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***Hudson v. McMillian*: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force Against Prison Inmates**

More than 823,000 persons currently are imprisoned in the United States.¹ Although these men and women serve sentences for crimes ranging from multiple murder to petty theft, they share more than their status as prisoners: They also share the right to be free of cruel and unusual punishments under the Eighth Amendment to the United States Constitution.² By virtue of 42 U.S.C. § 1983,³ inmates in state prisons who have been victimized by incidents of excessive physical force may bring

1. BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1991 1 (1992). There were 823,414 inmates in federal and state prisons on December 31, 1991. This number is a record high, and is up from 773,124 the year before. Since 1980, when 329,821 persons were incarcerated in federal and state prisons, the number has increased 149.7%. *Id.*

2. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See* *Wolf v. McDonnell*, 418 U.S. 539, 555-66 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

3. 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

Federal prisoners may seek redress for violations of their constitutional rights directly, depending upon the type of deprivation alleged. Federal inmates claiming personal injuries as a result of the negligence of prison officials may sue under the Federal Tort Claims Act (FTCA). *See* *United States v. Muniz*, 374 U.S. 150, 164-66 (1963) (allowing for the first time prisoners to bring suit under the FTCA). Since 1966, the FTCA has required the exhaustion of certain administrative procedures prior to the filing of such a suit in federal court. 28 C.F.R. § 543.30-32 (1992). For deprivations beyond the scope of the FTCA involving the actions of federal officials, federal prisoners may sue directly under the Constitution by virtue of the Court's decision in *Bivins v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which found a direct cause of action to obtain a remedy for violations of the Fourth Amendment by federal officials. *Id.* at 391-97. For a more complete discussion of the enforcement of federal claims generally, see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 664-88 (1982); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 748-53 (1992); Gene R. Nichol, *Bivins, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1118-20 (1989). In its October 1991 Term, the Court discussed what circumstances require the exhaustion of administrative remedies under the FTCA, and the claims to which the FTCA applies. *See* *McCarthy v. Madigan*, 112 S. Ct. 1081, 1084-89 (1992) (holding that a federal prisoner seeking only monetary damages due to the deliberate indifference of federal officials to his medical condition need not exhaust administrative remedies prior to bringing suit in federal court).

suit against their aggressors for violations of their constitutional rights.⁴ The burden of proof an inmate must meet under § 1983 and the Eighth Amendment has been the subject of varied interpretation because no authoritative judicial test for such complaints previously had been established.⁵ During its October 1991 term, in *Hudson v. McMillian*,⁶ the United States Supreme Court addressed the question of what elements must be present to establish a § 1983 cause of action for excessive physical force against prison inmates, and specified what a prisoner must show to prevail on such a claim.

In an opinion that might have surprised casual Court observers,⁷ the *Hudson* majority held that the use of excessive physical force against a prison inmate may constitute cruel and unusual punishment despite the absence of a serious injury to the prisoner.⁸ In reaching this holding, the Court expanded the reach of the Eighth Amendment to any unwarranted use of force "repugnant to the conscience of mankind,"⁹ and sent a clear message that minor injury will no longer deprive a prisoner of a claim resulting from physical force maliciously and sadistically exerted against him.¹⁰ The majority refused to read a serious injury requirement into the

4. Prisoners have filed suits alleging deprivations under the substantive Due Process Clause of the Fourteenth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment. Since the Court's announcement in *Whitley v. Albers*, 475 U.S. 312, 327 (1986), that no greater protection is afforded to prisoners by the Fourteenth Amendment than is available under the Eighth Amendment, courts have adjudicated prisoners' § 1983 claims under the Eighth Amendment. See *infra* note 81. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666-68 (1962).

5. See *infra* notes 77-140 and accompanying text.

6. 112 S. Ct. 995 (1992).

7. In light of the Court's narrowing of habeas corpus and its continued endorsement of the death penalty, see, e.g., *Walton v. Arizona*, 110 S. Ct. 3047, 3049-50 (1990); *Whitmore v. Arkansas*, 110 S. Ct. 1717, 1722-29 (1990); *Wainwright v. Witt*, 469 U.S. 412, 426-30 (1985); *Barefoot v. Estelle*, 463 U.S. 880, 896, 905-06 (1983), it may seem surprising that the Court decided not to establish a significant injury requirement in excessive force claims. As this Note explains, however, the Court's adaptation of the *Whitley* standard to all excessive force claims imposes a significant burden of proof upon the prisoner. See *infra* text accompanying notes 154-58.

8. *Hudson*, 112 S. Ct. at 997-1002; see *infra* notes 39-58 and accompanying text. In his concurrence, Justice Blackmun defines "serious" or "significant" injury as that which "requires medical attention or leaves permanent marks"; nowhere else in the opinion is "serious" defined. *Hudson*, 112 S. Ct. at 1002 (Blackmun, J., concurring).

9. *Hudson*, 112 S. Ct. at 1000. While the Court recognized that not "every malevolent touch by a prison guard gives rise to a federal cause of action," *id.*, the Court maintained that even *de minimis* injury may result in such a claim where that injury is caused by force "of a 'sort repugnant to the conscience of mankind.'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

10. *Id.* "[T]he core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause

Eighth Amendment analysis of an inmate's claims of excessive physical force; rather it focused on the force used and not the injury suffered,¹¹ relying on " 'contemporary standards of decency.' "¹² Conversely, Justice Thomas, in dissent,¹³ argued that the extent of a prisoner's injuries should determine the validity of his excessive physical force claim.¹⁴ The dissent would limit the scope of the Eighth Amendment, requiring objective proof of a significant injury as a prerequisite to a constitutional deprivation.¹⁵

This Note explains the reasoning of the majority and dissenting opinions in *Hudson*.¹⁶ It outlines the history of Eighth Amendment jurisprudence as it has been applied to instances of violence and neglect in the prison environment,¹⁷ and it examines the cases which have most affected this area of law. The Note then analyzes the Court's decision in *Hudson* in light of that precedent.¹⁸ In contrast to the dissent's characterization of the majority's ruling in *Hudson* as "beyond all bounds of history and precedent,"¹⁹ this Note illustrates the compatibility of the Court's holding with the prior development of law in this area.²⁰ Finally, the Note commends the majority's finding that a significant injury need not be a prerequisite to a claim of unwarranted use of excessive physical

harm." *Id.* at 999. The Court's adaptation of the *Whitley* standard to all claims of excessive force imposed a heightened state-of-mind requirement on claims arising outside of the context of a prison disturbance. Justices Blackmun and Stevens, in separate concurrences, disagreed with the adoption of the malicious and sadistic standard and instead preferred an unnecessary and wanton infliction of pain standard, because it lacked such a stringent subjective element. *Id.* at 1003-04 (Blackmun, J., concurring in the judgment); *id.* at 1002 (Stevens, J., concurring in part and concurring in the judgment).

11. The standard to be used is one that gives " 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.' " *Id.* at 1000 (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)); see *infra* notes 54-58 and accompanying text.

12. *Hudson*, 112 S. Ct. at 1000 (quoting *Estelle*, 429 U.S. at 103).

13. *Id.* at 1004 (Thomas, J., dissenting). Justice Scalia joined in the dissent.

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

15. *Id.* at 1005-11 (Thomas, J., dissenting). Justice Thomas stated: "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.' " *Id.* at 1005 (Thomas, J., dissenting).

16. See *infra* notes 45-75 and accompanying text.

17. See *infra* notes 76-140 and accompanying text.

18. See *infra* notes 141-68 and accompanying text.

19. *Hudson*, 112 S. Ct. at 1010 (Thomas, J., dissenting). The dissent repeatedly characterized the Court's opinion as unsupported by precedent: "The Court today goes far beyond our precedents." *Id.* at 1005 (Thomas, J., dissenting). "Given [precedent], one might have assumed that the Court would have little difficulty answering the question presented in this case by upholding the Fifth Circuit's 'significant injury' requirement." *Id.* at 1007 (Thomas, J., dissenting).

20. See *infra* notes 147-49 and accompanying text.

force, but concludes that the extension of a heightened state-of-mind requirement continues to burden a prisoner's opportunity to raise such a claim successfully.²¹

Keith J. Hudson continues to serve time in the Louisiana State Penitentiary in Angola, Louisiana, the maximum security prison where he (claimed to have) suffered the infliction of excessive physical force at the hands of prison officials.²² Hudson originally filed suit *pro se*²³ in the United States District Court for the Middle District of Louisiana²⁴ seeking compensatory damages under § 1983²⁵ for violations of his Eighth Amendment rights.²⁶ He alleged that on October 30, 1983, following an exchange of words with officers Jack McMillian and Marvin Woods, the two officers placed Hudson under full restraint, through the use of handcuffs and shackles, and then walked him toward the "administrative lockdown" area.²⁷ During this supervised escort, McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held, kicked, and punched him repeatedly from behind.²⁸ Officer Arthur Mezo, who supervised McMillian and Woods and observed the incident, but did not participate directly in the beating, advised his subordinates not to "have too much fun."²⁹ This attack resulted in bruises to Hudson's face and body. Although he sustained no injury requiring immediate medical attention, Hudson suffered a cracked dental plate, loosened teeth, and a split lower lip.³⁰

21. See *infra* notes 156-68 and accompanying text.

22. *Hudson*, 112 S. Ct. at 997.

23. Hudson continued to act on his own behalf until the Court appointed counsel to represent him on April 29, 1991. Brief of Petitioner at 3 n.1, *Hudson* (No. 90-6531).

24. The jurisdictional counterpart to 42 U.S.C. § 1983 is 28 U.S.C. § 1343 (1988), which grants to district courts original jurisdiction over claims by individuals seeking damages or other relief in response to the deprivation of their constitutional rights by officials acting under color of state law. 28 U.S.C. § 1343(a)(3), (4) (1988).

25. For the text of § 1983 see *supra* note 3.

26. Hudson's original complaint sought \$50,000 in compensatory damages and injunctive relief "against the officers directly involved to prohibit further cru[el]ty" to petitioner and other prisoners at Angola." Brief of Petitioner at 3, *Hudson* (No. 90-6531) (alteration in original) (citing Complaint at 8, *Hudson* (No. 90-6531)).

27. *Hudson v. McMillian*, 929 F.2d 1014, 1015 (1990) (per curiam), *rev'd*, 112 S. Ct. 995, 997 (1992).

28. *Hudson*, 112 S. Ct. at 997.

29. *Id.*

30. *Id.* The Fifth Circuit Court of Appeals noted that Hudson had "appeared at sick call on October 31 and November 1, 1983, with a dental complaint; his medical record contains no reference to facial bruises or other injuries." *Hudson*, 929 F.2d at 1015. The Supreme Court found that Hudson had in fact suffered minor bruises and swelling of his face, mouth, and lip, as well as loosened teeth and a cracked dental plate, "rendering it unusable for several months." *Hudson*, 112 S. Ct. at 997.

The parties consented to have their case heard by a magistrate,³¹ who found that McMillian and Woods had used unnecessary force against Hudson, while Mezo expressly condoned their actions, and awarded Hudson \$800 in compensatory damages.³² The Court of Appeals for the Fifth Circuit reversed.³³ Despite its distaste for the use of unnecessary force in the treatment of prisoners, the court applied an objective test to determine whether Hudson's complaint of excessive force established a violation under the Eighth Amendment and § 1983.³⁴ The Fifth Circuit's test required that the prisoner prove the following four elements: (1) a significant injury; (2) the injury resulted directly and only from the use of force that was clearly excessive to the need; (3) the excessive force was objectively unreasonable; and (4) the action constituted an unnecessary and wanton infliction of pain.³⁵ Despite its finding that Hudson satisfied the latter three criteria of the test,³⁶ the court held that his lack of significant injuries barred his § 1983 claim.³⁷

The Supreme Court granted certiorari³⁸ and reversed.³⁹ The Court acknowledged the traditional standard of "'unnecessary and wanton infliction of pain'"⁴⁰ and stated that the satisfaction of this standard "varies according to the nature of the alleged constitutional violation."⁴¹ Throughout its opinion, the Court emphasized the claim-specific nature of Eighth Amendment jurisprudence, noting in particular two justifications for this approach: the differences in the kinds of conduct giving rise to Eighth Amendment claims, and the influence upon the meaning of

31. With consent of the parties, a United States Magistrate "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." 28 U.S.C. § 636(c) (1988).

32. *Hudson*, 112 S. Ct. at 998. The Magistrate dismissed Hudson's claims for injunctive relief.

33. *Hudson*, 929 F.2d at 1015.

34. *Id.* The Fifth Circuit had, at the time of its decision in *Hudson*, recently enunciated the standard it would apply to excessive force claims made by prisoners. See *Huguet v. Barnett*, 900 F.2d 838, 841 (1990). The Fifth Circuit required proof of significant injury to sustain such a claim. *Id.*

35. *Hudson*, 929 F.2d at 1015 (quoting *Huguet*, 900 F.2d at 841 ("If any one of these elements fails, so too does the plaintiff's claim.")).

36. The court found that because no force was required in the Hudson incident, the force exerted was objectively unreasonable and clearly excessive. Furthermore, the court found these circumstances to reflect an unnecessary and wanton infliction of pain. *Hudson*, 929 F.2d at 1015.

37. *Id.*

38. 111 S. Ct. 1679 (1991).

39. *Hudson*, 112 S. Ct. at 1002.

40. *Id.* at 998 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)); see *infra* notes 85, 114-15 and accompanying text.

41. *Hudson*, 112 S. Ct. at 998 (citing *Whitley*, 475 U.S. at 320).

cruel and unusual punishment by the “‘evolving standards of decency that mark the progress of a maturing society.’”⁴²

Whether an inmate meets the traditional standard usually has involved two types of inquiry by a court: (1) a subjective inquiry, which questions the state-of-mind or motivation of the officials charged with inflicting force; and (2) an objective inquiry, which asks whether the force used was sufficiently serious to establish a constitutional violation.⁴³ The Court explained that these elements must be evaluated according to the context from which the claim arose,⁴⁴ without clearly explaining either inquiry.

Writing for the majority,⁴⁵ Justice O'Connor reasoned that contemporary standards of decency are always violated when prison officials use force maliciously and sadistically to cause harm to a prisoner, regardless of whether a significant injury results.⁴⁶ Justice O'Connor noted that the use of force against individual prisoners is similar to the application of force during a prison riot or disturbance; therefore, she concluded, the same state-of-mind standard should apply to any use of force against prisoners.⁴⁷ The Court held that whenever force is applied, the determinative inquiry asks whether it “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause

42. *Id.* at 1000 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

43. *Id.* at 999-1001; see *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991).

44. *Hudson*, 112 S. Ct. at 998. For example, the Court has held that, in the context of inadequate medical care, the subjective standard is one of “deliberate indifference,” and requires that an objectively serious deprivation be shown. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); see *infra* notes 82-88 and accompanying text. In a prison riot context, however, the subjective standard requires proof of “malicious and sadistic” intent, without ruling on the necessity of an objectively serious injury. *Whitley v. Albers*, 475 U.S. 312, 320 (1986); see *infra* notes 118-20 and accompanying text.

45. Justice O'Connor was joined in the majority by Chief Justice Rehnquist and Justices White, Kennedy, Souter, and by Justice Stevens, who joined in part and also filed a separate concurrence. *Hudson*, 112 S. Ct. at 997.

46. *Id.* at 1000. The dissent asserted that in this statement, Justice O'Connor eliminated the objective portion of the Eighth Amendment inquiry involving cases of excessive force. *Id.* at 1008 (Thomas, J., dissenting).

47. The Court reviewed its decisions regarding other circumstances giving rise to Eighth Amendment claims in the prison environment, including the use of excessive force during the course of a prison riot, see *Whitley*, 475 U.S. at 320, and the failure of prison officials to respond to the medical needs of inmates, see *Estelle*, 429 U.S. at 104. *Hudson*, 112 S. Ct. at 998-99. Justice O'Connor noted the similar concerns that arise whenever guards use force to keep order, including the resulting danger to other prisoners, guards, administrators, and visitors, the need to balance that danger against the importance of maintaining or restoring discipline, and the quick action required of prison officials under such circumstances. *Id.* Thus, the Court held all excessive force claims are subject to the standard previously enunciated for claims arising out of a riot situation. *Id.* at 999.

harm."⁴⁸

In discussing the role that serious injury plays in establishing excessive force, the Court noted its significance as one of several objective indicators. Other factors to be considered are the need for force, the degree of force used in proportion to that need, and the perceived threat to the officer at the time.⁴⁹ The majority therefore acknowledged the relevance of a significant injury to the objective prong of an Eighth Amendment inquiry, but rejected its absence as determinative.⁵⁰ The Court noted that in this case the three other factors all suggested that the force used against Hudson was excessive, and it reiterated its view that the fourth—the injury—is not the only objective factor to be considered.⁵¹ Thus, rather than requiring proof of significant injury in order to establish any Eighth Amendment violation,⁵² the Court chose to focus on the nature of the particular claim when determining the validity of a prisoner's cause of action.⁵³

48. *Hudson*, 112 S. Ct. at 999 (citing *Whitley*, 475 U.S. at 320-21). The Court noted that its expansion of this standard from the riot context to smaller disputes had already occurred at the appellate court level, citing cases from the Second, Fourth, Sixth, Eighth, and Eleventh Circuits that had applied the "malicious and sadistic" standard in fact situations not involving an actual riot. *Id.*

49. *Id.* The Court explained that several other objective factors comprise an Eighth Amendment analysis, including "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'" *Id.* (quoting *Whitley*, 475 U.S. at 321). The Court did not explain its reliance on these factors; rather, because of the Court's statement that the requisite intent is often proven by such objective factors, it is implicit in the Court's opinion that these factors were satisfied by the facts of *Hudson*.

50. *Id.*

51. *Id.*

52. *Id.* The officers argued that the Court's decision in *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991), mandated an inquiry into both the state of mind of the officer inflicting the force (subjective portion), and the harm caused by the incident (objective portion). Justice O'Connor rejected the argument that each inquiry be made separately in order for an allegation of excessive force to be maintained, noting that *Wilson*, a case involving the application of the Eighth Amendment to conditions of confinement, "presented neither an allegation of excessive force nor any issue relating to what was dubbed the objective component of an Eighth Amendment claim." *Hudson*, 112 S. Ct. at 1001; see also *infra* notes 156-58 and accompanying text (describing Justice O'Connor's apparent combination of the objective and subjective components in all excessive force cases by virtue of the "malicious and sadistic" state-of-mind requirement).

53. *Hudson*, 112 S. Ct. at 1000. The Court found that society accepts deprivations due to the routine discomfort of prison conditions more readily than it does incidents involving the use of force, and that contemporary standards of decency are always violated by the malicious and sadistic use of force against inmates. *Id.* Hence, while proof of an extreme deprivation is required to maintain a claim under the Eighth Amendment involving conditions of confinement or a failure to attend to medical needs, the showing of a significant injury is not required to raise successfully a claim involving a use of force. *Id.*

Justice O'Connor supported the Court's contextual interpretation of the objective portion of the Eighth Amendment test by stressing the importance of the relationship of Eighth Amendment rights to "contemporary standards of decency,"⁵⁴ a synergy that varies according to the type of deprivation alleged.⁵⁵ Contrary to the dissent's argument in favor of a substantial injury requirement,⁵⁶ the majority reasoned that such a requirement would run counter to society's general belief that the malicious and sadistic use of force by prison officials for the purpose of causing harm constitutes cruel and unusual punishment under the Eighth Amendment, regardless of the injury sustained.⁵⁷ Justice O'Connor attacked the dissent's failure to appreciate the differences between claims based on excessive force and claims based on conditions of confinement or insufficient medical attention: "To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment."⁵⁸

Justices Stevens and Blackmun wrote separate opinions concurring in part and concurring in the judgment.⁵⁹ Both agreed with the majority's view that a significant injury is not required for an actionable claim under the Eighth Amendment, but they disagreed with the "malicious and sadistic" state-of-mind requirement in all claims of excessive force.⁶⁰ Justice Stevens proposed that, absent the "special circumstances"⁶¹ pres-

54. *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

55. The Court acknowledged in dictum that, while not every show of force by a prison official constitutes a constitutional offense, minor injuries are nonetheless actionable where the use of force involved is either more than *de minimis* or of the sort "repugnant to the conscience of mankind." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986)). The Court explained, however, that Hudson's injuries were not *de minimis*, and thus did not expressly rule on the issue. The Court concluded that, because Hudson's injuries were characterized by the lower courts as "minor," the extent of Hudson's injuries provided no basis for the Fifth Circuit's dismissal of his claim. Although it is unclear whether the Court would have ruled in the prisoner's favor had Hudson's injuries been characterized as *de minimis*, the implication is that it would have. *Id.*

56. *Id.* Justice O'Connor explained that society's expectations vary according to the prisoner's complaint: People generally are less concerned with misdiagnoses of medical illnesses than with unwarranted and excessive threats to personal security. *Id.* at 1001.

57. *Id.* (quoting *Estelle*, 429 U.S. at 102-03). Justice O'Connor defined unnecessary and wanton infliction of pain in all instances of excessive force as inclusive of both the subjective inquiry of sadistic and malicious intent, and the four factor objective test as previously described.

58. *Id.* (quoting *Estelle*, 429 U.S. at 102).

59. *Id.* at 1002 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1002-04 (Blackmun, J., concurring in the judgment).

60. *Id.* at 1002 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1003 (Blackmun, J., concurring in the judgment).

61. *Id.* at 1002 (Stevens, J., concurring in part and concurring in the judgment).

ent in a prison disturbance, the subjective measure of "unnecessary and wanton pain" be defined simply by the meaning of the words "unnecessary" and "wanton" themselves, not by the "malicious and sadistic" intent requirement.⁶²

Justice Blackmun did not discuss in detail an alternate standard, but he voiced two concerns not addressed in Justice O'Connor's opinion.⁶³ First, he expressed his belief that the decision not to require significant injury will not open the floodgates to Eighth Amendment litigation.⁶⁴ Secondly, Justice Blackmun explained that the majority's opinion should not be limited to cases of physical injury, but should apply as well to claims of psychological harm.⁶⁵

In dissent,⁶⁶ Justice Thomas asserted that the use of force causing only insignificant harm to a prisoner is not cruel and unusual punishment.⁶⁷ Justice Thomas stated that historically the Eighth Amendment did not play a role in regulating the treatment of prisoners; only in the last two decades has the Court so interpreted it.⁶⁸ Therefore, he reasoned that the Eighth Amendment should play only a limited role in

62. *Id.* (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens reasoned that less deference should be given to the intentions of prison officials in smaller conflicts than should be given in situations involving a full scale prison disturbance. He noted that varying the standards applicable to the two circumstances would best fulfill the Court's goal of giving "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* (Stevens, J., concurring in part and concurring in the judgment) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

63. *Id.* at 1003 (Blackmun, J., concurring in the judgment). Justice Blackmun noted his dissent in *Whitley* and explained that he did not join the majority's extension of *Whitley's* malicious and sadistic standard to all allegations of excessive force. *Id.* (Blackmun, J., concurring in the judgment).

64. *Id.* at 1003-04 (Blackmun, J., concurring in the judgment). Justice Blackmun was disturbed by the audacity of the Respondents' suggestion that a significant injury requirement should be upheld because it would help control the number of court filings by prison inmates. He noted that there exist numerous other constraints to prevent frivolous claims, including the requirement that prisoners exhaust administrative remedies prior to filing suit in a court of law under 42 U.S.C. § 1997e(a), and the ability of a district court to dismiss, under 28 U.S.C. § 1915(d), a prisoner's complaint *in forma pauperis* "if satisfied that the action is frivolous or malicious." *Id.* (Blackmun, J., concurring in the judgment).

65. *Id.* at 1004 (Blackmun, J., concurring in the judgment). Justice Blackmun acknowledged that the Court was not faced with this issue in *Hudson*, but noted that he was "unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes." *Id.* (Blackmun, J., concurring in the judgment). He maintained that to read a requirement of physical pain into the Eighth Amendment would be "no less pernicious and without foundation" than the "significant injury" requirement the Court discarded in *Hudson*. *Id.* (Blackmun, J., concurring in the judgment).

66. *Id.* at 1004-11 (Thomas, J., dissenting).

67. *Id.* at 1005 (Thomas, J., dissenting).

68. *Id.* at 1005-06 (Thomas, J., dissenting). Justice Thomas cited a series of cases decided prior to 1963 which declined to apply the Eighth Amendment to prisoners' complaints of harsh treatment. He seemed to suggest that because the Court waited 185 years to apply the

regulating prison administration.⁶⁹ Justice Thomas stated his belief that precedent mandated that both the objective and subjective components of an Eighth Amendment inquiry be satisfied to establish an actionable violation, and that the objective portion of the test could not be satisfied without adequate proof of a serious injury.⁷⁰ Justice Thomas rejected the majority's contextual approach, and argued that significant injury is required for any actionable claim under the Eighth Amendment, whether involving excessive force or otherwise.⁷¹

Finally, Justice Thomas characterized the majority's interpretation of the subjective standard as a compensatory measure heightening the state-of-mind component to counter the "elimination" of the objective component.⁷² He criticized the Court's attempt to distinguish the isolated use of force in *Hudson* from prior cases involving conditions of confinement and medical treatment, arguing that "society's standards of decency [are no] more readily offended when officials, with a culpable state of mind, subject a prisoner to a deprivation on one discrete occasion

Eighth Amendment to regulate prison administration, its application should not be advanced beyond the limited role he envisions it should play. *See id.* (Thomas, J., dissenting).

69. *Id.* at 1006 (Thomas, J., dissenting).

70. *Id.* (Thomas, J., dissenting). Justice Thomas stated that the Court had never before recognized a violation of the Eighth Amendment in the prison environment absent the existence of an extreme deprivation or a serious injury to the prisoner. He pointed to the Court's decision in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), wherein it specified that "an inmate seeking to establish that a prison deprivation amounts to cruel and unusual punishment always must satisfy *both* the 'objective component . . . (was the deprivation sufficiently serious?)' and the 'subjective component (did the officials act with a sufficiently culpable state of mind?)' of the Eighth Amendment." *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting) (quoting *Wilson*, 111 S. Ct. at 2324). The majority, however, maintained that the objective component is composed of other factors beyond the single question of whether a deprivation is "serious enough" and suggested that often these additional objective factors shed light on whether the officials acted with the requisite culpable state-of-mind. *See infra* notes 156-58 and accompanying text.

71. *Hudson*, 112 S. Ct. at 1007-08 (Thomas, J., dissenting). Justice Thomas rejected the majority's contention that the Court's decision in *Whitley v. Albers*, 475 U.S. 312 (1986), supports its contextual approach. "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 on the context in which he acts." *Hudson*, 112 S. Ct. at 1008 (Thomas, J., dissenting). Justice Thomas objected to the majority's willingness to push aside the objective inquiry simply because malicious and sadistic intent had been established. "[The state of mind inquiry] is necessary but not sufficient when a prisoner seeks to show that he has been subjected to cruel and unusual punishment." *Id.* (Thomas, J., dissenting).

72. *Hudson*, 112 S. Ct. at 1008 (Thomas, J., dissenting). Justice Thomas stated that he was opposed to the majority's expansion of the strict "malicious and sadistic" state-of-mind requirement to all uses of excessive force and not just to extraordinary cases, such as the prison riot in *Whitley*. Justice Thomas noted, "The Court's unwarranted extension of *Whitley*, I can only suppose, is driven by the implausibility of saying that minor injuries imposed upon prisoners with anything less than a 'malicious and sadistic' state of mind can amount to 'cruel and unusual punishment.'" *Id.* (Thomas, J., dissenting).

than when they subject him to continuous deprivations over time.”⁷³ Justice Thomas suggested that labeling the significant injury requirement as arbitrary provides no reason to reject it in situations involving the use of force but not in other prison situations,⁷⁴ and cautioned that the Court’s decision has “sweeping” implications that extend “the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent.”⁷⁵

Hudson represents a logical extension of the modern development of Eighth Amendment jurisprudence.⁷⁶ Historically, the Supreme Court had applied the Cruel and Unusual Punishments Clause to temper sentences disproportionate to their crimes.⁷⁷ Former Chief Justice Warren first emphasized the dynamic nature of the Eighth Amendment in *Trop v. Dulles*,⁷⁸ stating that its very meaning is drawn from “the evolving standards of decency that mark the progress of a maturing society.”⁷⁹

Although several lower courts had begun to find that living conditions within prisons constituted a violation of the Cruel and Unusual Punishments Clause,⁸⁰ the Supreme Court did not invoke its protection

73. *Id.* at 1008-09 (Thomas, J., dissenting).

74. *Id.* at 1009 (Thomas, J., dissenting). Justice Thomas rejected Justice O'Connor’s statement that, were a showing of serious or significant injury required, “the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.” *Id.* at 1000. He could not reconcile the Court’s rejection of a serious injury requirement with its previous requirement that a prisoner’s “serious” medical needs must be violated or that conditions of confinement must fall below “the minimal civilized measure of life’s necessities.” *Id.* at 1009 (Thomas, J., dissenting).

75. *Id.* at 1010 (Thomas, J., dissenting). Justice Thomas rejected the view that the Constitution must address all of society’s problems, *id.* (Thomas, J., dissenting), and reasserted his belief that although Hudson’s claim was actionable under state law, *id.* at 1010 n.5 (Thomas, J., dissenting), in the absence of a serious injury the complaint did not merit adjudication under the Eighth Amendment. *Id.* at 1011 (Thomas, J., dissenting). Justice Thomas stated that the appropriate inquiry was whether state law provided inadequate remedial assistance so as to constitute a violation of the prisoner’s right to due process under the Fourteenth Amendment. *Id.* (Thomas, J., dissenting).

76. *See infra* notes 147-53 and accompanying text.

77. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (finding denationalization a cruel and unusual punishment for the crime of military desertion); *Weems v. United States*, 217 U.S. 349, 373 (1910) (finding 15 years hard labor a cruel and unusual punishment for a conviction of falsifying a public document). For a general discussion of the history of the Eighth Amendment, see *Gregg v. Georgia*, 428 U.S. 153, 169-76 (1976) (Stewart, Powell & Stevens, JJ., concurring); Anthony F. Grannucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969); Ronald H. Rosenberg, *Constitutional Law—The Eighth Amendment and Prison Reform*, 51 N.C. L. REV. 1539, 1540-50 (1973).

78. 356 U.S. 86 (1958) (plurality opinion).

79. *Id.* at 101.

80. *E.g., Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971); *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff’d*, 442

for the prison environment until 1976.⁸¹ In *Estelle v. Gamble*,⁸² the Court first confronted a prisoner's claim that the inadequacy of medical

F.2d 304 (8th Cir. 1971). *But cf.* *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968) (per curiam) (finding that work camps per se do not constitute cruel and unusual punishment). For a general discussion of these cases, see Rosenberg, *supra* note 77, at 1540-50.

81. Prior to its decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court had not recognized a prisoner's claim under the Eighth Amendment. Instead, the Court was satisfied with the protection provided by the Due Process Clause of the Fourteenth Amendment to prisoners claiming that excessive physical force had been used against them. This due process theory was born in 1952, when the Court invalidated the criminal conviction of a man found guilty of possession of morphine following the use of excessive physical force by the arresting officers to obtain the drug from him in *Rochin v. California*, 342 U.S. 165 (1952). The Court found that the actions of the officers "shock[ed] the conscience" and thus violated the accused's right to due process under the Fourteenth Amendment. *Id.* at 172.

In 1973, Judge Friendly of the Second Circuit Court of Appeals tackled the excessive force claim of a pre-trial detainee in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). Because the plaintiff had not been convicted of any crime at the time of the alleged beating, the court held that the attack did not constitute "punishment" within the meaning of the Eighth Amendment, rendering the Cruel and Unusual Punishments Clause inapplicable to the case. *Id.* at 1032.

Judge Friendly, however, refined the "shocks the conscience" test applied by the Court in *Rochin* by announcing a four-factor test to be applied when determining whether a claim of excessive force is actionable under 42 U.S.C. § 1983 and the Fourteenth Amendment:

[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] 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.

Id. at 1033. The *Glick* court held that, under this test, the plaintiff had established an actionable claim for a Fourteenth Amendment violation. *Id.*

The fourth factor of Judge Friendly's test was formally adopted by the Court in *Whitley v. Albers*, 475 U.S. 312 (1986), *see infra* note 119 and accompanying text, as the core judicial inquiry into an excessive force claim under the Eighth Amendment. In so doing, the Court held that in the prison context, the Due Process Clause of the Fourteenth Amendment affords no greater protection to the prisoner than does the Eighth Amendment. *Whitley*, 475 U.S. at 327. Hence, as a practical matter, *Whitley* eliminated the efficacy of a substantive due process claim involving the use of excessive force against prison inmates. *See, e.g., Colon v. Schneider*, 899 F.2d 660, 671 (7th Cir. 1990) (finding that macing of prisoner is not cruel and unusual punishment under the Eighth Amendment, and denying a basis for prisoner's claim under the Due Process Clause by virtue of Court's ruling in *Whitley* that substantive due process affords no greater protection than the Eighth Amendment); *Parrish v. Johnson*, 800 F.2d 600, 604 n.5 (6th Cir. 1986) (applying Eighth Amendment to prisoner's excessive force claim and stating that substantive due process affords him no greater protection).

As this Note focuses on Eighth Amendment jurisprudence, any further discussion of excessive force claims under the Due Process Clause, or any other provision, is beyond its scope. For a general analysis of the law in this area, *see, e.g.,* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313, 343-50 (1991); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 177-99 (1987).

82. 429 U.S. 97 (1976).

attention he received constituted cruel and unusual punishment under the Eighth Amendment. Prisoner J.W. Gamble complained that he had received inadequate medical care for an injury to his back allegedly sustained while performing prison work.⁸³ The Court held against the inmate because he could not prove a sufficiently culpable state-of-mind on the part of the prison officials responsible for treating him.⁸⁴ Writing for the Court, Justice Marshall held that "deliberate indifference" to the "serious" medical needs of a prisoner is the state-of-mind required to prove the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment.⁸⁵ Justice Stevens dissented,⁸⁶ criticizing the majority's reliance upon the intentions of prison officials to determine whether an Eighth Amendment violation had occurred. He noted also that "[w]hether the constitutional standard has been violated should turn upon the character of the punishment rather than the motivation of the individual who inflicted it."⁸⁷ He reasoned that "a denial of medical care is not a part of the punishment which civilized nations may impose for crime."⁸⁸

83. *Id.* at 98. Plaintiff Gamble alleged that he had not received adequate medical treatment following a back injury sustained on November 9, 1973. Gamble had sought and received care for his pain on several occasions prior to the swearing of his complaint on February 9, 1974, but maintained that he had not been treated correctly. *Id.* at 99-101.

84. *Id.* at 107.

85. *Id.* at 104-05. The Court held that a doctor's failure to respond to a prisoner's serious medical needs, as well as a guard's interference with a prisoner's access to medical care, amounts to deliberate indifference to the treatment of a prisoner's serious medical needs in violation of the Eighth Amendment. "It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 105. The Court did not specify what types of illnesses or injuries might constitute "serious" medical needs, and this standard remains uncertain today. See, e.g., Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 946-49 (1992).

In evaluating the point at which official neglect crosses over into cruel and unusual punishment, the Court adopted the general requirement enunciated in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), that an Eighth Amendment claimant prove an "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 102-03 (citing *Gregg*, 428 U.S. at 173). In *Gregg*, the Court upheld a Georgia statute requiring that at least one of ten aggravating circumstances be found before imposition of the death penalty could occur. *Gregg*, 428 U.S. at 173. *Estelle* extended this standard to incidents occurring within the prison environment. *Estelle*, 429 U.S. at 104. This standard continues to form the basis of the Eighth Amendment inquiry in conditions of confinement claims. See *infra* notes 125-36 and accompanying text.

86. *Estelle*, 429 U.S. at 108-15 (Stevens, J., dissenting).

87. *Id.* at 114 (Stevens, J., dissenting).

88. *Id.* at 106 n.13 (Stevens, J., dissenting). Compare *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("Prison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'") (quoting *Ingraham v. Wright*, 525 F.2d 909, 915 (5th Cir. 1976)) and *Rhodes v. Chapman*, 452 U.S. 337, 345 n.11 (1981) (quoting same), and *id.* at 347 (deliberate indifference is

In 1977, the Court clarified the circumstances that constitute "punishment" under the Eighth Amendment.⁸⁹ *Ingraham v. Wright* presented the Court with the question of whether corporal punishment in the public schools violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁹⁰ The Court found no constitutional violation, noting that protection against the use of excessive force is available only to prisoners.⁹¹ In its analysis, however, the Court included prison brutality as a form of punishment giving rise to an Eighth Amendment claim.⁹²

In *Rhodes v. Chapman*,⁹³ the Court formally adopted this reasoning and held that prison conditions also constitute punishment within the meaning of the Eighth Amendment.⁹⁴ In *Rhodes*, two prisoners held in a single cell of an overcrowded Ohio maximum security prison brought a class action suit alleging that the "double-celling" of prisoners under such circumstances violated the Eighth Amendment.⁹⁵ Writing for the majority, Justice Powell found that conditions which seriously deprive inmates of a "minimal civilized measure of life's necessities"⁹⁶ may be cruel and unusual under the "contemporary standards of decency" recognized in *Estelle*.⁹⁷ The Court held against the prisoners, however, and

"cruel and unusual punishment") with *Ingraham v. Wright*, 430 U.S. 651, 688 & n.4 (White, J., dissenting) (stating that "deliberate indifference to a prisoner's medical needs is clearly not punishment inflicted for the commission of a crime; it is merely misconduct by a prison official").

89. *Ingraham v. Wright*, 430 U.S. 651 (1977).

90. *Id.* at 653. The plaintiffs, two Florida junior high school students, also alleged a violation of their rights to due process under the Fifth and Fourteenth Amendments. *Id.*

91. *Id.* at 664. The Court stated that "[a]n examination of the history of the [Eighth] Amendment and the decisions of this Court . . . confirms that [the Eighth Amendment] was designed to protect those convicted of crimes." *Id.*

While the Court found that corporal punishment in the public schools "implicates a constitutionally protected liberty interest," the Court ruled against the plaintiffs on their due process complaint, holding that "traditional common-law remedies are fully adequate to afford due process." *Id.* at 672.

92. *Id.* at 669. While the Court admitted that prisons present the proper environment for an Eighth Amendment claim, it held that the Eighth Amendment does not apply to public school disciplinary practices. *Id.*

93. 452 U.S. 337 (1981). *Rhodes* marked the first time the Court confronted a disputed claim that conditions of confinement at a particular prison constitute cruel and unusual punishment. *Id.* at 345. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court upheld the decision of the lower court, which was undisputed by Arkansas prison administrators, that conditions in two state prisons violated the Eighth Amendment prohibition of cruel and unusual punishments. *Rhodes*, 452 U.S. at 345 n.11.

94. The Court found that "[c]onditions of confinement must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting punishment." *Rhodes*, 452 U.S. at 347.

95. *Id.* at 339-40.

96. *Id.* at 347.

97. *Id.*

stated that the prison's housing of thirty-eight percent more inmates at the time of trial than its "design capacity" ⁹⁸ failed to establish a constitutional deprivation. ⁹⁹ Justice Powell stated in dicta that "contemporary standards of decency" should be determined primarily by state legislatures rather than the courts. ¹⁰⁰ He further explained that, to the extent that prison conditions do not violate such standards, a restrictive and even "harsh" living environment does not constitute cruel and unusual punishment. ¹⁰¹

Justice Brennan concurred in the judgment that emphasized the Court's role in regulating prison administration. ¹⁰² He noted that in determining the point at which prison conditions pass beyond legitimate punishment to cruel and unusual, the "touchstone is the effect on the imprisoned." ¹⁰³ Justice Blackmun, who joined in Justice Brennan's concurring opinion, also wrote separately ¹⁰⁴ and cautioned against undue deference by federal judges to state legislators and administrators when determining contemporary standards of decency. ¹⁰⁵ Justices Blackmun and Marshall dissented and emphasized that the judiciary should also play a role in protecting prisoners' rights. ¹⁰⁶

98. *Id.* at 343. This housing situation forced the two prisoners to share a mere 63 square feet of living space, and the Court accepted studies recommending at least 50-55 square feet of living space for each individual prisoner sufficient to meet "contemporary standards of decency." *Id.* at 343 n.7. Nonetheless, the Court found this fact, among others, insufficient to support a constitutional violation. *Id.* at 348.

99. *Id.* at 348-49.

100. Justice Powell stated,

Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement . . . [but i]n discharging this oversight responsibility, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system . . .

Id. at 352.

101. *Id.* at 347. Justice Powell found that harsh and restrictive prison conditions are a part of the penalty criminals must pay for their offenses against society. *Id.*

102. *Id.* at 352 (Brennan, J., concurring). Justices Blackmun and Stevens joined in this opinion.

103. *Id.* at 364, 366 (Brennan, J., concurring) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977)).

104. *Id.* at 368 (Blackmun, J., concurring).

105. *Id.* at 369 (Blackmun, J., concurring) ("[I]ncarceration is not an open door for unconstitutional cruelty or neglect.").

106. Justice Blackmun stressed that there must be a federal forum available to state inmates with legitimate claims that the conditions in which they are confined constitute cruel and unusual punishment. *Id.* (Blackmun, J., concurring).

Justice Marshall wrote a dissent expressing the same concerns and disagreeing with the Court's assessment that the conditions complained of did not constitute cruel and unusual punishment. *Id.* (Marshall, J., dissenting). Justice Marshall found that the double celling of prisoners in a 63 square foot cell for a significant period of time to be contrary to contemporary

In *Whitley v. Albers*,¹⁰⁷ the Court addressed the issue of whether the shooting of a prisoner by a prison official during the course of a prison riot constituted cruel and unusual punishment. Gerald Albers was one of approximately 200 prisoners confined to cellblock "A" of the Oregon State Penitentiary on the night of June 27, 1980. That evening, following the forceful escort of several intoxicated prisoners by two correctional officials in full view of cellblock "A" detainees, a group of angry inmates, not including Albers, reacted by attacking the officers and taking one of them hostage.¹⁰⁸ In response, prison security manager Whitley led an armed riot squad in an attack on cellblock "A."¹⁰⁹ Shooting erupted and Albers, caught in the crossfire, suffered severe injury when he was shot in the leg by a riot squad member.¹¹⁰

Albers filed suit under § 1983, alleging a violation of his Eighth and Fourteenth Amendment rights due to the squad's use of excessive force, and also filed pendent state law claims for assault, battery, and negligence.¹¹¹ The lower courts agreed that all state claims should be dismissed, but the Ninth Circuit Court of Appeals reversed the district court's ruling that an Eighth Amendment violation could not be proven.¹¹²

The Supreme Court reversed.¹¹³ Writing for the majority,¹¹⁴ Justice O'Connor noted the general Eighth Amendment requirement that "'af-

standards of decency and therefore cruel and unusual. *Id.* at 375 (Marshall, J., dissenting). In addition, he expressed his disagreement with the "unfortunate" dicta that he felt "may be read as a warning to federal courts against interference with a State's operation of its prisons." *Id.* (Marshall, J., dissenting).

107. 475 U.S. 312 (1986).

108. *Id.* at 314-15.

109. *Id.* at 316. Despite the availability of alternatives, including the use of tear gas, the prison superintendent, assistant superintendent, and Whitley determined that a squad armed with shotguns would be necessary in order to protect the life of the hostage and the safety of those prisoners who were not rioting. *Id.* The dissent took issue with their decision, noting testimony that denied that the hostage or any inmate was in danger, particularly when the guards finally stormed the building, as the cellblock was described as "silent" at that time. *Id.* at 331-33 (Marshall, J., dissenting).

110. *Id.* at 317.

111. *Id.*

112. *Id.* at 317-18. The district court found that no constitutional violation had occurred and directed a verdict in favor of the defendants on all claims. *Id.* at 317. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of all state law claims, but reversed its verdict under the Eighth Amendment. The court found that Albers raised a valid claim provided that he could prove either "a prison official deliberately shot [him] under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," or "the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel and unusual punishment." *Id.* at 318 (quoting *Whitley v. Albers*, 743 F.2d 1372, 1375 (9th Cir. 1984), *aff'd*, 475 U.S. 312 (1986)).

113. *Id.* at 328.

ter incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment.' ”¹¹⁵ She explained that the Court must apply this requirement with an understanding of the different types of Eighth Amendment claims that may arise.¹¹⁶ Under a claim of inadequate medical treatment, the “deliberate indifference” standard was appropriate.¹¹⁷ In a prison riot, however, with the safety of prison inmates and staff at stake, a stricter state-of-mind standard was required.¹¹⁸ Thus, in the context of a prison disturbance, the Court found that whether the infliction of pain was wanton and unnecessary turned 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.”¹¹⁹ Because the prison guard was found not to have exhibited the requisite culpable state-of-mind, no Eighth Amendment violation was found.¹²⁰

Justice Marshall dissented,¹²¹ vehemently opposing the implementation of a legal test which heightened the “unnecessary and wanton” standard in circumstances where the alleged injury occurred during a prison disturbance.¹²² He faulted the majority for basing the inquiry on a judicial interpretation of whether a disturbance ever existed or posed a significant risk to prison security.¹²³ Justice Marshall maintained that the correct test for identifying an Eighth Amendment violation occurring during the course of a prison riot should be whether there was an unne-

114. Chief Justice Burger and Justices White, Powell, and Rehnquist joined Justice O'Connor's opinion.

115. *Whitley*, 475 U.S. at 319 (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

116. *Id.* at 320. The circumstances from which Eighth Amendment claims arise include a riot situation or similar prison disturbance, a failure to provide adequate medical care or adequate conditions of confinement, and individual disciplinary actions against inmates. *Id.*

117. The Court first applied the “deliberate indifference” standard to facts alleging the inadequate medical treatment of prisoners. *See supra* notes 82-88 and accompanying text.

118. *Whitley*, 475 U.S. at 320. Justice O'Connor emphasized the importance of giving deference to prison officials forced to take action in response to a prison uprising in order to protect the lives of other inmates, staff, and visitors as justification for imposing a higher standard of proof upon the plaintiff. *Id.* at 321-22.

119. *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973), and adopting a test formerly used in the context of due process challenges); *see supra* note 81. In addition to adopting the fourth prong (malicious and sadistic) of the test announced by Judge Friendly in *Glick*, 481 F.2d at 1033, as the standard in excessive force complaints arising from circumstances posing danger to others, Justice O'Connor stressed the importance of the other three *Glick* factors in deciding whether the force inflicted was unnecessary and wanton and therefore cruel and unusual.

120. *Whitley*, 475 U.S. at 326.

121. *Id.* at 328-34 (Marshall, J., dissenting). Justices Brennan, Blackmun, and Stevens joined Justice Marshall in dissent.

122. *Id.* at 329 (Marshall, J., dissenting).

123. *Id.* (Marshall, J., dissenting).

essary and wanton infliction of pain—period.¹²⁴

One year prior to its decision in *Hudson*, the Court clarified somewhat the relationship of the subjective and objective prongs of the Eighth Amendment analysis. In *Wilson v. Seiter*,¹²⁵ prisoner Wilson alleged that his Eighth Amendment rights were violated by confinement in an overcrowded facility with poor heating and cooling, improper ventilation, unsanitary restrooms and dining facilities, insufficient locker and storage space, and excessive noise.¹²⁶ The Sixth Circuit Court of Appeals applied the *Whitley* state-of-mind standard of “malicious and sadistic” intent to Wilson’s claim and held against the plaintiff.¹²⁷

The Supreme Court granted certiorari to determine whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show that the responsible officials acted with a culpable state of mind and, if so, what subjective state-of-mind is required.¹²⁸ Writing for the majority, Justice Scalia reasoned that a subjective inquiry is implicit in conditions of confinement claims, without regard to the duration of the disputed conditions.¹²⁹ He emphasized the necessity of the subjective element in determining whether an unnecessary and wanton infliction of pain has occurred,¹³⁰ but rejected the Sixth Circuit’s application of the “malicious and sadistic” standard to conditions of confinement claims.¹³¹ Instead, Justice Scalia announced that the correct standard is that of “deliberate indifference” previously established by the Court in *Estelle* for analyzing cases involving failure to pro-

124. *Id.* at 329-30 (Marshall, J., dissenting). The dissenters simply could not accept a heightened state-of-mind requirement “merely because the judge believe[d] that the injury at issue was caused during a disturbance that ‘pose[d] significant risks to the safety of inmates and prison staff.’” *Id.* (Marshall, J., dissenting) (quoting *Whitley*, 475 U.S. at 320).

Furthermore, Justice Marshall charged that the Court did not view the evidence in a light most favorable to Albers, as it was required to do on review of the district court’s granting of a directed verdict against him. *Id.* at 330 (Marshall, J., dissenting). Justice Marshall asserted that had the Court given proper credit to the evidence presented by Albers, it would have affirmed the reversal of the directed verdict. *Id.* at 330-33 (Marshall, J., dissenting).

125. 111 S. Ct. 2321 (1991).

126. *Id.* at 2323.

127. *Id.* at 2327-28 (quoting *Wilson*, 893 F.2d at 867).

128. *Id.* at 2323.

129. Justice Scalia rejected any standard that would require a culpable state of mind in claims involving “short-term” or “one-time” prison conditions, but not for “continuing” or “systematic” conditions of confinement. *Id.* at 2325.

130. *Id.* at 2324. The Court noted that although *Rhodes v. Chapman*, 452 U.S. 337 (1981), was decided upon an objective analysis of the severity of the deprivation, the subjective inquiry should not be ignored, and is in fact mandated by a claim that any official has inflicted unnecessary and wanton pain. *Id.*

131. *Id.* at 2328.

vide adequate medical care.¹³²

The *Wilson* majority upheld the Sixth Circuit's dismissal of several of the plaintiff's individual claims, finding that, even if proved, the allegations did not involve the "serious" deprivation required by *Rhodes*.¹³³ Justice Scalia reasoned that the correct interpretation of the Court's statement in *Rhodes* "that conditions of confinement, 'alone or in combination,' may deprive a prisoner of the minimal civilized measure of life's necessities"¹³⁴ requires that the alleged conditions have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise."¹³⁵ Because the Court did not rule on the merits of the lower court's dismissal of the particular claims, however, it offered little guidance on the factors determinative of the requisite seriousness of a conditions of confinement claim. The Court also failed to elucidate what needs other than food, warmth, and exercise, qualify as "single and identifiable" for purposes of the Eighth Amendment analysis in conditions of confinement claims.¹³⁶

Justice White concurred in the judgment, but disagreed that a prisoner must satisfy a subjective component when complaining of cruel and unusual conditions of confinement.¹³⁷ Justice White argued that while a subjective inquiry is helpful to an Eighth Amendment analysis involving a claim of excessive force, an allegation of cruel and unusual prison conditions should be examined only on the basis of its objective severity, irrespective of any prison official's intent.¹³⁸ He noted that the Court's

132. *Id.* at 2326-27.

133. *Id.* at 2327. The Sixth Circuit dismissed *Wilson*'s claims of inadequate cooling, housing with mentally ill inmates, and overcrowding.

134. *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)); see *supra* notes 93-106 and accompanying text.

135. *Wilson*, 111 S. Ct. at 2327 ("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.").

136. *Id.*; see also Friedman, *supra* note 85 (discussing the continued uncertainty following *Wilson* of the serious deprivation requirement of the objective test applied in conditions of confinement claims).

137. *Wilson*, 111 S. Ct. at 2327 (White, J., concurring in the judgment). Justices Marshall, Blackmun, and Stevens joined in this opinion.

138. Citing *Estelle* and *Whitley*, Justice White pointed out that the Court's prior imposition of an intent element to the Eighth Amendment analysis had occurred in cases involving challenges to "specific acts or omissions directed at individual prisoners." *Id.* at 2330 (White, J., concurring in the judgment). He reasoned that a state-of-mind requirement "likely will prove impossible to apply" to conditions of confinement claims which often result from "cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time." *Id.* (White, J., concurring in the judgment). Justice White correctly identified the difficulty of imposing an intent requirement to claims in which a responsible defendant or group of defendants possessing the requisite culpability for the entire deprivation is not identifiable.

role in such cases is to assess punishment that is "formally meted out as punishment by the statute or the sentencing judge."¹³⁹ Justice White feared that imposing a subjective requirement on claims of cruel and unusual conditions of confinement would leave inmates with no alternative other than to suffer serious deprivations of basic human needs.¹⁴⁰

The Court's commitment to a contextual application of the Eighth Amendment when adjudicating prisoners' claims of deprivations during confinement has emerged as one of the few constants in an uncertain area of law. Throughout its decisions, the Court has emphasized the importance of that application in response to "evolving" or "contemporary" standards of decency.¹⁴¹ In so doing, prior to its decision in *Hudson*, the Court had established two categories of such claims: complaints arising out of an inmate's conditions of confinement, and claims alleging the use of excessive force to quell a prison riot. To each group the Court applied a different Eighth Amendment test. In *Wilson*, the Court included inadequate medical treatment under the heading of claims arising out of an inmate's conditions of confinement and announced that the correct test to be applied to all such claims is one of "deliberate indifference" on the part of the accused official, as well as suffering a "serious" deprivation.¹⁴² In *Whitley*, the Court announced that in prison-uprising cases the prisoner must show that the official acted with "malicious and sadistic" intent; the necessity of showing serious injury was left unaddressed.¹⁴³

Hudson presented the Court with the new question of whether the use of excessive physical force against an inmate may violate the Eighth Amendment when the prisoner does not sustain a serious injury.¹⁴⁴ The majority logically grouped such claims with those arising out of a riot situation and held that the applicable test for all excessive force claims is the "malicious and sadistic intent" test.¹⁴⁵ However, in recognition of its established distinction between force claims and conditions of confine-

139. *Id.* (White, J., concurring in the judgment) (quoting *id.* at 2325).

140. *Id.* at 2331 (White, J., concurring in the judgment). Justice White stated, "The ultimate result of today's decision, I fear, is that 'serious deprivations of basic human needs' will go unredressed due to an unnecessary search for 'deliberate indifference.'" *Id.* (White, J., concurring in the judgment) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

141. See *supra* note 40; see also *supra* notes 80-140 (discussing the application of the Eighth Amendment to inmate complaints). The terms "evolving" and "contemporary" are used interchangeably by the Court.

142. See *supra* notes 125-40 and accompanying text.

143. See *supra* notes 107-24 and accompanying text.

144. *Hudson*, 112 S. Ct. at 997 (1992). Although the question before the Court was one concerning the objective prong of the Eighth Amendment inquiry, the Court approached this question as an opportunity to determine the standard of inquiry, objective and subjective, to be applied in excessive force claims arising out of circumstances other than a prison riot.

145. *Id.* at 999-1001.

ment claims, and the different relationship that each category has with society's "evolving standards of decency," the Court wisely rejected the serious injury requirement. The Court held that while the presence of a "serious" injury is one of several objective factors that may determine whether force was inflicted with "malicious and sadistic" intent, its absence is not determinative of the inmate's claim.¹⁴⁶

The Court's decision in *Hudson* logically derives from precedent. In recognition of its prior implementation of a contextual approach to prisoners' Eighth Amendment claims, the Court upheld the dual classification of such claims, grouped together all excessive force claims, and announced a single standard of inquiry be applied to them.¹⁴⁷ Contrary to the dissent's repeated characterization of the majority's opinion as "beyond all bounds of history and precedent,"¹⁴⁸ the decision is wholly justifiable in light of the history of the Court's opinions in this area. Just as the *Wilson* Court rejected the *Whitley* standard for conditions of confinement claims in favor of the less stringent "deliberate indifference" state-of-mind requirement, the *Hudson* majority rejected the *Wilson* approach in favor of *Whitley's* subjective inquiry. This extension of the *Whitley* standard to all claims of excessive force logically maintains the contextual approach previously taken by the Court in that it classifies all force claims within the excessive force category, as opposed to grouping some force claims under the conditions of confinement label or creating a separate category altogether. As Justice O'Connor explained, "Extending *Whitley's* application . . . to all allegations of excessive force works no innovation,"¹⁴⁹ due largely to its use by many appellate courts in deciding allegations of excessive force outside of a riot situation.

In addition to simplifying the categorical structure of the Eighth Amendment analysis, the *Hudson* Court's decision to apply a different standard of inquiry to claims of force than that examined in conditions of confinement cases recognizes the traditional contextual approach of analyzing the unique characteristics of each type of claim against society's "evolving standards of decency." On this point, Justice O'Connor chastised the dissenters for their failure to acknowledge the obvious differences between "punching a prisoner in the face and serving him unappetizing food."¹⁵⁰ As she explained, society is likely to be less con-

146. *Id.* at 999.

147. *Id.* at 998-1001.

148. *Id.* at 1010 (Thomas, J., dissenting).

149. *Id.* at 999 (citing cases from the Second, Fourth, Sixth, Eighth, and Eleventh Circuits that previously had applied the "malicious and sadistic" standard in fact situations not involving an actual riot).

150. *Id.* at 1001.

cerned with denying a prisoner expert medical care for nonserious illnesses or the nonserious deprivation of habitable conditions of confinement because many people live without such protections;¹⁵¹ hence, a similar expectation is not present throughout society.¹⁵² There does exist, however, the expectation that persons, even prisoners, will not suffer a violation of their personal security as a result of force inflicted "maliciously and sadistically to cause harm."¹⁵³ This contextual distinction recognized by the *Hudson* majority correctly takes into account the function that prisons fulfill as places of detention, not as playgrounds for the abuse of authority.

In *Hudson*, the Court justifiably structured the relationship between the objective and subjective prongs of the Eighth Amendment analysis differently from the *Wilson* Court's approach one year before. Justice O'Connor recognized that the *Whitley* state-of-mind test, which requires no *additional* objective fact to be proven by the prisoner, essentially incorporates the objective component of an Eighth Amendment inquiry into the subjective component.¹⁵⁴ Justice Thomas improperly characterized this decision not to retain the serious injury requirement, in addition to the heightened state-of-mind, as an "elimination" of the objective component of Eighth Amendment inquiry.¹⁵⁵ While it is true that Justice O'Connor stated that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated,"¹⁵⁶ she emphasized the importance of the presence of a serious injury as one of several objective factors to be considered when determining whether the prisoner satisfies that subjective standard.¹⁵⁷ Under *Hudson*, the objective test in excessive force claims is not a separate inquiry; rather, the objective component of the Eighth Amendment

151. *Id.* at 1000.

152. *Id.*

153. Justice Thomas failed to appreciate this distinction, and instead suggested that society does not demand that prisoners enjoy "unqualified freedom from force." *Id.* at 1009 (Thomas, J., dissenting). The majority, however, clearly did not impose such an "unqualified" standard of force inflicted, by virtue of the dual "malicious and sadistic" state-of-mind requirement, and the refusal to acknowledge claims involving either a *de minimis* show of force or a type of force "not repugnant to the conscience of mankind." *Id.* at 1000.

154. *Id.* at 1001.

155. *Id.* at 1008 (Thomas, J., dissenting). Justice Thomas's perception of the standard applied was further evident in his statement that "[t]he extent to which a prisoner is injured by the force—indeed, whether he is injured at all—is in the Court's view irrelevant." *Id.* at 1005 (Thomas, J., dissenting). *But see infra* notes 47-51 and accompanying text (discussing Justice O'Connor's explanation of the relevancy of the extent of injury suffered by a prisoner to the Eighth Amendment analysis).

156. *Hudson*, 112 S. Ct. at 1000.

157. *Id.* at 999.

analysis is a part of the subjective inquiry which must be satisfied before a finding of "malicious and sadistic" intent may be made.¹⁵⁸ Because the sole distinction between the *Hudson* objective test and the *Wilson* objective test is the certain dismissal of a *Wilson* claim that fails to establish a serious deprivation, the objective test remains very much alive under the *Hudson* configuration.

Largely because the issue before the Court specifically involved the imposition of a significant injury requirement, the Court's discussion of its decision not to require a serious injury overshadowed its discussion of the extension of the *Whitley* state-of-mind requirement.¹⁵⁹ Certainly, it is the significant injury aspect of the ruling that most disturbed Justice Thomas,¹⁶⁰ and his preoccupation with the Court's refusal to adopt it may confuse the reader who lacks a full understanding of the history of the law in this area.¹⁶¹ Despite the dissenters' fears of the majority's "expansion" of the Cruel and Unusual Punishment Clause, the requirement that a prisoner prove the heightened standard of malicious and sadistic intent significantly restricts his ability to maintain an Eighth Amendment claim. Because the requirement must be proved through objective factors, it is the rare case in which the need for force, the amount of force used, and the relationship between these two factors alone will provide the evidence necessary to prove "malicious and sadistic" intent. Merely to measure the amount of force used necessitates that some injury be inflicted, and not every case will present facts so favorable to a prisoner's claim as *Hudson*'s complaint: When a man is shackled and handcuffed, no need exists for using any additional force, because there does not exist any threat to officials, other prisoners, or prison visitors. Hence, *Hudson*'s imposition of the "malicious and sadistic" intent standard does not provide for the unbridled expansion of the Eighth Amendment to prisoners' excessive force claims; rather, the decision provides a remedy for prisoners suffering unwarranted and abusive attacks which nonetheless failed to inflict a "serious" injury.

Unfortunately, *Hudson* reflects the somewhat muddled development of the law it purports to clarify. The decision announces the standard to be applied in all excessive force cases without providing any guidelines for *how* that standard *should* be applied. However, the Court's rejection of the serious injury requirement in excessive force claims will limit to a certain extent the uncertainty with which prisoners' Eighth Amendment

158. *Id.*

159. *Id.* at 1001-02.

160. It is the injury issue to which Justice Thomas's dissenting opinion is devoted. *Id.* at 1004-11 (Thomas, J., dissenting).

161. See *supra* note 7 and accompanying text.

claims are often adjudicated. Adopting the requirement would have left the Court with two options—defining the term “serious,” or not defining it—both of which would have presented problems for the Court.¹⁶² A decision to adopt a serious injury requirement but not define the term “serious” would have perpetuated the uncertainty that presently exists in conditions of confinement cases, leading to inconsistent decisions in later cases. Similarly, had the Court defined the term “serious,” that act would have granted a prison official the authority to use excessive force so long as he did not cross some arbitrary line and inflict a significant injury upon his victim. Prisoners would have no remedy for injuries that although significant in some way, did not quite rise to the level of the Court’s definition. There simply is no place for this type of treatment of human beings in a civilized society.

Despite its wise decision not to adopt a serious injury requirement, the Court provided little advice on how the malicious and sadistic intent standard it did impose should be implemented. Nor did the Court enunciate whether the Eighth Amendment may be used to support prisoners’ claims of infliction of psychological pain.¹⁶³ As Justice Blackmun stated in his concurrence,¹⁶⁴ although Hudson did not allege that he suffered psychological pain due to his attack, “the Court [made] clear that the Eighth Amendment prohibits the unnecessary and wanton infliction of ‘pain,’ rather than ‘injury.’”¹⁶⁵ Justice Blackmun asserted his belief 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 we reject today.”¹⁶⁶

The importance of Justice Blackmun’s point should not be overlooked; certainly, some forms of psychological torture may scar an individual more severely than wounds inflicted by physical force. A failure to provide prisoners a remedy for psychological torture would sanction barbaric activity, thwart the intention of the Court’s decision in *Hudson* by allowing cruel and unusual punishment to be inflicted mentally but not physically, and quash the rights that all Americans are guaranteed under the Eighth Amendment. The Court likely will either battle over whether to include claims of psychological harm under one of the two existing categories, or create a new standard requiring both malicious and sadistic intent and a serious mental injury. Because psychological pain may be proven medically through well-established methods, the

162. See *supra* note 8.

163. See *supra* note 65.

164. *Hudson*, 112 S. Ct. at 1002-04 (Blackmun, J., concurring in the judgment).

165. *Id.* at 1004 (Blackmun, J., concurring in the judgment).

166. *Id.* (Blackmun, J., concurring in the judgment).

Court should apply a "malicious and sadistic" intent standard. The current Court, however, might impose a hybrid test, requiring both the *Hudson* subjective inquiry and the *Wilson* objective inquiry to be satisfied.

Few Americans feel sympathy for prisoners, but sympathy is not the issue in these cases. At stake is the integrity of the criminal justice system, which provides that persons convicted of wrongdoing pay for their crimes as ordered by a judge or jury of their peers. While a degree of discomfort may be expected and warranted in prison, there is no need for force inflicted for the purpose of causing physical or psychological harm. Judges or juries determine the punishment an inmate receives, not prison officials. It is therefore vital that prisoners have means to vindicate violations of their Eighth Amendment rights.

From a Court that supports the death penalty and continues to narrow prisoners' rights to habeas corpus,¹⁶⁷ the refusal to require serious injury is a significant breakthrough. However, the Court's logical extension of the stringent *Whitley* standard to encompass all instances of excessive force in the prison environment seriously tempers the impact of its rejection of the significant injury requirement. Not every guard is so foolish as to shackle and handcuff his victim prior to his use of force, and the Court's reliance on objective factors to prove the intent element effectively requires that a serious injury must be shown. Because the Court gave little guidance as to how these objective factors should be weighed, courts should place a greater emphasis on factors such as the need for the force applied, the threat posed to other prisoners, officers, and prison visitors by the inmate, and the alternatives available to the use of force when determining whether the official acted with malicious and sadistic intent.¹⁶⁸ To rely on the significance of the injury injects into the analysis an arbitrariness that runs counter to the intended purpose of the Eighth Amendment itself; courts must be careful to approach an inmate's complaints of cruel and unusual punishment as they do any other claimant's. Similarly, when faced with the question, the Court must recognize claims of psychological harm under the Eighth Amendment; failing to do so would sanction an insidious alternative to the infliction of physical force in prisons.

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167. See *supra* note 7.

168. See *supra* note 49.