CONSTITUTIONAL LAW—Use of Excessive Physical Force Against a Prisoner May Constitute Cruel and Unusual Punishment Under the Eighth Amendment Even Though the Prisoner Does Not Suffer Significant Injury—*Hudson v. McMillian*, 112 S. Ct. 995 (1992).

I. INTRODUCTION

During the early morning hours of October 30, 1988, two men handcuffed, shackled, and beat Keith Hudson.[1] At the time, Hudson was an inmate at the Louisiana State Penitentiary.[2] The two men who beat Hudson, Jack McMillian and Marvin Woods, were corrections officers at the facility.[3] Because of an argument Hudson had with McMillian, the two officers removed Hudson from his cell and took him to the prison's administrative lockdown area.[4] On the way, Woods held Hudson, kicking and punching him from behind, while McMillian punched Hudson in the stomach, chest, mouth, and eyes.[5] The supervisor on duty, Arthur Mezo, merely observed the beating and cautioned the officers "'not to have too much fun.'"[6] As a result of the beating, Hudson received minor bruises, swelling in his face, mouth, and lip, loosened teeth, and a cracked dental plate.[7]

Hudson sued the two officers and the supervisor for compensatory damages under section 1983 of the United States Code, alleging their actions violated the Eighth Amendment's prohibition against cruel and unusual punishment.[8] The case was tried before a magistrate who awarded Hudson $800 based on the magistrate's conclusion that McMillian and Woods used unnecessary force expressly condoned by Mezo.[9] The Court of Appeals for the Fifth Circuit reversed, holding inmates alleging excessive use of force in violation of the Eighth Amendment must prove: "(1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was (3) objectively unreasonable, and (4) the action constituted an unnecessary and wanton infliction of pain."[10] The court found the force used was objectively unreasonable and the officer's conduct "qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain."[11] The court, however, denied recovery to Hudson because he did not meet the significant injury requirement.[12]

---

1. Hudson v. McMillian, 112 S. Ct. 995, 997 (1992).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 997-98. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.
9. Hudson v. McMillian, 112 S. Ct. 995, 998 (1992).
10. Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990).
11. *Id.*
12. *Id.*

The United States Supreme Court granted certiorari to decide "whether the 'significant injury' requirement applied by the Court of Appeals accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted."[13] The Court *held*, reversed.[14] Excessive use of physical force against a prisoner may constitute cruel and unusual punishment under the Eighth Amendment even though the prisoner does not suffer significant injury. *Hudson v. McMillian*, 112 S. Ct. 995 (1992).

This case is significant for three reasons: (1) Treatment of prisoners is of continued importance for the criminal justice system, (2) The court has abandoned the objective prong of the Eighth Amendment analysis opting for a higher standard subjective prong, and (3) The new standard will potentially allow the Court to continue to avoid deciding whether mistreatment of prisoners is "punishment" within the meaning of the Eighth Amendment.

II. BACKGROUND OF THE EIGHTH AMENDMENT IN THE CONTEXT OF PRISON CLAIMS

The Court's holding in *Hudson* is another step in the evolution of Eighth Amendment prison claims. The majority based its rationale on the Court's previous Eighth Amendment prison claim cases.[15] Justice Thomas, in his dissenting opinion, explored the historical perspective of the Eighth Amendment and its extension into the prison context.[16] In order to better understand the holding of the case, its constitutional relevance, and the distinctions made by the Justices, it is necessary to understand the judicial development of Eighth Amendment prison claims.

Until the 1970s, the Eighth Amendment's Cruel and Unusual Punishment Clause applied only to deprivations meted out as part of the criminal sentence, not to all deprivations.[17] For over 180 years, judicial opinions and scholarly commentary suggested the Cruel and Unusual Punishment Clause did not apply to any hardship a prisoner faces during incarceration, but rather only to "torturous punishments meted out by statutes or sentencing judges."[18] Judges and commentators were aware of the often harsh conditions prisoners faced during incarceration; "they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment."[19] In 1976, 185 years after the adoption of the Eighth Amendment, the Supreme Court first applied the Cruel and Unusual Punishment Clause to an inmate's complaint about prison deprivation.[20]

In *Estelle v. Gamble*,[21] a prisoner alleged an Eighth Amendment violation, claiming he was subjected to cruel and unusual punishment as a result of inade-

13. Hudson v. McMillian, 112 S. Ct. at 998.
14. *Id.* at 1002.
15. *Id.* at 998-1001.
16. *Id.* at 1005-06 (Thomas, J., dissenting).
17. *Id.* at 1005 (Thomas, J., dissenting).
18. *Id.* (Thomas, J., dissenting).
19. *Id.* (Thomas, J., dissenting).
20. *Id.* at 1006 (Thomas, J., dissenting); *see* Estelle v. Gamble, 429 U.S. 97 (1976).
21. Estelle v. Gamble, 429 U.S. 97 (1976).

quate medical care.[22] The Court rejected the prisoner's claim because he was unable to prove "acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs."[23] The Court concluded "that deliberate indifference to serious medical needs of prisoners constitut[ed] the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[24] In so doing, the Court applied the Cruel and Unusual Punishment clause for the first time to a prison claim and established "unnecessary and wanton infliction of pain" as the applicable standard.[25]

Five years after *Estelle*, the Court decided *Rhodes v. Chapman*,[26] in which the Court considered for the first time an Eighth Amendment claim based upon alleged poor conditions of confinement.[27] In *Rhodes*, the Court upheld a state prison practice of housing two prisoners in a single cell because the Court did not find these conditions cruel and unusual.[28] The Court re-affirmed the standard established in *Estelle* by stating the prison conditions violated the Eighth Amendment only if the conditions involved unnecessary and wanton infliction of pain or if they were grossly disproportionate to the severity of the crime.[29]

In 1986, the Supreme Court, in *Whitley v. Albers*,[30] again affirmed the unnecessary and wanton infliction of pain standard.[31] In *Whitley*, the Court held a prisoner's Eighth Amendment rights were not violated when a guard shot him during a riot.[32] The Court stated that "[w]here a prison security measure is undertaken to resolve a disturbance . . . the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turn[ed] on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[33]

In *Wilson v. Seiter*,[34] the Court finally articulated the inquiry necessary in an Eighth Amendment prison claim. In *Wilson*, an inmate claimed the conditions of his confinement were so poor they per se amounted to cruel and unusual punishment such that he did not have to prove prison officials acted culpably.[35] The Court rejected the argument and emphasized that an Eighth Amendment prison claim consisted of both an objective and a subjective component.[36] The objective component inquired whether the deprivation was sufficiently serious.[37] The sub-

22. *Id.* at 99-101.
23. *Id.* at 106 (emphasis added).
24. *Id.* at 104 (citations omitted).
25. *Id.*
26. Rhodes v. Chapman, 452 U.S. 337 (1981).
27. *Id.* at 344-45.
28. *Id.* at 339, 352.
29. *Id.* at 347.
30. Whitley v. Albers, 475 U.S. 312 (1986).
31. *Id.* at 319.
32. *Id.* at 325-26.
33. *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
34. Wilson v. Seiter, 501 U.S. 294 (1991).
35. *Id.* at 296.
36. *Id.* at 298.
37. *Id.*

jective component inquired whether the official acted with a sufficiently culpable state of mind.[38]

III. THE MAJORITY OPINION

The majority began by analyzing its 1986 *Whitley v. Albers*[39] decision. The majority acknowledged the "unnecessary and wanton infliction of pain" standard is the settled rule for claims of cruel and unusual punishment.[40] The majority emphasized that proof of unnecessary and wanton infliction of pain varies depending upon the type of conduct allegedly violating the Eighth Amendment.[41] The majority compared *Estelle v. Gamble*[42] with *Whitley*. The majority stated the deliberate indifference standard articulated in *Estelle* was appropriate for the factual situation in *Estelle* because administrative prison concerns did not conflict with the state's duty to provide medical care to inmates.[43] In *Whitley*, however, the deliberate indifference standard was inappropriate because in quelling a prison riot, the officials had to balance "the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may [have] suffer[ed] if guards use[d] force."[44] The appropriate standard under the circumstances of a prison riot was to determine "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[45]

The majority suggested the concerns underlying the Court's holding in *Whitley* are present whenever guards use force to maintain order.[46] By making this comparison, the majority extended the *Whitley* standard to any Eighth Amendment claim alleging excessive use of force by prison officials.[47]

The majority had not addressed the main issue of the case: "[W]hether the 'significant injury' requirement applied by the Court of Appeals accord[ed] with the Constitution's dictate that cruel and unusual punishment shall not be inflicted."[48] Additionally, the majority essentially eliminated the objective component of the Eighth Amendment analysis and raised the subjective component from wanton and unnecessary to malicious and sadistic infliction of pain, without distinguishing the 1991 *Wilson* case that clearly established the two components of an Eighth Amendment claim.[49]

Under *Wilson*, the significant injury requirement would have clearly fallen under the objective component—whether the deprivation was sufficiently seri-

---

38. *Id.*
39. Whitley v. Albers, 475 U.S. 312 (1986).
40. Hudson v. McMillian, 112 S. Ct. 995, 998 (1992).
41. *Id.* (citing Whitley v. Albers, 475 U.S. at 320).
42. Estelle v. Gamble, 429 U.S. 97 (1976).
43. Hudson v. McMillian, 112 S. Ct. at 998 (citing Whitley v. Albers, 475 U.S. at 320).
44. *Id.*
45. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).
46. *Id.*
47. *Id.* at 999.
48. *Id.* at 998.
49. *See* Wilson v. Seiter, 501 U.S 294, 298 (1991).

ous.[50] Because the majority eliminated the objective component, however, the opinion next analyzed where the significant injury requirement would fall under the *Whitley* approach.[51]

The majority concluded the extent of injury was relevant to the Eighth Amendment inquiry, but it did not end the analysis.[52] The seriousness of the injury inflicted upon a person was one factor that may have indicated "'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'"[53] The majority also suggested other factors important in determining the following: wanton and unnecessary use of force, the need for using force, the relationship between the amount of force used and the necessity, the threat responsible officials perceived, and efforts made to lessen the severity of the force used.[54] The majority did not, however, relate the significant injury requirement to the malicious and sadistic standard it adopted in *Whitley*. Apparently, both the seriousness of the injury and the malicious and sadistic actions of the officer were incorporated into the subjective element of the state of mind of the officer.

The majority ultimately addressed the *Wilson* decision by stating the case announced no new rule.[55] The majority asserted the *Wilson* decision merely suggested the type of Eighth Amendment claim that had a bearing on what was required to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause.[56] In rationalizing this conclusion, the majority referred to portions of the *Whitley* and *Rhodes* decisions.[57] The *Whitley* Court stated that "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should . . . be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged."[58] The *Rhodes* Court stated the Eighth Amendment's prohibition against cruel and unusual punishment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[59] The majority used these two statements to justify the conclusion that "[t]he objective component of an Eighth Amendment claim is . . . contextual and responsive to 'contemporary standards of decency.'"[60] In order to support this position, the Court distinguished between the types of Eighth Amendment claims prisoners allege.[61] The Court reasoned that in conditions-of-confinement claims,

---

50. *Id.*
51. Hudson v. McMillian, 112 S. Ct. 995, 999 (1992).
52. *Id.*
53. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).
54. *Id.*
55. *Id.*
56. *Id.* at 999-1000.
57. *Id.* at 1000.
58. Whitley v. Albers, 475 U.S. 312, 320 (1986).
59. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
60. Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)).
61. *Id.*

a prisoner must prove extreme deprivations in order to state a claim.[62] "Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."[63] Similarly, the Court reasoned that in medical needs cases a prisoner must allege deliberate indifference to *serious* medical needs "[b]ecause society does not expect that prisoners will have unqualified access to health care."[64] The Court reaffirmed the requirement that a prisoner must allege a serious or significant injury in the medical needs and conditions of confinement cases, apparently leaving a determination of whether contemporary standards of decency are violated by a case-by-case analysis.

In sharp contrast, the majority surmised that contemporary standards of decency are always violated when prison officials maliciously and sadistically use force to cause harm.[65] In so doing, the majority clearly established that in the excessive use of force context the extent of injury is not a consideration if the force was applied maliciously and sadistically.[66]

The majority apparently realized the potential wide reaching effects of the new standard. The majority emphasized that not "every malevolent touch by a prison guard" will rise to the level of an Eighth Amendment violation.[67] "The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'"[68] The majority offered no guidance on what conduct constitutes de minimis use of force, aside from stating the conduct of the officers in this case rose past the de minimis level.[69]

The majority attempted to diffuse the dissent's arguments by stating the dissent's theory of an objective and subjective component misapplied *Wilson* and ignored the Court's Eighth Amendment jurisprudence.[70] The majority, however, offered no real analysis of *Wilson* or the Court's Eighth Amendment jurisprudence. The majority relied on the fact that the issue in *Wilson* dealt only with the prison officials' state of mind to conclude there was no need to prove serious injury in addition to the actor's state of mind.[71] The majority's Eighth Amendment jurisprudential analysis consisted of referring to *Estelle v. Gamble*.[72] In *Estelle*, the Court stated punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" or "involv[ing] the unnecessary and wanton infliction of pain" are "repugnant to the Eighth

62. *Id.*
63. *Id.* (citations omitted).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* (citations omitted).
69. *Id.*
70. *Id.* at 1001.
71. *Id.*
72. Estelle v. Gamble, 429 U.S. 97 (1976).

Amendment."[73] The majority, however, did not analyze the relevance of this statement or the dissent's treatment of it, but merely stated the dissent would reject it and *Wilson* did not depart from it.[74]

Further, the majority summarily rejected the dissent's argument that excessive force claims and conditions of confinement claims are not inherently different and should, therefore, be analyzed under the same standard.[75] Instead, the majority focused on the rather simplistic concept of the physical difference between punching a prisoner in the face and serving him an unappetizing meal.[76]

Finally, the majority refused to address whether an isolated, unauthorized incident of excessive use of force was "punishment" within the meaning of the Eighth Amendment.[77] The respondents argued some courts have held an isolated and unauthorized incident of force is beyond the scope of Eighth Amendment "punishment."[78] The majority ignored this argument, merely stating the conduct was not isolated and was condoned by a supervisor and was, therefore, inapposite on the record.[79]

IV. JUSTICE STEVENS'S CONCURRENCE

Justice Stevens agreed with the decision of the Court.[80] He disagreed, however, with the Court's reliance on the *Whitley* malicious and sadistic standard.[81] Justice Stevens would confine the higher standard of malicious and sadistic to the prison disturbance cases, which involve special circumstances, such as allowing prison officials to consider their own safety and the safety of the inmates, in making a decision to use force.[82] "Absent such special circumstances, however, the less demanding standard of 'unnecessary and wanton infliction of pain' should be applied."[83] Justice Stevens reasoned his view was consistent with using a standard that considers the differences in the type of conduct allegedly violating the Eighth Amendment.[84]

Thus, Justice Stevens would take the majority's approach of distinguishing between the types of Eighth Amendment claims a prisoner lodges one step further and separate excessive use of force claims into two categories: (1) those involving use of force during a prison disturbance, which would require the prisoner to prove the higher standard of malicious and sadistic infliction of pain; and (2) those not involving a prison disturbance, which would require the prisoner to

---

73. *Id.* at 102-03.
74. Hudson v. McMillian, 112 S. Ct. 995, 1001 (1992).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* (citing George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)).
79. *Id.* at 1001-02.
80. *Id.* at 1002 (Stevens, J., concurring).
81. *Id.* (Stevens, J., concurring).
82. *Id.* (Stevens, J., concurring).
83. *Id.* (Stevens, J., concurring) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).
84. *Id.* (Stevens, J., concurring) (citing Whitley v. Albers, 475 U.S. 312, 320 (1986)).

prove the lower standard of unnecessary and wanton infliction of pain.[85] Justice Stevens reasoned that in the present case, the guard's actions resulted in unnecessary and wanton infliction of pain because there was no prison disturbance and no need to use force on a handcuffed man.[86] Although Justice Stevens disagreed with the Court's adoption of the malicious and sadistic standard, he concurred in the judgment because he believed even the higher standard was met in the present case.[87]

V. JUSTICE BLACKMUN'S CONCURRENCE

Justice Blackmun began his concurrence by commending the Court for putting "to rest [the] seriously misguided view that pain inflicted by an excessive use of force [was] actionable under the Eighth Amendment only when coupled with 'significant injury,' *e.g.*, injury that requires medical attention or leaves permanent marks."[88] He suggested if the Court held otherwise, state-sponsored torture that caused pain but did not show signs of injury would be beyond constitutional protection.[89] Justice Blackmun, like Justice Stevens, would not extend *Whitley*'s malicious and sadistic standard to all excessive force claims outside the prison disturbance context.[90] He offered no basis for this position, except that he dissented in *Whitley*.[91]

Justice Blackmun wrote a concurring opinion in order to address two major concerns the majority did not address. First, Justice Blackmun addressed the respondents' argument that rising caseloads made the significant injury requirement necessary to control the number of inmate court filings.[92] Justice Blackmun virtually reprimanded the respondents for taking such an "audacious approach to the Eighth Amendment."[93] He stated that although caseload management is appropriate in some circumstances, it is "inherently self-interested" and "has no appropriate role in interpreting the contours of a substantive constitutional right."[94] Justice Blackmun argued the state's caseload "concern" was really a "conclusion" that the prisoners' suits were without merit; otherwise the courts would be willing to bear the burden.[95] He further argued cases involving fundamental constitutional rights should be the last candidate for exclusion based on the courts' caseloads.[96] Justice Blackmun strengthened his argument by noting several methods used to control the number of cases prisoners are able to file: (1) prisoners must exhaust administrative remedies before they may file a section

85. *Id.* (Stevens, J., concurring).
86. *Id.* (Stevens, J., concurring).
87. *Id.* (Stevens, J., concurring).
88. *Id.* (Blackmun, J., concurring).
89. *Id.* (Blackmun, J., concurring).
90. *Id.* at 1003 (Blackmun, J., concurring).
91. *Id.* (Blackmun, J., concurring). Blackmun joined Marshall's dissent in *Whitley*. *See* Whitley v. Albers, 475 U.S. 312, 328 (1986) (Marshall, J., dissenting).
92. Hudson v. McMillian, 112 S. Ct. 995, 1003 (1992) (Blackmun, J., concurring).
93. *Id.* (Blackmun, J., concurring).
94. *Id.* (Blackmun, J., concurring).
95. *Id.* (Blackmun, J., concurring).
96. *Id.* (Blackmun, J., concurring).

1983 claim; (2) prison officials may be entitled to qualified immunity; and (3) federal district courts can dismiss frivolous and malicious claims.[97]

Second, Justice Blackmun addressed whether non-physical injury, particularly psychological harm, would be cognizable under the Eighth Amendment.[98] The majority did not address the issue because Hudson did not allege non-physical injury, but Blackmun said nothing in the majority's opinion would limit cognizable injury to physical injury.[99] Justice Blackmun emphasized that "the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' 'Pain' in its ordinary meaning surely includes a notion of psychological harm."[100] Blackmun took a preventive approach when he stated he had "no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement" the Court rejected in this case.[101]

VI. THE DISSENTING OPINION

Justice Thomas, joined by Justice Scalia, summarized the dissent's view by stating: "In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.' "[102] Justice Thomas justified his stance by discussing the history of the Eighth Amendment jurisprudence, focusing on the four cases discussed earlier.[103]

The dissenters focused on the two prong Eighth Amendment test by analyzing *Estelle*.[104] Justices Thomas and Scalia stated the Court has made clear from its first prison claim case, *Estelle*, that the Eighth Amendment's Cruel and Unusual Punishment Clause played only a limited role in regulating prison administration.[105] The Justices emphasized the Court's decision in *Estelle* established that the Eighth Amendment applies only to the "narrow class of deprivations involving 'serious' injury inflicted by prison officials acting with a culpable state of mind."[106] Justice Thomas explained the Court has since described the "serious injury" requirement and the "state of mind" requirement "as the 'objective' and 'subjective' components of an Eighth Amendment prison claim."[107] Justice Thomas referred to *Wilson* as the case in which the Court finally articulated these two components.[108] According to Justice Thomas, the *Wilson* decision clearly established that in order for a prison deprivation to

97. *Id.* at 1003-04 (Blackmun, J., concurring).
98. *Id.* at 1004 (Blackmun, J., concurring).
99. *Id.* (Blackmun, J., concurring).
100. *Id.* (Blackmun, J., concurring).
101. *Id.* (Blackmun, J., concurring).
102. *Id.* at 1005 (Thomas, J., dissenting).
103. *See supra* text accompanying notes 15-38.
104. Hudson v. McMillian, 112 S. Ct. 995, 1006 (1992) (Thomas, J., dissenting).
105. *Id.* (Thomas, J., dissenting).
106. *Id.* (Thomas, J., dissenting).
107. *Id.* (Thomas, J., dissenting); *see* Wilson v. Seiter, 501 U.S. 294, 298 (1991).
108. Hudson v. McMillian, 112 S. Ct. at 1006 (Thomas, J., dissenting).

amount to cruel and unusual punishment, the inmate must prove the deprivation was sufficiently serious—the objective component—and the official acted with a sufficiently culpable state of mind—the subjective component.[109] Justice Thomas stated "[b]oth are necessary components; neither suffices by itself."[110]

In arguing for the continued enforcement of the two prong test, Justice Thomas stressed that the "subjective and objective components . . . are implicit in the traditional Eighth Amendment jurisprudence."[111] He focused on the Eighth Amendment protection against cruel and unusual "punishment"—"penalties meted out by statutes or sentencing judges."[112] Justice Thomas recognized that when the Court decided to extend the Eighth Amendment to a broad range of prison deprivations, it explicitly limited the scope by creating the two prong analysis.[113] The subjective component preserved the concept of the Eighth Amendment protecting against punishment by requiring that "'if the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.'"[114] The objective component ensured "that the Eighth Amendment [would] not transfer wholesale the regulation of prison life from executive officials to judges" by requiring proof of a serious deprivation, not just any deprivation, because the essence of imprisonment entails all sorts of deprivations.[115]

Justices Thomas and Scalia asserted the *Wilson* Court, by setting out the two prong analysis, made clear that "a serious deprivation is *always* required."[116] The Justices emphasized the lower court's determination in any given case should be based on whether the alleged deprivation was sufficiently serious and not "whether a 'serious' deprivation is *required at all*."[117]

Justice Thomas further criticized the majority's analysis by focusing on the majority's treatment of the objective component.[118] Justice Thomas suggested the majority's classification of the objective component as "contextual and responsive to contemporary standards of decency," essentially eliminated the inquiry into the extent of the injury.[119] Justice Thomas extended his analysis in order to conclude that the majority's decision created a new test in which the only relevant inquiry in deciding whether the Eighth Amendment has been violated in the prison claim cases is ascertaining the official's state of mind, without regard for the seriousness of the deprivation.[120]

Justices Thomas and Scalia addressed the majority's reliance on *Whitley*. The dissenters noted the only dispute in *Whitley*, in which a prisoner who had

109. *Id.* (Thomas, J., dissenting) (citing Wilson v. Seiter, 501 U.S. at 298).
110. *Id.* (Thomas, J., dissenting).
111. *Id.* (Thomas, J., dissenting).
112. *Id.* (Thomas, J., dissenting).
113. *Id.* at 1007 (Thomas, J., dissenting).
114. *Id.* (Thomas, J., dissenting) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).
115. *Id.* (Thomas, J., dissenting).
116. *Id.* (Thomas, J., dissenting).
117. *Id.* (Thomas, J., dissenting).
118. *Id.* (Thomas, J., dissenting).
119. *Id.* (Thomas, J., dissenting).
120. *Id.* (Thomas, J., dissenting).

been shot obviously suffered an objectively serious injury, was the state of mind of the guard.[121] The dissenters criticized the majority's use of *Whitley* to hold that the objective component is contextual.[122] Justice Thomas stated:

> *Whitley* stands for the proposition that, assuming the existence of an objectively serious deprivation, the culpability of an official's state of mind depends 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***, whether it can be characterized as 'wanton' depends upon the constraints facing the official."[123]

The majority failed to acknowledge the Court's decision in *Wilson*, which made clear that the subjective inquiry was necessary but not sufficient.[124]

Justices Thomas and Scalia criticized the majority for increasing the standard necessary to establish the subjective component, which they suggest was an apparent attempt to compensate for its elimination of the objective component.[125] The *Whitley* malicious and sadistic standard was justified in *Whitley* because of the institutional concerns inherent in a prison riot situation.[126] The dissenters were not impressed by the majority's conclusion that every use of excessive physical force is accompanied by a malicious and sadistic state of mind.[127] The higher *Whitley* standard evolved because of the important considerations facing prison officials in the context of a prison riot.[128] Not every excessive use of force situation has these same considerations, including the situation Hudson faced, which arguably required no use of force.[129] Justice Thomas suggested the majority's unwarranted extension of *Whitley* occurred because of the implausibility of finding an Eighth Amendment violation when the injuries are only minor and inflicted with less than a malicious and sadistic state of mind.[130] By abandoning the significant injury requirement, the majority had to increase the standard required to prove the subjective component in order to preserve the integrity of the Eighth Amendment. Otherwise every use of force by a prison official would amount to an Eighth Amendment violation.

The dissenters addressed the majority's reliance on the concept of contemporary standards of decency as related to the majority's focus on distinguishing between the types of Eighth Amendment prison claims.[131] Justice Thomas stated that in conditions of confinement cases, the majority's view would mean "our society's standards of decency are not violated by anything short of uncivilized conditions of confinement (no matter how malicious the mental state of the offi-

---

121. *Id.* (Thomas, J., dissenting).
122. *Id.* at 1007-08 (Thomas, J., dissenting).
123. *Id.* at 1008 (Thomas, J., dissenting) (citations omitted).
124. *Id.* (Thomas, J., dissenting); *see* Wilson v. Seiter, 501 U.S. 294, 298 (1991).
125. Hudson v. McMillian, 112 S. Ct. 995, 1008 (1992) (Thomas, J., dissenting).
126. *Id.* (Thomas, J., dissenting).
127. *Id.* (Thomas, J., dissenting).
128. *Id.* (Thomas, J., dissenting).
129. *Id.* (Thomas, J., dissenting).
130. *Id.* (Thomas, J., dissenting).
131. *Id.* (Thomas, J., dissenting).

cials involved), but are automatically violated by any malicious use of force, regardless of whether it even causes an injury."[132] This draws an unnecessary distinction between types of Eighth Amendment prison claims. The dissenters criticized the majority for resurrecting the distinction between conditions of confinement cases and excessive use of force cases.[133] Justice Thomas argued an official's use of force against a prisoner, regardless of how frequently used, is a condition of his confinement.[134]

Justice Thomas further criticized the majority's attempt to distinguish medical needs cases from excessive use of force cases.[135] The majority's rationale for upholding the need to prove deliberate indifference to a serious medical need focused on the fact that society does not expect prisoners to have unqualified freedom from force, because the purpose of prisons is forcibly detaining prisoners.[136]

The dissenters admitted that ultimately they could not conclusively refute the majority's assertions about society's contemporary notions of decency.[137] The concept is subject to many differing opinions, which is why the Court, prior to *Hudson*, had insisted "that determinations of whether punishment is cruel and unusual 'should be informed by objective factors to the maximum possible extent.'"[138] The dissenters further criticized the majority's attempt to justify its departure from precedent.[139] The majority rationalized its decision to eliminate the significant injury requirement by suggesting that if such a showing were required, any physical punishment inflicting less than some arbitrary quantity of injury, no matter how diabolical or inhuman, would not violate the Eighth Amendment.[140] Justice Thomas stated this view evidenced the central flaw in the majority's reasoning: "Diabolical or inhuman punishments *by definition* inflict serious injury."[141] Justice Thomas acknowledged Justice Blackmun's concern about psychological injury by stating that a person who alleges a guard tortured him but did not physically injure him has, nevertheless, alleged a serious injury.[142] Justice Thomas reiterated that the Court's precedents are clear: "[A] prisoner seeking to prove that he has been subjected to cruel and unusual punishment must always show that he has suffered a serious deprivation," regardless of the type of Eighth Amendment prison claim he alleges.[143]

Justices Thomas and Scalia concluded by suggesting the majority's decision establishing that unnecessary and wanton infliction of pain on an inmate per se amounts to an Eighth Amendment violation has sweeping implications.[144]

---

132. *Id.* (Thomas, J., dissenting).
133. *Id.* at 1009 n.4 (Thomas, J., dissenting).
134. *Id.* (Thomas, J., dissenting).
135. *Id.* at 1009 (Thomas, J., dissenting).
136. *Id.* (Thomas, J., dissenting).
137. *Id.* (Thomas, J., dissenting).
138. *Id.* (Thomas, J., dissenting) (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
139. *Id.* (Thomas, J., dissenting).
140. *Id.* at 1000.
141. *Id.* at 1009 (Thomas, J., dissenting).
142. *Id.* (Thomas, J., dissenting).
143. *Id.* at 1009-10 (Thomas, J., dissenting).
144. *Id.* at 1010 (Thomas, J., dissenting).

They argued the majority's decision replaces the objective component of the Eighth Amendment analysis with a necessity component.[145] The Justices emphasized many prison deprivations are not "necessary" in the strictest sense of the word.[146] They argued under the majority's view, *Rhodes* was wrongly decided because clearly double-celling was not "necessary" to fulfill the penal mission.[147] The Justices reminded the majority that the *Rhodes* decision was not based on any concept of necessity, but rather on the concept of an alleged deprivation that was not sufficiently serious to constitute an Eighth Amendment violation.[148]

The dissenters recognized that the use of force by prison officials is deplorable conduct, but emphasized such conduct is not invariably unconstitutional.[149] The laws and regulations of various states are the primary means of preventing and punishing abusive conduct.[150] Hudson could have sought redress under state law.[151] Justice Thomas stated that if the state law remedies proved to be constitutionally inadequate, the appropriate constitutional remedy would be a claim under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause.[152]

VII. CONCLUSION

The Court's decision demonstrates that sometimes a good decision can lead to bad law. Excessive use of force by prison officials is wrong. Punching and beating a prisoner, under almost any circumstances but especially when he is handcuffed, is immoral and unjustifiable. The Court's decision establishes that a prisoner may seek relief under the Eighth Amendment's Cruel and Unusual Punishment Clause, providing he can prove the official acted maliciously and sadistically for the purpose of causing harm. The Court focused solely on whether the action of the prison official was "cruel and unusual," without deciding whether mistreatment of prisoners by guards is "punishment" within the meaning of the Eighth Amendment. The Court has avoided the key issue of what constitutes "punishment" for Eighth Amendment purposes. The present case presented the Court with an opportunity to decide the issue, yet the Court declined to do so. By avoiding the punishment issue in the present case, the Court has expanded "the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent," which is another "manifestation of the pervasive view that the Federal Constitution must address all ills in our society."[153]

Prisoners often face harsh conditions of confinement, inadequate medical needs, and sometimes excessive use of force. Prisoners can and need to be able to seek redress for their injuries. They can sue under state laws, state regulations, and even under the Due Process Clause of the Fourteenth Amendment. They

145. *Id.* (Thomas, J., dissenting).
146. *Id.* (Thomas, J., dissenting).
147. *Id.* (Thomas, J., dissenting).
148. *Id.* (Thomas, J., dissenting); *see* Rhodes v. Chapman, 452 U.S. 337, 343 (1981).
149. Hudson v. McMillian, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting).
150. *Id.* (Thomas, J., dissenting).
151. *Id.* (Thomas, J., dissenting).
152. *Id.* at 1010-11 (Thomas, J., dissenting).
153. *Id.* at 1010 (Thomas, J., dissenting).

should not, however, be able to prove cruel and unusual punishment under the Eighth Amendment for these conditions. Conditions of confinement, inadequate medical care, and especially excessive use of force by a prison official are not "punishments" under the historical or common definition of the word. The Court has diminished the integrity of the Eighth Amendment by extending its constitutional coverage to these situations. "The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation."[154]

Brenda L. Taylor

154. *Id.* (Thomas, J., dissenting).