EIGHTH AMENDMENT — FROM CRUELLY RESTRICTIVE TO UNUSUALLY BROAD PROTECTIONS AGAINST PUNISHMENT — *Hudson v. McMillian*, 112 S. Ct. 995 (1992).

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I. INTRODUCTION

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] While the excessiveness of bail or fines requires a subjective determination, the problems of interpreting the Eighth Amendment have centered around the Cruel and Unusual Punishment Clause.[2] The underlying concern of the Eighth Amendment is "the dignity of man."[3] The dignity of man is a nebulous idea and one not easily

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[1] U.S. CONST. amend. VIII. The language of the Eighth Amendment first appeared in the English Bill of Rights of 1689. Amanda Rubin, *Before and After* Wilson v. Seiter: *Cases Challenging The Conditions Of Confinement In The Ninth Circuit*, GOLDEN GATE U. L. REV. 22, 207, 209 (1992). The Virginia Declaration of Rights adopted this prohibition from the English Bill of Rights verbatim in 1776. Anthony Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969). Subsequently, eight other states adopted the clause and it ultimately became the Eighth Amendment to the United States Constitution in 1791. *Id.* Originally, the Eighth Amendment applied only to the federal government because the Bill of Rights was not applicable to the States. *See* Duckworth v. Franzen, 780 F.2d 645, 651 (7th Cir. 1985). The Eighth Amendment was eventually applied to the states, however, through the Due Process Clause of the Fourteenth Amendment. Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991) (citing Robinson v. California, 370 U.S. 660, 666 (1962)).

[2] *See generally* Anthony Granucci, *supra* note 1, at 839 (focusing on the brutal punishments inflicted under the Stuarts in England, tortuous methods of extracting confessions, and other barbarous treatments directed at those convicted of crimes).

[3] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("A penalty must accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.'") (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)); Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'") (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); *see also* Kim Ellis, *Prison Overcrowding, Inmate Violence and Cruel and Unusual Punishment*, 13 CRIM. JUST. J. 81, 83 (1991) (The concept underlying the Eighth Amendment is the dignity of man.).

amenable to definition.[4]

The federal courts have confronted Eighth Amendment claims in three basic contexts: (1) the imposition of criminal penalties meted out by judges and statutes;[5] (2) the conditions of confinement in penal institutions;[6]

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[4] Over the years, the courts have struggled with defining the concept and outlining the parameters of the term "cruel and unusual punishment." *See* Trop, 356 U.S. at 99 (noting that the Court has not detailed the exact scope of the Eighth Amendment). *See also* Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) (stating that a precise definition is not easily attributed to the Cruel and Unusual Punishment Clause); Weems v. United States, 217 U.S. 349, 368 (1910) (observing that the parameters of cruel and unusual punishment have not been exactly decided); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879) (commenting that difficulty attends efforts to exactly define the extent of the constitutional protection from cruel and unusual punishments); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (observing that the Supreme Court has recognized that the boundaries of the proscription against cruel and unusual punishment is not precisely or easily defined); Therese Roy, Solem v. Helm: *The Court's Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W. L. REV. 590, 590 (1985) (explaining that the precise standards defining the exact scope of the terms cruel and unusual have eluded both courts and scholars); Rubin, *supra* note 1, at 208 (stating that the "Supreme Court has labored unsuccessfully to determine the exact meaning of the Eighth Amendment.").

[5] *See* Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (holding that, while the Eighth Amendment's language suggests that it is directed at action taken by a court when carrying out a legislative act, it also acts as a restraint on legislative authority). *See also* Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the Georgia statute imposing the death sentence against a challenge that it was "cruel and unusual punishment" under the Eighth and Fourteenth Amendments); Wilkerson v. Utah, 99 U.S. 130 (1879) (holding the death penalty is not *per se* cruel and unusual).

Indeed, every decision of the Supreme Court striking down a punishment under the Eighth Amendment has concerned a legislative act. Trop v. Dulles, 356 U.S. 86 (1958) (upholding a state statute providing for divestiture of citizenship as not cruel and unusual punishment); Weems v. United States, 217 U.S. 349 (1910) (holding a Philippine statute delineating the punishment for falsifying public records unconstitutional on proportionality grounds).

[6] *See* Hutto v. Finney, 437 U.S. 678 (1978) (holding confinement in punitive isolation for an indeterminate period of time is cruel and unusual punishment in violation of the Eighth Amendment); Rhodes v. Chapman, 452 U.S. 337 (1981) (rejecting the allegation that the practice of "double celling" was cruel and unusual punishment); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991) (rejecting a claim alleging overcrowding, excessive noise, insufficient 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).

The Court has also recognized that access to adequate health care is a condition of confinement. However, the Court has refused to extend recovery absent a showing of deliberate indifference to serious medical needs. *See* Estelle v. Gamble, 429 U.S. 97

and (3) the physical force prisoners have been subjected to at the hands of prison officials.[7] A fourth context in which Eighth Amendment claims arise involves allegations of negligence on the part of penal institutions or their employees. However, these claims have been met with disfavor by the courts.[8] Each of the three cognizable Eighth Amendment contexts has its

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(1976) (refusing to extend recovery for inadequate treatment of a back injury when the prison doctor failed to accurately diagnose his problem and neglected to perform X-rays or to use additional diagnostic techniques because what was alleged was at most medical malpractice); *but cf.* Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988) (reversing the district court's grant of summary judgment in favor of the Commissioner of the New York State Department of Correctional Services and remanding the case for a determination as to whether Corselli was deliberately exposed to brutally cold temperatures or was purposely prevented from receiving adequate medical care); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (extending recovery to a prisoner for a beating he received at the hands of a guard when, after the beating, the guard purposely detained the prisoner for two hours to prevent him from receiving medical care).

[7] *See* Whitley v. Albers, 475 U.S. 312 (1986) (Prisoner claimed the Eighth Amendment was violated when he was shot during a prison riot.); Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987) (Plaintiff asserted an Eighth Amendment violation as the result of a "physical assault" by a prison guard.); Cambell v. Grammer, 889 F.2d 797 (8th Cir. 1989) (Inmates claimed their Eighth Amendment rights were violated when they were sprayed with a high power fire hose during a "prison disturbance."); George v. Evans, 633 F.2d 413 (5th Cir. 1980) (Prisoner claiming that he was beaten merely for refusing to take a disciplinary report that was delivered to him in his cell.); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Prisoners challenged the use of a strap as a disciplinary measure.); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (Prisoner alleged that a prison guard made an unprovoked attack upon him.). *See also* Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990) (en banc) (Prisoner alleged that verbal provocation alone was an insufficient provocation to justify a beating wherein he sustained a fractured arm and swollen elbow.); Stenzel v. Ellis, 916 F.2d 423 (8th Cir. 1990) (Prisoner claimed that his forcible removal to punitive isolation constituted unconstitutional punishment.); Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988) (Prisoner asserted that he was beaten merely for being in the vicinity of a fight.); Williams v. Boles, 841 F.2d 181 (7th Cir. 1988) (Prisoner brought a claim alleging that he was beaten by a pipe-wielding guard and sprayed with mace by another guard.); Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987) (Prisoner challenged the act of being shoved by a prison maintenance worker.); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956) (Prisoner challenged disciplinary beatings and the conditions he was subjected to while in solitary confinement.).

[8] *See* Davidson v. Cannon, 474 U.S. 344 (1986) (holding that failure to adequately protect a prisoner from another prisoner after being told of the possibility of an attack was not recognized under the Eighth Amendment); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985). A procedure that chained prisoners to their seats during transportation did not constitute an Eighth Amendment violation although several prisoners died from smoke inhalation when a fire broke out on the bus. *Id.* With regard to the procedure, the

own standard by which claims are judged.[9] Furthermore, the various standards are not fixed but instead, are flexible.[10] In the excessive force

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Duckworth court determined that it was "[n]egligence, perhaps; gross negligence — giving due regard for the jury's verdict — perhaps; but not cruel and unusual punishment." *Id.* at 651. *See* Haynes v. Marshall, 887 F.2d 700 (6th Cir. 1989). In *Haynes*, the mother of a deceased prisoner alleged *inter alia* that prison officials were negligent in failing to administer the anti-psychotic medication that probably would have prevented the deceased from struggling with the twelve officers that inflicted the injuries leading to his death. *See also* Estelle v. Gamble, 429 U.S. 97 (1976) (holding that failure to accurately diagnose a medical condition is, at most, medical malpractice which is remedial under state tort systems but not under the Constitution); Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987) (denying prisoner's recovery based on a finding that the infliction of the injury was "accidental."); Procunier v. Navarette, 434 U.S. 555, 566 (1977) (refusing to set aside the prison officials qualified immunity, the Court declared that, "[t]o the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.").

[9] What constitutes an "unnecessary and wanton infliction of pain" varies according to the character of the asserted constitutional violation. Hudson v. McMillian, 112 S. Ct. 995, 998 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

In the context of reviewing a sentence meted out by a judge or statute, the penalty must not be excessive. Gregg v. Georgia, 428 U.S. 153, 173 (1976). A determination of "excessiveness" has two aspects. First, the punishment may not inflict pain in an unnecessary and wanton manner. Furman v. Georgia, 408 U.S. 238, 392-393 (1972) (Burger, C. J., dissenting). *See* Wilkerson v. Utah, 99 U.S. at 136; Weems v. United States, 217 U.S. at 381. Second, the punishment may not be grossly disproportionate to the severity of the offense. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (dictum); Weems v. United States, 217 U.S. 349, 367 (1910).

In "conditions of confinement" cases, the standard of culpability is whether the official acted with "deliberate indifference." *See* Estelle v. Gamble, 429 U.S. 97 (1976); Rhodes v. Chapman, 452 U.S. 337 (1981); Wilson v. Seiter, 111 S. Ct. 2321 (1991); Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988).

In the "excessive force" context, the general standard of culpability is "the unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)). However, what is unnecessary and wanton varies with the circumstances in which the force is applied. *Id.* at 320-21. In the context of a prison disturbance, the presence of competing interests justifies a higher standard — "malicious and sadistic." *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[10] *See* Weems v. United States, 217 U.S. 349 (1910). The Eighth Amendment is not anchored to the obsolete; it may gain meaning as society "becomes enlightened by a humane justice." *Id.* at 378 (citing Ex parte Wilson, 114 U.S. 417, 427 (1885); Mackin v. United States, 117 U.S. 348, 350 (1886)); Trop v. Dulles, 356 U.S. 86 (1958) The words of the Eighth Amendment do not have a precise meaning. *Id.* at 100. The Constitution's provisions are not time-worn adages or empty shibboleths. *Id.* at 103. They are vibrant, living principles guiding the exercise of governmental authority in our Nation.

context, the standard is particularly contextual.[11]

Eighth Amendment analysis did not always fit into precise categories of interpretation. This article will first examine the development of the standards of Eighth Amendment analysis in its various contexts, culminating with the excessive force context. Against this backdrop, this article will recount and analyze the Court's decision in *Hudson v. McMillian*.[12] This paper will conclude with an analysis of the implications of *Hudson v. McMillian*.[13]

II. THE DEVELOPMENT OF EIGHTH AMENDMENT ANALYSIS

A. HISTORICAL BACKGROUND

The phrase "cruel and unusual" punishment first appeared in the English Bill of Rights of 1689.[14] In the English Bill of Rights, the phrase

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Id.; Gregg v. Georgia, 428 U.S. 153 (1976). The Eighth Amendment is not a static concept; thus, contemporary values must be assessed when applying the Eighth Amendment. *Id.* at 172-73; Furman v. Georgia, 408 U.S. 238 (1972). The Court in *Wilkerson* could not identify what constitutes cruel and unusual punishment simply by examining traditional practices; instead, it was bound to explore developing thought. *Id.* at 322 (Marshall, J., concurring); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). The Supreme Court has clearly indicated that the standards applicable to the Eighth Amendment are flexible. *Id.* at 579.

[11] Although "unnecessary and wanton" infliction is actionable under Eighth Amendment excessive force analysis, what constitutes unnecessary and wanton conduct varies according to the context in which the claim is lodged. Whitley v. Albers, 475 U.S. 312 (1986). For a discussion of the various standards of unnecessary and wanton conduct, see *infra* note 183. For example, it has been widely accepted that a heightened standard of culpability is required in the context of a prison disturbance. The courts have articulated this heightened standard to be "malicious and sadistic" inflictions of pain. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 320-21 (1986); Cambell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989); Hudson v. McMillian, 112 S. Ct. 995, 998 (1992).

[12] 112 S. Ct. 995 (1992).

[13] *Id.*

[14] The Tenth Declaratory Clause of the English Bill of Rights of 1689 provides: "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court has repeatedly acknowledged this clause as the precursor of the Eighth Amendment to the United States Constitution. Furman v. Georgia, 408 U.S. 238, 317 (1972) (Marshall, J., concurring) ("[T]he English Bill of Rights contain[s] the progenitor of our prohibition against cruel and unusual

proscribed punishments which were either unauthorized by statute, beyond the sentencing court's jurisdiction, or disproportionate to the offense committed.[15] Commentators have asserted that the drafters of the Eighth Amendment originally intended to proscribe punishments similar or analogous to those prohibited by the English Bill of Rights.[16] Generally, these punishments have been categorized as "tortuous" or "barbaric."[17] Therefore, traditional Eighth Amendment analysis centered on the comparison between the punishment at issue and those permissible in England after 1689.[18] The earliest Eighth Amendment claims focused on various methods of execution in order to determine if they could survive constitutional scrutiny or were, simply, too cruel.[19] In these cases, the

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punishments."); Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("The phrase first appeared in the English Bill of Rights of 1689.") (citing Anthony Granucci, *supra* note 1, at 852-53).

[15] *Furman*, 408 U.S. at 318; *Gregg*, 428 U.S. at 169 (citing Granucci, *supra* note 1, at 860. *See also* Rubin, *supra* note 4, at 209.

[16] *See* Granucci, *supra* note 1, at 842 (explaining that the framers misinterpreted the English Bill of Rights as prohibiting barbarous methods of punishment in response to the "Bloody Assize" treason trials and thereby restricting Eighth Amendment protections to banning only tortuous and barbarous punishments).

[17] *Furman*, 408 U.S. at 319 (stating that "in borrowing the language . . . our Founding Fathers intended to outlaw torture and other cruel punishments."); Granucci, *supra* note 1, at 856-59 (identifying several punishments that were considered barbarous or tortuous, such as quartering, thumb screws and excessive punishments). *See also* Thomas Baker, *The Eighth Amendment, Becarria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 788 (1969) (identifying crucifixion, quartering, disembowelment, burning at the stake, breaking on the wheel and subjection to the rack as inherently cruel).

[18] *See* Gregg v. Georgia, 428 U.S. 153, 170 (1976) (asserting that traditionally the method of execution, but not the imposition of death, was the focus of the court's inquiry). *See also* Rubin, *supra* note 4, at 209 (observing that the Court has often interpreted the Eighth Amendment to proscribe only tortuous and barbaric punishments comparable to those barred by the English Bill of Rights).

[19] *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (comparing shooting as a mode of execution for murder to shooting and hanging for offenses such as mutiny, desertion, treason, and piracy); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (finding the absence of an express purpose to inflict unnecessary pain sufficient to justify a second attempt at electrocution after the first failed); *In re* Kemmler, 136 U.S. 436, 447 (1890) (holding that the phrase cruel and unusual implies something inhuman or barbarous about the challenged act, something "more than the mere extinguishment of life.").

constitutionality of the death sentence itself was not the issue; the cases instead revolved merely around the constitutionality of the means of execution.[20]

1. The Early Capital Punishment Cases

The Supreme Court first addressed the constitutionality of execution as a means of punishment in *Wilkerson v. Utah*.[21] In *Wilkerson*, the defendant was convicted of first degree murder and sentenced to death by shooting.[22] After discussing the authority of the Utah courts to sentence convicted persons to death,[23] the Court analyzed capital punishment in the military context.[24] The Court in *Wilkerson* then identified the punishments that were permissible at common law in England.[25] Ultimately, the Court

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[20] *See Gregg*, 428 U.S. at 170 (observing that in the earliest cases asserting Eighth Amendment claims, the Court focused on specific methods of execution to ascertain whether they could pass constitutional muster or were too cruel); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (finding it "safe to say" that it is not capital punishment that is proscribed by the Eighth Amendment but merely the tortuous elements of capital punishment). *See also* In re Kemmler, 136 U.S. 436 (1890); Louisiana *ex rel.* Francis, 329 U.S. 459 (1947).

[21] 99 U.S. 130 (1879).

[22] *Id.* The legislative act of Utah, passed March 6, 1852, provided for a penalty of death for any person found guilty of a capital offense. *Id.* (citing COMP. LAWS UTAH (1876)) provided that "when any person shall be convicted of any crime the punishment of which is death, . . . he shall suffer death by being shot, hanged, or beheaded, as the court may direct, or he shall have his option as to the manner of his execution." *Id.* at 132.

[23] *Id.* at 132-33.

[24] *Id.* at 133-34. The Court noted that in the case of a court-martial, the imposition of death was statutorily sanctioned provided that two-thirds of the members of the court-martial board concurred in its application. *Id.* at 133. The Court also observed that the statute did not specify the manner of implementing the punishment. *Id.* at 134. Ultimately, the Court concluded that shooting or hanging were both appropriate methods of carrying out the sentence depending on the offense committed. *Id.* (citation omitted).

[25] *Id.* at 134-35. The Court advanced the proposition that both shooting and hanging were accepted and common forms of capital punishment that comported with the Eighth Amendment. *Id.* at 134-35. Next, the Court recounted and endorsed Blackstone's rendition of the English common law, where Blackstone claimed that the severity of these punishments were sometimes augmented:

determined that shooting as a mode of execution was not within the purview of the Eighth Amendment's proscription against cruel and unusual punishment.[26]

In *In re Kemmler*,[27] the Supreme Court implemented a similar analysis in determining whether death by electrocution for murder in the first degree constituted cruel and unusual punishment.[28] In concluding that death by electrocution was not "cruel and unusual" punishment, the Court in *Kemmler* went beyond the purely historical approach implemented *Wilkerson* and articulated several factors to be considered in this determination, the most important of which was whether the method of execution was inhumane.[29]

Subsequently, in *Louisiana ex rel. Francis v. Resweber*,[30] the Supreme Court arguably took the decision in *Kemmler* a step further in holding that a second electrocution, after an unsuccessful first attempt, was

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> [In the case of] very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by [Blackstone] are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgements as savored of torture or cruelty, and he states that they were seldom strictly carried into effect.

Id. at 135 (citation omitted).

[26] *Id.* The Court concluded that the common implementation of shooting and hanging for numerous crimes in England was quite sufficient to demonstrate that shooting as a mode of execution for the crime of first degree murder is not within the category of punishments considered cruel and unusual that are proscribed by the Eighth Amendment. *Id.* at 134-35.

[27] 136 U.S. 436 (1890).

[28] *Id.*

[29] *Id.* at 447. The Court held that punishments are only cruel when they consist of torture or a lingering death. *Id.* The Court elaborated that the punishment of death itself is not *per se* cruel. *Id.* Instead, the Court proffered that "cruel" in the constitutional sense implies "something more than the mere extinguishment of life." *Id.*

[30] 329 U.S. 459 (1947).

not cruel and unusual punishment.[31] In upholding the punishment imposed, the Court expanded *Kemmler's* "inhumane" concept by explaining what is humane.[32] The Court explained that it is humane to reduce the suffering in an execution as much as possible to no more than the death itself.[33]

2. The Early Non-Captial Cases — Expanding The Concept of Humane Punishment

Progressing from a purely historical analysis of "cruel and unusual" punishment[34] to one that incorporates the concept of "humanity,"[35] the Supreme Court has demonstrated a willingness to expand the reach of the Eighth Amendment.[36]

In *Weems v. United States*,[37] the Supreme Court was confronted

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[31] *Id.* In *Resweber*, Willie Francis was convicted of murder and sentenced to electrocution. *Id.* at 460. When the executioner threw the switch, death did not result, presumably because of a mechanical failure. *Id.* Declaring that "[a]ccidents happen," *id.* at 462, the majority was reluctant to overturn the sentence for murder, proffering to characterize the unsuccessful first attempt at execution "an innocent misadventure." *Id.* at 470.

[32] *Id.* at 464. The Court held that the Constitution protects against cruelty inherent in the manner of punishment, not the suffering necessarily involved in the particular method utilized to extinguish life humanely. *Id.* Therefore, the Court found that the fact that an unforeseeable mishap prevented the expeditious consummation of the sentence could not add the element of cruelty requisite for invalidation. *Id.*

[33] *Id.* at 443-44 (asserting that the pivotal consideration is that the execution be as instantaneous and painless as feasible).

[34] Wilkerson v. Utah, 99 U.S. 130 (1879). For a discussion of the early cases implementing an historical approach to Eighth Amendment challenges, see *supra* notes 16-29 and accompanying text.

[35] *See In re* Kemmler, 136 U.S. 436 (1890); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[36] *See infra* notes 63-97 and accompanying text (discussing the continued expansion of the Eighth Amendment to include "conditions of confinement" and "excessive force" cases for prisoners). *See also* Furman v. Georgia, 408 U.S. 238, 318 (1976) (Marshall, J., concurring) (observing that in the English Bill of Rights, the phrase proscribed punishments unauthorized by statute, beyond the sentencing court's jurisdiction, or disproportionate to the offense committed).

[37] 217 U.S. 349 (1910).

with applying the Philippine Bill of Rights' proscription against cruel and unusual punishments to a person convicted of falsifying public documents.[38] After noting that the Philippine Bill of Rights was modeled after the United States Constitution, the Court proceeded to attribute to the clause the same meaning as its Eighth Amendment predecessor.[39] The *Weems* Court observed that the Eighth Amendment proscribes "inhumane" punishments and then maintained that it would not limit inhumane punishments to those that are "tortuous and barbarous."[40] Instead, the Court categorized the cruel and unusual punishment clause as "progressive" and one that is not anchored to the obsolete but, instead, is capable of acquiring meaning as a humane justice enlightens society.[41] Thus, the Court expanded the approach to capital punishment cases by showing that the definition of cruel and unusual punishment not only included the concept of humanity, but also that the concept of humanity was flexible and not static.[42] In this regard, the *Weems* Court decided that, by 1910, enlightened humane justice required that the concept of humanity include the idea that punishments meted out by statutes

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[38] *Id.* at 367. The defendant had been sentenced to fifteen years imprisonment at hard labor and fined four thousand pesetas by the trial court. *Id.* at 358.

[39] *Id.* at 367.

[40] *Id.* In *Weems*, the Court adhered to its established practice of beginning Eighth Amendment inquiries with an historical analysis. *Id.* at 367-72. After explaining that the English Bill of Rights (the Eighth Amendment's predecessor) arose largely in response to the tyranny inflicted by the Stuarts (the English royal family), the Court discussed the intent of its drafters. *Id.* at 372-73. The Court concluded that protection from "cruel and unusual" punishment must have been designed to apply not only to the barbarous punishments that existed but also to those which may be invented in the future. *Id.* at 373. The Court declared that "our contemplation cannot be only of what has been but of what may be." *Id.*

[41] *Id.* (citing *Ex parte* Wilson, 114 U.S. 417, 427 (1885); Mackin v. United States, 117 U.S. 348, 350 (1886)). This conclusion followed naturally from *Weems'* analysis of the genesis of the English Bill of Rights where the drafters' predominant political motivation was a distrust of power which led to their insistence on constitutional constraints against its abuse. *Id.* at 372. The Court then opined that the drafters must have intended to protect against not only the abuses they had endured under the Stuarts but also persecutions that might be developed in the future. *Id.* at 373.

[42] Weems v. United States, 217 U.S. 349, 373 (1910) ("[A] principle to be vital must be capable of wider application than the mischief which gave it birth."). *See also* note 10 (observing that the Court has repeatedly held that the Eighth Amendment is evolving).

and judges must be proportional to the offenses committed.[43]

In *Trop v. Dulles*,[44] the Court sustained a challenge to the sentence of denationalization for the crime of wartime desertion on proportionality grounds.[45] The *Trop* Court echoed the *Weems* notion that the meaning of "humanity"[46] and, consequently, that of the Eighth Amendment is "progressive."[47] In rendering its decision, the Court stated that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[48] The Court in

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[43] The *Weems* Court held that the sentence of fifteen years imprisonment at hard labor and four thousand pesetas fine was excessive and disproportionate to the crime committed and consequently invalidated it. *Id.* at 381-82.

[44] 356 U.S. 86 (1958).

[45] *Id.* at 87 Before reaching the question of proportionality, the Court revealed that a court must first inquire whether the law in question is in fact penal. *Id.* at 95-96. The Court explained, "a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." *Id.* at 96. (citations omitted). The Court ultimately determined that the purpose of the law requiring denationalization was in fact penal and thus subject to a proportionality analysis. *Id.* at 97.

[46] In reaching this conclusion, the Court articulated the oft quoted statement of the undercurrent of the Eighth Amendment: "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. See *supra* note 3 for a discussion of the cases that have relied upon the dignity of man as a basis for Eighth Amendment analysis.

[47] The Court opined, that while the power to punish is vested in the state, the Eighth Amendment is designed to guarantee that this power be exercised in a manner that comports with civilized standards. *Id.* at 100. The Court elaborated that these standards are dynamic and robust principles that not only authorize but also limit the government's power. *Id.* at 103.

[48] *Id.* at 101. The court in Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), offered an account of cases prior to *Trop* that implemented a similar approach.

> In State of La. *ex rel.* Francis v. Resweber, supra, 329 U.S. at 463, . . . the Court spoke of the "traditional humanity of modern Anglo-American law" . . . and the dissent referred, at page 473, . . . to that which "shocks the most fundamental instincts of civilized man." Mr. Justice Douglas, concurring, in Robinson v. California, supra, 370 U.S. at 676, . . . said, "[t]he Eighth Amendment expresses the revulsion of civilized man against barbarous acts — the 'cry of horror' against man's inhumanity to his fellow man." In Rudolph v. Alabama, 375 U.S. 889 (1963), three dissenters to the denial of certiorari spoke

Trop then concluded that, by 1958, expatriation as a means of punishment offended society's evolving standard of decency.[49] With this decision, the Court solidified the notion that the Eighth Amendment's protections extend to non-physical as well as to physical punishments.[50]

Subsequent cases have affirmed the development of the Eighth Amendment in the context of criminal penalties meted out by judges and statutes.[51] The most notable of these cases was *Gregg v. Georgia*.[52] In *Gregg*, the defendant was convicted of armed robbery and murder and was sentenced to death.[53] In upholding the imposition of the death penalty,[54] the Court in *Gregg* identified two factors to consider when deciding if a

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> of "standards of decency more or less universally accepted . . . ."
>
> This court has added its word. It has described the situation where a court will interfere with prison discipline as one "of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness, and so to amount to illegal administration of prison sentence." Carey v. Settle, supra, 351 F.2d at 485.

Id. at 578.

[49] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the use of denationalization as a form of punishment is prohibited under the Eighth Amendment). The Court in *Trop* bolstered its conclusion by asserting that to punish by means of denationalization is more primitive than torture, "for it destroys for the individual the political existence that was centuries in the development." *Id.* Thus, the Court declared that denationalization was synonymous with "los[ing] the right to have rights." *Id.* at 102 (plurality opinion).

[50] *Id.* at 103-04 (plurality opinion). Although the Eighth Amendment was arguably cut loose from its traditional moorings in *Weems*, where a lack of proportionality was found to be cruel and unusual, the punishment in *Weems* involved hard labor. Weems v. United States, 217 U.S. 349, 358 (1910). However, in *Trop*, there was absolutely no physical element involved in the punishment. *Trop*, 356 U.S. at 88 (plurality opinion).

[51] *See* Robinson v. California, 370 U.S. 660 (1962) (finding a statute making it a misdemeanor to use or be addicted to narcotics cruel and unusual punishment because it was based on a condition or status); Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (striking the imposition of the death penalty for a conviction for rape on proportionality grounds).

[52] 428 U.S. 153 (1976).

[53] *Id.* at 158.

[54] *Id.* at 207.

punishment is "excessive."[55] First, the Court considered whether the punishment involved the infliction of pain in an unnecessary and wanton manner.[56] Next, the Court asked whether the *Weems* proportionality principle was violated.[57] *Gregg* also expressly enumerated factors a court should consider in its attempt to ascertain "contemporary values."[58]

In spite of this expansion of the Eighth Amendment, its evolution was far from over. By 1976, the Court was willing to entertain another category of Eighth Amendment challenges — the conditions of confinement.[59] While

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[55] *Id.* at 173.

[56] *See Gregg*, 428 U.S. at 173. (citing Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C. J., dissenting)). *See also* Wilkerson v. Utah, 99 U.S. 130, 136 (1879); Weems v. United States, 217 U.S. 349, 381 (1910).

[57] *Gregg*, 428 U.S. at 173. (holding that the punishment may not be grossly disproportionate to the crime) (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (dictum); *Weems*, 217 U.S. at 367.

[58] Gregg v. Georgia, 428 U.S. 153, 173 (1976). After citing *Trop*, 356 U.S. at 101, for the proposition that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," the *Gregg* Court substituted the word "contemporary" for the word "evolving." *Gregg*, 428 U.S. at 173. The Court stressed that these factors should represent "objective indicia." *Id.* The Court first identified statutes as a good source of objective indicia for courts to consider although it declined to cite to any specific statues for the purposes of the case at hand. *Id.* at 179. The Court also explained that legislative measures, because they are adopted by representatives chosen by the people, weigh heavily in determining contemporary standards of decency. *Id.* at 179-83. But again, the Court did not identify any specific legislative measures in its opinion. *Id.* Next, the Court explained that the history preceding enactment of the statutes is likewise an important objective indicia. *Id.* at 176-80. The Court's third consideration was the opinion of juries because they are "a link between contemporary community values and the penal system." *Id.* at 181 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)). The Court's fourth indicia was whether the sentence advances an objective of the penal system. *Id.* at 183. The *Gregg* Court identified retribution and deterrence as the death penalty's "two principal social purposes." *Id.* The Court asserted that the "instinct for retribution" promotes "the stability of a society" by showing that society is willing and able to punish criminal acts. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)). After a discussion of statistical attempts to evaluate the weight of the death penalty as a deterrent, the Court concluded that some murderers will not be deterred at all but will undoubtedly remain a significant deterrent for others. *Id.* at 185-86.

[59] See *infra* notes 62-88 for a discussion of the evolution of the Eighth Amendment as applied to the conditions of confinement.

the early cases established the standards that would be applied to sentences,[60] this new category answers the question of what rights are retained once the sentence has passed muster.[61] These new cases establish that "a prisoner does not leave his civil rights at the prison door."[62]

3. The Conditions of Confinement as a Form of "Punishment"

In *Estelle v. Gamble*,[63] the Court established that certain deprivations suffered by prisoners not specifically meted out as part of a criminal sentence are proscribed by the Eighth Amendment.[64] In *Estelle*, a prisoner complained that he received inadequate medical treatment after

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[60] See *supra* notes 21-33 for a discussion of the principles with which a sentence must comport.

[61] See *infra* notes 62-88 for a discussion of exactly what rights are retained as well as the standard that the Court will apply to challenges to the conditions of confinement.

[62] Rhodes v. Chapman, 452 U.S. 337 (1981) (noting that while incarceration necessarily, and constitutionally, includes restrictions and a loss of certain entitlements that complete freedom affords, it is not an open door for cruelty or neglect). Traditionally, prisoners did not have any rights. *See* Rubin, *supra* note 4 at 213. In fact, many rights were abridged even before sentencing. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 523-24 (1979) (refusing to accept every pretrial detention impairment as of constitutional moment and holding that detainees "may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration'"). *See also* David Cox, McKinney v. Anderson: *Cruel and Unusual Smoke — Eighth Amendment Limitations on Conditions of Confinement in Prisons*, 18 J. CONTEMP. L. 131, 131 (1992) Originally, penitentiary inmates were considered slaves of the state and the cruel and unusual punishment clause imposed no limitations on the conditions of confinement. *Id.* (citing Cootz v. Idaho, 785 P.2d 163, 170 (Idaho 1989)).

Remnants of the historically restrictive view of prisoners' rights was evidenced by the Supreme Court as late as 1991 in Wilson v. Seiter, 111 S. Ct. 2321 (1991). Justice White, in his concurrence, proclaimed that prior cases have made it clear "that the conditions [of confinement] are themselves *part of the punishment* even though not specifically 'meted out' by a statute or judge." *Id.* at 2328 (emphasis in original).

[63] 429 U.S. 97 (1976).

[64] Wilson v. Seiter, 111 S. Ct. 2321 (1991). Relying upon Estelle v. Gamble, 429 U.S. 97 (1976), the *Wilson* Court acknowledged that the Eighth Amendment was applied to certain deprivations that did not constitute a portion of the sentence "but were suffered during imprisonment." *Id.* at 2323.

incurring an injury while performing a prison work assignment.[65] Confronting the issue of whether the unnecessary infliction of pain[66] accorded with "contemporary standards of decency,"[67] the Court in *Estelle* examined various state laws[68] as evidence of existing contemporary standards with regard to the level of medical care to be administered to prisoners.[69] Upon examining the various laws, the Court concluded that

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[65] Estelle v. Gamble, 429 U.S. 97, 98 (1976). The Complaint named the Director of the Department of Corrections, W.J. Estelle, Jr., the prison warden, H. H. Husbands, and the Department's medical director and chief medical officer, Dr. Ralph Gray. *Id.* Estelle alleged inadequate treatment of his medical needs by virtue of delayed access to medical treatment on several occasions, *id.* at 100-01, and the doctor's failure to order an X-ray which might have avoided the erroneous diagnosis. *Id.* at 107.

[66] The unnecessary infliction of suffering was a point of departure for the *Estelle* Court because the case was brought before the Court on an appeal from the District Court's dismissal of the action for failure to state a claim upon which relief could be granted. *Id.* at 98. Thus, the Court felt obliged to "take as true [the] handwritten, *pro se* allegations." *Id.* at 99 (citing Cooper v. Pate, 378 U.S. 546 (1964)).

[67] *Id.* at 102. The Court first cited the standard by which Eighth Amendment claims are measured. *Id.* The Court noted that punishments which do not comport with "the evolving standards of decency that mark the progress of a maturing society" or involve unnecessary and wanton inflictions of pain, violate the Eighth Amendment. *Id.* at 102-03.

[68] *Estelle*, 429 U.S. at 103. The Court cited several examples:

> ALA. CODE § 125 (1958); ALASKA STAT. § 33.30.050 (1975); ARIZ. REV. STAT. ANN. § 31-201.01 (Supp. 1975); CONN. GEN. STAT. ANN. § 18-7 (West 1975); GA. CODE ANN. § 77-309(e) (1973); IDAHO CODE § 20-209 (Supp. 1976); ILL. ANN. STAT. ch. 38, para. 103-2 (1970); IND. CODE ANN. § 11-1-1.1-30.5 (West 1973); KAN. STAT. ANN. § 75-5429 (Supp. 1975); MD. ANN. CODE art. 27 § 698 (1976); MASS. GEN. L. ANN. ch. 127, § 47-1-57 (West 1972); MO. REV. ANN. STAT. § 221.120 (Vernon 1962); NEB. REV. STAT. § 83-181 (1971); N.H. REV. STAT. ANN. § 619.9 (1974); N.M. STAT. ANN. § 42-2-4 (Michie 1972); TENN. CODE ANN. §§ 41-318, 41-1115, 41-1226 (1975); UTAH CODE ANN. §§ 64-9-13, 64-9-19, 64-9-20, 64-9-53 (1968); VA. CODE ANN. §§ 32-81, 32-82 (1973); W. VA. CODE. § 25-1-16 (Supp. 1976); WYO. STAT. § 18-299 (1959).

Id. at 103 n.8.

[69] Representative of the statutes relied upon by the Court is the New Hampshire statute, which provides:

> Every Jailer shall provide each prisoner in his custody with necessary

when prison officials are "deliberately indifferent" to the serious medical needs of prisoners, their acts constitute the "unnecessary and wanton infliction of pain prohibited under the Eighth Amendment."[70] In denying recovery to the prisoner in this case,[71] the Court concluded that the acts of the prison officials were not deliberate, and thus, not actionable under the Eighth Amendment.[72]

In *Hutto v. Finney*,[73] the Court applied the "objective component," which was the sole prong of Eighth Amendment conditions of confinement

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> sustenance, clothing, bedding, fuel, and medical attendance, and the county commissioners shall allow him, out of the county treasury, a reasonable compensation for the support of all prisoners confined on criminal process, but in no case shall the sum allowed for the sustenance of each prisoner be less than $3 a week.

N.H. REV. STAT. ANN. § 619.9 (1974).

[70] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[71] *Id.* at 108. The Court claimed that because unintentional acts are not actionable under the Eighth Amendment, a negligent diagnosis or an inadvertent failure to afford adequate medical care cannot be considered "'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Id.* at 105-06. Instead, the Court proffered that, at most, it was medical malpractice. *Id.* at 107. The Court then observed that medical malpractice is remedial under tort systems and does not merit constitutional recognition merely because the patient is a prisoner. *Id.* at 106.

The *Estelle* Court's emphasis on the prison officials' intent established what would later be referred to as the "subjective component" of Eighth Amendment claims outside the traditional context of legislative and judicial sentencing. *See Wilson*, 111 S. Ct. at 2321 (holding that an inquiry into the officials' state of mind is mandated by Eighth Amendment analysis); Hudson v. McMillian, 112 S. Ct. 995 (1992) (explaining that the subjective component requires an inquiry into whether the prison official acted with a "sufficiently culpable state of mind").

Arguably, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) was the first case to implement the subjective component. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991) (asserting that *Estelle* "relied in larger measure" on *Francis* which emphasized the word "wanton.").

[72] *Estelle*, 429 U.S. at 105. In justifying its holding, the Court stated that accidents provide an insufficient basis to be classified as "wanton infliction of unnecessary pain." *Id.* (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947) (characterizing a failed attempt to electrocute a prisoner, because of a mechanical malfunction, "an innocent misadventure" and holding that a second attempt to electrocute the prisoner did not constitute cruel and unusual punishment)).

[73] 437 U.S. 678 (1978).

analysis before *Estelle*. *Hutto* involved an appeal of two remedial orders entered by the district court below after it determined that the deplorable conditions in Arkansas' prison system were violative of the Eighth and Fourteenth Amendments.[74] Arkansas specifically appealed an order limiting punitive isolation to a maximum of 30 days and the award of attorney's fees.[75] In affirming the lower court, the *Hutto* Court emphasized objective factors with regard to the practice of punitive isolation.[76]

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[74] *Id.* at 680. The Court observed that the Arkansas prison system tried to operate at a profit. *Id.* at 681 n.3. The inmates were forced to work on a farm for 10 hours a day for six days a week using inadequate tools. *Id.* They were also forced to work in inclement weather and with insufficient light and clothing. *Id.* Further, inmates were forced to sleep in 100-man barracks where stabbings and homosexual rape were "common and uncontrolled." *Id.* Inmates were also subjected to lashings, whippings, *id.* at 682 n.4, and the "Tucker telephone," which administered electrical shocks to their bodies. *Id.* at 682 n.5. Prisoners in punitive isolation were subjected to particularly harsh conditions:

> Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as may as 10 or 11, prisoners were crowded into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. Holt v. Sarver, 300 F. Supp. 825, 831-32 (E.D.Ark. 1969) (*Holt I*). At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. *Id.*, at 832. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. *Ibid.*

Id. at 682-83.

[75] *Hutto*, 437 U.S. at 680.

[76] *Id.* at 688. The Court observed that the prisoners in isolation were fed less than 1,000 calories per day. *Id.* at 683. When compared to the recommended daily allowance of the National Academy of Sciences, 1,000 calories per day was found to be inadequate. *Id.* at 683 n.7. Additionally, the prisoner population had risen by 500 persons since the prison was first condemned for being overcrowded. *Id.* at 684. There were two times as many prisoners as there were bunks in some cells. *Id.* "Practically all" the inmates were losing weight on the scanty rations they received. *Id.* Finally, the determination of the length of stay in punitive isolation was arbitrary. *Id.* Thus, by basing its holding on quantifiable and verifiable factors, the Court based its decision on the objective component of Eighth Amendment claims. *See id.* at 685-89. By according negligible consideration to the intent of the prison officials in subjecting the prisoners to these conditions, the Court

The next major case challenging the conditions of confinement was *Rhodes v. Chapman*.[77] In *Rhodes*, a prisoner challenged the practice of double bunking[78] as a cruel and unusual condition of confinement.[79] The *Rhodes* Court, in applying the *Weems* analytical framework, stated that the conditions of confinement must neither inflict wanton and unnecessary pain nor be disproportionate to the offense committed.[80] However, the Court intimated that threshold of actionability was high because it asserted that contemporary standards would only be offended if the inmates were deprived "of the minimal civilized measure of life's necessities."[81] Accordingly, the Court held that double bunking did not offend contemporary standards of decency.[82]

The petitioner in *Wilson v. Seiter*[83] likewise challenged

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did not meaningfully consider the subjective component. *Id.*

[77] 452 U.S. 337 (1981).

[78] *Id.* at 339-40. Double bunking was a practice that placed two prisoners in a cell that had originally been designed for one prisoner. *Id.* at 340-41. Much of the Court's discussion of the constitutionality of this practice centered around the prison's "design capacity." *Id.* at 341-43.

[79] *Id.* at 340.

[80] *Id.* at 347. For an account of how *Weems* handled proportionality see *supra* notes 41-43 and accompanying text.

[81] *Id.* at 347. While the Court did not regress to the traditional view that prisoners did not have any rights, the Court did express its belief that the rights of prisoners are restricted. *Id.* See *supra* note 62 discussing the traditional view that prisoners forfeited many rights. In justifying its belief, the Court stated that such restrictions constitute a portion of the punishment prisoners must endure for their criminal conduct. *Id.* at 347. The Court also relied upon Ingraham v. Wright, 430 U.S. 651 (1977), to support its view that conditions of confinement are an integral part of a convicted person's sentence. *Id.* at 345 n.11.

[82] Rhodes v. Champman, 452 U.S. 337, 352 (1981). Contemporary standards of decency have explicitly been held to not require retention of all constitutional rights. See *supra* note 64 discussing the Court's guidelines as to what restrictions on prisoners' rights will be permitted. Instead, the Court held that only rights that are not fundamentally inconsistent with incarceration itself or with the objectives of imprisonment are retained. *Id.* (citing Hudson v. Palmer, 468 U.S. 517, 523 (1984)).

[83] 111 S. Ct. 2321 (1991).

overcrowding as an unconstitutional condition of confinement.[84] However, the petitioner in *Wilson* also challenged several other conditions such as: excessive noise, insufficient 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.[85] The *Wilson* Court first asserted that a subjective prong must be applied in Eighth Amendment analysis when the deprivation is not a formal part of the punishment.[86] The Court opined that the appropriate standard of wanton and unnecessary pain in this "conditions of confinement" context was "deliberate indifference."[87] The *Wilson* Court determined that the *Rhodes* "minimal civilized measure of life's necessities" standard was appropriate to apply to the objective component.[88] Ultimately, the Court determined that the objective component was not satisfied.[89] However, the *Wilson* Court remanded the case for further consideration of the subjective component.[90]

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[84] *Id.* at 2323.

[85] *Id.*

[86] *Id.* at 2325 (holding that if the pain administered is not formally made part of the punishment by the sentencing judge or statute, some intent must be attributed to the officer who inflicts it before it qualifies as a constitutional violation).

[87] *Id.* at 2327.

[88] Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

[89] *Id.* at 2327. The Court in *Wilson* explained that a combination of conditions may establish an Eighth Amendment violation:

> [O]nly when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise . . . . To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.

Id.

[90] *Id.* at 2328. Interestingly, the fact that the Court in *Wilson* remanded the case for a determination of the subjective component after finding that the objective component was not satisfied, implied that satisfaction of either prong alone (or at least the subjective component alone) would be sufficient to sustain an Eighth Amendment claim. *Id.* If both the objective and subjective prongs needed to be satisfied, it would have been unnecessary to remand the case after a finding that the objective prong was not satisfied. *Id.*

4. Excessive Force in Prisons As a Form of Punishment

While contemporary standards of decency had evolved to protect prisoners from harsh conditions of confinement by 1976,[91] the Supreme Court did not confront the issue of Eighth Amendment protection from excessive force in the prison system until 1986 in *Whitley v. Albers*.[92] In *Whitley*, an inmate asserted that his Eighth Amendment rights were violated when a prison guard shot him.[93] The shooting took place during an attempt by several guards to free a prison official who had been taken hostage during a prison riot.[94] In this case, the Court proffered that wanton and unnecessary conduct would revolve around the question of whether the application of force reflected a good faith attempt to maintain or restore

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Consideration of the subjective prong, at that point, would have been moot. *Id.* As Justice White made clear, this approach, while foreshadowing the Court's subsequent holding in Hudson v. McMillian, 112 S. Ct. 995 (1992), was novel. *Id.* at 2330 (White, J., concurring). Justice White's concurrence found the majority's emphasis of the subjective component misplaced: "we [should] examine only the objective severity, not the subjective intent of government officials." *Id.* (White, J., concurring).

[91] See *supra* notes 63-89 and accompanying text for a discussion of the conditions of confinement cases beginning with Estelle v. Gamble, 429 U.S. 97 (1976).

[92] 475 U.S. 312 (1986). Several of the circuit courts had entertained Eighth Amendment excessive force claims with mixed results. *See* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956) (denying an Eighth Amendment claim on the basis that the common law affords adequate remedies against abuses suffered at the hands of errant law enforcement officials) (quoting Jennings v. Nester, 217 F.2d 153, 155 (7th Cir. 1955)); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (recognizing an Eighth Amendment claim for the use of a strap as a form of punishment in a penitentiary); Johnson v. Glick, 481 F.2d 1028, 1033-34 (2d Cir. 1973) (finding a claim of an unprovoked beating cognizable against the officer who administered it but refusing to recognize a cause of action against the warden); George v. Evans, 633 F.2d 413, 415 (5th Cir. 1980) (holding that an isolated assault by a lone guard on an inmate is not punishment within the purview of the Eighth Amendment) (citing Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)).

[93] *Whitley*, 475 U.S. at 316.

[94] *Id.* at 315-16.

control or a malicious and sadistic attempt to cause harm.[95] Given the facts in *Whitley*,[96] the Court concluded that the guard discharged his weapon in good faith[97] and, consequently, held that the prison officials did not violate Albers' Eighth Amendment rights.[98]

After *Whitley* several of the circuit courts again entertained Eighth

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[95] *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). In *Whitley*, the Court recognized that its "malicious and sadistic" standard of "wanton and unnecessary" was significantly higher than the "deliberate indifference" standard set forth in *Estelle* and *Wilson*. *Id.* at 320. However, the Court stated that what constitutes unnecessary and wanton conduct can vary and thus should reflect the particular context in which the Eighth Amendment objection is lodged. *Id.*

In the context of a prison disturbance, the Court in *Whitley* observed that a certain amount of deference should be accorded to prison officials because of the exigencies under which they are forced to make decisions. *Id.* Accordingly, the Court concluded that in this type of situation, a "deliberate indifference" standard is inappropriate. *Id.*

The belief that prison officials should be given deference in the administration of their duties was popular long before *Whitley* or *Johnson*. In Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944), the Fifth Circuit Court of Appeals proclaimed that it is not the function of the courts to superintend the treatment of penitentiary prisoners. *Id.* at 676. The court in *Sarshik* proffered that the court's role is merely to deliver from prison those who are wrongfully detained there. *Id.* In Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), the court opined that the *Sarshik* view was so thoroughly ingrained in the law that citations to authority were unnecessary to support the proposition. *Id.* at 771.

[96] The "circumstances" (force in a riot situation) required a balancing of three factors: (1) the need to apply force, (2) the quantum of force used relative to the amount that was required, and (3) the extent of injury delivered. *Whitley*, 475 U.S. at 321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

The circuit courts generally have adopted and applied these factors verbatim. *See, e.g.*, Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987); Cambell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989); *cf.* Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988). The court in *Corselli* identified a fourth *Whitley* factor: whether the application of force reflected a good faith attempt to maintain or restore control or a malicious and sadistic attempt to cause harm. *Id.* at 26 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). The circuit court did not realize that its first three factors are what determine whether the force was applied in good faith or maliciously and sadistically.

[97] Whitley v. Albers, 475 U.S. 312, 326 (1986) (finding that in the context of an attempt to rescue a prison guard from rioting inmates the shooting was the result of a good-faith attempt to restore prison security).

[98] *Id.* at 328.

Amendment excessive force claims with mixed results.[99] At least two of these cases either intimated or actually expressed the idea that a significant injury, the traditional objective component, is not required for an Eighth Amendment claim to lie.[100] In 1992, in *Hudson v. McMillian*,[101] the Supreme Court revisited the question of whether a significant injury is required to sustain an Eighth Amendment claim.

III. *HUDSON v. McMILLIAN*

On October 30, 1983, Keith Hudson, an inmate at the penitentiary in Angola, Louisiana, argued with Jack McMillian, a corrections security

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[99] *See* Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987). In *Brown*, the court employed the *Whitley* factors and denied a prisoner relief. *Id.* at 1190. The court found that: (1) there was a genuine need for force, (2) the extent of the injury inflicted was "minimal," and (3) these factors would support a reasonable inference that the quantum of force applied was justified. *Id.*

Where *Whitley's* exigent circumstances are absent, some courts have determined that a standard lower than malicious and sadistic should apply. *See, e.g.*, Unwin v. Campbell, 863 F.2d 124, 130 (1st Cir. 1988) (finding that the disturbance at issue was not of a magnitude to justify application of the *Whitley* standard). Instead, the court applied a wanton and unnecessary standard. *Id.* at 135. Other courts have concentrated on whether the prisoner has suffered a severe injury. *See, e.g.*, Williams v. Boles, 841 F.2d 181 (7th Cir. 1988) (holding the defendants innocent because of the absence of a severe injury in spite of a finding that the force was applied without justification).

Still other courts have found the quantum of force extreme even in the context of "exigent circumstances." *See* Cambell v. Grammer, 889 F.2d 797 (8th Cir. 1989) (extending recovery to prisoners who were sprayed with a fire hose during a "prison lockdown" in spite of specifically finding that the injuries sustained were not especially severe); Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990) (reversing the grant of summary judgment in favor of the guard on the grounds that a verbal provocation alone did not justify the blows inflicted upon Miller); Stenzel v. Ellis, 916 F.2d 423 (8th Cir. 1990) (holding that under *Whitley* the prisoner could not sustain an Eighth Amendment claim and at best had a cause of action for battery under state law).

[100] *See* Williams v. Boles, 841 F.2d 181 (7th Cir. 1988) (refusing to require a significant injury to establish a violation of Eighth Amendment rights); Cambell v. Grammer, 889 F.2d 797 (8th Cir. 1989) (holding that significant injury is not necessary for an Eighth Amendment claim to lie). *See also* Wilson v. Seiter, 111 S. Ct. 2321 (1991) (remanding for further consideration of the subjective component after having found that the objective component was not satisfied). See *supra* note 90 and accompanying text for a discussion of the implications of the *Wilson* holding.

[101] 112 S. Ct. 995 (1992).

officer at the facility.[102] Assisted by Arthur Woods, another security officer, McMillian handcuffed, shackled, and then led Hudson to the penitentiary's "administrative lockdown" section.[103] Hudson testified that, en route, McMillian punched Hudson several times while Woods restrained, kicked, and punched Hudson from behind.[104] Hudson also testified that Arthur Mezo, the on-duty supervisor, observed the beating but merely directed the officers "not to have too much fun."[105] As a result of the altercation, Hudson suffered minor bruises, swelling, loosened teeth, and a cracked partial dental plate.[106]

A United States Magistrate concluded that McMillian and Woods applied unnecessary force and that Mezo expressly sanctioned their actions.[107] The Magistrate awarded damages of $800 to Hudson.[108]

On appeal, the Fifth Circuit held that Eighth Amendment excessive force claims require a showing that (1) the injury was serious; (2) the injury resulted directly and solely from the excessive force; (3) the excessiveness of the force was objectively immoderate; and (4) the conduct constituted an infliction of unnecessary and wanton pain.[109] In applying this framework to the facts, the Fifth Circuit reversed, asserting that Hudson could not maintain an Eighth Amendment claim because the injuries he sustained were "minor."[110]

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[102] *Id.* at 997.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 998. Hudson filed suit in Federal District Court against McMillian, Woods, and Mezo, under 42 U.S.C. § 1983. *Id.* at 997. He alleged an infringement of his Eighth Amendment right to be free from cruel and unusual punishment and sought compensatory damages. *Id.* at 998. The parties agreed to have a Magistrate hear the case. *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* The Fifth Circuit buttressed its decision that the injuries were minor by observing that Hudson required no medical attention. *Id.* Ultimately, the observation that Hudson's injuries were not significant led to the circuit court's refusal to recognize Hudson's claim. *Id.* This was made clear by the courts finding that respondents' exercise

The United States Supreme Court granted certiorari to determine whether a significant injury is necessary for an Eighth Amendment claim to lie.[111] Writing for the majority, Justice O'Connor first held that the appropriate standard to apply in Eighth Amendment excessive force cases is dictated by *Whitley*.[112] Justice O'Connor explained that, under the *Whitley* standard, what constitutes an infliction of unnecessary and wanton pain varies according to the character of the asserted constitutional violation.[113] The Court contrasted Hudson's claim of excessive force with what it termed the "deprivation cases" where the appropriate standard is deliberate indifference.[114] Defending its adoption of the higher *Whitley* standard, the Court observed that when prison officials are confronted with a disturbance, they must weigh the competing interests of establishing order against the potential harm to inmates resulting from the actions of prison officials.[115]

Next, the Court declared that the application of the unnecessary and wanton standard turned on the question of "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and

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of force was objectively immoderate because no force was necessary and that the actions of McMillian and Woods constituted an infliction of unnecessary and wanton pain. *Id.*

[111] Hudson v. McMillian, 111 S. Ct. 1679 (1991).

[112] Hudson v. McMillian, 112 S. Ct. 995, 998 (1992). *See* Whitley v. Albers, 475 U.S. 312, 316 (1986) (involving a claim by an inmate who was shot by a security officer during a prison riot). For a discussion of *Whitley,* see *supra* notes 93-98 and accompanying text.

[113] *Hudson*, 112 S. Ct. at 998 (1992) (citing *Whitley*, 475 U.S. at 320). See *supra* note 11 for a discussion of how the definition of what will constitute "unnecessary and wanton" conduct depends upon the context in which an Eighth Amendment claim is asserted. In applying the *Whitley* standard, the court in Stenzel v. Ellis, 916 F.2d 423, 426 (8th Cir. 1990), stated that, whether the jailer inflicted "unnecessary and wanton" pain upon a prisoner will turn on how the episode is characterized — whether it was a measure taken to calm a disturbance or merely punishment. *Id.* (quoting *Whitley*, 475 U.S. at 320).

[114] *Id.* As an example, the Court cited Estelle v. Gamble, 429 U.S. 97 (1976), for the proposition that the deliberate indifference standard applied. *Id.* The Court elaborated that this standard is suitable because the State's responsibility to furnish inmates with medical attention does not ordinarily conflict with competing administrative concerns. *Id.* (citing *Whitley*, 475 U.S. at 320).

[115] *Id.* The Court elaborated that, despite the pressure of these competing concerns, institutional officials must act "'in haste, under pressure, and frequently without the luxury of a second chance.'" *Id.* (quoting *Whitley*, 475 U.S. at 320).

sadistically for the very purpose of causing harm."[116] Observing that prison officials must sometimes act quickly and decisively, the Court maintained that wide-ranging deference should be accorded to the execution of prison policies and practices designed to preserve internal order and security.[117] The Court asserted that the lack of a serious injury is pertinent to an Eighth Amendment investigation, but is not dispositive.[118]

The Court summarily rejected the respondents' assertion that a finding of significant injury is mandated by the Court's holding in *Wilson*.[119] Rather, the Court explained that the objective component of Eighth Amendment analysis is simply an inquiry as to whether a "sufficient

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[116] *Id.* (quoting *Whitley*, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[117] *Id.* at 999. The Court observed that when confronted with exigent circumstances, prison officials must act quickly and decisively, and thus, implied that comparing decisions made under these conditions should not be evaluated in hindsight against a standard of a calculated response made with the luxury of time and in consideration of all possible ramifications. *Id.*

The Court identified four factors in its analysis of whether wanton and unnecessary force was applied in this case. *Id.* The factors the Court considered relevant were the need to apply force, the relationship between that force needed and the amount actually used, the threat as reasonably perceived by the officials, and any efforts that were made to allay the severity of the response. *Id.* (quoting *Whitley*, 475 U.S. at 321).

Subsequent cases applying the *Whitley* standard have discussed what would not constitute a "need" for the application of force outside the prison riot situation. *See, e.g.*, Miller v. Leathers 913 F.2d 1085, 1089 (1990) (refusing to acknowledge a verbal provocation alone as sufficient to justify the response that occurred); Cambell v. Grammer, 889 F.2d 797, 802 (8th Cir. 1989) (finding the fact that there was a fire, "absolutely no justification" to intentionally spray several inmates with a high-powered fire hose); Unwin v. Campbell, 863 F.2d 124, 130 (1st Cir. 1988) (holding that an official's license to employ force is more limited when institutional security is not at risk).

[118] Hudson v. McMillian, 112 S. Ct. 995, 999 (1992).

[119] *Id.* (citing *Wilson*, 111 S. Ct. at 2326). The respondents claimed that without a significant injury, the objective component would not be satisfied. *Id.* The majority asserted that *Wilson* merely identified subjective and objective facets of Eighth Amendment claims. *Id.* Moreover, the Court asserted, these facets merely obligate courts to ask both if "the officials act[ed] with a sufficiently culpable state of mind" and whether the alleged misdeed was objectively "harmful enough" to comprise a constitutional violation. *Id.* (quoting *Whitley*, 475 U.S. at 320).

In defense of this interpretation of *Wilson*, the majority stated that *Wilson* merely extended the application of the deliberate indifference standard that has been applied to Eighth Amendment claims asserting inadequate medical care to claims challenging the conditions of confinement. *Id.*

harm" was suffered.[120] The Court asserted that this inquiry is dependent upon the claim at issue.[121]

Having found the objective component of Eighth Amendment analysis "contextual," the Court opined that conditions-of-confinement claims require serious or extreme deprivations.[122] The Court asserted that contemporary views are that certain levels of discomfort are understood to be part of criminal penalties.[123] In contrast, the Court declared that in the context of excessive force claims, societal views are quite different.[124] The Court explained that when sadistic and malicious force is applied, contemporary standards of decency are always offended whether or not it is accompanied by a significant injury.[125] The Court qualified its position, however, claiming that *de minimis* applications of physical force are excluded from constitutional recognition except when "'repugnant to the conscience of mankind.'"[126] In applying this standard, the Court concluded that the Fifth Circuit's dismissal of Hudson's claim was unjustified because his injuries

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[120] *Id.* at 999-1000.

[121] *Id.* at 1000. The Court offered two justifications for its position: first, the unnecessary and wanton standard should be applied in a way that accounts for differences in the type of conduct against which the Eighth Amendment challenge is lodged, *id.* (quoting Whitley v. Albers, 475 U.S. 312, 320 (1992)); and second, the Eighth Amendment's cruel and unusual punishment proscription "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society' and so admits of few absolute limitations." *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). For a discussion of how the definition of what constitutes "unnecessary and wanton" conduct depends upon the context in which an Eighth Amendment claim is asserted, see *supra* note 11.

[122] Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992). See *supra* note 62 discussing how a certain degree of discomfort is expected to be endured by prisoners.

[123] *Hudson*, 112 S. Ct. at 1000.

[124] *Id.*

[125] *Id.* The Court reasoned that otherwise, heinous and brutal acts that did not cause some arbitrary level of injury would remain outside the purview of the Eighth Amendment. *Id.*

[126] *Id.* (quoting *Whitley*, 475 U.S. at 327).

were not *de minimis*.[127]

After rejecting the dissent's[128] interpretation of *Wilson* as requiring a significant injury in addition to unnecessary and wanton force,[129] the Court summarily dismissed the argument advanced by the respondents that their conduct was beyond the reach of the Eighth Amendment because it was "isolated and unauthorized."[130]

Writing separately, Justice Stevens concurred in part and concurred in the judgment.[131] Justice Stevens posited that *Whitley* stands for the proposition that prisoner claims arising in the context of prison disruptions should be measured against the high standard of malicious and sadistic uses

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[127] *Id.* In conclusion, the Court asserted that the extent of Hudson's injuries provided no basis for dismissal of his § 1983 claim. *Id.* Several cases illuminate the types of injury that are likely to be found to be *de minimis*. *See, e.g.*, Wyatt v. Delaney, 818 F.2d 21, 24 (8th Cir. 1987) (determining that the emotional harm resulting from a shove constituted only "bruised feelings" and thus was *de minimis*); Brown v. Smith, 813 F.2d 1187, 1189 (11th Cir. 1987) (being pinned against a wall through the use of a riot baton pressed against the back of the prisoners neck and being "hit" produced at most a "minimal injury").

[128] Justice Thomas, joined by Justice Scalia, dissented. Hudson v. McMillian, 112 S. Ct. 995, 1004 (1992) (Thomas, J., dissenting).

[129] *Id.* at 1001. The Court rejected the contention that *Wilson* had anything to do with the objective component of Eighth Amendment analysis and thus found that it indicated no departure from the *Estelle* rule. *Id.* Rather, the Court proffered that *Wilson* was concerned with whether there was a *mens rea* requirement and, if so, what it was. *Id.*

The Court further maintained that the dissent's position identifying no difference between excessive force claims and those founded upon conditions of confinement was untenable. *Id.* In support of this contention, the Court relied upon *Wilson* which had, arguably, adopted *Whitley's* unnecessary and wanton standard. *Id.* The Court justified this position by emphasizing the difference between excessive force and conditions of confinement claims: it is "the difference between punching a prisoner in the face and serving him unappetizing food." *Id.*

[130] *Id.* Although the respondents supported their claim by asserting that the beating was against prison policy and was the result of a personal dispute, the Court refused to consider the defense because it was not one that was properly before the Court. *Id.* The Court supported this finding by observing that the Court of Appeals did not disturb the Magistrate's conclusion that the violence directed at Hudson was "not an isolated assault." *Id.* at 1002. The Court bolstered its position by noting the Magistrate's finding that Lieutenant Mezo expressly condoned the exercise of force against Hudson. *Id. Cf.* Johnson v. Glick, 481 F.2d. 1028, 1033 (1973) (finding that while an attack by a guard is cruel and unusual, it is not "punishment" within the term's ordinary meaning).

[131] *Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring).

of force because these disturbances pose serious dangers to the well being of inmates and prison staff alike.[132] In the absence of such exigencies, however, Justice Stevens asserted that the lower "unnecessary and wanton infliction of pain" standard should be applied.[133] Finding no exigencies in the case at hand, Justice Stevens concluded that the Court's application of the

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[132] *Id.* Justice Stevens supported the view that it is the exigencies of a prison disturbance that justify the higher mental requirement. *Id.* This mental requirement is justified, Justice Stevens posited, in situations that pose significant risks to the welfare and safety of prisoners and prison staff. *Id.* (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). As a result, Justice Stevens further stated that when the constant potential for conflict ripens into actual violence, prison officials must be allowed to respond appropriately to the very real threats that the violence presents. *Id.* (quoting *Whitley*, 475 U.S. at 320).

[133] *Id.* at 1002 (Stevens, J., concurring) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Justice Stevens bolstered his opinion with references to Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988) and Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987).

In *Unwin*, a prison inmate sued state and local police officers seeking damages for injuries sustained during the quelling of a disturbance. *Unwin*, 863 F.2d at 127. The defendants claimed qualified immunity and filed a motion for summary judgment. *Id.* Ronald Unwin alleged that he was merely a bystander of a fight in the dayroom in the Merrimack County House of Corrections. *Id.* When the guard tried to break up the fight, Unwin was struck several times and then restrained. *Id.* He was struck several more times after he tried to retaliate by punching one of the officials. *Id.* In denying the defendant's motion for summary judgment, the Unwin court began its analysis by noting that government officials performing discretionary functions are generally "shielded from liability." *Id.* at 128. However, the court opined that cases like *Rhodes* and *Estelle* have clearly established that the unjustified striking of prisoners gives rise to liability under 42 U.S.C. § 1983. *Id.* at 129. After explaining that what constitutes an unjustified striking depends on the circumstances surrounding the application of force, the court explained that *Whitley* dictates that in a riot situation "wide ranging deference" should be accorded prison officials when they use "prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline." *Id.* (quoting *Whitley*, 475 U.S. at 321-22). The court concluded that a standard lower than "malicious and sadistic" will suffice absent a disturbance of the magnitude that occurred in *Whitley*. *Id.* at 130. Thus, because the extent of the disturbance was unclear, the court determined that summary judgment was not appropriate. *Id.* at 136.

Wyatt involved a civil rights action brought by an inmate alleging that his Eighth Amendment rights were violated when he was struck by a prison maintenance worker. *Wyatt*, 818 F.2d at 22. The *Wyatt* court observed that the district court's application of *Whitley's* malicious and sadistic standard was inappropriate absent a prison disturbance. *Id.* at 23. The court nonetheless upheld the holding that Delaney did not violate Wyatt's Eighth Amendment rights, finding that the application of the higher degree of fault was harmless error because the record supported the district court's finding that the injury was inflicted accidently. *Id.*

"malicious and sadistic standard [was] misplaced."[134] Nonetheless, as the even higher standard was met in this case, Justice Stevens concurred in the result.[135]

Writing separately, Justice Blackmun concurred in the judgment.[136] First, Justice Blackmun agreed that a "significant injury" is not needed to sustain an Eighth Amendment claim.[137] Justice Blackmun then echoed Justice Stevens' disapproval of the Court's application of *Whitley's* higher malicious and sadistic standard in the absence of a prison riot.[138]

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[134] Hudson v. McMillian, 112 S. Ct. 995, 1002 (1992) (Stevens, J., concurring).

[135] *Id.*

[136] *Id.* (Blackmun, J., concurring).

[137] *Id.* Justice Blackmun criticized the view that, to be considered "serious", the injury must require medical attention or leave permanent marks. *Id.* Justice Blackmun explained that if a significant injury was required, many types of torture and abuse, such as those "ingeniously designed to cause pain but without [leaving] a telltale [sign of] 'significant injury,'" would be put entirely beyond the scope of the Constitution. *Id.* Justice Blackmun then provided some examples of the "ingeniously designed" abuses he felt should be proscribed:

> In other words, the constitutional prohibition of 'cruel and unusual punishments' then 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.

Id. at 1002-03 (Blackmun, J., concurring).

Asserting that these types of insidious acts are "hardly unknown within this Nation's borders," Justice Blackmun provided some examples of these types of abuses. *Id.* at 1003. *See* Cambell v. Grammer, 889 F.2d 797 (8th Cir. 1989) (involving the use of high powered fire hoses); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (involving the use of the "Tucker Telephone," a device that delivered electric shocks to sensitive parts of the body, and floggings with leather straps); Hutto v. Finney, 437 U.S. 678 (1978) (involving excessive confinement in "punitive isolation"). *Cf.* Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) (denying recovery because the injury was no more than a trifling). See also Rhodes v. Chapman, 452 U.S. 337 (1981), discussed at length *supra* notes 82-87 and accompanying text.

[138] Hudson v. McMillian, 112 S. Ct. 995, 1003 (1992) (Blackmun, J., concurring). In support of his rejection of the application of the higher *Whitley* malicious and sadistic standard, Justice Blackmun referenced Justice Marshall's dissent in *Whitley* in which he had joined. *Id.* (citing Whitley v. Albers, 475 U.S. 312, 328 (1986)) (positing that "the contested existence of a 'riot' in [a] prison lessens the constraints imposed on prison

Next, Justice Blackmun identified two additional considerations not addressed by the majority.[139] First, Justice Blackmun rejected respondents' contention that a significant injury requirement is needed to curb the number of filings made by prison inmates.[140] Second, Justice Blackmun asserted that the majority's decision "does not open the floodgates" for § 1983 filings.[141]

Justice Blackmun concluded by explaining that the holding of the majority should not be read to require a physical injury to sustain an Eighth Amendment claim.[142] Justice Blackmun urged that inflictions of

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authorities by the Eighth Amendment"). Thus, as Justice Blackmun did not approve of the application of the higher standard even in the context of a "riot," he certainly did not agree with its application in this case which did not present the exigencies commonly associated with the disturbance context. *Id.*

[139] *Id.* at 1002 (Blackmun, J., concurring).

[140] *Id.* at 1003 (Blackmun, J., concurring). After labeling respondents' approach as "audacious," Justice Blackmun declared that a policy preference for limiting § 1983 filings cannot guide the Court's interpretation of explicit constitutional protections. *Id.* Justice Blackmun explained that although judicial overload is a legitimate concern to the Court, the Court's self-interest cannot influence the interpretation of substantive constitutional rights. *Id.* *See* Johnson v. Glick, 481 F.2d 1028, 1030 (1973) (upholding a prisoner claim in spite of the recognition that its holding might well lead a to significant expansion of state prisoner actions)

Justice Blackmun elaborated that any meritorious claim is worth the burden it might place on the courts. *Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring). Further, Justice Blackmun expounded that the right to file in the courts for legal redress is a fundamental constitutional right that cannot be abridged. *Id.* Justice Blackmun asserted that for prisoners, this right is even more valuable than for other citizens because it is preservative of all their rights. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[141] *Id.* Justice Blackmun defended this assertion by pointing out that the statute requires all claimants to exhaust administrative remedies. *Id.* at 1003-04 (Blackmun, J., concurring). Justice Blackmun then bolstered this argument by referring to prison officials' qualified immunity defense and the *in forma pauperis* dismissal procedure of 28 U.S.C. § 1915(d) for frivolous or malicious complaints. *Id.* at 1004 (Blackmun, J., concurring).

[142] *Id.* at 1004 (Blackmun, J., concurring). Justice Blackmun concluded that psychological harm that was unaccompanied by a corresponding physical harm could constitute cruel and unusual punishment. *Id.* In support of this proposition, Justice Blackmun cited Wisniewski v. Kennard, 901 F.2d 1276 (5th Cir. 1990). Wisniewski was a state prisoner who filed a civil rights action alleging an excessive use of force when he was arrested after a failed escape attempt. *Id.* at 1277. The majority denied recovery, finding that being "frightened" and "suffering bad dreams" were not significant injuries

psychological harm can also constitute cruel and unusual punishment.[143]

Justice Thomas, joined by Justice Scalia, dissented.[144] The dissenting Justices asserted that the sole issue before the Court was whether a prisoner must demonstrate a minimum level of injury in order to prevail on an Eighth Amendment claim.[145] The dissent suggested that by virtue of the majority's holding, the extent of the injury inflicted is no longer a factor in Eighth Amendment analysis.[146] Justice Thomas noted that although

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and did not reach the issue of whether the significant injury threshold could be satisfied absent a physical injury. *Id.* However, Justice Blackmun found Judge Goldberg's dissent in *Wisniewski* persuasive. Judge Goldberg stated, "[t]hrough legal alchemy, the majority transformed the shield of discretion, emblematized by the officer's badge, into a sword that cuts intangible wounds. The state may now injure in ways that will remain legally invisible — albeit morally arrestive." *Id.* at 1280 (Goldberg, J., dissenting). *See also* Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987) (holding that the extent of emotional injuries is relevant but nonetheless upholding the district court's decision on the grounds that the district court could have reasonably found that the emotional harm to the prisoner resulting from the guard's shove was *de minimis*).

[143] Hudson v. McMillian, 112 S. Ct. 995, 1004 (1992) (Blackmun, J., concurring). In support of this proposition, Justice Blackmun emphasized the majority's distinction between pain and injury. *Id.* The Justice emphasized that the majority makes it clear that only the unnecessary and wanton infliction of pain is actionable under Eighth Amendment analysis. *Id.* The Justice asserted that the ordinary meaning of "pain" includes psychological harm. *Id.* (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (recognizing Article III standing for "aesthetic" injury); Brown v. Board of Education, 347 U.S. 483, 494 (1954) (identifying school children's feelings of psychological inferiority from segregation in the public schools)).

Noting the majority's refusal to recognize *de minimis* or non-measurable pain as cognizable under the Eighth Amendment, Justice Blackmun asserted that psychological pain can be more than *de minimis*. *Id.* In justifying this contention, Justice Blackmun noted that psychological pain may be clinically diagnosed and quantifiable. *Id.* The idea that physical injury is not a prerequisite to sustaining an Eighth Amendment claim could be said to have had its genesis in Weems v. United States, 217 U.S. 349, 382 (1910) (holding that denationalization is a cruel and unusual punishment).

[144] *Hudson*, 112 S. Ct. at 1004 (Thomas, J., dissenting).

[145] *Id.* at 1005 (Thomas, J., dissenting). The dissent noted that the Magistrate, as the finder of fact, had determined that Hudson's injuries were minor. *Id.* Therefore, because that assessment was neither disturbed by the Fifth Circuit nor challenged by the petitioner, Justice Thomas concluded that consideration of the extent of the injuries was obviated. *Id.*

[146] *Id.* Justice Thomas interpreted the majority opinion to hold that any "unnecessary and wanton" use of force beyond *de minimis* uses of force "*automatically* amounts to 'cruel and unusual punishment.'" *Id.* (emphasis in original). The dissent found disconcerting the fact that even *de minimis* uses of force could be held to be actionable

unnecessary and wanton uses of force may be immoral, tortious, criminal, or even actionable under other constitutional provisions, they do not necessarily constitute cruel and unusual punishment.[147]

The dissent applied an historical analysis of Eighth Amendment claims, insisting that, for generations, the Eighth Amendment applied only to torturous punishments effected by statutes and judges and not to hardships suffered by prisoners during incarceration.[148] Furthermore, Justice Thomas opined that any punishment provided for by statute at the time of the adoption of the Constitution could not be considered constitutionally cruel or unusual.[149]

Next, Justice Thomas asserted that although the conditions of prison

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whenever such force was "repugnant to the conscience of mankind." *Id.* (citing *Hudson* 112 S. Ct. at 1000).

[147] *Id.* Justice Thomas asserted that the majority's holding exceeded precedent. *Id.* *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (holding that state tort actions provide one obvious avenue of redress for prisoners asserting that they were subjected to excessive force); Hudson v. Palmer, 468 U.S. 517 (1984) (finding that common law and state tort remedies are available to redress the destruction of personal property); Ingraham v. Wright, 430 U.S. 651 (1977) (holding that common law remedies adequately protect students' right to due process); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956) (finding that challenges to the conditions of confinement are protected by common law causes of action).

Furthermore, the constitutional cause of action that the dissent felt was more appropriate, was under the Fourteenth Amendment's Due Process Clause which provided that the state remedies proved insufficient. The dissent's Fourteenth Amendment analysis is discussed at length *infra* note 166.

[148] *Id.* The traditional view espoused has been, simply, that limitations of rights are an essential incident of imprisonment. *See, e.g.*, Stroud v. Swope 187 F.2d 850, 851 (9th Cir. 1951) (opining that incarceration necessarily entails the limitation or withdrawal of many rights and privileges, a retraction that is justified by the considerations forming the basis of our penal system). See also *supra* note 62 and accompanying text explaining how harsh conditions not only existed but were considered part of a prisoner's sentence.

[149] Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting). See *supra* notes 18-33 and accompanying text for a discussion of the historical approach to interpreting the Eighth Amendment which contends that any punishments that were permissible at the time of the adoption of the Eighth Amendment must survive constitutional scrutiny. Extending this analysis, the dissenting Justices maintained that punishments analogous to those existing at the time of the adoption of the Constitution likewise survive constitutional challenge. *Id.* *See* Weems v. United States, 217 U.S. 349, 375 (1910) (finding that any statutory punishment which punishes in the same or a similar manner as analogous offenses were punished at common law is not constitutionally cruel or unusual).

life have always been harsh, prisoner grievances have been routinely rejected because the courts have no role in supervising prison life.[150] The dissent observed that it had taken 185 years after the adoption of the Eighth Amendment for the Court to apply the Amendment to deprivations suffered in prison.[151] Additionally, the dissent opined, insofar as *Estelle* recognized Eighth Amendment protection from prison deprivations, it required both a serious injury and a culpable state of mind.[152] Justice Thomas supported this two-pronged approach with an analysis of several later cases which required that both the "objective" and "subjective" components of Eighth Amendment inquiries be satisfied.[153]

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[150] *Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting). In support of this contention, Justice Thomas relied upon lower court authority. Justice Thomas asserted, "'it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only deliver from imprisonment those who are illegally confined.'" *Id.* (quoting Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951)). Justice Thomas bolstered his position with citations to several other cases: Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) (finding that the courts have uniformly held that administrative authorities are the proper supervisors of federal prison inmates and that it is their province to adopt and implement the disciplinary rules of prisons); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956) (observing that this court has been reluctant to interfere with the management of state penal institutions (citing Ortega v. Ragen, 216 F.2d 561, 562 (7th Cir. 1952)). *Id.* For a comprehensive review of the Court's view of its role in the day to day administration of prisons, see *supra* notes 95-96 and accompanying text.

[151] *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting) (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

[152] *Id.* The dissent pointed out that in *Estelle*, the prisoner's claim was rejected because he failed to allege conduct sufficiently injurious to evidence deliberate indifference to serious medical needs. *Id.* (quoting *Estelle*, 429 U.S. at 106). The dissent further maintained that from the beginning, the Court specifically limited the application of the Eighth Amendment to a narrow class of deprivations where prison officials have inflicted a serious injury while acting with the requisite intent. *Id.*

[153] *Id.* The dissenting Justice relied upon Wilson v. Seiter, 111 S. Ct. 2321 (1991) to set forth the "objective" and "subjective" components of these "twin elements" of Eighth Amendment analysis. *Id.* With regard to the cases requiring satisfaction of both components, Justice Thomas looked to Rhodes v. Chapman, 452 U.S. 337 (1981) (involving a challenge to the practice of "double celling," which entails putting two inmates in cells designed for one as cruel and unusual punishment). In distinguishing *Rhodes* from the case at hand, Justice Thomas explained that, in *Rhodes*, recovery was denied because the injury was not sufficiently serious because it did not deny the inmate of "the minimal civilized measure of life's necessities." *Id.* (quoting *Rhodes*, 452 U.S. at 347).

The dissent accused the majority of defining the objective component in subjective terms and effectively eliminating it as a consideration of Eighth Amendment claims.[154] The dissenting Justices argued that the majority was unjustified in relying on *Whitley* for its elimination of the objective component.[155] Justice Thomas observed that *Whitley* concentrated on the subjective component because in that case, the plaintiff had been shot, thus positively establishing the objective component and obviating the necessity of its consideration.[156]

Furthermore, the Justice distinguished *Rhodes* from Whitley v. Albers, 475 U.S. 312 (1986) (involving an Eighth Amendment claim asserted by a prisoner who was shot during a prison riot). *Id.* Justice Thomas observed that in *Whitley*, recovery was denied because the guard had not acted "maliciously and sadistically for the very purpose of causing harm." *Id.* (quoting Whitley v. Albers, 475 U.S. 320-21 (1986)).

Justice Thomas' analysis was appropriate because, just a year earlier, the *Wilson* Court had juxtaposed the same two cases to support the continued application of both prongs of Eighth Amendment claims. 111 S. Ct. at 2324. The *Wilson* Court began its analysis by noting that "[its] holding in *Rhodes* turned on the objective component." *Id.* The *Wilson* majority continued, "that *Rhodes* had not eliminated the subjective component was made clear by our next relevant case, *Whitley v. Albers*." *Id.*

[154] Hudson v. McMillian, 112 S. Ct. 995, 1007 (1992) (Thomas, J., dissenting). The Justice opined that *Wilson* made it eminently clear that the objective component (which asks whether the deprivation was sufficiently serious) and the subjective component (which asks whether the official acted with a sufficiently culpable state of mind) must both be satisfied and that neither, standing alone, suffices. *Id.* at 1006 (Thomas, J., dissenting). In light of this dual inquiry, the dissent criticized the majority for limiting the Eighth Amendment inquiry merely to the prison officials' *mens rea*. *Id.*

[155] *Id.* Perhaps the majority could have more appropriately relied upon Wilson v. Seiter, 111 S. Ct. 2321 (1991), for its elimination of the objective component. In *Wilson*, the Court, after finding that the objective component was not satisfied, remanded the case anyway for consideration of the subjective component thereby implying that satisfaction of the subjective prong alone would have been sufficient to maintain the cause of action. *Id.* at 2328. See *supra* notes 83-90 and accompanying text for a detailed discussion of *Wilson*.

[156] *Hudson*, 112 S. Ct. at 1008 (Thomas, J., dissenting). Justice Thomas asserted that, while there is ample authority for the proposition that Eighth Amendment claims are contextual, such authority is with regard to the subjective prong and not the objective prong. *Id.* at 1007 (Thomas, J., dissenting). Justice Thomas continued:

> *Whitley* did not say, as the Court does today, that the *objective* component is contextual, and that an Eighth Amendment claim may succeed where a prisoner is not seriously injured. Rather, *Whitley* stands for the proposition that, assuming the existence of an objectively serious deprivation, the culpability of an official's state of mind depends

The dissent then surmised that the majority had attempted to compensate for its elimination of the objective component by simultaneously raising the standard to establish the subjective component for Eighth Amendment claims.[157] The dissenting Justice argued that the Court unjustifiably extended the heightened mental state absent competing institutional concerns, namely those of maintaining order.[158]

Next, relying upon *Rhodes* and *Estelle*, Justice Thomas then questioned the majority's attempt to sanction the use of an objective component for "deprivation" cases but not for "use of force" cases.[159] The

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> on the context in which he acts. "*Whitley* teaches that, *assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, see* Rhodes v. Chapman, 452 U.S. 337 (1981), whether it can be characterized as 'wanton' depends upon the constraints facing the official."

Id. at 1007-08 (Thomas, J., dissenting) (quoting Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (emphasis in original)). Justice Thomas concluded, that while *Wilson* demonstrated that an inquiry into the officials' state of mind is a necessary condition, it is far from being a sufficient condition for Eighth Amendment claims. *Id.* at 1008 (Thomas, J., dissenting).

[157] *Id.* Justice Thomas contended that *Wilson* stands for the proposition that the higher "malicious and sadistic" standard is only applicable when officials are acting in response to an emergency. *Id.* Otherwise, the dissenting Justice opined, the standard should remain at the "baseline mental state" — that of deliberate indifference. *Id.* Justice Thomas observed that the Court has extended *Whitley's* heightened mental state, even in the absence of competing institutional concerns, to all excessive force cases. *Id.*

[158] *Id.* Justice Thomas observed that many excessive force claims arise in contexts other than guards' attempts to "keep" or "maintain order." *Id.* Further, Justice Thomas noted that the very case before the Court revolved around allegations that Hudson was hit in the absence of any "need" to apply force at all. *Id.* These observations, led Justice Thomas to surmise that the Court's extension of *Whitley* must be driven by the absurdity of holding that the imposition of minor injuries upon prisoners with something less than a "malicious and sadistic" state of mind can constitute cruel and unusual punishment. *Id.*

Justice Thomas' opinion that the Court's extension of the *Whitley* standard in this case was unjustified was endorsed by both concurring justices. *Id.* at 1002 (Thomas, J., dissenting). See *supra* notes 132, 137-39 and accompanying text for a discussion of the "deliberate indifference" requirement that Justices Stevens and Blackmun opined were necessary components of Eighth Amendment jurisprudence.

[159] Hudson v. McMillian, 112 S. Ct. 995, 1008 (1992) (Thomas, J., dissenting). The dissenting justice found the majority's explanation of this distinction unpersuasive, in that "routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 1000 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). While the majority was attempting to rely on *Rhodes*, the dissent seized upon the

dissent criticized the majority for challenging the objective component in excessive force cases on the basis that the level of injury required necessarily would be "arbitrary" while at the same time endorsing the continued application of an objective standard for deprivation cases.[160]

Next, Justice Thomas assessed the implications of the majority's holding.[161] The dissenting Justice asserted that if "the unnecessary and wanton infliction of pain" upon an inmate *per se* amounts to cruel and unusual punishment, as the majority contended, then the majority has replaced the objective component with a necessity component.[162] Justice Thomas argued that, through this new standard, the Court has extended the Eighth Amendment "beyond all reasonable limits."[163]

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majority's inconsistent application of the very case it purported to follow. *Id.* The dissent perceptively observed, that there is a large gap between enduring "routine discomfort" and being denied the "minimal civilized measure of life's necessities essential to establish an Eighth Amendment violation." *Id.* (quoting *Rhodes*, 452 U.S. at 347).

Justice Thomas was likewise unconvinced by the majority's attempt to distinguish *Estelle*. *Id.* at 1009 (Thomas, J., dissenting). The majority explained that the Eighth Amendment is implicated only by deliberate indifference to medical needs that are serious "[b]ecause society does not expect that prisoners will have unqualified access to health care." *Id.* (quoting *Hudson*, 112 S. Ct. at 1000) (emphasis in original).

[160] *Id.* The majority defended its elimination of the objective component from excessive force cases, reasoning that were it a requirement, physical punishments, "no matter how diabolic or inhuman," would then be countenanced by the Eighth Amendment provided that they inflicted less than some arbitrary level of injury. *Id.* at 1000. However, Justice Thomas proffered that, by definition, "diabolic or inhuman" punishments inflict serious injury. *Id.* at 1009 (Thomas, J., dissenting). Justice Thomas then explained that considerations of what may constitute a "serious injury" need not necessarily center on physical aspects of injury. *Id.* However, Justice Thomas noted that in this case, the injuries the petitioner alleged were "purely physical" and were found by the court below to be "minor." *Id.* Furthermore, the dissent asserted that characterization of the objective component in excessive force cases as "arbitrary," does not explain why its application in other Eighth Amendment contexts remains justified. *Id.*

[161] *Id.* at 1010 (Thomas, J., dissenting).

[162] *Id.* Justice Thomas proclaimed, "[a]fter today, the 'necessity' of a deprivation is apparently the only relevant inquiry beyond the wantonness of official conduct." *Id.* This assertion seems reasonable because the Court arguably eliminated the objective component and, hence, obviated consideration of the quantum of injury suffered. *See Hudson*, 112 S. Ct. at 999.

[163] *Id.* Justice Thomas' assertion was reminiscent of Justice Frankfurter's dissent in Trop v. Dulles, 356 U.S. 86 (1958). In *Trop*, Justice Frankfurter was appalled by the holding that a statute imposing a punishment of denationalization for a capital offense was cruel and unusual punishment. Dissenting, Justice Frankfurter asserted, "[e]ven assuming,

Finally, Justice Thomas observed that this holding manifested the pervasive view that all of the ills of our society must be addressed by the Federal Constitution.[164] Justice Thomas urged that the primary responsibility for prison regulation rests with the states.[165] Further, Justice Thomas proffered that, insofar as Hudson had a constitutional claim, it was a Fourteenth Amendment Due Process claim and not an Eighth Amendment Cruel and Unusual Punishment claim.[166]

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arguendo, that § 401(g) can be said to impose 'punishment,' to insist that denationalization is 'cruel and unusual' punishment *is to stretch that concept beyond the breaking point.*" *Trop*, 356 U.S. at 125 (Frankfurter, J., dissenting). Baffled, Justice Frankfurter declared that it is hardly arguable that the loss of citizenship is a disproportionate capital offense within the purview of the Eighth Amendment. *Id.* The disillusioned justice observed that such a holding required a finding that the loss of citizenship is a punishment worse than death. *Id.* Justice Frankfurter maintained that a constitutional dialectic so construed was absolutely empty of reason. *Id.*

In Miller v. Leathers, 913 F.2d 1085 (1990), Judge Wilkinson dissented because, *inter alia*, he felt that the extension of recovery to prisoners in situations where force is used to maintain order unduly infringed on the discretion of prison officials and put guards in an "intolerable dilemma." *Id.* at 1092 (Wilkinson, J., dissenting). Judge Wilkinson explained that prison guards were now forced to choose between risking bodily injury and defending a § 1983 suit. *Id.*

[164] Hudson v. McMillian, 112 S. Ct. 995, 1010 (Thomas, J., concurring). *Id. See* Rhodes v. Chapman, 452 U.S. 337, (1981) (admonishing that holdings that a punishment is constitutionally impermissible should be made cautiously as "they cannot be reversed short of a constitutional amendment"). *Id.* at 351 (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

[165] *Rhodes*, 452 U.S. at 351. Justice Thomas maintained that the Eighth Amendment should not be turned into "a National Code of Prison Regulation." *Id.* Justice Thomas urged that denying prisoners claims under the constitution would not bar the claims, it would merely funnel them into their appropriate forum — the states. *Id.*

This was the dominant approach until Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), and its progeny. *See infra* note 166. For example, the court in United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), found that a claim, involving both conditions of confinement and excessive force allegations, was not cognizable under the Federal Civil Rights Act. 42 U.S.C.A. §§ 1981 et seq., 1983. *Id.* at 956. The court declared that the United States government is neither concerned with nor has the power to regulate or control the internal discipline of state penal institutions. *Id.* at 955. Instead, the court proffered that reparation for excessive force may be obtained under state law. *Id.* at 956. Judge Finnegan, in his concurrence, asserted that the Civil Rights Act was not intended as an "open-sesame" for federal prisoner claims. *Id.* at 957.

[166] *Ragen*, 237 F.2d. at 1011 (Thomas, J., dissenting). This assertion was based on the fact that *Hudson* could have sought redress under state law. *Hudson*, at 1010 (Thomas, J., dissenting). Justice Thomas supported his claim by citing to numerous examples of the

IV. CONCLUSION

At first blush, it might appear that the majority in *Hudson* may have exercised judicial license in order to extend recovery to a victim whose injuries were arguably not "minor." To do so, the Court was required to eliminate the objective component because the Magistrate, as the finder of

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Louisiana courts entertaining claims by prisoners that they have suffered unjustified wrongs at the hands of prison officials. *See, e.g.*, Parker v. State, 282 So.2d 483, 486-87 (La. 1973) (holding that the failure of prison officials to isolate the plaintiff or at least place him in a separate facility from an inmate who attacked plaintiff with a knife, was not negligent where the steps taken by the prison authorities were reasonable under the circumstances), *cert. denied*, 414 U.S. 1093 (1973). Interestingly, of the twenty-three cases cited by Justice Thomas, only two extended recovery to the plaintiff. Hudson v. McMillian, 112 S. Ct. 995, 995 (1992) (Thomas, J., dissenting). *See* St. Julian v. State, 98 So.2d 284, 286 (La. Ct. App. 1st Cir. 1957) (holding that the evidence sustained a finding that the prison officials had actual knowledge of the assailant's dangerous state and that their failure to secure the decedent and other prisoners from reasonably foreseeable harm had been the proximate cause of decedent's wrongful death); Hampton v. State, 361 So. 2d 257, 258 (La. Ct. App. 1st Cir. 1978) (awarding $10,000 in general damages for injuries sustained by a prisoner when a fellow inmate allegedly threw acid on him).

The availability of state remedies led Justice Thomas to conclude that if state remedies were not constitutionally adequate, the claims would have been cognizable under the Due Process Clause of the Fourteenth Amendment. *Hudson*, 112 S. Ct. at 1010-11 (Thomas, J., dissenting). *See also* Hudson v. Palmer, 468 U.S. 517, 533 (1984) (concluding that it follows from the fact that negligent deprivations of property are not violative of the Due Process Clause because of the impracticability of predeprivation process that intentional deprivations are not violative of that Clause provided that adequate post deprivation relief is available through the state). *Cf.* Ingraham v. Wright, 430 U.S. 651, 690 (1977) (White, J., dissenting) (declaring that the scope of or the protections furnished by the Eighth Amendment have never been determined by the availability of state remedies); Johnson v. Glick 481 F.2d 1028, 1030 n.1 (1973) (upholding a prisoner claim where a prisoner's state remedies were not yet exhausted); Patsy v. Florida Board of Regents, 457 U.S. 496, 509 (1981) (noting that § 1997e and its legislative history demonstrate that exhaustion is generally not required in § 1983 actions).

The Fifth Circuit examined another potential basis of a Fourteenth Amendment claim in this context in George v. Evans, 633 F.2d 413 (5th Cir. 1980). The *George* court asserted that only actions by prison guards or conditions of confinement that are applied to inmates for penal or disciplinary purposes that are also authorized or acquiesced to by high prison officials. *Id.* at 415. Therefore, the *George* court determined that the Eighth Amendment could not be implicated by an individual guard's isolated assault on an inmate. *Id.* (citing Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)). The *George* court concluded that its holding would not leave prisoners vulnerable to the exercise of unreasonable force by prison guards because the use of unnecessary force by prison guards is actionable as a denial of the right to due process under the fourteenth amendment. *Id.* at 416.

fact, assessed that the injuries were "minor."[167] Moreover, that assessment was not disturbed by the Fifth Circuit and was not challenged by the petitioner.[168] The question before the Court was whether a prisoner must establish that he has suffered a significant injury to prevail on an Eighth Amendment claim.[169] The Court answered that question in the negative.[170] However, the Court simultaneously raised the standard to satisfy the subjective component. The Court did this by adopting the *Whitley* malicious and sadistic standard.[171] Was this done, as the dissent asserts, in an effort to compensate for the elimination of the objective component?[172] It can not with certainty be said.

What can be said is that the Court does not appear to realize the implications of its holding. A concern addressed in the dissent was that *Hudson* might increase the number of Eighth Amendment claims asserted by prisoners "beyond all reasonable limits."[173]

Justice Blackmun, asserting that the reach of the Eighth Amendment was not made overly broad,[174] relied on the § 1983 requirement of exhausting administrative remedies, prison officials' qualified immunity, and the § 1915(d) *in forma pauperis* dismissal procedure.[175] Thus, by emphasizing mitigating factors as opposed to the direct effects of the holding, Justice Blackmun likewise implied that the Court's decision did expand the scope of Eighth Amendment protection somewhat.

The concern that *Hudson* may expand Eighth Amendment protections to inmates is unfounded. The likely result of *Hudson* is a decrease in successful Eighth Amendment challenges by prison inmates for excessive force claims. An examination of the Court's analysis illustrates why this is true.

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[167] *Hudson*, 112 S. Ct. at 998.

[168] *Id.* at 1005 (Thomas, J., dissenting).

[169] *Id.*

[170] *Id.* at 1002

[171] *Id.* at 1000. *See supra* notes 110-113 and accompanying text.

[172] *Id.* at 1008 (Thomas, J., dissenting).

[173] *Id.* at 1010 (Thomas, J., dissenting).

[174] *Id.* at 1003 (Blackmun, J., concurring).

[175] *Id.* at 1003-04 (Blackmun, J., concurring).

The majority opinion asserted that a malicious and sadistic intent always violates "contemporary standards of decency" and that to hold otherwise would be to permit "any physical punishment, no matter how diabolic or inhuman."[176] Extending this analysis to its natural conclusion, a prison official who, for no good reason and unbeknownst to a prisoner, swings a baseball bat at that prisoner and misses, has inflicted cruel and unusual punishment. However, in that case, by definition, the prisoner has not been punished because he has experienced neither physical nor psychological pain, loss or suffering.[177]

The point of this hypothetical is to demonstrate that it is inconceivable that the objective component could be completely eradicated from Eighth Amendment analysis. As a practical matter, it does not seem likely that the Court, given the facts above, would recognize the prisoner's standing.[178] Borrowing the logic employed by the dissent, this conduct might be immoral, criminal, or remediable under other constitutional provisions but it cannot be considered cruel and unusual punishment.[179]

The objective component will always be lurking in Eighth

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[176] *Id.* at 1000.

[177] The prisoner in this hypothetical has obviously not been punished physically because he has not even been touched. Likewise, the prisoner cannot be said to have experienced any psychological suffering because he was unaware that the bat was swung, thus negating any argument that he may have been made apprehensive of the impending, albeit errant, blow.

[178] The hypothetical prisoner described above would not have a significant stake in the litigation to have Eighth Amendment standing because he has not suffered any injury. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (holding that whether a plaintiff has standing to sue depends upon whether he has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversarial context and in a form historically viewed as capable of judicial resolution). Thus, the prisoner could not have been subjected to cruel and unusual punishment. In fact, any litigation based on the incident described would not be brought under the Eighth Amendment at all. Rather, an action would have to be based on a criminal theory. Thus, because the action of swinging a baseball bat at a person for no reason at all must be discouraged by society as a whole, in the absence of any specific injury, the prisoner would not be able to allege that his interest in the controversy is somehow more direct or individualized than that of the citizenry at large. *See, e.g.*, Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) (holding that plaintiffs lacked standing as citizens to sue since their claim implicated only a generalized interest of all citizens and thus, were alleging a mere abstract injury rather than the essential concrete injury).

[179] Hudson v. McMillian, 112 S. Ct. 995, 1005 (Thomas, J., dissenting).

Amendment analysis. The Court acknowledged this fact by conceding that the lack of a serious injury is "pertinent" to the Eighth Amendment inquiry.[180] Interestingly, the Court, while not disrupting the Magistrate's and Fifth Circuit's finding that Hudson's injuries were minor, found that the injuries were not *de minimis*.[181]

Therefore, the Court has not eliminated the objective component of Eighth Amendment analysis in the excessive force context. However, the Court has made the subjective prong of this analysis much more difficult for prisoners to satisfy by virtue of its adoption of *Whitley's* malicious and sadistic standard for all excessive force cases.[182] Thus, far from expanding the Eighth Amendment "beyond all reasonable limits," the Court in *Hudson* has limited its scope.[183]

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[180] *Id.* at 999.

[181] *Id.* at 1000. The Court stated that the beating which caused bruises, swelling, a cracked dental plate, and loosened teeth "are not *de minimis* for Eighth Amendment purposes." *Id.* However, the Court's seemingly contradictory actions — those of not disturbing the magistrate's finding that the injuries were minor while also holding that they were not *de minimis* — were reconciled by the Court. The majority asserted that *de minimis* uses of force that were "'repugnant to the conscience of mankind'" would not be excluded from constitutional recognition. *Id.*

[182] The Court claimed that many of the concerns that formed the basis for its holding in *Whitley* are implicated whenever guards employ force to keep order. *Id.* at 998. The dissent, through its emphasis of the word "whenever," implied that the majority was extending the *Whitley* malicious and sadistic standard to all excessive force claims. *Id.* at 1008 (Thomas, J., dissenting). With regard to this quote, the dissent seems to overlook the use of the words "to keep order." These words seem to respect the competing interests that the *Whitley* standard was designed to venerate. Ultimately, however, the dissent is correct. The majority has extended the *Whitley* standard to all excessive force claims, despite its claim that the extension of the *Whitley* standard to all claims of excessive force "works no innovation." *Id.* at 999.

[183] Although, theoretically, the Court has expanded the scope of Eighth Amendment claims to cases where *de minimis* uses of force are "repugnant to the conscience of mankind," *id.* at 1000 (quoting *Whitley*, 475 U.S. at 327), in practice it seems likely that the prisoner's standing will only be recognized when the Court disagrees with the finding that the injuries sustained are *de minimis*, as was the case in *Hudson*. *Id.* See *supra* note 181 discussing the distinction the Court drew between minor and *de minimis* injuries.

Another consequence of the Court's decision is the clarification of what has been an extremely confused application of the Eighth Amendment by the courts in the excessive force context. In all Eighth Amendment contexts, outside that of the imposition of criminal penalties meted out by judges and statutes, courts must inquire whether the act charged constitutes unnecessary and wanton infliction of pain. *Hudson*, 112 S. Ct. at 998. Furthermore, the requisite to establish an "unnecessary and wanton infliction of pain"

In the absence of an overruling or modification of *Hudson*, the state legislatures may recognize that the protection afforded prisoners by the Federal

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varies according to the character of the asserted constitutional violation. *Id.* at 999 (quoting *Whitley*, 475 U.S. at 320). Thus, while it is clearly established that in the conditions of confinement cases what constitutes unnecessary and wanton behavior is measured by a standard of deliberate indifference, see *supra* notes 60-86 and accompanying text, what will constitute unnecessary and wanton conduct in an excessive force claim is dependent upon whether the official was faced with exigent circumstances of a magnitude comparable to those present in *Whitley*. *See supra* notes 92-98 and accompanying text.

However, what constitutes unnecessary and wanton conduct in the excessive force context seems to have been applied inconsistently. While *Whitley* dictated that, in a prison disturbance situation, unnecessary and wanton behavior should be judged by a malicious and sadistic standard, the courts have not had a definitive pronouncement on what would comprise unnecessary and wanton conduct outside the disturbance context. *See* Wyatt v. Delaney, 818 F.2d 21, 23 (8th Cir. 1987) (determining that the *Whitley* Court endorsed the rule that courts should apply the deliberate indifference standard in cases where institutional security is not involved). The significance the courts consistently placed on the context in which the violence occurred seems to indicate that, as of 1987, there were two potential standards of unnecessary and wanton behavior and that the determinative factor as to which would apply centered on whether the force was applied in the context of a prison disturbance. In Unwin v. Campbell, 863 F.2d 124, 130 (1st Cir. 1988), however, the First Circuit identified a third possible standard for unnecessary and wanton conduct. After the *Unwin* court found *Whitley's* exigent circumstances absent, it determined that a standard lower than malicious and sadistic should apply. *Id.* (citing *Wyatt*, 818 F.2d at 21). The court applied a wanton and unnecessary standard. *Id.* at 135. Ultimately, the court remanded the case to determine whether the defendants acted with "objective legal reasonableness." *Id.* at 136 (quoting Anderson v. Creighton, 483 S. Ct. 635, 639-40 (1987)).

Justice Stevens, in his concurrence in *Hudson* approached the mental requirement the same way that *Wyatt* had. Justice Stevens did not agree that the *Whitley* standard was appropriate absent the exigencies of a prison riot, he proffered that a less demanding standard be applied. *Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring). Justice Stevens suggested that a standard of "unnecessary and wanton infliction of pain" was proper. *Id.* This could be read to imply a third standard of unnecessary and wanton conduct in the excessive force context. A generic unnecessary and wanton standard would have to fall somewhere between deliberate indifference and malicious and sadistic conduct.

Therefore, in light of this apparent confusion, the Court has simplified Eighth Amendment excessive force cases by providing a bright line test. Now, in the excessive force context, whether conduct is unnecessary and wanton will always turn on whether the application of force reflects a good faith effort to preserve or restore discipline or a malicious and sadistic attempt to cause harm. *Id.* at 998 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).

Constitution's Eighth Amendment has been abated.[184] They may react by assuming the primary responsibility for the preservation of prisoner rights by augmenting this federally mandated minimum level of protection with state statutes.[185] Ironically, this is exactly the role the dissent urged the states should play.[186]

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[184] In recognition of the fact that *Hudson* has decreased the protections afforded prisoners, some states may increase their protections of prisoners' rights but this in no way implies that even the lessened federal protections afforded by *Hudson* are not more than adequate.

[185] The Court in Robinson v. California, 370 U.S. 660 (1962), found that the Eighth Amendment applies to (or is incorporated into) the laws of the states through the Fourteenth Amendment. *Id.* at 667. Thus, the Eighth Amendment's scope is the same when applied to the states as it is when applied to the federal government by virtue of the majority's "jot for jot" or "bag and baggage" approach to incorporation. Crist v. Bretz, 437 U.S. 28, 53 (1978) (Burger, J., dissenting). Consequently, while the states may supplement federal law by affording remedies under state law that are greater than their federal counterparts, the states may not reduce these protections. *See* Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (asserting that the Court has rejected the view that the Fourteenth Amendment is applicable to the states in only a "watered down" subjective version). The fact that this relationship between state and federal law is not reciprocal was made apparent in Parratt v. Taylor, 451 U.S. 527 (1981) (concluding that the Fourteenth Amendment need not cover all of the potential claims that would be available under state law).

[186] Justice Thomas asserted that the chief responsibility for preventing and penalizing abusive behavior by prison guards resides not within the protective ambit of the Federal Constitution but within the purview of the regulations and laws of the various States. Hudson v. McMillian, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting).