50-55 square feet of living space constituted cruel and unusual punishment. *Id.* at 348. However, dismissing the lower court's considerations as reflecting "an aspiration toward an ideal environment for long-term confinement," Justice Powell's majority opinion stated that "the Constitution does not mandate comfortable prisons." *Id.* at 349.

69. *Id.* at 346. The Court held that only those deprivations that deny prisoners "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation. *Id.* at 347. Justice Powell's majority opinion stated: "[C]onditions that cannot be said to be cruel and unusual under contemporary standards [of decency] are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.*

70. Not only did the Court not consider the intent of prison officials, but referring to its earlier assessments of death penalty statutes as support, Justice Powell asserted that judgments about punishments "should be informed by objective factors to the maximum possible extent." *Id.* at 346 (citations omitted).
However, in *Whitley v. Albers*, the Court made it clear that its decision in *Rhodes* had not eliminated the subjective component. In *Whitley*, the conduct challenged was a correctional officer’s shooting of inmate Albers in the leg during a prison riot as Albers ran up a stairway to his cell. Relying on the *Estelle* holding that negligence alone does not suffice to establish an Eighth Amendment claim, the Court concluded that any official conduct that does not purport to be punishment “must involve more than the ordinary lack of due care for the prisoner’s interests or safety.”

The Court held that the meaning ascribed to the general requirement that an Eighth Amendment claimant allege and prove unnecessary and wanton infliction of pain is not fixed, but varies according to the type of conduct alleged. Reaffirming that “debatable indifference” is the appropriate standard for claims of inadequate medical care, the Court concluded that claims of excessive force in the context of a prison riot require a more stringent standard. In the latter category of cases, the appropriate inquiry is whether the officers applied force in good faith to maintain or restore discipline or whether they applied force maliciously and sadistically to cause harm.

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71. 475 U.S. 312 (1986).

72. *Id.* at 316. Inmates at the Oregon State Penitentiary held a prison officer hostage in the upper tier of a two-tier cellblock. *Id.* at 314-15. Although Albers had not been involved in the riot and had instead attempted to help, an officer shot him pursuant to an order from the security manager to “shoot low” at any inmates climbing the stairs to the upper tier. *Id.* at 325. Because the officer was unaware that Albers presented no security risk, and moreover, because the officer was following orders, the Court concluded that the shooting was “part and parcel of a good-faith effort to restore prison security.” *Id.* at 325-26.

73. *Id.* at 319. To emphasize that the prisoner’s injury did not in itself establish cruel and unusual punishment, the Court stated in dictum that “obduracy and wantonness, not inadvertence or error in good faith,” implicate the Eighth Amendment. *Id.* The Court explained that this general state of mind characterizes conduct prohibited by the Cruel and Unusual Punishments Clause whether the conduct “occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.” *Id.*

74. *Id.* at 319. The Court relied on its dictum in *Ingraham* for this general requirement. See supra note 60.


76. *Id.*

77. Id. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)). In *Johnson*, 481 F.2d at 1033, the Second Circuit held that a pretrial detainee’s complaint that a guard attacked him without provocation stated a cognizable due process claim under § 1983. Quoting *Johnson*, the *Whitley* Court stated: Not 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. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the
Explaining its departure from the deliberate-indifference standard, the Whitley Court reasoned that because a riot threatens prison security, analysis of the force used during a riot requires a court to balance the officials' penological interest in the protection of staff and inmates against the risk of injury to prisoners. The Court concluded that courts must therefore grant prison administrators considerable deference in the choice of procedures that they implement to preserve order and discipline and to maintain security. In contrast, deliberate indifference to a prisoner's illness requires no balancing of competing institutional concerns because the state's responsibility to provide prisoners with medical care does not clash with other equally important governmental responsibilities.

In Wilson v. Seiter, the Court extended the Estelle deliberate-indifference standard to challenges to general conditions of confinement and formally divided the Eighth Amendment into subjective and objective components. Rejecting the inmate's argument that individual acts, such as shooting a prisoner or denying medical care, are distinguishable from general conditions of confinement, the Court posited that both situations require a showing that harm constitutes punishment. The Court then concluded that unless punishment is formally meted out as a criminal sentence, an element of intent must be attributed to the inflicting officer or institution before punishment can qualify as an Eighth Amendment violation. For challenges to general conditions of confinement, the

need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Whitley, 475 U.S. at 320-21. See generally Kathryn R. Urbonya, Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments, 51 ALB. L. REV. 171, 212-29 (1987) (describing the development and application of the wantonness standard to prisoners' Eighth Amendment claims).

78. Whitley, 475 U.S. at 320.
79. Id. at 321-22. However, the Court made it clear that such deference does not insulate from review actions taken in bad faith and for no legitimate purpose. Id. at 322.
80. Id. at 320.
82. In particular, the plaintiff's complaint in Wilson alleged "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." Id. at 2323.
83. Id. at 2325.
84. Id. As support, the Court quoted Judge Posner of the Seventh Circuit:
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
Court found deliberate indifference to be a more appropriate measure for the defendant’s intent than the more demanding standard prescribed by *Whitley*. In reaching this conclusion, the Court emphasized that the wantonness of conduct does not depend upon its effect on the prisoner. Rather, assuming that conduct is harmful enough to satisfy the objective component, wantonness depends “upon the constraints facing the official.”

III. *Hudson v. McMillian*

On the basis of the Eighth Amendment doctrine developed in *Estelle*, *Rhodes*, *Whitley*, and *Wilson*, the Supreme Court decided *Hudson v. McMillian*. The issue before the Court was whether a prisoner who claimed that he was subjected to cruel and unusual punishment as a result of a single incident of force must show that he suffered a “significant injury” to state a cognizable Eighth Amendment claim. A majority of the Court concluded that although a prisoner need not prove that he suffered a significant injury to state an Eighth Amendment claim, whether we consult the usage of 1791, or 1868, or 1985.

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86. *Id.* at 2326.
87. *Id.* The Court stated that only the deprivation of “a single, identifiable human need such as food, warmth, or exercise” would satisfy the objective component of an Eighth Amendment violation. *Id.* at 2327.
90. 475 U.S. 312 (1986).
93. *Id.* at 996. The Court granted certiorari limited to the following question: “Did the Fifth Circuit apply the correct legal test to determine that petitioner’s claim that his Eighth Amendment rights under the Cruel and Unusual Punishment Clause were not violated as a result of a single incident of force by the respondents which did not cause a significant injury?” *Hudson v. McMillian*, 111 S. Ct. 1679, 1680 (1991).

cant injury, he must prove that officials acted with malicious and sadistic intent.  

A. The Facts and the Lower Court Opinions

In the early morning hours of October 30, 1983, corrections officers Jack McMillian and Marvin Woods handcuffed and shackled inmate Keith Hudson and took him from his cell to the administrative lockdown area of the penitentiary. On the way there, McMillian punched the inmate in the mouth, eyes, chest, and stomach while Woods held him in place and kicked and punched him from behind. Arthur Mezo, the supervisor on duty, watched the beating and told the officers “not to have too much fun.” The blows split Hudson’s lower lip, loosened his teeth, and cracked his partial dental plate, rendering it unusable for several months. The prisoner also suffered bruises on his body, and bruises and swelling on his face, mouth, and lip.

Hudson sued the officers in federal court under section 1983, alleging an Eighth Amendment violation and seeking compensatory damages. Finding that McMillian and Woods violated Hudson’s Eighth Amendment rights by using unnecessary force and that the supervisor expressly condoned the acts, the trial court entered judgment for Hudson and awarded him $800 in damages.

The Court of Appeals for the Fifth Circuit reversed, holding that inmates alleging an Eighth Amendment use-of-force violation must prove: (1) a significant injury (2) resulting directly and only from unwarranted use of force that was (3) objectively unreasonable.

95. Id. at 997. Hudson was a prisoner at the State Penitentiary in Angola, Louisiana. Id. He had had an exchange of words with the officers and had received two disciplinary reports. Brief of Petitioner at 3, Hudson (No. 90-6531) [hereinafter Brief of Petitioner].
96. Hudson, 112 S. Ct. at 997.
97. Id.
98. Id. Respondents referred to the cracking of Hudson’s dental plate as “damage to property not to the person.” Brief of Respondents at 12 n.8, Hudson (No. 90-6531) [hereinafter Brief of Respondents]. In Hudson’s reply brief, he submitted that “cracking his dental plate by repeatedly punching him in the mouth while he was wearing it constitutes an injury to the person.” Reply Brief of Petitioner at 7-8 n.10, Hudson (No. 90-6531).
100. Id.
101. Id. at 997-98.
102. Brief of Petitioner, supra note 95, at 4. The trial court opinion is unreported.
103. Hudson, 112 S. Ct. at 998.
104. Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (per curiam).
ble and that (4) caused an unnecessary and wanton infliction of pain. Although it agreed with the trial court that the officials had used unreasonable and excessive force and that they had caused unnecessary and wanton infliction of pain, the Fifth Circuit nonetheless held that Hudson could not prevail on his Eighth Amendment claim because he had suffered only "minor" injuries that required no medical attention.

B. The Opinion of the United States Supreme Court

In a seven-to-two decision, the Supreme Court reversed the Fifth Circuit ruling, which required a showing of significant injury as a prerequisite to an excessive-force claim. With respect to the objective component, the Court concluded that all but de minimis uses of force are subject to Eighth Amendment scrutiny. In addition, the Court extended the Whitley subjective standard of "malicious and sadistic" intent to all Eighth Amendment allegations of excessive physical force.

Writing for the majority, Justice O'Connor first explained that the Whitley subjective standard was designed to protect prison officials confronting a riot who must make quick, difficult decisions under tense and uncertain circumstances, and who must therefore be allowed to balance their concern for maintaining prison security against the risk of injury to inmates. Justice O'Connor then found sufficient similarities between a riot and the "lesser disruption" in Hudson to justify extending the Whitley subjective standard to all Eighth Amendment excessive-force claims. She contended that both situations require prison officials to act quickly and decisively, and both implicate the principle that courts

105. Id.
106. Id.
107. Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Kennedy, and Souter joined and in which Justice Stevens joined in part. Hudson, 112 S. Ct. at 997. Justice Stevens filed a separate opinion concurring in part and concurring in the judgment. Id. Justice Blackmun also filed a separate concurring opinion, and Justice Thomas filed a dissenting opinion, in which Justice Scalia joined. Id.
108. Hudson, 929 F.2d at 1015.
110. Id. at 998-99 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The Court stated: "[W]henever 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 . . ." Id.
111. Id. at 998 (citing Whitley, 475 U.S. at 320).
112. Id. at 999.
should defer to prison officials in matters of prison security. On this basis, Justice O'Connor concluded that all prisoners claiming Eighth Amendment excessive-force violations must demonstrate that the officials acted with malicious and sadistic intent.\footnote{113} Addressing the objective component, the majority noted that under the Whitley standard, a finding of less than substantial injury does not end the inquiry.\footnote{115} Other factors include: (1) the need to apply force, (2) the relationship between that need and the amount of force used, (3) the question of whether the officials reasonably perceived the prisoner as threatening, and (4) the question of whether the officials made any efforts to temper the severity of a forceful response.\footnote{116}

Distinguishing allegations of physical abuse from allegations of inadequate health care or routine discomfort, the majority stated that because malicious and sadistic beatings always violate societal standards of decency, excessive-force claims do not require a showing of significant injury.\footnote{117} The Court explained that although this standard excludes \textit{de minimis} uses of force,\footnote{118} Hudson's claim satisfied the objective component because his injuries, though minor, were caused by force that exceeded the \textit{de minimis} threshold.\footnote{119}

\footnote{113} \textit{Id.} Although the Court cited cases from five circuits in support of this contention, in fact, the courts disagreed considerably on this issue. Some courts had applied \textit{Whitley} to all prison use-of-force cases. See \textit{Miller v. Leathers}, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc), \textit{cert. denied}, 111 S. Ct. 1018 (1991); \textit{Haynes v. Marshall}, 887 F.2d 700, 703 (6th Cir. 1989); \textit{Brown v. Smith}, 813 F.2d 1187, 1188-89 (11th Cir. 1987). Other courts had defined "prison disturbance" broadly to include almost any defiance of authority but had still insisted on proof of an actual security threat at the time force was used. See, e.g., \textit{Stenzel v. Ellis}, 916 F.2d 423, 427 (8th Cir. 1990) (holding that refusal to "show skin" while sleeping constituted a disturbance invoking \textit{Whitley}); \textit{Cowan v. Wyrick}}, 862 F.2d 697, 699 (8th Cir. 1988) (holding inmate's refusal to close food slot in his cell door a disturbance); \textit{Bolin v. Black}}, 875 F.2d 1343, 1350 (8th Cir. 1989) (holding that proof of malice is not required for retaliatory beatings after disturbance has been suppressed), \textit{cert. denied}, 493 U.S. 993 (1990); \textit{Wyatt v. Delaney}, 818 F.2d 21, 23 (8th Cir. 1987) (holding that malice need not be alleged if no security need for force existed).

\footnote{114} \textit{Hudson}, 112 S. Ct. at 999.

\footnote{115} \textit{Id.}

\footnote{116} \textit{Id.} (citing \textit{Whitley}, 475 U.S. at 321).

\footnote{117} \textit{Hudson}, 112 S. Ct. at 1000. "Otherwise," Justice O'Connor contended, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today." \textit{Id.}

\footnote{118} \textit{Id.} In addition, Justice O'Connor stated: "The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" \textit{Id.} (quoting \textit{Johnson v. Glick}}, 481 F.2d 1028, 1033 (2d Cir. 1973) (citations omitted)).

\footnote{119} \textit{Id.} Justice O'Connor explicitly declined to address the respondents' argument that their conduct could not "constitute an Eighth Amendment violation because it was
C. The Concurring Opinions

Justices Stevens and Blackmun filed separate opinions, concurring with the majority’s holding with respect to the objective level-of-injury component, but arguing that the majority was unjustified in extending the Whitley subjective malicious-and-sadistic intent standard to claims lacking the exigent circumstances of a serious prison disturbance. Although he agreed with the majority that Hudson’s claim satisfied even the more demanding standard, Justice Stevens contended that courts should apply the less demanding standard of unnecessary and wanton infliction of pain to claims involving no risk to institutional security.

Justice Blackmun also dismissed the suggestion made by the prison officials and their amici curiae that the need to curb the number of prisoner complaints in federal courts compelled a “significant injury” requirement. He stressed that inasmuch as a

isolated and unauthorized.’” Id. at 1001. First, she contended, the Fifth Circuit had adopted the trial court’s determination that the violence at issue was “not an isolated assault.” Id. at 1001-02. Justice O’Connor noted that the record indicated “that McMillian and Woods beat another prisoner shortly after they finished with Hudson.” Id. at 1002. Second, the unauthorized nature of the respondents’ acts was an issue that was not addressed by the Fifth Circuit and not related to the question on which the Court granted certiorari. Id. Moreover, the trial court found that supervisor Mezo had “expressly condoned the use of force in this instance.” Id.

Justice Blackmun contended that a contrary holding would put torture techniques “ingeniously designed to cause pain but without a telltale ‘significant injury’—entirely beyond the pale of the Constitution.” Id. at 1002 (Blackmun, J., concurring). Justices Stevens and Blackmun joined Justice Marshall’s dissent in Whitley. See Whitley, 475 U.S. at 328 (Marshall, J., dissenting).

Hudson, 112 S. Ct. at 1002. Justice Stevens stated that his approach was consistent with “the Court’s admonition in Whitley that the standard to be used is one that gives ‘due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.’” Id. (quoting Whitley, 475 U.S. at 320); see also supra notes 71-80 and accompanying text. In addition, Justice Stevens cited lower court cases that applied the standard he deemed appropriate. Hudson, 112 S. Ct. at 1002 (Stevens, J., concurring); see, e.g., Unwin v. Campbell, 863 F.2d 124, 135 (1st Cir. 1988) (“[W]here institutional security is not at stake, the officials’ license to use force is more limited; to succeed, a plaintiff need not prove malicious and sadistic intent.”).

The Attorney General of Louisiana represented the respondents, and the states of Texas, Hawaii, Nevada, Wyoming, and Florida joined as amici curiae. Hudson, 112 S. Ct. at 1003 (Blackmun, J., concurring).

Id. (Blackmun, J., concurring). The respondents urged that this method had proved effective to “control its system-wide docket management problems” in the Fifth Circuit. Id. Justice Blackmun replied:

This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. . . . But this inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.

Id. (Blackmun, J., concurring).
convict is disenfranchised, the right to file a court action is a most fundamental right because it provides the means to preserve all rights.\(^{125}\)

Finally, Justice Blackmun explained that the *Hudson* decision did not limit injury cognizable under the Eighth Amendment to physical injury because the prohibition against unnecessary and wanton infliction of pain includes psychological pain.\(^{126}\) Citing Supreme Court precedent as support for the proposition that psychological pain is cognizable for constitutional purposes,\(^{127}\) Justice Blackmun asserted that reading a ‘‘physical injury’ requirement into the Eighth Amendment would be no less pernicious’’ than the significant-injury requirement rejected by the majority.\(^{128}\)

**D. Justice Thomas’s Dissenting Opinion**

Justice Thomas, joined by Justice Scalia, dissented from both prongs of the Court’s decision. In his view, ‘‘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.’’’\(^{129}\) Justice Thomas rejected what

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125. *Id.* (Blackmun, J., concurring). Justice Blackmun then noted that three measures already in place provided adequate control of docket management problems caused by frivolous prisoner claims. First, prisoners, alone among § 1983 claimants, are required by statute to exhaust administrative remedies before filing suit. *Id.* at 1003-04. This statement is not entirely accurate because 42 U.S.C § 1997e(a) provides that a federal district court may continue a state prisoner’s § 1983 suit for 90 days to compel the prisoner to exhaust the internal grievance remedy. The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1988). Second, prison officials are entitled to a pretrial ruling on the qualified immunity defense. *Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring). A court must look to the ‘‘objective reasonableness of an official’s conduct, as measured by reference to clearly established law,’’ to determine whether qualified immunity applies in the particular case. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). Third, federal district courts are authorized to dismiss frivolous or malicious *in forma pauperis* complaints. *Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring); *see also* 28 U.S.C. § 1915(d) (‘‘The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.’’).

126. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring) (citing *Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir.), *cert. denied*, 111 S. Ct. 309 (1990)).


128. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring). Justice Blackmun acknowledged that the Court’s opinion intimates that *de minimis* or nonmeasurable psychological pain is not actionable under the Eighth Amendment. *Id.*

129. *Id.* at 1005 (Thomas, J., dissenting).
he characterized as the majority's broad assertion that any unnecessary and wanton use of force against a prisoner, greater than a *de minimis* level, is automatically cruel and unusual.\(^{130}\) He also rejected the majority's contention that even a *de minimis* use of force inflicts cruel and unusual punishment if it is repugnant to the public conscience.\(^{131}\)

Justice Thomas traced the Cruel and Unusual Punishments Clause back to when it applied only to torturous punishments meted out by judges or legislatures and when, under the hands-off doctrine, courts routinely rejected prisoner complaints.\(^{132}\) He noted that when the Court "cut the Eighth Amendment loose from its historical moorings" by applying it in the prison context for the first time in *Estelle v. Gamble*,\(^ {133}\) the Court made it clear that the Eighth Amendment plays a very limited role in regulating prison administration.\(^{134}\) On this basis, he argued, *Estelle* restricted application of the clause to those deprivations that involved serious injury inflicted by prison officials acting with a culpable state of mind.\(^{135}\)

Noting further that *Wilson* formally required prisoners to satisfy both the objective and the subjective components in order to state an Eighth Amendment claim, Justice Thomas objected to the majority's failure to extend *Wilson* 's formulation of the objective component inquiry: "[W]as the deprivation sufficiently serious?"\(^{136}\) He claimed, instead, that the *Hudson* majority erred in eliminating the objective component altogether by relying on a misreading of *Whitley* 's assertion that Eighth Amendment standards are contextual.\(^{137}\)

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\(^{130}\) *Id.* (Thomas, J., dissenting).

\(^{131}\) *Id.* at 1005 (Thomas, J., dissenting).

\(^{132}\) *Id.* at 1005-06 (Thomas, J., dissenting). According to Justice Thomas, the former interpretation was well grounded in history, in the Eighth Amendment's English antecedents, and in its adoption by Congress. *Id.* He added:

Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.

*Id.*

\(^{133}\) 429 U.S. 97 (1976).

\(^{134}\) *Hudson*, 112 S. Ct. at 1006-07 (Thomas, J., dissenting).

\(^{135}\) *Id.* at 1006 (Thomas, J., dissenting).

\(^{136}\) *Id.* (Thomas, J., dissenting) (quoting *Wilson*, 111 S. Ct. at 2324).

\(^{137}\) *Id.* at 1008 (Thomas, J., dissenting). This criticism of Justice O'Connor's reasoning is curious because she also wrote the majority opinion in *Whitley*. *Whitley*, 475 U.S. at 313. Justice Thomas, however, relied on Justice Scalia's interpretation of *Whitley* in *Wilson* to conclude that "*Whitley* stands for the proposition that, assuming the exist-
Justice Thomas also found the majority's attempt to distinguish *Hudson* from conditions cases unconvincing because he saw no reason why subjecting a prisoner to a single beating was more offensive than subjecting him to substandard conditions over a long period of time.\(^{138}\) Similarly, he found the Court's distinction of *Estelle* unpersuasive.\(^{139}\) Since prisons are meant to "forcibly" detain prisoners, he argued, society has no greater expectations that prisoners will have unqualified freedom from force than that they will have unqualified access to health care.\(^{140}\)

Justice Thomas also rejected the majority's reasoning that drawing the line between substantial and insubstantial injury is dangerous because diabolic or inhuman treatment might escape proper classification if the resulting injury does not manifest itself as substantial.\(^{141}\) Rather, he interpreted the Eighth Amendment as requiring courts to determine which punishments qualify as cruel and unusual, regardless of the difficulty of such line drawing.\(^{142}\)
Thus, Justice Thomas contended, the majority's characterization of the serious-injury requirement as "arbitrary" did not justify substituting it in one particular context while leaving it intact in others.\textsuperscript{143}

Concerned about the implications of substituting the objective component with a "necessity" component, Justice Thomas argued that \textit{Rhodes}, for example, would be wrongly decided under \textit{Hudson} because its holding rested not on reasoning that double celling was necessary, but rather on reasoning that double celling did not objectively qualify as cruel and unusual punishment.\textsuperscript{144} According to Justice Thomas, having the standard based solely on the justification for, and the wantonness of, official conduct extended Eighth Amendment protection beyond reasonable limits.\textsuperscript{145}

In addition to rejecting the majority's decision with respect to the objective component, Justice Thomas rejected the majority's simultaneous extension of \textit{Whitley}'s heightened mental-state requirement to all excessive-force cases.\textsuperscript{146} He reasoned that the majority's extension of the \textit{Whitley} standard to cases like \textit{Hudson}, which involve no threat to prison security, was unwarranted.\textsuperscript{147}

Finally, Justice Thomas complained that the majority's expansion of the Cruel and Unusual Punishments Clause "beyond all bounds of history and precedent" indicated an attitude that the "Federal Constitution must address all ills in our society" and that the Eighth Amendment stands as a "National Code of Prison Regulation."\textsuperscript{148} He defended his view that minor injuries should be excluded from the ambit of the Cruel and Unusual Punishments Clause by asserting that although he did not consider beating prisoners acceptable conduct, he believed that state courts were more appropriate than federal courts for adjudicating prisoner grievances.\textsuperscript{149} Justice Thomas urged that \textit{Hudson} could have sought

\begin{itemize}
  \item \textsuperscript{143} \textit{Id.} (Thomas, J., dissenting).
  \item \textsuperscript{144} \textit{Id.} at 1010 (Thomas, J., dissenting).
  \item \textsuperscript{145} \textit{Id.} (Thomas, J., dissenting).
  \item \textsuperscript{146} \textit{Id.} at 1008 (Thomas, J., dissenting). The dissent criticized the majority's extension of the \textit{Whitley} mental-state requirement as an attempt to "compensate for its elimination of the objective component." \textit{Id.}
  \item \textsuperscript{147} \textit{Hudson}, 112 S. Ct. at 1008 (Thomas, J., dissenting). Justice Thomas contended that "[t]he use of excessive physical force is by no means invariably (in fact, perhaps not even predominantly) accompanied by a 'malicious and sadistic' state of mind." \textit{Id.} He further stated: "The Court's unwarranted extension of \textit{Whitley}, I can only suppose, is driven by the implausibility of saying that minor injuries imposed upon prisoners with anything less than a 'malicious and sadistic' state of mind can amount to 'cruel and unusual punishment.'" \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} (Thomas, J., dissenting).
  \item \textsuperscript{149} \textit{Id.} (Thomas, J., dissenting).
\end{itemize}
redress for his injuries under state law; and even if available state remedies were constitutionally inadequate, a claim under the Due Process Clause of the Fourteenth Amendment would have appropriately limited federal constitutional inquiry.\footnote{150}

IV. ANALYSIS

A. The Objective Component

The majority’s approach to the objective prong reflects societal standards of decency and is analytically sound. Although the \textit{Whitley} decision turned on the subjective component alone, the \textit{Hudson} opinion logically derives from \textit{Whitley} and \textit{Wilson}: while Eighth Amendment claims require satisfaction of both the objective and the subjective components, the substantive test for each component is “contextual and responsive to ‘contemporary standards of decency.’”\footnote{151}

\textit{Hudson} presented a unique context for Eighth Amendment analysis—the gratuitous beating of a handcuffed and shackled prisoner. As a matter of common sense, the act of beating a defenseless and nonthreatening person is unnecessary and wanton, regardless of the severity of the resulting injury. By questioning this reasoning on the ground that conditions cases are more pernicious because of their frequency,\footnote{152} the dissent misconstrues the context of physical abuse. Although society does not expect that prisoners will have unqualified access to health care or to any of “the other measures of life’s necessities,” society does expect that prisoners will not be needlessly beaten, regardless of how infrequently it occurs.\footnote{153}

\footnote{150. \textit{Id.} at 1010-11 (Thomas, J., dissenting).}
\footnote{151. \textit{Id.} at 1000 (Thomas, J., dissenting) (quoting \textit{Estelle}, 429 U.S. at 103). Contrary to Justice Thomas’s argument, \textit{id.} at 1008, \textit{Whitley} contains no language to suggest that the inquiry into the culpability of a defendant official must be conditioned upon a prisoner’s objectively serious deprivation. Instead, \textit{Whitley}, 475 U.S. at 320, states that the general Eighth Amendment standard, which requires proof of unnecessary and wanton infliction of pain, should be applied with due regard for differences in the type of conduct under review. Moreover, the majority’s conclusion is amply justified by Justice Scalia’s pronouncement in \textit{Wilson} that the wantonness of conduct does not depend upon its effect on the prisoner. \textit{See Wilson}, 111 S. Ct. at 2326.}
\footnote{152. \textit{Hudson}, 112 S. Ct. at 1008-09 (Thomas, J., dissenting).}
\footnote{153. Moreover, as one of Hudson’s \textit{amici curiae} urged, affirmance of a constitutional standard that tolerates some arbitrary measure of governmental abuse “would bare as hypocritical pieties decades of American proclamations about the right of every person, at home and abroad, to be free from violent, physical abuse by government officials.” Brief of Human Rights Watch as \textit{amicus curiae} supporting Petitioner at 2, \textit{Hudson} (No. 90-6531).}
The majority’s criticism that the dissent’s view denies “the difference between punching a prisoner in the face and serving him unappetizing food”\textsuperscript{154} has merit. Justice Thomas’s response to this criticism—that “society . . . has no expectation that prisoners will have ‘unqualified’ freedom from force, since forcibly keeping prisoners in detention is what prisons are all about”\textsuperscript{155}—fails to distinguish between different kinds of force. Given that Hudson was not beaten for resisting detention, this is a spurious argument.

Similarly, Justice Thomas’s concern that the majority’s holding with respect to the injury component will have sweeping implications on all Eighth Amendment cases is unfounded. The Court has not hesitated yet to develop standards for Eighth Amendment prison claims of inadequate medical care, general substandard conditions of confinement, and injury in the context of a prison riot.\textsuperscript{156} Furthermore, the dissent’s argument that \textit{Rhodes} would be wrongly decided under \textit{Hudson}\textsuperscript{157} ignores the foundation on which the majority’s argument rests, namely that the standards vary according to the nature of the alleged violation.\textsuperscript{158} Because \textit{Hudson}’s excessive-force standard is inapposite to claims alleging substandard conditions or, as in \textit{Rhodes}, double celling, Justice Thomas’s pronouncement that the elimination of the significant-injury requirement has “extended the Eighth Amendment beyond all reasonable limits” is greatly exaggerated.

The dissent justified its conclusion—that prisoners should not be protected against nonserious injuries by the Eighth Amendment—by arguing that Hudson could have sued under state law or if state remedies were constitutionally inadequate, under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{159} This argument, however, is unclear because Justice Thomas does not explain whether the officers violated Hudson’s procedural or substantive due process rights.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{154} See \textit{Hudson}, 112 S. Ct. at 997.
\item \textsuperscript{155} Id. at 1009 (Thomas, J., dissenting).
\item \textsuperscript{156} See supra part II.B.
\item \textsuperscript{157} See \textit{Hudson}, 112 S. Ct. at 1010 (Thomas, J., dissenting).
\item \textsuperscript{158} Id. at 998; see also \textit{Whitley}, 475 U.S. at 320.
\item \textsuperscript{159} \textit{Hudson}, 112 S. Ct. at 1010-11 (Thomas, J., dissenting).
\item \textsuperscript{160} When an inmate claims either that he has been subjected to a special type of punishment or to unfavorable conditions to which other inmates have not been subjected, he raises a procedural due process issue in terms of the administrative procedures by which he was selected for such punishment. See, e.g., \textit{Vitek v. Jones}, 445 U.S. 480 (1980) (requiring a hearing before the transfer of an inmate from a prison to a mental hospital). However, when the prisoner claims that the conditions of his confinement fall below constitutionally acceptable standards of decency, he raises an issue that can be analyzed under the Cruel and Unusual Punishments Clause and that can also be categorized as a
\end{itemize}
Moreover, in *Hudson*, a procedural due process claim would not have made sense. Hudson did not claim that he should have been granted a hearing before being punched in the face. He claimed that he should never have been beaten. Thus, Hudson’s claim can be examined only under the rubric of substantive due process. A substantive due process argument, however, would contradict the Court’s precedent. The Court has expressly stated that for prisoners, Eighth Amendment protection against excessive force makes the protection provided by substantive due process redundant. Similarly, the Court has repeatedly affirmed that a plaintiff claiming a Bill of Rights violation has the right to invoke section 1983, regardless of the availability of a state remedy.

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161. Respondents conceded that actions by prison officials that cause prisoner injury may constitute a deprivation of substantive due process rights. Brief of Respondents, *supra* note 98, at 42.


However, these cases are not analogous to *Hudson*. *Parratt* and *Palmer* dealt specifically with due process claims involving deprivations of property. In both cases, the Court held that the existence of an adequate state remedy precludes a procedural due process claim where a deprivation of property is caused by “random and unauthorized” acts of state officials, but that this limitation is irrelevant to substantive due process claims. *See Davidson*, 474 U.S. at 358. Again, in *Zinermon v. Burch*, 494 U.S. 113, 124-25 (1990), the Court explicitly stated that the availability of state remedies is irrelevant to substantive due process claims. *See generally* Laura Oren, *Signing into Heaven: Zinermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape*, 40 EMORY L.J. 1 (1991).

In *Davidson*, a prisoner claimed that officials violated his liberty interest under the Fourteenth Amendment by negligently failing to protect him from another inmate. *Davidson*, 474 U.S. at 345-46. The Court held that the protection of the Fourteenth Amendment Due Process Clause, whether procedural or substantive, is not triggered by the negligence of prison officials. *Id.* at 348. Hudson made no claim of negligence.


164. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 338 (1986) (Stevens, J., concurring). In resuscitating the Reconstruction-era civil rights statute in *Monroe* v. Pape, 365 U.S. 167 (1961), Justice Douglas’s majority opinion stated that the purpose of § 1983 was to provide a federal remedy to supplement any state remedies and that “the latter need not be first sought and refused before the federal one is invoked.” *Id.* at 183. Thirty years after *Monroe*, despite complaints that federal courts were flooded with § 1983 lawsuits, the Court reaffirmed *Monroe*’s central principle—that state officials who misuse their power are subject to federal suit regardless of the availability of state remedies. *Zinermon v. Burch*, 494 U.S. at 124-25. In addition, the Court has unequivocally stated that
Justice Thomas’s view appears to illustrate a disdain for the evolution of Eighth Amendment principles in the prison context. In essence, by emphasizing the original interpretation given to the Amendment, Justice Thomas has expressed his preference for the hands-off doctrine, under which the Eighth Amendment applied only to measure the severity of sentences and not to assess the treatment of prisoners. Not only does this opinion disregard the Court’s repeated recognition that the meaning of the Cruel and Unusual Punishments Clause evolves over time, but it ignores the existence of criminal statutes and common-law torts that serve as objective indicia that society recognizes a difference between brutality and discomfort. Moreover, other objective indications validate the Court’s standard: numerous states and the federal government have criminalized brutality by prison guards,


165. See, e.g., Is Thomas-Scalia Axis Emerging on the Court?, NAT’L L.J., Mar. 9, 1992, at 26. The report stated:

Justice Thomas’s analysis is "in part unsound and incorrect and in part downright scary . . . . "

"The scary part is he’s putting the Eighth Amendment in a historical straitjacket, saying the way things were in 1789 is the way they should be today . . . ."

Prisons . . . were not the conventional method of punishment at the time the Eighth Amendment was drafted . . .

The system of punishment changes . . . and the rule has to evolve or “the Constitution would become a dead or silly document.”

Id. (partially quoting Professor Lynn S. Branham of Thomas M. Cooley Law School, immediate past chair of the American Bar Association’s Prison and Jail Problems Committee and a member of the National Commission on Accreditation in Corrections).

166. See, e.g., Trop v. Dulles, 356 U.S. 86, 101 (1958) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); Weems v. United States, 217 U.S. 349, 373 (1910) (“Time works changes, brings into existence new conditions and purpose . . . a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”); see also supra notes 40-46 and accompanying text.

167. The Court has previously used objective evidence to formulate standards. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 370 (1989) (recognizing that “first among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society’s elected representatives,” the Court examined state statutes regarding the execution of minors to determine whether there was a national consensus on the issue); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (considering evidence that at least 35 states had enacted death penalty statutes “the most marked indication of society’s endorsement of the death penalty”); Furman v. Georgia, 408 U.S. 238, 295 (1972) (Brennan, J., concurring) (noting that several studies revealed the arbitrary and capricious “selection of criminals for the punishment of death,” the Court invalidated state death penalty laws).

168. See Brief of Petitioner, supra note 95, at 21 n.17 (listing relevant state statutes).

169. Id. at 20-21 n.16 (discussing United States v. Bigham, 812 F.2d 943 (5th Cir.
and correctional organizations similarly condemn this practice.\textsuperscript{170}

The majority's argument that standards of decency compel Eighth Amendment protection of prisoners against torture by prison officials reflects a rational concern that any line drawing between minor and substantial injuries would be both difficult and arbitrary.\textsuperscript{171} Any constitutional line drawing that would permit prison officials to inflict unnecessary and wanton pain on prisoners would be indefensible under the Eighth Amendment.\textsuperscript{172}

\textbf{B. The Subjective Component}

In contrast with its solid reasoning with respect to the objective component, the majority's extension of the \textit{Whitley} subjective standard to all excessive force cases is not well-reasoned. The majority's analysis rests on the false premise that the officials in \textit{Hudson} faced constraints similar to those faced by the officials confronting the prison riot in \textit{Whitley}. By failing to recognize the distinction between the force needed to quell a riot and the force called for in a noncrisis situation, the majority's logic fails. Because the officers restrained Hudson with handcuffs and shackles, he presented no security risk and the trial court found no justification for the use of

\textsuperscript{170} See Brief of Americans for Effective Law Enforcement as \textit{amicus curiae} for Respondents at 6, \textit{Hudson} (No. 90-6531) (stating that the force in this case exceeded generally accepted professional standards, and citing Mandatory Standard 3-4198, \textit{STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS} 64 (3d ed. 1990)); Brief of D.C. Prisoner's Legal Services Project, Inc., as \textit{amicus curiae} for Respondents at 37-38, \textit{Hudson} (No. 90-6531) (discussing the Model Sentencing and Corrections Act (U.L.A.) § 4-104(b)(2) and the \textit{STANDARDS FOR ADULT LOCAL DETENTION FACILITIES} § 2-5198 (American Correctional Ass'n, 2d ed. 1987)).

\textsuperscript{171} The Fifth Circuit's application of the significant-injury test to excessive-force claims yielded bizarre results. For example, in a case in which a police officer had placed a revolver in a suspect's mouth and threatened to blow his head off, the court found no constitutional violation because the suspect had suffered no physical injuries. Wisniewski v. Kennard, 901 F.2d 1276 (5th Cir.) (per curiam), \textit{cert. denied}, 111 S. Ct. 309 (1990). Criticizing the majority's decision, the dissenting judge wrote: "[A]ccording to the majority, when the injury vanishes from sight, so does the Fourth Amendment's cloth of protection." \textit{Id.} at 1280 (Goldberg, J., dissenting). Justice Blackmun's concurring opinion in \textit{Hudson} cites Wisniewski to demonstrate that injury cognizable under the Eighth Amendment should not be limited to physical injury. \textit{Hudson}, 112 S. Ct. at 1004 (Blackmun, J., concurring).

\textsuperscript{172} See \textit{Hudson}, 112 S. Ct. at 1002-03 (Blackmun, J., concurring). According to Justice Blackmun, imposing a significant-injury requirement on the Eighth Amendment might "not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs." \textit{Id.}
force; therefore, there was no need to balance the risk of injury against a penological interest. That prison officials require wide latitude in making security-related decisions has no logical bearing in cases like Hudson, which involve completely gratuitous beatings. Applying the Whitley malicious-and-sadistic intent standard in such circumstances is untenable.

Moreover, a constitutional standard that requires a showing of sadistic intent is inappropriate. Sadism is defined as "a type of mental disease or disorder" that is manifested by "a form of satisfaction, commonly sexual, derived from inflicting harm on another." The Eighth Amendment's ban on cruel and unusual punishment must be acknowledged to prohibit more than sadistic conduct.

As Justice Marshall argued in his dissent in Whitley, even a serious prison disturbance provides inadequate justification for "the especially onerous standard" of malicious and sadistic intent. In addition, Justice Marshall concluded that the standard is particularly inappropriate because courts deciding whether to apply it would have to determine as a preliminary issue of fact whether the disturbance presented a security risk, a question "that will often be disputed and properly left to the jury." By collapsing all distinctions between disturbances that present security risks and those that do not, the Court's decision in Hudson essentially magnifies the second of Justice Marshall's concerns and devalues the Eighth Amendment.

As Justice Stevens suggests, in excessive force cases in which no

173. Id. at 997; see also supra note 102 and accompanying text. It is accepted practice to put maximum security prisoners in restraints before moving them. See Transcript, supra note 93, at 12.

174. The Court's disregard for this essential point is surprising because Justice O'Connor, who also wrote the Whitley majority opinion, had previously insisted on a fact-specific approach to the Whitley standard. See Dudley v. Stubbs, 489 U.S. 1034, 1037-38 (1989) (O'Connor, J., dissenting from denial of certiorari) (arguing for application of the Whitley standard to a case involving no use of force, on the ground that the lower court acknowledged competing institutional concerns similar to those in Whitley). In view of Justice O'Connor's close attention to the facts of Stubbs, Hudson's broad embrace of all use-of-force cases—including those involving gratuitous abuse—seems inconsistent.

175. Even the officers conceded that although both the district and appellate courts had determined that the officers "acted maliciously and sadistically," the lower "deliberate indifference" standard would have been appropriate since "no balancing of important governmental responsibilities existed." Brief of Respondents, supra note 98, at 20-21 n.13.


178. Id.
deference to prison officials is warranted, a finding of liability requires a fact-intensive analysis, and the proper standard for the analysis is "unnecessary and wanton infliction of pain."\(^\text{179}\) Although this standard requires a prisoner to demonstrate that officials inflicted pain both unnecessarily and wantonly, in Hudson’s case, the issues blend together: Hudson’s proof that the officials’ action served no legitimate purpose also proved that the action was unnecessary and that the officials acted wantonly.

V. THE IMPLICATIONS OF HUDSON

By overruling the significant-injury component of the standard previously relied upon by the Fifth Circuit,\(^\text{180}\) Hudson made an immediate impact on the Fifth Circuit’s review of Eighth Amendment excessive-force claims. In light of the holdings in Hudson, the Fifth Circuit not only reinstated Hudson’s damages on remand,\(^\text{181}\) but also remanded other Eighth Amendment prison cases.\(^\text{182}\) Since the previous standard was intended to control docket management problems,\(^\text{183}\) Hudson will also result in the increased access of prisoners to courts in the Fifth Circuit.

Although the objective prong of the Hudson holding in fact ratified the standard applied in most lower federal courts,\(^\text{184}\) the deci-

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\(^{179}\) Hudson, 112 S. Ct. at 1002 (Stevens, J., concurring). In determining whether official actions are unnecessary and wanton, courts should consider four factors: (1) a significant injury (2) resulting directly and only from the use of force that was (3) clearly and unreasonably excessive, and that (4) caused an unnecessary and wanton infliction of pain. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). The Supreme Court has recognized that although they do not provide a formula for deciding cases, these factors provide a list of inquiries to focus the central inquiry—whether the particular use of force amounts to unnecessary and wanton infliction of pain. See Graham v. Connor, 490 U.S. 386, 398 n.11 (1989).

\(^{180}\) See supra notes 104-06 and accompanying text.

\(^{181}\) See Hudson v. McMillian, 962 F.2d 522 (5th Cir. 1992).

\(^{182}\) See, e.g., Shabazz v. Lyaugh, 974 F.2d 597 (5th Cir. 1992); Tijerina v. Plentl, 958 F.2d 133 (5th Cir. 1992).

\(^{183}\) See supra notes 123-24 and accompanying text.

\(^{184}\) See, e.g., Felix v. McCarthy, 939 F.2d 699, 702 (9th Cir. 1991) ("[[I]t is not the degree of injury which makes out a violation of the eighth amendment. Rather, it is the use of official force or authority that is 'intentional, unjustified, brutal and offensive to human dignity.' "); Campbell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989) (concluding that because the spraying of inmates with high-powered fire hoses was intentional rather than accidental and because the application of force was unjustified, the officers violated the inmates' Eighth Amendment rights even though the inmates did not suffer severe injuries); Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) ("The state is not free to inflict ... pain without cause just so long as it is careful to leave no marks."); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) ("[T]he day has passed when an inmate must show a court the scars of torture in order to make out a complaint."). But see Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990) (requiring prisoners to prove "a significant
sion not 'only cured the aberrational Fifth Circuit standard, but also precluded the possibility that other courts would follow its lead. However, the subjective prong of the Hudson standard resolved against prisoners a question that had divided the lower federal courts in several ways. The requirement of a showing of malice is implicit in a standard that requires a showing of unjustified use of force, but the added burden of showing sadistic intent will be difficult for prisoners to meet and for courts to apply.

VI. CONCLUSION

Constitutional inquiry that involves value-based notions, such as “contemporary standards of decency” and acts that are “repugnant to the conscience of mankind,” necessarily arouses debate. Mirroring its two-prong Eighth Amendment analysis, the Supreme Court approaches the formulation of Eighth Amendment standards with a two-prong inquiry: First, in light of Justice Powell’s admonition that “Eighth Amendment judgments should neither be nor appear to be merely the subjective views’ of judges,” the Court’s decision rests on clear objective reasoning. Second, in defining the Eighth Amendment’s ban on cruel and unusual punishments, the Court’s reasoning acknowledges that the subjective values that inform “broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.”

In Hudson v. McMillian, the Court decided that all but de minimis uses of force are subject to Eighth Amendment scrutiny. By eliminating the requirement that a prisoner must show significant injury in order to prove an Eighth Amendment excessive-force violation, Hudson eases the prisoner’s burden of proof.

injury’ in order to prevail on an Eighth Amendment excessive force claim). The Fifth Circuit followed its precedent in Huguet when ruling on Hudson’s claim. See Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (per curiam).

185. See, e.g., Miller v. Glanz, 948 F.2d 1562, 1567 (10th Cir. 1991) (holding that in nonemergency situations, “deliberate indifference” is the proper standard); McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990) (holding that an Eighth Amendment violation occurs “if the infliction of pain upon a prisoner is both unnecessary and wanton,” as determined by “the reasons or motivation for the conduct, the type and excessiveness of the force used, and the extent of the injury inflicted”); Unwin v. Campbell, 863 F.2d 124, 135 (1st Cir. 1988) (“[W]here institutional security is not at stake ... a plaintiff need not prove malicious and sadistic intent.”); Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987) (declining to extend Whitley’s “malicious and sadistic” standard when officials faced no imminent danger).


188. Hudson, 112 S. Ct. at 1000.
However, the subjective prong of the *Hudson* holding makes the plaintiff's burden in Eighth Amendment cases more onerous. By requiring that they prove that officials acted with malicious and sadistic intent in order to establish an Eighth Amendment excessive-force violation, *Hudson* effectively diminishes the Eighth Amendment protection of prisoners. If courts sanction all but the most invidious abuse against our nation's prisoners, one must ask what this says about the "mood and temper" of our public conscience.189

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189. *See* text accompanying *supra* note 1.