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A Serious Injury to the Eighth Amendment: The Supreme Court's Cruel and Unusual Distortion of Precedent in Hudson v. McMillian

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NOTES AND COMMENTS

A SERIOUS INJURY TO THE EIGHTH AMENDMENT: THE SUPREME COURT'S CRUEL AND UNUSUAL DISTORTION OF PRECEDENT IN *HUDSON v. McMILLIAN*

> 1. That the offender be drawn to the gallows, and not be carried or walk; . . . 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.[1]

Although the expression *drawn and quartered* is a familiar one, it is difficult to imagine that such a torture was ever employed. It is precisely this type of torture that inspired the framers of the United States Constitution to draft the Eighth Amendment.[2] More recent cases alleging cruel and unusual punishment involve less shocking, and sometimes even frivolous, claims of torture.[3] Consequently, the Supreme Court has struggled to define the purview of the Eighth Amendment.

In *Hudson v. McMillian*,[4] the Supreme Court faced the question of whether a serious injury is a prerequisite for establishing a constitutional violation. The Court took a positive step in holding that a serious injury

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1. 4 WILLIAM BLACKSTONE, COMMENTARIES *92 (describing the punishment for the crime of high treason).

2. *See In re* Kemmler, 136 U.S. 436, 447 (1890) (quoting Wilkerson v. Utah, 99 U.S. 130, 135 (1878)).

3. *See* Searight v. State, 412 F. Supp. 413 (D.N.J. 1976). In *Searight*, the prisoner alleged that the state inserted a radium electric beam into his eye which resulted in a voice speaking to him inside his brain. *Id.* at 414. The judge noted that,

> assuming [the facts] to be true, they show a case of presumably unlicensed radio communication, a matter which comes within the sole jurisdiction of the Federal Communications Commission, 47 U.S.C. § 151, et seq. And even aside from that, Searight could have blocked the broadcast to the antenna in his brain simply by grounding it. . . . Searight might have pinned to the back of a trouser leg a short chain of paper clips so that the end would touch the ground and prevent anyone from talking to him inside his brain.

Id. at 414-15. For these and other reasons, the judge accordingly dismissed the case. *Id.* at 415.

4. 112 S. Ct. 995 (1992).

should not be a requirement for cases involving the use of excessive force.[5] The Court's departure from precedent, however, has further complicated the test for determining when a violation of the Eighth Amendment occurs. Furthermore, *Hudson* makes it more difficult for prisoners to establish that their constitutional rights have been violated.

I. THE LAW PRIOR TO *HUDSON*

Traditionally, the Eighth Amendment of the United States Constitution prohibited only those punishments which involved torture or lingering death.[6] It later protected prisoners from punishments which were greatly disproportionate to the crimes they committed.[7] The Eighth Amendment did not play a role in the regulation of prison life. Believing that prison administrators were obligated to maintain secure prisons, courts developed the "hands-off" doctrine, under which the actions of prison officials were not subject to judicial review.[8] In *Robinson v. California*,[9] the Eighth Amendment was applied to the states through the Fourteenth Amendment.[10] Consequently, the "hands-off" doctrine began to erode and federal courts began hearing prisoners' complaints about prison conditions.[11]

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5. *Id.* at 997.

6. *In re* Kemmler, 136 U.S. 436, 447 (1890). The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishment be inflicted, nor shall witnesses be unreasonably detained." U.S. CONST. amend. VIII. *See generally* Gregg v. Georgia, 428 U.S. 153, 169-70 (1976) (stating that the phrase "cruel and unusual punishment" first appeared in the English Bill of Rights of 1689, and Americans later adopted the phrase in the drafting of the Eighth Amendment); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (containing a complete discussion of the original meaning of the phrase "cruel and unusual punishment").

7. *See* Weems v. United States, 217 U.S. 349, 368 (1910).

8. *See* Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969). The court noted that "[t]he hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment." *Id.* at 506 (quoting Edwards v. Dunan, 355 F.2d 993 (4th Cir. 1966)).

9. 370 U.S. 660 (1962).

10. *Id.* at 667. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. *See generally* Elizabeth A. Blackburn, Note, *Prisoners' Rights: Will They Remain Protected After Whitley?*, 16 STETSON L. REV. 385, 395 (1987) (applying the Eighth Amendment to the states allows federal courts to hear constitutional claims).

11. Blackburn, *supra* note 10, at 395 n.91; *see* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (stating that prisoners do not forfeit their constitutional rights upon conviction); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (claiming that prisoners do enjoy limited constitutional rights); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) (stating that incarceration is a punishment subject to scrutiny under the standards of the Eighth Amendment); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding that the Eighth Amendment is no longer limited to the punishments set forth by legislatures and the sentences handed down by judges, but it also applies to the conditions of confinement in prison).

The current trend is for courts to defer to prison officials and administrators on matters of prison administration and security until an Eighth Amendment violation is found. According to the Court in *Bell v. Wolfish*,[12] internal security considerations are "[c]entral to all other corrections goals."[13] Accordingly, prison officials must have the freedom to take appropriate measures to maintain the security and safety of the prison,[14] and the Court will defer its judgment on matters of prison administration in which prison officials are better informed.[15] In *Rhodes v. Chapman*,[16] however, the Court stressed that federal courts have the power to scrutinize conditions of confinement to determine if those conditions have lead to violations of the Eighth Amendment's prohibition against cruel and unusual punishment.[17] Thus, the Court must intervene when a prisoner claims the Eighth Amendment has been violated.

It is difficult to determine what constitutes a violation of the Eighth Amendment. In *Weems v. United States*,[18] the Court held that the meaning of the Eighth Amendment should be derived from public opinion, which evolves from enlightened principles of humane justice.[19] This idea was expressed again in *Trop v. Dulles*,[20] where the Court emphasized that

12. 441 U.S. 520 (1979).

13. *Id.* at 546-47 (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

14. *See* Whitley v. Albers, 475 U.S. 312, 316 (1986) (after firing a warning shot during a prison disturbance, a prison official shot an inmate who was climbing up the stairs); Bell v. Wolfish, 441 U.S. 520, 527-28 (1979) (involving pretrial detainees and numerous conditions of confinement such as "double-bunking," body-cavity searches, and the prohibition against the inmates from receiving packages from outside of the institution). In *Bell*, the Court went so far as to say that the courts have become too involved with the prison environment since the abandonment of the "hands-off" doctrine. Instead, the courts should limit their involvement to only those claims that involve a constitutional violation. *Id.* at 562.

15. *Bell*, 441 U.S. at 531 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)). Justice Marshall pointed out in his dissent that almost any restriction or action of a prison official could be characterized as falling under the need for security. *Id.* at 567-68 (Marshall, J., dissenting). *See also* Hudson v. Palmer, 468 U.S. 517, 555 (1984) (Stevens, J., dissenting) (arguing that the majority, by adopting deference to prison officials, has readopted the "hands-off" approach that was abandoned in Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974)); Rhodes v. Chapman, 452 U.S. 337, 375-76 (1981) (Marshall, J., dissenting) (pointing out the problem of prison officials' insensitivity to the requirements of the Eighth Amendment).

16. 452 U.S. 337 (1981).

17. *Id.* at 352 (quoting Procunier v. Martinez, 416 U.S. 396, 405-406 (1974)). *See also* Gregg v. Georgia, 428 U.S. 153 (1976).

> Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.

Id. at 174 (quoting Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring)).

18. 217 U.S. 349 (1910).

19. *Id.* at 378.

20. 356 U.S. 86 (1958).

the scope and meaning of the Amendment should evolve as the standards of decency evolve in a maturing society.[21] Thus, the Court has recognized that the validity of prisoners' Eighth Amendment claims should be determined largely by contemporary standards of decency.

Although the Eighth Amendment is dynamic, it mandates that the Court determine and enforce the outer boundaries of contemporary standards of decency which define the phrase *cruel and unusual punishment.*[22] Simply relying on the public's perception of the standards of decency, however, does not establish these boundaries.[23] Consequently, the Court concluded that the Eighth Amendment prohibits those punishments which are "excessive."[24]

One inquiry into excessiveness is based upon a standard prohibiting "unnecessary and wanton infliction of pain."[25] In *Estelle v. Gamble,*[26] a prisoner claimed that the inadequate medical treatment he received for a back injury violated the Eighth Amendment.[27] The Court agreed, emphasizing that an inmate is totally dependent on prison personnel for his medical needs.[28] If prison authorities ignore these needs, the inmate may be forced to endure pain and suffering or even physical torture and lingering death.[29] The Court therefore concluded that deliberate indifference to unnecessary suffering is inconsistent with contemporary

21. *Id.* at 100-1.

> This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character.

Id. at 100 (citing *Weems,* 217 U.S. 349). Later cases also emphasize that the Eighth Amendment is flexible and expands to embody evolving principles of humane justice. Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Gregg v. Georgia, 428 U.S. 153, 171 (1976).

22. *See Trop,* 356 U.S. at 99-100. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

23. *See Gregg,* 428 U.S. at 173. The Court emphasized that incorporating contemporary standards of decency into the meaning of the Eighth Amendment is important, but the Amendment also requires the court to utilize objective criteria to reflect on these standards. *Id.*

24. *Id.*

25. *Id.* The Court explained that the inquiry into excessiveness has two aspects, the first of which is whether the punishment involves the unnecessary and wanton infliction of pain. "Second, the punishment must not be grossly out of proportion to the severity of the crime." *Id. See also Weems,* 217 U.S. at 371 (holding that twelve years in irons at hard labor was cruel in its excessiveness).

26. 429 U.S. 97 (1976).

27. *Id.*

28. *Id.* at 103.

29. *Id.* The infliction of physical torture or lingering death is the primary evil that the drafters of the Eighth Amendment intended to prohibit. *Id.* (citing *In re* Kemmler, 136 U.S. 436, 447

standards of decency and thus constitutes the unnecessary and wanton infliction of pain which is prohibited by the Eight Amendment.[30]

In *Wilson v. Seiter*,[31] the Court extended the deliberate indifference standard to cases involving conditions of confinement such as overcrowding, excessive noise, and unclean facilities.[32] The Court also distinguished between the subjective and objective aspects of the deliberate indifference standard.[33] The subjective aspect requires courts to consider whether prison officials acted with a "sufficiently culpable state of mind."[34] The objective aspect requires courts to consider whether the force used was "harmful enough" to constitute an Eighth Amendment violation.[35]

After *Estelle* and *Wilson*, the unnecessary and wanton infliction of pain standard became the applicable test in Eighth Amendment cases involving a medical deprivation or condition of confinement. Neither case, however, involved a disturbance or situation of unrest which threatened the security of the prison. Accordingly, in *Estelle* and *Wilson* the prison officials were not required to weigh institutional concerns such as maintaining prison security against prisoners' rights. In *Whitley v. Albers*,[36] the Court addressed whether the unnecessary and wanton infliction of pain was the appropriate standard to apply in cases involving a threat to the prison's security.[37] The Court stressed that in situations of prison unrest, officials must consider their own safety as well as the inmates'.[38] Therefore, the proper test to apply in cases where security measures are used to resolve prison unrest is whether the force was used

(1890)). The infliction of pain and suffering, although less severe, is also unnecessary because it does not serve any penological purpose. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 182-83 (1976)).

30. *Id.* at 104. Mere negligence of prison officials or doctors is not enough to constitute a violation of the Eighth Amendment. The prison officials or doctors must have acted with deliberate indifference. *Id.* at 105-6.

31. 111 S. Ct. 2321 (1991).

32. *Id.* at 2323. The Court quoted retired Justice Powell, who said, "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or . . . both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.* at 2327 (quoting LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987)).

33. *Id.* at 2324.

34. *Id.*

35. *Id.* at 2326.

36. 475 U.S. 312 (1986).

37. *Id.* at 320-21. In *Whitley*, where a prison official shot an inmate during a prison riot, the Court reasoned that "[t]he deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Id.* at 320.

38. *Id.* In the setting of a prison riot, the deliberate indifference standard does not take into account the "appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.*

"in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[39]

To support its use of the malicious and sadistic standard in cases dealing with a prison disturbance, the Court cited cases which have given prison authorities a wide range of discretion when carrying out security policies.[40] The Court stated that deference to prison officials extends not only to situations where actual unrest or conflict occurred, but also to situations where officials employ security measures to prevent future unrest.[41] Prior to *Whitley*, the unnecessary and wanton infliction of pain standard did not require an intent to cause harm.[42] The *Whitley* decision added a new dimension to the test of determining whether force constitutes a violation of the Eighth Amendment by requiring a showing of intent to harm, thereby creating a more stringent test to apply in situations involving prison disturbances.[43]

II. DISCUSSION OF *HUDSON*

On the morning of October 30, 1983, Keith Hudson, an inmate at the state penitentiary in Angola, Louisiana, quarreled with Jack McMillian, a security officer at the Angola facility.[44] McMillian, assisted by fellow security officer Marvin Woods, placed Hudson in handcuffs and shackles and escorted the prisoner toward the penitentiary's "administrative lockdown" area.[45] Hudson alleged that on the way to lockdown, Woods held him in place and kicked and punched him from behind while McMillian punched him in the mouth, eyes, chest, and stomach.[46] Hudson further alleged that the supervisor on duty witnessed the beating but did nothing to discourage it other than telling the officers "not to have

39. *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). In *Johnson*, the court outlined several factors to be used in determining whether a constitutional violation has occurred, including "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." *Johnson*, 481 F.2d at 1033.

40. *Whitley*, 475 U.S. at 321-22; *see* Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981) (prison officials should be given deference in the use of practices that they deem necessary to maintain prison security); Bell v. Wolfish, 441 U.S. 520, 547 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977) ("prison officials must be permitted to take reasonable steps to forestall" threats of prison violence).

41. *Whitley*, 475 U.S. at 322. The Court added that the broad scope of deference to prison officials does not preclude review of "actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Id.*

42. *Id.* at 328 (Marshall, J., dissenting).

43. *Id.* at 329 (Marshall, J., dissenting); Blackburn, *supra* note 10, at 387.

44. Hudson v. McMillian, 112 S. Ct. 995, 997 (1992).

45. *Id.*

46. *Id.*

too much fun."[47] Consequently, Hudson "suffered minor bruises and swelling of his face, mouth, and lip."[48] He also suffered loosened teeth and a cracked partial dental plate which he was unable to use for several months.[49]

Hudson sued the officers under 42 U.S.C. § 1983, claiming they had violated the Eighth Amendment's prohibition on cruel and unusual punishment.[50] The Court of Appeals for the Fifth Circuit held that in order to prove a violation of the Eighth Amendment, an inmate must show: "(1) significant injury; (2) resulting 'directly and only from the use of force that was clearly excessive to the need'; (3) the excessiveness of which was objectively unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain."[51] The court found that Hudson met all the requirements except the first and concluded that Hudson did not sustain a significant injury because he did not need medical treatment.[52] The Supreme Court granted certiorari[53] to determine whether a prisoner must have a significant injury to prevail on a claim of cruel and unusual punishment.[54]

The alleged violation in *Hudson* involved neither a deprivation nor an injury resulting from force applied during prison unrest.[55] Instead, it involved the use of excessive force by prison officials.[56] Thus, the Court had to determine the standard to apply in cases involving excessive force where the force was not applied during a prison disturbance. The Court stressed that even in an isolated incident, the need to maintain security must be balanced against the risk of injury to an inmate.[57] Accordingly, the proper standard to use in cases involving the excessive use of force is "whether [the] force was applied in a good-faith effort to maintain or

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 997-98. The Civil Rights Act 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. . . .

42 U.S.C. § 1983 (1988).
51. *Hudson*, 112 S. Ct. at 998 (citing Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990)).
52. *Id.*
53. 111 S. Ct. 1679 (1991).
54. *Hudson*, 112 S. Ct. at 998.
55. *See id.* at 997-98.
56. *Id.*
57. *Id.* at 999.

restore discipline, or maliciously and sadistically to cause harm."[58]

In determining whether cases involving the use of physical force require a showing of physical injury, the Court acknowledged that the extent of the prisoner's injury is a factor in determining the necessity of the force used.[59] Additionally, the Court recognized that the objective standard discussed in *Wilson* mandates that the injury must be "harmful enough" to sustain an Eighth Amendment claim.[60] The Court also emphasized that application of the objective standard depends upon the context of the alleged violation.[61] Evaluation of Eighth Amendment claims in light of their context is important for two reasons. First, the courts should give "due regard" to the variety of objectionable conduct which may fall under the Eighth Amendment.[62] Second, the Eighth Amendment has "few absolute limitations" since it derives its meaning from "evolving standards of decency that mark the progress of a maturing society."[63]

Applying this analysis to Hudson's allegation, the Court stated that when an official uses excessive force sadistically and maliciously, he violates societal standards of decency regardless of whether any serious or significant injury resulted.[64] In other words, a prisoner need not show that he was seriously injured if his claim involves physical force, but he must show that the force was applied sadistically and maliciously.[65]

The Court distinguished between conditions of confinement and uses of physical force because only conditions which deny the "minimal civilized measure of life's necessities" are grave enough to constitute a violation of the Eighth Amendment,[66] and society expects that prisoners should suffer certain deprivations as part of their punishment.[67] Furthermore, the unnecessary and wanton standard applied in cases involving conditions of confinement is less stringent than the malicious and sadistic

58. *Id.* The Court pointed out that previous courts had already extended the *Whitley* standard to excessive use of force claims not involving a prison disturbance. *Id. See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (arising from a prisoner's claim that a prison guard had beaten him).

59. *Hudson*, 112 S. Ct. at 999.

60. *Id.* (quoting Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991)).

61. *Id.* at 1000.

62. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

63. *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

64. *Id.* The Court added that "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action." *Id.*

65. *See id.*

66. *Id.* (quoting Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991)).

67. *Id.*

standard applied in cases involving physical force because prison conditions do not interfere with prison security.[68]

In his concurrence, Justice Blackmun asserted that "injury" is not limited to physical pain, but also encompasses mental or emotional suffering. It is easy to imagine cruel and unusual punishments which inflict no serious physical injury but do result in a great deal of physical or mental pain.[69] "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999'—may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks."[70]

Justice Blackmun reasoned that the Eighth Amendment prohibits the unnecessary and wanton infliction of pain and that the plain meaning of "pain" includes psychological harm.[71] Although not at issue in *Hudson*, in previous cases the Court has recognized that mental or emotional suffering is a form of pain.[72] For example, damages are often awarded in tort cases for quantified pain and suffering.[73] Therefore, the Eighth Amendment should also protect prisoners from psychological harm.[74]

III. ANALYSIS

The *Hudson* decision has two important ramifications. First, it extends the requirement of an intent to cause harm to cases which do not involve a prison disturbance.[75] Second, it draws a distinction between cases involving conditions of confinement and cases involving excessive

68. *See id.* at 998. The defendants also raised the issue of whether Hudson's beating was an isolated incident arising from a "personal dispute between correctional security officers and a prisoner" and therefore not within the scope of "punishment" as prohibited by the Eighth Amendment. *Id.* at 1001. *See also* George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980) (assaulting a prisoner in a single unauthorized attack does not constitute cruel and unusual punishment); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (stating that a spontaneous attack by a guard does not fall within the scope of punishment). *But see* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (supplementing a prisoner's punishment with a beating from a guard constitutes punishment). The Court in *Hudson* did not address this issue because it found that the attack on Hudson was "not an isolated assault because another prisoner was beaten shortly after they finished with Hudson." *Hudson*, 112 S. Ct. at 1002.

69. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring).

70. *Id.* at 1009 (Thomas, J., dissenting) (quoting Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988)). Justice Thomas reasoned that inhumane punishments, by definition, inflict serious injuries, and those injuries may be either physical or mental. *Id.*

71. *Id.* at 1004 (Blackmun, J., concurring).

72. *Id.*; *see, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (recognizing the psychological damage to school children from being segregated in public schools).

73. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring).

74. *Id.*

75. *Id.* at 999.

force, finding that serious injury must be shown in the former, but not in the latter.[76] These ramifications fly in the face of precedent and cause unnecessary confusion. It is now questionable whether prisoners who endure pain and suffering from conditions of confinement will be afforded any protection under the Eighth Amendment if their injuries are not "serious."

A. *The Malicious and Sadistic Requirement*

By extending the malicious and sadistic requirement to all excessive force cases, the Court ignored the reasoning behind the development of that standard.[77] The malicious and sadistic standard was developed for application in cases where prison unrest threatens the prison's security.[78] In situations of prison unrest, this higher standard takes into account prison officials' "appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."[79] Some cases, however, allege an excessive use of force, but do not involve a threat to prison security. In these cases, prison officials are not required to balance the rights of inmates against prison security, nor are they forced to make hasty decisions. Therefore, it is not necessary to apply the more stringent malicious and sadistic standard, which requires a showing of intent. Rather, the Court should apply the unnecessary and wanton standard.

The *Hudson* Court attempted to circumvent the fact that the malicious and sadistic requirement was intended to be applied only in cases involving actual unrest. The Court claimed that regardless of the degree of the disruption, courts should grant prison officials "wide-ranging deference."[80] However, not every prison disturbance threatens prison security.[81] The facts in *Hudson* illustrate that deference to prison officials is not always justified. In *Hudson*, the beating occurred after the prisoner had been restrained and apparently was not a threat to himself, the

76. *Id.* at 1000.

77. *Id.* at 1002 (Stevens, J., concurring). Although Justice Stevens agreed with the majority that prison officials in the *Hudson* case acted maliciously and sadistically, he did not agree that the standard should be extended to all cases involving the use of excessive force. *Id.*

78. *E.g.*, Whitley v. Albers, 475 U.S. 312, 320-22 (1986).

79. *Id.* at 320.

80. *Hudson*, 112 S. Ct. at 998-99 (citing *Whitley*, 475 U.S. at 321-22).

81. *See* Bell v. Wolfish, 441 U.S. 520, 567 (1979) (Marshall, J., dissenting) ("Almost any restriction on detainees . . . can be found to have some rational relation to institutional security. . . . Yet this toothless standard applies irrespective of the excessiveness of the restraint or the nature of the rights infringed.").

guards, or the other inmates.[82] Moreover, the beating arose from a personal dispute between the prisoner and one of the guards, but the Court never addressed how this dispute was related to the security of the prison or to the safety of the prison staff or other inmates.[83] Under the Court's ruling, the prisoner now has the burden of proving that the official acted for the purpose of causing harm,[84] even though it had previously held that the proper standard to apply in cases not involving a security threat was the "unnecessary and wanton" standard.[85]

B. *The Serious Injury Requirement*

The serious injury requirement addressed in *Hudson* concerns the objective component of an Eighth Amendment claim. Under the objective component, a prisoner must show that he sustained a sufficiently harmful injury.[86] The *Hudson* Court was faced with determining whether the objective requirement precludes those claims involving injuries which are not serious.[87]

In holding that a serious injury is not required in all Eighth Amendment claims, the Court distinguished its *Wilson* decision from *Hudson*. The Court explained that *Wilson* involved a condition of confinement rather than the excessive use of force.[88] The Court also stated that "*Wilson* announced no new rule. Instead, that decision suggested a relationship between the requirements applicable to different types of Eighth Amendment claims."[89] Thus, the objective component should be determined on a case-by-case basis.[90] By drawing a distinction between types of cases, the Court implicitly held that while excessive force cases do not require a serious injury, serious injury is required in order to sustain an Eighth Amendment claim involving conditions of confinement.

The Court's distinction between excessive force cases and those involving conditions of confinement is not convincing. The Court suggested that the difference between the two types of claims is self-evident.[91] "To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of

82. *See Hudson*, 112 S. Ct. at 997.
83. *Id.* at 1001-02.
84. *Id.* at 999.
85. *See* Whitley v. Albers, 475 U.S. 312, 320 (1986).
86. *Hudson*, 112 S. Ct. at 999 (citing Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991)).
87. *Id.*
88. *Id.* at 1000.
89. *Id.* at 999-1000.
90. *See id.* at 1000.
91. *Id.*

dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment."[92] As Justice Thomas points out in his dissent, however, a lengthy deprivation may be much more offensive to contemporary standards of decency than an isolated physical assault.[93] For example, some people might find it more offensive to be forced to live in a filthy environment with inadequate facilities than to be punched in the stomach. Under *Hudson*, however, a prisoner living in unsanitary conditions can not sustain his Eighth Amendment claim unless he has suffered some serious injury as a result of these conditions.[94]

The *Hudson* Court could have held that a serious injury is not a prerequisite for Eighth Amendment claims without making the distinction between excessive force and conditions of confinement cases. Acknowledging that conduct must be "harmful enough to satisfy the objective component of an Eighth Amendment claim," the *Wilson* Court cited *Rhodes v. Chapman*.[95] The *Rhodes* opinion, however, does not suggest that a serious injury is a prerequisite to finding an Eighth Amendment violation.[96] Rather, the Court in *Rhodes* simply stated that "judgment[s] should be informed by objective factors to the maximum possible extent."[97]

The *Wilson* Court's misinterpretation of *Rhodes* forced the *Hudson* Court to focus on the type of alleged violation rather than the context in which the alleged violation occurred. The Court held in *Hudson* that a serious injury is not required to sustain an Eighth Amendment claim in cases involving excessive force.[98] Further, the Court implicitly held that a serious injury is required in cases involving a condition of confinement

92. *Id.* at 1001 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

93. *Id.* at 1009 (Thomas, J., dissenting). Justice Thomas reasoned that because he could find no distinction between cases involving deprivations and cases involving excessive force, a showing of serious injury should be required in both situations. *Id.* at 1009-10. According to Justice Thomas, the Court's decision "extends the Eighth Amendment beyond all reasonable limits." *Id.* at 1010. Instead, the states, not the federal courts, should regulate prison life, unless an injury is serious enough to rise to the level of a constitutional violation. *Id.*

94. *Id.* at 1000.

95. Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

96. *See* Clemmons v. Bohannon, 918 F.2d 858, 866 (10th Cir. 1990), *vacated*, 956 F.2d 1523 (10th Cir. 1992) (the material referenced from this case is unaffected by the vaction of the decision). The court noted that "[t]he majority opinion in *Rhodes* does not even intimate that an Eighth Amendment plaintiff is required to allege that the unreasonable risk to health complained of has actually come to fruition before a court may intervene." *Id.*

97. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)). The Court held that because the Eighth Amendment draws its meaning from "evolving standards of decency," courts use their own subjective judgment concerning the acceptability of a given punishment. *Id.* However, judges should use as many objective factors as possible when making these decisions. *Id.*

98. *Hudson*, 112 S. Ct. at 999.

or deprivation.[99] In so holding, the Court has effectively overlooked condition of confinement cases where the injury is not serious, but where the violation results from an affront to contemporary standards of humane justice.

If the *Hudson* Court had focused on the context in which the alleged violation occurred, it could have avoided the implication that confinement cases require a showing of serious injury. In other words, the Court should have first determined that Hudson's claim did not involve a threat to prison security. The Court then should have applied the unnecessary and wanton infliction of pain standard rather than the higher, and in this context, inappropriate, malicious and sadistic standard. Finally, the Court should have recognized that regardless of the kind of alleged violation that occurs, an injury that is not serious may still offend contemporary standards of decency.

IV. CONCLUSION

The *Hudson v. McMillian* decision has broad-sweeping implications for the future of prisoners' rights under the Eighth Amendment. First, the Court departed from precedent by requiring prisoners to show that prison officials acted with intent to cause harm in all cases involving excessive force. This holding not only ignores the rationale behind the intent requirement, but it will also make it much more difficult for prisoners to sustain Eighth Amendment claims in the future. Second, the Court's distinction between claims involving conditions of confinement and those involving excessive force was unconvincing. As a result, the Court now may not recognize Eighth Amendment claims in condition of confinement cases where the prisoner has not suffered a serious injury. Thus, the Court took a step forward by holding that a serious injury is not required in cases involving an excessive use of force, but it took a step backward by implicitly holding that a serious injury is required in cases involving conditions of confinement.

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99. *Id.* at 1000.