Adding Insult to Injury? The Untoward Impact of Requiring More than De Minimus Injury in an Eighth Amendment Excessive Force Case

Robyn D. Hoffman

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol77/iss6/7
ADDING INSULT TO INJURY?:
THE UNTOWARD IMPACT OF REQUIRING MORE THAN DE MINIMIS INJURY IN AN EIGHTH AMENDMENT EXCESSIVE FORCE CASE

Robyn D. Hoffman*

This Note explores the conflict over whether a prisoner must suffer more than de minimis injury to sustain an Eighth Amendment excessive force claim. It examines this conflict against the backdrop of the various standards the U.S. Supreme Court adopted in its Eighth Amendment prison conditions jurisprudence between 1976 and 1992, principally focusing on the 1992 Hudson v. McMillian decision. Moreover, this Note considers the intersection of “the evolving standards of decency,” the “hands-off doctrine,” and the Eighth Amendment injury requirement. Ultimately, this Note advocates that excessive force—when meted out as punishment—violates the Eighth Amendment’s prohibition on cruel and unusual punishment regardless of whether a prisoner’s injuries are more than de minimis.

INTRODUCTION

In 1995, the New York Times reported on the violent culture of Clinton Correctional Facility, a maximum security prison in upstate New York.1 The article chronicled prison officials’ “retaliatory” and “sadistic” use of excessive force, including an incident where officers made an inmate who they had assaulted kiss the steps on his way to the hospital.2 Moreover, it publicized that an inner circle of officials had colluded to remain quiet about guards’ blatant use of excessive force, resulting in spotty enforcement of the prison’s “strict rules” against such practices.3

Less than one year later, the Los Angeles Times exposed California’s “most maximum-security prison,” a facility with a similar record of inmate

* J.D. Candidate, 2010, Fordham University School of Law; B.A., 2004, University of Michigan. I would like to thank Professors James Kainen and Lloyd Weinreb for their invaluable guidance. Thank you Mom, Dad, Evan, and Jacob for your constant love, support, and encouragement.

2. Id.
3. Id.
The article highlighted a prison tradition where "[s]hackled inmates arriving from other prisons were pummeled by officers in an intimidation rite called 'greet the bus.'" The article also reported on the officials' practice of placing bitter prison rivals in the same cramped exercise yard—a ritual known as "gladiator day"—to provide occasions for guards to enjoy the institution's policy that allowed them to use firepower to stop disturbances between inmates.

Despite these mid-1990s accounts that exposed unspeakable and unnecessary acts of excessive force by prison officials, such practices continue to occur in correctional facilities across the country. In April 2008, two western Maryland prisons fired at least seventeen officers after a large-scale probe uncovered violent abuse of roughly seven inmates. One of the inmates wrote to the Baltimore Sun from prison, claiming that after the officers ordered him to put his face against a wall, they kicked him in the head; then, despite his splattered blood all over the walls, the officers continued to hit and kick him senselessly.

For every article published about such wanton and unnecessary use of force by prison officials, however, thousands of incidents are not publicized. Moreover, in some circuits, obtaining Eighth Amendment

---

5. Id.
6. Id. One retired prison lieutenant recounted eight-hour shifts with four or five shootings in the yard. See also HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH STATEMENT TO THE VIRGINIA CRIME COMMISSION: SUPER-MAXIMUM SECURITY (1999), available at http://hrw.org/english/docs/1999/06/30/usdom5755_txt.htm (criticizing Virginia's Red Onion State Prison for its history of excessive force and abusive use of stun guns, as well as a gratuitous firearms policy that the Department of Corrections defended because the shotguns only carried rubber pellet "stinger rounds").
redress can be a particularly daunting task for inmates who suffer minor injuries.¹¹

Courts assess excessive force cases under the Eighth Amendment, guided by a set of factors developed by the U.S. Supreme Court to ascertain whether the use of force amounts to a constitutional violation. In *Hudson v. McMillian*, the Supreme Court held that an Eighth Amendment excessive force claim requires a prisoner to show that a prison official used force maliciously and sadistically for the sole purpose of causing harm.¹² Moreover, the Court announced that serious injury is not a condition precedent to a successful Eighth Amendment excessive force case.¹³ The *Hudson* Court did not, however, clearly define what minimum quantum of injury, if any, a prisoner must prove to establish a constitutional violation.¹⁴ As such, the U.S. courts of appeals are divided over whether de minimis injury can sustain an Eighth Amendment claim.¹⁵

This Note argues that the *Hudson* Court clearly articulated a standard that many circuit courts fail to follow as a way to remain hands-off to prison management and as a method of limiting prisoners’ redress through the courts. Part I examines the Eighth Amendment’s Cruel and Unusual Punishments Clause jurisprudence, highlighting four Supreme Court cases preceding *Hudson* that tackled the amendment’s applicability to certain prison conditions, while simultaneously refining Eighth Amendment standards. Part I then studies *Hudson*, highlighting the particular standards and factors to which courts must look in deciding prison excessive force claims. Part I also discusses the arguments for and against the “hands-off doctrine,” a pre-1970s principle that courts employed to defer to state legislatures and prison officials to regulate prisons, thereby limiting court intervention.

Part II articulates the circuit court split resulting from varied interpretations of *Hudson* and details arguments on both sides of the debate. The U.S. Courts of Appeals for the Third, Sixth, Eighth, Tenth, and Eleventh Circuits read the plain meaning of *Hudson* to state that a prisoner does not need to suffer serious injury to sustain an Eighth Amendment claim, whereas the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits hold that certain *Hudson* passages imply that, although the injury need not be significant, a prisoner must prove more than de minimis injury.

¹¹. See infra Part II.B (examining the difficulties prisoners face in sustaining excessive force claims in the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits when there is only de minimis injury). But see infra Part II.A (discussing other circuit courts that do not require such showing, thus enabling redress in more instances).
¹³. Id. at 7–8.
¹⁴. Id. at 7.
¹⁵. See infra Part II.A–B (examining the circuit split resulting from this omission).
¹⁶. Compare infra Part II.A (noting certain circuit courts that do not require any discrete level of injury), with Part II.B (discussing other circuit courts that hold that de minimis injury is conclusive evidence of de minimis force, which therefore precludes recovery).
Finally, Part III argues that, by failing to read the plain meaning of the *Hudson* text, some courts have reinvigorated the hands-off doctrine, thereby deferring to prison officials even in the face of constitutional violations. Furthermore, Part III advocates that the Court must once again refine Eighth Amendment jurisprudence so that a particular quantum of injury is not required to prevail in cases where excessive force is used wantonly and unnecessarily in violation of the evolving standards of decency that mark the progress of a maturing society.17

I. THE SUPREME COURT’S EIGHTH AMENDMENT JURISPRUDENCE: THE STANDARDS THAT GOVERN PRISONERS’ CLAIMS

Part I.A of this Note tracks the pre-*Hudson* Cruel and Unusual Punishments Clause jurisprudence as applied to prison conditions and defines the “evolving standards of decency” that guide courts in determining what comports with the Eighth Amendment. Part I.B then examines *Hudson*, the seminal case that set the standard for what constitutes cruel and unusual punishment violative of the Eighth Amendment in prison excessive force cases. Finally, Part I.C discusses the use of, and the breaking from, the “hands-off doctrine” that the Court employed prior to the early 1970s as a way to defer to the legislature and prison officials to manage prisons.

A. The History of the Eighth Amendment as Applied to Prison Conditions

1. The Cruel and Unusual Punishments Clause of the Eighth Amendment

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”18 Prior to 1976, the Court invoked the Eighth Amendment Cruel and Unusual Punishments Clause only in cases where it questioned the constitutionality of death penalty procedures imposed on capital defendants.19 Perhaps because of rising prison populations,20 a change in

17. See infra Part I.A.2 (defining the “evolving standards of decency” that influence Eighth Amendment jurisprudence).
18. U.S. CONST. amend. VIII.
19. See In re Kemmler, 136 U.S. 436, 443 (1890) (upholding electrocution as constitutional because the specified electricity current brings about an immediate and painless death and, therefore, does not constitute torture); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (stating that punishments of torture—when circumstances of panic, shame, and excess pain are “superadded” to the extinguishment of life, thereby imposing a punishment worse than death—or other such unnecessary cruelty, are forbidden by the Eighth Amendment); cf. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (“It suffices to note that the primary concern of the drafters [with respect to the Eighth Amendment] was to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.” (alteration in original) (quoting Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 CAL. L. REV. 839, 842 (1969))).
20. See, e.g., U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Statistics, Key Facts at a Glance: Number of Persons Under Correctional Supervision, available at
DE MINIMIS INJURY AND EXCESSIVE FORCE

Public sentiment toward prisoners' rights, the rise of a civil rights-civil liberties bar that took over myriad cases that would have otherwise been filed pro se, or increased media coverage of violence in prisons, in 1976, the Court for the first time examined the applicability of the Eighth Amendment to prison conditions. Subsequently, between 1976 and 1992, the Court granted certiorari in a series of five cases in an attempt to parse out the applicability of the Eighth Amendment to various prison-related issues.


In Estelle v. Gamble, J. W. Gamble, an inmate under the custody of the Texas Department of Corrections, was injured when a bale of cotton fell on him while he unloaded a truck during a prison work assignment. Over the three months following his injury, doctors examined Gamble seventeen times at the unit hospital. The doctors initially took Gamble off work duty because of the injury, but then certified that he could partake in light duty, despite his complaints that the pain had not subsided. Gamble filed a federal civil rights action under 42 U.S.C. § 1983 alleging that the Chief Medical Officer, Prison Warden, and Director of Corrections subjected him to cruel and unusual punishment forbidden by the Eighth Amendment by denying him adequate medical care. The U.S. District Court for the Southern District of Texas dismissed the case for failure to state a claim.

http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (last visited Apr. 7, 2009). The number of people under U.S. correctional supervision in 1980 was 1,842,100. Id. In 2007, that population rose to 7,328,200 persons, a 396% increase in 27 years. See id.

21. See Chadwick L. Shook & Robert T. Sigler, Constitutional Issues in Correctional Administration 8 (2000). Prior to the 1960s, inmates and the prisoners' rights lobby made unsuccessful attempts at the state level to initiate changes to correctional facility administration. Id. at 7–8. Because early prison philosophy held that prisoners should lose all status in society and be treated in any way prison officials saw fit, inmates had few rights. Id. at 7.

22. See 1 Michael Mushlin, Rights of Prisoners 10 (2d ed. 1993). Michael Mushlin also contends that prisoners were "becoming increasingly militant and assertive," which incited court intervention. Id.


25. 429 U.S. 97.

26. Id. at 99.

27. Id. at 107.

28. See id. at 99–100.

29. Section 1983 provides a civil, tort-like remedy for individuals whose constitutional rights are violated by a state actor. Section 1983 states, in part, that, Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .


upon which relief could be granted; however, the Fifth Circuit reversed and reinstated Gamble's complaint.

The Supreme Court granted certiorari to decide whether the denial of medical care by prison officials was a viable Eighth Amendment claim. Justice Thurgood Marshall, writing for the majority, held that, under the facts, Gamble did not state a claim under § 1983 because doctors tried to treat his condition seventeen times in three months. Nevertheless, the Court held broadly that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Furthermore, the Court stated that its holding extends to situations where prison doctors fail to respond appropriately to prisoners' needs or when prison officials intentionally deny medical care or impede prisoner access to medical treatment.

Justice John Paul Stevens dissented, stating that a finding of cruel and unusual punishment should not turn on an individual's subjective motivation to inflict pain or punishment. Rather, Justice Stevens believed that the Court's inquiry should be into the character of the punishment—whether the punishment was cruel and inhuman because of "design, negligence, or mere poverty."

b. Rhodes v. Chapman: Analyzing Both Subjective Intent and Objective Harm

Five years later, in Rhodes v. Chapman, the issue was whether "double celling" inmates—the act of housing two inmates in one cell—violates the Eighth Amendment's prohibition on cruel and unusual punishment. At Southern Ohio Correctional Facility (SOCF), double-celled inmates shared sixty-three square feet of cell space. The U.S. District Court for the Southern District of Ohio held that double celling was cruel and unusual punishment. In making this determination, the court looked to several

31. Id. at 98.
33. Gamble, 429 U.S. at 107–08. Although doctors prescribed a variety of medicines to alleviate J. W. Gamble's symptoms, Justice Thurgood Marshall conceded that the doctors could have x-rayed Gamble's back or employed some other diagnostic method. Id. at 107. Nevertheless, Justice Marshall stated that failure to order an x-ray was a medical decision that, at most, amounted to medical malpractice. Id.
34. Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
35. Id. at 104–05.
36. Id. at 116 (Stevens, J., dissenting). But see Wilson v. Seiter, 501 U.S. 294, 299 (1991) (holding that the subjective inquiry is required in Eighth Amendment cases); infra notes 79–82 and accompanying text (discussing the reasoning behind the Wilson standard).
37. Gamble, 429 U.S. at 117.
39. Id. at 339–40.
40. Id. at 341.
41. See Chapman v. Rhodes, 434 F. Supp. 1007, 1021 (S.D. Ohio 1977), rev'd, 452 U.S. 337 (stating that, although double celling is acceptable as a temporary measure, the conditions at SOCF were in no way transitory).
studies that recommended that each prisoner should have, at a minimum, fifty to fifty-five square feet of living quarters. Because of an increase in Ohio’s statewide prison population, which required SOCF to house more prisoners than its original intended capacity, inmates at SOCF had approximately twenty square feet per person less than this suggested amount. The Sixth Circuit affirmed, holding narrowly that double ceiling is cruel and unusual punishment, but only under conditions akin to those at SOCF.

Having not yet decided whether certain conditions of confinement constitute punishment that violates the Eighth Amendment, the Supreme Court granted certiorari to decide that issue. Writing for the majority, Justice Lewis Powell utilized a portion of the Gamble standard, stating that the Eighth Amendment prohibits punishments that involve unnecessary and wanton infliction of pain, including such inflictions that are “totally without penological justification.” Thus, when deprivation results in physical torture or pain without any penological purpose, or if conditions of confinement lead to deprivation of “basic human needs” or “the minimal civilized measure of life’s necessities,” such as food, medical care, and sanitation, this constitutes cruel and unusual punishment violative of the Eighth Amendment. The Rhodes Court held that the conditions at SOCF did not constitute cruel and unusual punishment because the inmates were not deprived of basic human needs; moreover, double ceiling occurred because of Ohio’s teeming inmate population, not as a result of prison officials’ wanton infliction of pain. In so holding, the Court stated, “To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.” Justice Powell also noted that state legislatures and prison officials are not insensitive to prisoners’ needs or penal system goals.

42. Id. at 1020–21 (citations omitted).
43. Id. at 1021.
44. See Rhodes, 452 U.S. at 344 (discussing the holding of the U.S. Court of Appeals for the Sixth Circuit); Chapman v. Rhodes, 624 F.2d 1099, 1099 (6th Cir. 1980) (affirming without opinion).
45. See generally Rhodes, 452 U.S. 337. Previously, Hutto v. Finney, 437 U.S. 678 (1978), challenged the Arkansas state correctional system’s practice of keeping inmates in solitary confinement for indeterminate durations, subjected to infectious diseases, an insufficient diet, and cells without beds. Id. at 682–83. Hutto, however, did not look at any one particular prison’s policies and practices of housing inmates.
47. See id. at 347.
48. Id. at 348. The Court distinguished Rhodes v. Chapman from Estelle v. Gamble and Hutto. The difference in Gamble was that denial of medical care in the most extreme case could result in torture, and in less severe situations could impose pain for no penological reason. Id. at 347. Rhodes differed from Hutto, because Hutto inmates were denied a sufficient diet and a bed to sleep on, thus resulting in “serious deprivations of basic human needs.” Id.
49. See id. at 348.
50. Id. at 347.
51. Id. at 352.
Therefore, courts must tread lightly in prison management and perform their only required duty—to protect constitutional rights.\textsuperscript{52}

Justices William Brennan, Harry Blackmun, and John Paul Stevens concurred in the judgment but wrote about their disagreement with Justice Powell on the issue of the Court’s intervention in prison administration.\textsuperscript{53} Justice Marshall was the sole dissenter, stating that the majority should not have ignored the studies—which had swayed the Southern District of Ohio’s decision—that supported the finding that the standard of living at SOCF put prisoners in conditions so crowded that they could be seriously harmed.\textsuperscript{54}

c. Whitley v. Albers: The Malicious and Sadistic Standard

Five years after \textit{Rhodes}, the Court granted certiorari in an Eighth Amendment case very different from its two predecessors. In \textit{Whitley v. Albers},\textsuperscript{55} the Court addressed the issue of whether a prison official’s use of deadly force to quell a prison riot constitutes cruel and unusual punishment proscribed by the Eighth Amendment.

On the day in question, several prisoners were intoxicated at the Oregon State Penitentiary.\textsuperscript{56} Two guards attempted to move those inmates into isolation, some of whom resisted.\textsuperscript{57} Inmate onlookers grew agitated at the situation, believing that the officers were using too much force to move the inmates, and several prisoners confronted the officers, taking one of them hostage.\textsuperscript{58} Harol Whitley, the prison guard manager, tried, without success, to negotiate with an inmate who brandished a homemade knife and riled up other inmates to break prison furniture.\textsuperscript{59} Believing that an intervention was necessary both to suppress the riot and to save the officer taken hostage, Whitley organized and led an assault squad, armed with shotguns, to the cellblock where the riot was ongoing.\textsuperscript{60} Whitley advised his officers to “shoot low” if any prisoners were climbing the stairs toward the hostage officer.\textsuperscript{61} Gerald Albers, an inmate involved in the riot, began ascending

\textsuperscript{52} Id.; see also infra Part I.C.1 (discussing the Court’s reluctance to intervene in prison administration).

\textsuperscript{53} \textit{Rhodes}, 452 U.S. at 359 (Brennan, J., concurring) (“[C]ourts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost.”); see also infra Part I.C.2 (discussing particular judges and commentators who believe that courts’ intervention in prison management is necessary to uphold prisoners’ substantive constitutional rights).

\textsuperscript{54} \textit{Rhodes}, 452 U.S. at 371–72 (Marshall, J., dissenting); see also infra Part I.A.2 (discussing the evolving standards of decency that govern Eighth Amendment jurisprudence and that Justice Marshall’s dissent highlighted).

\textsuperscript{55} 475 U.S. 312 (1986).

\textsuperscript{56} Id. at 314.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 314–15.

\textsuperscript{59} Id. at 315.

\textsuperscript{60} Id. at 315–16.

\textsuperscript{61} Id. at 316.
the stairs, and an officer shot multiple times in Albers’s direction. A bullet struck Albers in his knee.

Because Whitley posed a situation to the Court not of ongoing deprivation or inhuman conditions of confinement, but of circumstances where officers had taken security measures to control a crisis situation, Justice Sandra Day O’Connor, writing for the five-Justice majority, fashioned a new standard for such Eighth Amendment cases. She stated that “the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns 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.’” Justice O’Connor affirmed the holding of the district court, finding that the officer used force to restore order and to ensure that the prison staff, the guard held hostage, and the prisoners were safe. Furthermore, Officer Whitley gave the assault squad orders to shoot low, which did not evince an intention to harm prisoners in a wanton and unnecessary way.

Justices Marshall, Brennan, Blackmun, and Stevens dissented, criticizing the majority for again reading an express intent element into Eighth Amendment jurisprudence. The dissent emphasized that a prisoner need only show an unnecessary and wanton infliction of pain, which itself already poses an extremely high burden on the prisoner to prove. The dissenting Justices strongly believed that the existence of a prison riot or other similar disturbance should not lessen the constraints imposed on prison officials and stated that there is no justification for imposing a higher burden on prisoners in these types of cases.

62. Id.
63. Id.
64. See generally id. at 314–17.
65. Id. at 320.
66. Id. at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
69. Id. at 324. Moreover, the Court claimed that officials cannot consider every contingency or possible peril when confronted by a frenzied environment. Id. at 325.
70. Id. at 328–31 (Marshall, J., dissenting). But see infra Part I.A.1.d (discussing Wilson, where the Court held that to sustain an Eighth Amendment claim, an inmate must prove that the prison official acted with culpable intent).
71. Whitley, 475 U.S. at 329. The dissent stated that the Court had previously disavowed any intent requirement. Id.; see also Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opining that the evolving standards of decency “assessment does not call for a subjective judgment”). Moreover, the dissent noted that the majority took the intent standard from Johnson v. Glick, 481 F.2d at 1033, where Judge Henry Friendly considered intent as one of many factors, but not itself a dispositive element. Whitley, 475 U.S. at 329 n.1.
72. Whitley, 475 U.S. at 329–30. Justice Marshall posed a scenario that diminished the strength of the majority’s argument:
The issue of whether a prisoner must prove culpable intent to cause harm remained a contentious issue in the Court after the dissent’s lengthy discussion of that issue in *Whitley*. Thus, the Court granted certiorari in *Wilson v. Seiter* to discuss this limited question after the Southern District of Ohio granted summary judgment for the prison guards and the Sixth Circuit affirmed. In his complaint, Pearly Wilson alleged that a number of conditions of his confinement violated the Eighth Amendment’s prohibition on cruel and unusual punishment, including “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.”

Justice Antonin Scalia, writing for the majority, returned to the Court’s previous Eighth Amendment jurisprudence to decide whether culpable intent was necessary. He recalled that *Gamble* required a prisoner to prove that the offending official demonstrated “deliberate indifference” to his medical needs, and furthermore, that such indifference amounted to an “unnecessary and wanton infliction of pain.” The Court then stated that *Rhodes* called for a two-part analysis: (1) an objective inquiry into whether the deprivation was sufficiently serious, and (2) a subjective inquiry into whether the official acted with “a sufficiently culpable state of mind.” Finally, *Whitley*’s standard imposed the heightened requirement that the official act “maliciously and sadistically for the very purpose of causing harm.”

Drawing the holdings of these cases together, Justice Scalia stated directly what the *Whitley* Court had previously implied: “These

For if prison officials were to drop a bomb on a cellblock in order to halt a fistfight between two inmates, for example, I feel confident that the Court would have difficulty concluding, as a matter of law, that such an action was not sufficiently wanton to present a jury question, even though concededly taken in an effort to restore order in the prison.

*Id.* at 333–34.

73. *See supra* notes 70–72 and accompanying text; *see also supra* note 36 and accompanying text (discussing Justice John Paul Stevens’s dissent in *Gamble* where he urged that the Eighth Amendment does not require a subjective inquiry into the mind of the offending official).
75. *Id.* at 296.
78. *See generally id.* at 296–303.
79. *Id.* at 297 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).
80. *Id.* at 298.
81. *Id.* at 302 (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)). Justice Antonin Scalia noted that the Eighth Amendment requires a prisoner to prove that the official acted with more than a lack of due care for the prisoner’s safety or well-being. *Id.* at 298–99 (quoting *Whitley*, 475 U.S. at 319).
cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and usual punishment."

The Court also for the first time distinguished the standards under which conditions-of-confinement cases and prison disturbance cases are analyzed. In so doing, it stated that prison condition cases require no higher a burden than the *Gamble* standard of deliberate indifference. In contrast, *Whitley*'s malicious and sadistic standard governs emergency situations, a finding made based on the facts facing the prison official. Ultimately, "[o]ut of an abundance of caution," the Court vacated the Sixth Circuit's entry of summary judgment and remanded the case back to the court of appeals to apply the deliberate indifference test to the case.

Justices Byron White, Marshall, Blackmun, and Stevens concurred in the judgment, but read the precedent upon which Justice Scalia based his opinion in a very different way. The concurrence stated that *Rhodes* merely made an inquiry into whether the punishment was, in fact, intentionally doled out to harm the prisoner. Thus, the only investigation is into the objective severity of the inflicted punishment, not the subjective intent of the prison official. Moreover, the concurring Justices objected to the majority's reliance on *Gamble* and *Whitley*—cases in which the petitioners did not challenge conditions of confinement. Additionally, it stated that *Whitley* expressly articulated that conditions-of-confinement cases merely require an objective inquiry and that the majority misread *Whitley*'s dictum in placing emphasis on the subjective inquiry in such cases.

Notwithstanding the minor disagreement by the concurring Justices, *Wilson* was the culmination of an activist Court's prison condition jurisprudence. From *Gamble* to *Wilson*, the Court laid a solid foundation for the various standards that it would apply to the gamut of Eighth Amendment prison cases.

---

82. *Id.* at 299. Justice Scalia further noted that the intent requirement is drawn directly from the Eighth Amendment itself, which forbids pain inflicted when it is "formally meted out as punishment." *Id.* at 300; see also McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991) ("Whether an injury . . . is 'punishment' depends on the mental state of those who cause or fail to prevent it.").


84. *Id.* at 302–03. The deliberate indifference standard covers all conditions-of-confinement cases, which includes medical care, as this "is just as much a 'condition' of [an inmate's] confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Id.* at 303.

85. *Id.* at 302–03.

86. *Id.* at 305–06.

87. *Id.* at 308–09 (White, J., concurring).

88. *Id.* at 309.

89. See *id.* (stating that *Gamble* challenged inadequate medical care to one specific inmate, not general access to medical care in prisons, and that the facts in *Whitley* were clearly inapposite).

90. See *id.* at 310.
2. The Evolving Standards of Decency

Even though Gamble, Rhodes, Whitley, and Wilson provided disparate standards, Eighth Amendment jurisprudence before Gamble and throughout these prison conditions cases continually emphasized the Court's desire to have objective indicia—such as public attitude toward a given sanction, findings by state legislatures, or experts' opinions regarding a form of punishment—help define Eighth Amendment standards "to the maximum possible extent." The Court calls this objective factors inquiry, looking to "the evolving standards of decency that mark the progress of a maturing society." Quite simply, the Eighth Amendment ensures that certain forms of punishment—even though inflicted on unpopular people like prisoners and capital defendants—comport with human dignity and the standards of decency owed to all persons, notwithstanding their criminal status.

For example, Justice Marshall's Rhodes dissent noted that when SOCF was built, the state legislature made a judgment based on expert opinion that each prisoner should have his own cell and approximately sixty-three square feet of personal space. After the trial judge personally went to the prison and viewed the conditions himself, the Southern District of Ohio found that long exposure to SOCF's cramped conditions, to which two-thirds of the inmates were subjected because of their lengthy or life sentences, limited both physical and mental movement in a cruel way. As a result, Marshall criticized the majority for its ruling that violated the evolving standards of decency.

In the line of conditions-of-confinement cases, the Court made it clear that the deliberate indifference to serious deprivations of basic human necessities, such as medical care, food, shelter, and sanitation, do not accord

93. Id. at 372 (Marshall, J., dissenting); see also Fliter, supra note 23, at 23 (noting that state laws, jury-imposed sentences, and opinions of public interest groups are additional objective yardsticks to determine if a particular punishment violates the evolving standards of decency).
95. Trop v. Dulles, 356 U.S. 86, 101 (1958). In Trop v. Dulles, the Court questioned whether the government violated the Eighth Amendment when it stripped a man of his citizenship after he was found guilty of deserting the U.S. Army during wartime. Id. at 87–88. Although this action did not impose any physical pain or torture per se, the Court believed it caused the total destruction of an individual's status and political existence—"punishment more primitive than torture." Id. at 101. The Court stated that "the words of the Amendment are not precise, and that their scope is not static"; rather, the words must respond to the evolving standards of decency. Id. at 100–01.
96. See, e.g., Furman v. Georgia, 408 U.S. 238, 270 (1972) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").
98. Id. at 374.
99. Id. at 375.
with the evolving standards of decency.\textsuperscript{100} In \textit{Gamble}, however, the Court opined that, like inmate Gamble, not every prisoner who claims that he receives inadequate medical treatment in prison states a valid claim under the Eighth Amendment.\textsuperscript{101} Rather, a prisoner must allege that prison officials acted with \textit{deliberate} indifference to serious medical needs because only this type of indifference violates the evolving standards of decency.\textsuperscript{102}

Despite its continual reliance on the evolving standards of decency, the Court has conceded that a judgment of whether a punishment comports with human dignity is nonetheless "imprecise and indefinite."\textsuperscript{103} Justice White's \textit{Wilson} concurrence highlighted that this imprecision could negatively affect prisoners. Justice White feared that the ever-changing Eighth Amendment jurisprudence, with its high burdens on prisoners and inapplicability to various situations, might insulate prison officials from constitutional challenges, thus offending the evolving standards of decency.\textsuperscript{104}

**B. Hudson v. McMillian: The Court Responds to Excessive Force in Prison**

With the evolving standards of decency guiding the Court's Eighth Amendment jurisprudence, and \textit{Whitley} providing the standard for excessive force used in emergency situations,\textsuperscript{105} \textit{Hudson v. McMillian} was the Court's next vehicle to refine the excessive force standard under the Eighth Amendment. In \textit{Hudson}, the issue was whether excessive force outside of an emergency context may constitute cruel and unusual punishment if the prisoner does not suffer serious injury.\textsuperscript{106}

Keith Hudson, an inmate in a Louisiana state penitentiary, and Jack McMillian, a correctional officer at the facility, were arguing early one morning.\textsuperscript{107} Assisted by his colleague, Officer Marvin Woods, McMillian placed Hudson in handcuffs and shackles so that he could be walked to the "'administrative lockdown' area."\textsuperscript{108} Hudson alleged that on that walk,
Officer McMillian punched him about his body, while Woods kicked and punched him from behind, and Officer Arthur Mezo, the supervisor on duty, watched the assault, cautioning the guards “not to have too much fun.” As a result of the beating, Hudson suffered minor bruises, swelling of his face, mouth and lip, loose teeth, and a cracked partial dental plate.

Magistrate Judge Stephen Riedlinger of the U.S. District Court for the Middle District of Louisiana, who the parties consented to hear the case, awarded Hudson $800 after finding that Officers McMillian and Woods used unnecessary force and that Officer Mezo encouraged their actions. The Fifth Circuit, however, reversed the magistrate’s ruling. The court conceded that the force was objectively unreasonable and that the officials’ actions led to an unnecessary and wanton infliction of pain. Nevertheless, it held that Hudson did not have an Eighth Amendment claim because his injuries were “minor” and “required no medical attention.”

The Court granted certiorari to decide two issues. As to the broad question of which standard governs nonemergency excessive force cases, Justice O’Connor, writing for the Court, extended the Whitley standard: whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. To determine whether the use of force was wanton and unnecessary, Justice O’Connor stated that courts should apply a factors test, looking at (1) “the extent of injury suffered,” (2) “the need for application of force,” (3) “the relationship between that need and the amount of force used,” (4) “the threat ‘reasonably perceived by responsible officials,’” and (5) “any efforts made to temper the severity of a forceful response.”

As to the narrow issue of the case—whether a prisoner can make out an Eighth Amendment excessive force claim even in the absence of serious

109. Id.
110. Id.
111. Id.

112. Hudson v. McMillian, 929 F.2d 1014, 1015 (5th Cir. 1990) (per curiam). The U.S. Court of Appeals for the Fifth Circuit’s test examined whether there was (1) significant injury; (2) resulting from force that was clearly excessive to the need; (3) an excessiveness that was objectively unreasonable; and (4) which constituted an unnecessary and wanton infliction of pain. Id. (citing Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990)).
113. Id.
114. Id.

115. Hudson, 503 U.S. at 7. Justice O’Connor stated that it “works no innovation” to extend the Whitley v. Albers standard to all cases involving excessive force by prison officials because many of the concerns underlying her opinion in Whitley arise whenever guards use force to maintain control over inmates. Id. Moreover, many courts of appeals had already employed the Whitley standard in excessive force cases. Id. (citing Stenzel v. Ellis, 916 F.2d 423, 427 (8th Cir. 1990); Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc); Haynes v. Marshall, 887 F.2d 700, 703 (6th Cir. 1989); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988); Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987)). But compare Corselli, 842 F.2d at 26 (extending the Whitley standard), with Mertiwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) (holding that the deliberate indifference standard applies). The latter two cases demonstrate inconsistent application even within a given circuit.

injury—Justice O’Connor answered in the affirmative.117 She stated that the “absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it.”118 Justice O’Connor bolstered this holding in two ways. First, she invoked the two-part test espoused in Rhodes, that a prisoner must prove that (1) subjectively, the official acted with a sufficiently culpable state of mind, and (2) objectively, the use of force was wanton and unnecessary.119 Second, she called upon the evolving standards of decency to distinguish excessive force cases from conditions-of-confinement cases.120 Justice O’Connor opined that, in conditions-of-confinement cases, the evolving standards of decency are violated only when a prisoner proves extreme deprivation, because general discomfort is part and parcel of any prison sentence.121 In excessive force cases, however, the central inquiry is regarding the force. If a prison official uses force maliciously and sadistically for the sole purpose of causing harm, “contemporary standards of decency are always violated. This is true whether or not significant injury is evident.”122

Although the question before the Court was the extent of injury and how that inquiry plays into an Eighth Amendment excessive force claim, Justice O’Connor went further. She noted that not all malicious pushes and shoves by a prison guard create a federal cause of action.123 Rather, “[t]he Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments 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.’”124 Furthermore, she stated that Hudson’s injuries—bruises, swelling, loose teeth, and a cracked dental plate—were not de minimis injuries under the Eighth Amendment, and therefore, the extent of Hudson’s injuries did not justify a dismissal of his § 1983 claim.125

Justice Stevens concurred in part and concurred in the judgment but wrote separately for one major reason. He urged that nonemergency excessive force cases do not justify the malicious and sadistic standard.126

117. Id. at 4.
118. Id. at 7.
119. Id. at 8; see also id. at 7 (“[T]he extent of injury suffered by an inmate is one factor that may suggest . . . [that an officer] ‘evinced such wantonness with respect to the unjustified infliction of harm.’” (quoting Whitley, 475 U.S. at 321)); see also supra text accompanying note 116 (defining the factors to which courts should look for the objective inquiry).
120. Hudson, 503 U.S. at 8–9.
121. Id.
122. Id. at 9.
123. Id. (citing a frequently quoted statement by Judge Friendly in Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), that “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights”).
124. Id. at 9–10 (citing Whitley, 475 U.S. at 327). Rather than invoking the traditional language of the evolving standards of decency, Justice O’Connor reworded the same concept in Hudson v. McMillian as “the conscience of mankind.” Id. at 10.
125. Id. at 10; see also infra Part II.B (discussing circuit courts that have taken this dicta to be part of Hudson’s holding).
126. Hudson, 503 U.S. at 12 (Stevens, J., concurring).
When there is no threat to inmates, prison officials, or institutional security, the license to use force is severely limited; therefore, Justice Stevens believed that the test should merely be whether the prison guard's attack resulted in an infliction of unnecessary and wanton pain.\(^1\) Additionally, Justice Stevens highlighted a fact that was not emphasized by the majority, that Hudson was handcuffed and shackled, rendering him unable to fight back when the officers beat him.\(^2\) Thus, under the facts, any force resulted in the infliction of unnecessary and wanton pain.\(^3\)

Justice Blackmun also concurred in the judgment, lauding the majority for holding that excessive force claims under the Eighth Amendment do not turn on whether there is significant injury.\(^4\) Like Justice Stevens, however, Justice Blackmun did not join the extension of the Whitley standard to all excessive force cases.\(^5\) Justice Blackmun additionally highlighted two concerns that the majority opinion did not address. First, he noted that an amicus brief for the respondent officers stated that the significant injury requirement helped the Fifth Circuit sort through and pare down prisoner excessive force petitions.\(^6\) In response, Blackmun castigated the Fifth Circuit for using this requirement in a self-serving manner and at the expense of prisoners' substantive constitutional rights.\(^7\)

Second, Justice Blackmun interpreted the majority opinion to say that it would not foreclose a prisoner's claim of psychological harm without corresponding physical harm.\(^8\) Moreover, in dicta, Justice Blackmun noted that the majority opinion implied—albeit subtly—that "de minimis or nonmeasureable pain is not actionable under the Eighth Amendment."\(^9\)

Justice Clarence Thomas, joined by Justice Scalia, dissented. The dissent claimed that the majority expanded the Cruel and Unusual Punishments

---

\(^{127}\) Id. at 13 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976); Unwin v. Campbell, 863 F.2d 124, 135 (1st Cir. 1988)).

\(^{128}\) See id.

\(^{129}\) Id.

\(^{130}\) Id. at 13–14 (Blackmun, J., concurring). Justice Harry Blackmun defined "significant injury" as an injury that necessitates medical attention or leaves lasting marks. Id. at 13.

\(^{131}\) Id. at 14. Blackmun noted that he dissented in Whitley and did not approve of the malicious and sadistic standard in any prison-related context. Id.

\(^{132}\) Id. at 14; see Brief for Texas et al. as Amici Curiae Supporting Respondents at *20–21, Hudson, 503 U.S. 1 (No. 90-6531), 1991 U.S. S. Ct. Briefs LEXIS 346 ("It would, in fact, cripple the eighth amendment and unreasonably burden the federal judiciary to invoke a system which provides no objective method for winnowing the wheat from the chaff.").

\(^{133}\) See Hudson, 503 U.S. at 15 (stating that protecting constitutional rights by "pure policy preferences for the paring down of prisoner petitions" is an "audacious approach to the Eighth Amendment"). Justice Blackmun cited the many measures that are used to control docket management in the federal courts, including requiring a prisoner to exhaust all administrative remedies before filing in federal court, providing prison officials with a determination on a qualified immunity defense before trial, and enabling judges to dismiss a complaint in forma pauperis if the action is frivolous. Id. at 15–16.

\(^{134}\) Id. at 16.

\(^{135}\) Id. at 17; see also infra Part II.B (discussing certain circuit courts that also interpret the majority opinion to say that de minimis injury precludes redress under the Eighth Amendment).
Clause “beyond all bounds of history and precedent.” The gravamen of Justice Thomas’s dissent was that 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.” To bolster his argument, Justice Thomas rehashed the language of Gamble, that an inmate must allege deliberate indifference to serious medical needs, and Wilson, that the objective inquiry in an Eighth Amendment case asks whether the deprivation was sufficiently serious. Furthermore, Justice Thomas was baffled by the majority’s extension of the Whitley standard to all excessive force claims, even when no competing institutional concerns were at issue. Finally, the dissent urged that the various state legislatures—not federal courts—wield the responsibility to prevent and punish this type of conduct in prisons, implying that the Court should remain hands-off to these types of cases.

C. The “Hands-Off Doctrine”

1. The Court’s Reluctance to Involve Itself in Prison Administration

For over a century before Gamble was decided, the Court employed the established and broad “hands-off doctrine” to prison management, affording officials wide discretion in the operation of correctional facilities. Tracing back to the late nineteenth century, courts regarded prisoners as slaves of the state and of the institutions in which they served their land. Justice Clarence Thomas stated that such conduct by prison officials induces feelings of anger, but that a feeling of contempt for such behavior should not turn the Eighth Amendment into a national code of prison regulation. Id. at 28. Justice Thomas stated that Wilson v. Seiter explained that deliberate indifference is the baseline mental state to establish an Eighth Amendment claim and a departure from that is only justified in cases like Whitley, where officers respond to emergency situations and their conduct under the circumstances can only be construed as wanton if they act with intent to cause harm. Id. at 23–24. It was especially puzzling to Justice Thomas that “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 officials involved), but are automatically violated by any malicious use of force, regardless of whether it even causes an injury.” Id. at 25.

---

136. Hudson, 503 U.S. at 28 (Thomas, J., dissenting).
137. Id. at 18. Justice Clarence Thomas stated that such conduct by prison officials induces feelings of anger, but that a feeling of contempt for such behavior should not turn the Eighth Amendment into a national code of prison regulation. Id. at 28.
138. Id. at 20–22.
139. Id. at 24. Justice Thomas stated that Wilson v. Seiter explained that deliberate indifference is the baseline mental state to establish an Eighth Amendment claim and a departure from that is only justified in cases like Whitley, where officers respond to emergency situations and their conduct under the circumstances can only be construed as wanton if they act with intent to cause harm. Id. at 23–24. It was especially puzzling to Justice Thomas that “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 officials involved), but are automatically violated by any malicious use of force, regardless of whether it even causes an injury.” Id. at 25.
140. Id. at 28–29.
141. See, e.g., Bell v. Wolfish, 441 U.S. 520, 562 (1979) (stating that federal courts should only intervene when a particular prison condition violates a prohibition in the Constitution); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (“Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”). See generally JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 261–63 (5th ed. 1997) (tracking various conditions-of-confinement decisions that followed the hands-off doctrine); SHOOK & SIGLER, supra note 21, at 7–15 (noting that “the federal government had no legal standing to interfere in the operations of state institutions”).
sentences. Prisoners forfeited their constitutional rights upon entering prison and could only claim rights the state chose to extend them. Moreover, the general public was apathetic to—or uninformed about—prisoners’ plights, thus assisting courts in maintaining this stance. Even in 1958, the Court affirmed the long-standing tradition of nonintervention in Gore v. United States, where Justice Felix Frankfurter emphasized that the Court would not enter the domain of prison management because that would unconstitutionally intrude on legislative responsibilities. Because only those who face day-to-day correctional operations truly know what prison is like and what policies need to be in place, the Court traditionally regarded the federal courts as “ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints.”

In Eighth Amendment cases, the Court has also historically given deference to prison administrators. This obeisance stems from a variety of policy considerations. One consideration is that prison administrators are in the best position to know what is needed to preserve institutional order and security, how to discipline inmates, and what policies are required to ensure that the goals of the penal system are reached. Courts are unwilling to overstep their bounds in this realm because prison operations are multifaceted and complicated. Thus, the hands-off approach merely

142. See, e.g., Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 798–99 (1871) (holding that the Court defers to the laws and regulations of a state with respect to conditions of penal servitude).
146. Id. at 393.
148. See MUSHLIN, supra note 22, at 7–8 (discussing the many policy reasons for the hands-off doctrine, including (1) separation of powers concerns; (2) federalism principles; (3) courts believing they lack the expertise to manage prisons; (4) a way to protect judges from hearing baseless prisoner complaints; and (5) the great deal of time judges would have to expend to hear cases and fashion remedies, which could overload already onerous dockets).
"reflects no more than a healthy sense of realism" that federal courts are unqualified to reform prison administration.\textsuperscript{151}

A second reason to maintain a hands-off approach is that courts must show a level of trust in prison officials that they will do their jobs correctly, respecting constitutional limitations.\textsuperscript{152} The \textit{Rhodes} majority stated that courts cannot presuppose that state legislatures and prison officials will push constitutional concerns aside so that they can achieve self-interested goals.\textsuperscript{153} Rather, officials should be afforded deference that they will punish justly and will make policy choices that are sensitive to the U.S. Constitution and the evolving standards of decency.\textsuperscript{154} Because prison officials have the expertise and already bear onerous responsibilities in the administration of their jobs without federal court intervention, interference administration decisions has quite simply become "a culture or ethos to which many lower courts aim to conform their conduct").

151. \textit{Jones}, 433 U.S. at 126 (quoting \textit{Procunier}, 416 U.S. at 405). \textit{But see Mushlin, supra} note 22, at 8 (arguing that this policy concern "rests on a misconception of the judiciary’s role in prison cases” because courts get involved merely to rectify constitutional violations, not to micromanage prisons generally).

152. Congress empowers the Bureau of Prisons to "manage[] and regulat[e]... all Federal penal and correctional institutions" and to "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(1), (3) (2006); \textit{see also Rhodes v. Chapman}, 452 U.S. 337, 352 (1981) (advocating that, absent contrary evidence, courts cannot presuppose “that state legislatures and prison officials are insensitive to the requirements of the Constitution"); Fliter, \textit{supra} note 23, at xvi ("Many judges felt that intervention would weaken the authority of corrections officials and undermine discipline among inmates."); cf. Emily Calhoun, Comment, \textit{The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal}, 4 Hastings Const. L.Q. 219, 246 (1977) (claiming that until the public condemns a particular condition in prison, the Court will remain deferential because legislative approval is objective indicia that a condition comports with the evolving standards of decency).

153. \textit{See Rhodes}, 452 U.S. at 352; Malcolm M. Feeley & Edward L. Rubin, \textit{Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons} 380–81 (1998) (discussing courts’ inherent inability to implement lasting change in prisons because separation of powers requires that the politically accountable branches establish such social policy). \textit{But see Fliter, supra} note 23, at xvi (observing that those who are politically accountable have also remained hands-off to prison reform so as not to appear to their constituents that they are “soft on crime,” because there are few political benefits that would result); Van Swearingen, Note, \textit{Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process}, 96 Cal. L. Rev. 1353, 1381 (2008) (arguing that courts must intervene because elected officials have failed to “show true leadership" in rectifying abuse in prison); cf. Ahmed A. White, \textit{The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society}, 56 Buff. L. Rev. 737, 788 (2008) (commenting that even district attorneys do not want to intervene in excessive force cases because they, too, are elected, and prisoners do not vote, but prison guards do).

154. \textit{See Whitley}, 475 U.S. at 321–22; Michael S. Feldberg, Comment, \textit{Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform}, 12 Harv. C.R.-C.L. L. Rev. 367, 371 & n.20 (1977) (stating that legislative prison reform is favored over judicial activism because the legislature is not impeded by the same practical difficulties facing courts, and thus can bring about longer lasting change).
by the courts could render an "already daunting task virtually impossible."\footnote{155
See Lewis v. Casey, 518 U.S. 343, 386–87 (1996) (Thomas, J., concurring) (advocating for the hands-off approach); see also Simeon Goldstein, Note, Prisoners with AIDS: Constitutional and Statutory Rights Implicated in Family Visitation Programs, 31 B.C. L. REV. 967, 1023 (1990) ("Courts presume that... [prison] regulations and policies are rationally related to legitimate penological interests. The presumption of good faith ends only when prison regulations may violate constitutionally protected rights of prisoners.").}

Congress reinforced the Court's position of nonintervention with the passage of the Prison Litigation Reform Act of 1995 (PLRA),\footnote{156
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C.).} which limited the type and scope of remedies that courts may provide to prisoners. One of the PLRA’s purposes was to "restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems."\footnote{157
141 CONG. REC. S14,414 (Sept. 27, 1995) (statement of Sen. Bob Dole); see also id. at S14419 (statement of Sen. Spencer Abraham) ("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.").}
The PLRA signaled Congress's desire for inmates to air their grievances through internal prison compliance structures by (1) requiring state prisoners to exhaust all internal prison grievance procedures before filing a case in federal court;\footnote{158
42 U.S.C. § 1997e(a) (2000).} (2) imposing filing fees on indigent prisoner litigants;\footnote{159
28 U.S.C. § 1915(b) (2000).} (3) enabling courts to reject claims of emotional injury without corresponding physical injury;\footnote{160
28 U.S.C. § 1915(g).} and (4) initiating a "three-strikes" rule that forbids prisoners from filing in federal court after three previous claims have been dismissed as frivolous.\footnote{161
28 U.S.C. § 1915(g).} The PLRA "worked as intended," and decreased federal inmate court filings by forty-three percent in six years.\footnote{162
Swearingen, supra note 153, at 1376.}

2. Breaking from the Hands-Off Doctrine: Why the Court Should Get Involved

Even before the hands-off doctrine formally ended in the early 1970s,\footnote{163
See MUSHLIN, supra note 22, at 9 (discussing two early 1970s cases—Procunier v. Martinez, 416 U.S. 396 (1974), and Wolff v. McDonnell, 418 U.S. 539 (1974)—that "sounded the death knell to the hands-off doctrine"). But see infra Part III.A (arguing that some circuits have revived the hands-off doctrine by requiring a showing of more than de minimis injury in Eighth Amendment excessive force cases).} lower courts and a small number of Supreme Court Justices saw the flip side of the judiciary's failure to get involved in prison reform and urged courts to step in when substantial constitutional rights are at issue. For example, in his Rhodes concurrence, Justice Brennan argued that lower courts have never been overeager to bear the responsibilities of ensuring...
basic humanity in prisons; rather, he advocated that courts are the in the “strongest position to insist that unconstitutional conditions be remedied,” which can be done even while a court is being deferential to prison policies and practices.164

Likewise, Justice Marshall’s Rhodes dissent criticized the majority for their “unfortunate dicta” that federal courts could read as a warning to stay out of prison operations.165 He believed this dicta gave courts a furtive way out of sanctioning prison officials’ use of cruel and unusual punishment.166 Likewise, Justice White highlighted a similar point in his Wilson concurrence. Justice White stated that the Wilson court had departed from precedent in holding that the Eighth Amendment requires an inquiry into whether a prison official had a culpable state of mind.167 In so doing, he hinted that the Court had imposed this higher burden on prisoners because the Court believed that prison officials deserve deference in how they carry out prison policies.168

Furthermore, in his Hudson concurrence, Justice Blackmun aired his disdain for the Fifth Circuit’s use of the “significant injury” requirement as a way to pare down prisoners’ excessive force petitions.169 Justice Blackmun believed that the Court must take an activist approach to hearing Eighth Amendment cases because the “right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable.”

165. See id. at 375 (Marshall, J., dissenting) (quoting the majority’s statement that, in overseeing prison administrations, “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”).
166. Id.; see also Mann v. Reynolds, 828 F. Supp. 894, 902 (W.D. Okla. 1993) (stating that it is a federal court’s responsibility to remain aware of prisoners’ constitutional rights after being convicted and imprisoned).
168. See id. Justice Byron White stated further that the majority’s standard would enable prison officials to defeat § 1983 challenges as a trickle-down effect of this deference. Id. at 311.
170. Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring); see also Hickey v. Reeder, 12 F.3d 754, 758 (8th Cir. 1993) (“[W]e extend wide ranging deference to the judgment and policies of the prison officials who must maintain internal order and discipline . . . . Our deference, however, does not insulate actions taken in bad faith or actions that amount to a wanton infliction of pain for no legitimate reason.” (citing Whiteley v. Albers, 475 U.S. 312, 322 (1986))); Lisa Gizzi, Note, Helling v. McKinney and Smoking in the Cell Block: Cruel and Unusual Punishment?, 43 AM. U. L. REV. 1091, 1129 (1994) (arguing that when a state fails to ensure prisoners are housed in safe conditions, a court must step in for redress).
Members of the prisoners’ rights lobby, scholars, and legal commentators, among others, have also taken a hard stance against judicial nonintervention. For example, in 2005, the Commission on Safety and Abuse in America’s Prisons, a twenty-one member nonpartisan panel comprised of a former circuit court judge, attorneys, seasoned correctional officers, civic leaders, and former prisoners, explored the gravest problems facing U.S. correctional facilities.\textsuperscript{171} Among the Commission’s thirty recommendations for prison reform in its June 2006 report, \textit{Confronting Confinement},\textsuperscript{172} it urged federal courts to play an important role in monitoring abuse in prison and advocated changes to the PLRA so that federal courts could deliver justice to the many inmates who confront abuse in prisons.\textsuperscript{173}

John J. Gibbons, former Chief Judge of the Third Circuit and a member of the Commission, recently spoke about prison conditions and inmate abuse before the U.S. House of Representatives Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.\textsuperscript{174} In his comments, he noted his bias about the powerful change that he believes judges can make, but stressed that at times courts have been the \textit{only} means of oversight of correctional facilities.\textsuperscript{175} Moreover, Gibbons advocated that federal court intervention led to myriad successes, including a reduction in overcrowding, the revamping of out-of-date prisons, improved medical and health services for prisoners, and a decrease in the use of excessive force.\textsuperscript{176}

John Boston, the director of the New York Legal Aid Society’s Prisoners’ Rights Project, also advocated for courts’ intervention when prisoners’ constitutional rights are at issue.\textsuperscript{177} Speaking from the perspective of a lawyer who has brought numerous class action lawsuits on

\begin{footnotesize}
\begin{enumerate}
\item[173.] See \textit{id.} at 16.
\item[175.] \textit{id.} at 2. Judge John J. Gibbons went on to emphasize that “the improvement of safety and reduction of abuse in prisons in America benefits everyone, including correctional staff, inmates’ family members, and the greater public.” \textit{id.} at 3.
\item[176.] \textit{id.} at 2. Judge Gibbons bolstered this contention by citing successful class action cases that curbed patterns of excessive force. For example, he praised \textit{Sheppard v. Phoenix}, 210 F. Supp. 2d 450, 459–60 (S.D.N.Y. 2002), where Rikers Island Correctional Facility in New York City successfully implemented institutional changes that halted a pattern of excessive force. \textit{id.}
\item[177.] See John Boston, Project Dir., Prisoners’ Rights Project, Legal Aid Soc’y, Testimony Prepared for the Commission on Safety and Abuse in America’s Prisons 17 (Apr. 20, 2005) [hereinafter Testimony of John Boston], transcript available at http://www.prisoncommission.org/statements/boston_john.pdf (stating that litigation brings about desired reform, but conceding that it is a “blunt instrument for reforming complex institutions”).
\end{enumerate}
\end{footnotesize}
behalf of injured prisoners, Boston has noted that New York State court intervention on issues of excessive force resulted in a marked decrease in prison official violence "with no loss of administrative control."\(^{178}\)

Likewise, commentators have underscored the notable changes that judicial activism has brought about for prisoners, even stating boldly that "litigation has probably been the single most important source of change in prisons and jails during the past forty years."\(^ {179}\) Thus, despite some prison officials' resentment toward court involvement in rectifying prisoner abuse issues, some scholars believe that judicial intervention places prison reform on the public agenda, contributing to much needed change in U.S. correctional facilities.\(^ {180}\)

II. DISSECTING THE CIRCUIT SPLIT—WHETHER A PRISONER MUST PROVE MORE THAN DE MINIMIS INJURY TO SUSTAIN AN EXCESSIVE FORCE CLAIM

The *Hudson* Court took the Eighth Amendment in a different direction than previous Eighth Amendment jurisprudence had seen before. The Court said that a petitioner does not need to prove serious injury to prevail on an Eighth Amendment excessive force claim.\(^{181}\) In so holding, however, the Court failed to define what constitutes "serious," "significant," "minor," "minimal," or "de minimis"\(^ {182}\) injury for purposes of this inquiry, words used throughout the *Hudson* opinion and in the Court's previous Eighth Amendment jurisprudence.\(^ {183}\) The majority did not want to define these

180. Id. Moreover, Professor Malcolm M. Feeley of U.C. Berkeley Boalt Hall School of Law and practicing attorney Van Swearingen endorsed "four powerful trends" that prison reform litigation incited: (1) increased professionalism within prisons; (2) standardization across correctional facilities for best policies and practices; (3) a proliferation of the federal government's interest in supervising prison facilities; and (4) "the last step in constitutionalizing the criminal process." Id.
181. See supra text accompanying note 118 (discussing the narrow holding in *Hudson*).
182. The Latin phrase "de minimis" means trifling, minimal, or something "so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 464 (8th ed. 2004). The phrase comes from the larger *de minimis non curat lex*, which means that the "law does not concern itself with trifles." Id. For the purposes of an Eighth Amendment inquiry, courts have failed to define explicitly what constitutes a de minimis injury. See, e.g., Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997) (noting that the Fifth Circuit had not offered a definition of de minimis injury, but that the inquiry should require a commonsense approach—whether the injury at issue would "require or not require a free world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury"); cf. L. Allan Parrott, Jr., Note, *Hudson v. McMillian and Prisoners' Rights in the 1990s: Is the Supreme Court Now More Responsive to "Contemporaneous Standards of Decency"?*, 27 U. RICH. L. REV. 151, 166 (1992) (commenting that after *Hudson* courts would dismiss cases with only de minimis injury, "thereby putting a new premium on what is and what is not de minimis injury").
amorphous words, and perhaps for good reason. For, if the Court had “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.”\textsuperscript{184} However, the Court failed to discuss or expressly define in \textit{Hudson} what level of injury can sustain an Eighth Amendment excessive force claim, an issue on which the circuits are split.

Part II.A examines the circuit courts that have stringently adhered to the \textit{Hudson} text by looking at the force applied rather than the injury inflicted,\textsuperscript{185} which Justice O’Connor stated was the integral inquiry in an excessive force case.\textsuperscript{186} Part II.B, however, highlights cases from a handful of circuit courts that have interpreted \textit{Hudson} to state that some fixed minimum quantum of injury is necessary, although the injury need not be significant.\textsuperscript{187}

\textbf{A. The Injury Need Not Be Significant: The Third, Sixth, Eighth, Tenth, and Eleventh Circuits’ Approach}

One set of circuits employ the plain meaning of \textit{Hudson} by looking directly at the force an officer used and whether the officer evinced malicious or sadistic intent to cause the prisoner harm.\textsuperscript{188} Under this interpretation of \textit{Hudson}, the injury that a prisoner sustains is examined, but

\begin{footnotesize}
\begin{itemize}
\item[] Amendment words and phrases, including “cruel,” “unusual,” “unnecessary and wanton,” and “totally without penological justification”). Nonetheless, one can draw on \textit{Hudson}'s oral argument to determine what the term “de minimis” means to the Court. For example, in attempting to elicit from the prison guards’ counsel what injury requirement the Court should adopt, a Justice noted, “I think I can understand the level that you might call de minimis. You know, it’s really negligible. I guess a slap over the knuckles with a ruler or something like that . . . .” Transcript of Oral Argument at *24, \textit{Hudson} v. McMillian, 503 U.S. 1 (1992) (No. 90-6531), 1991 U.S. Trans. LEXIS 245. The \textit{Hudson} opinion, however, did not reflect any meaningful discussion about what constitutes de minimis injury.
\item[185.] \textit{See infra} Part II.A (focusing on case law from the Third, Sixth, Eighth, Tenth, and Eleventh Circuits that hold that prisoners do not need to prove more than de minimis injury).
\item[186.] \textit{Hudson}, 503 U.S. at 6–7 (“[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in \textit{Whitley}: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”).
\item[187.] \textit{See infra} Part II.B (discussing how the Second, Fourth, Fifth, and Seventh Circuits have pieced together different portions of Justice O’Connor’s \textit{Hudson} opinion to find that a prisoner must allege more than de minimis injury to sustain an Eighth Amendment claim).
\item[188.] \textit{See Hudson}, 503 U.S. at 6–7. The \textit{Hudson} court held that the Eighth Amendment does not recognize de minimis uses of physical force because not every push or shove violates a prisoner’s constitutional rights. \textit{Id.} at 9–10. The Court did not, however, expressly discuss de minimis injury, likely because the central inquiry under the Eighth Amendment is the force.
\end{itemize}
\end{footnotesize}
is merely one of many factors to which a court looks in determining whether the force was excessive under the circumstances. 189

1. The Sixth Circuit: Moore v. Holbrook

The Sixth Circuit was the first circuit to undertake applying Hudson to a new set of facts. In Moore v. Holbrook, 190 the facts were hotly disputed. Nevertheless, the Southern District of Ohio accepted the prison officials' version of the facts and held that the injuries were de minimis and temporary, and, therefore, that the amount of force used was neither inordinate nor excessive. 191

In Moore, there had been a riot in the Southern Ohio Correctional Facility where inmates flooded the cellblock, started fires, and threw objects at inmates and prison officials. 192 Inmate William Moore claimed that the day after the riot, three officers came to his cell, handcuffed him, punched him in the face, placed a stun gun between his arms, and dragged him out of his cell and up a set of stairs, punching and kicking him the entire way. 193 The officers disputed those facts, claiming that during the day Moore alleged he was beaten, the riot was still in progress, and Moore was heavily involved. 194 They stated that as they were taking Moore, who had been handcuffed, up the stairs, he fell on top of Troy Holbrook, one of the officers. 195 Moore claimed, and his medical records confirmed, that he suffered an edema (swelling) on his forehead, slight cuts on his wrists, and pain in his right shoulder, beneath both arms, and in his groin. 196

The Sixth Circuit utilized the subjective and objective tests set forth in Rhodes to analyze the case. 197 Under the subjective test, the court stated that the inquiry is merely whether the officer's wantonness reveals itself through the use of malicious and sadistic force for the very purpose of causing harm. 198 The court also opined that, under the objective test, "no actual injury needs to be proven to state a viable Eighth Amendment

189. Id. at 7 ("[T]he extent of injury suffered by an inmate is one factor that may suggest '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..." (citing Whitley v. Albers, 475 U.S. 312, 321 (1986))); see supra text accompanying note 116 (laying out the factors test used to determine whether the use of force was wanton and unnecessary).
190. 2 F.3d 697 (6th Cir. 1993).
191. Id. at 698, 701.
192. Id.
193. Id.
194. Id. William Moore denied any involvement in the riot whatsoever. Id. at 704.
195. Id.
196. Id. at 698, 704.
197. See supra text accompanying note 80 (discussing the objective and subjective inquiries for an Eighth Amendment claim).
Because the court believed that there were genuine issues of material fact, it reversed the judgment of the Southern District of Ohio and remanded the case.

2. The Third Circuit: Brooks v. Kyler

In Brooks v. Kyler, the Third Circuit also discussed whether an inmate needs to prove more than de minimis injury to sustain an Eighth Amendment claim. In that case, inmate Alan Brooks had been approved to make a legal phone call while being handcuffed to a waist restraint belt. Ten minutes into the call, an officer told Brooks to hang up the telephone. Before he actually hung up, however, another officer rushed into the room and punched Brooks in the head, causing him to fall onto the floor. While on the floor (and still handcuffed to the waist restraint), various officers punched, kicked, choked, and verbally abused Brooks. Brooks sustained abrasions on his neck and hands, suffered an increase in his already-high blood pressure, and displayed an onset of anxiety and depression.

Using a textual approach to Hudson, the Third Circuit reversed the U.S. District Court for the Middle District of Pennsylvania’s entry of summary judgment. The court stated, “As we read [Hudson], the Supreme Court is committed to an Eighth Amendment which protects against cruel and unusual force, not merely cruel and unusual force that results in sufficient injury.” Thus, even though Brooks only displayed “minor” or “de minimis” injuries, the court strongly indicated that the focus is on the force used and whether that force is wanton and unnecessary under the objective factors test. The court further held that “there is no fixed minimum quantum of injury that a prisoner must prove that he suffered through objective or independent evidence in order to state a claim for wanton and excessive force.”

199. Id. (citing Boretti v. Wiscomb, 930 F.2d 1150, 1154-55 (6th Cir. 1991), a pre-Hudson case where the Sixth Circuit expressed its view that a prisoner may recover for an Eighth Amendment violation in the absence of actual injury).
200. Id. at 702.
201. 204 F.3d 102 (3d Cir. 2000).
202. Id. at 104.
203. Id.
204. Id.
205. Id.
206. Id. at 104-05.
207. Id. at 109.
208. Id. at 108; see also Smith v. Mensinger, 293 F.3d 641, 648 (3d Cir. 2002) (following Brooks).
209. Brooks, 204 F.3d at 108.
210. Id. at 104.
Additionally, the court criticized the Fourth Circuit's approach to this issue in *Norman v. Taylor*, where the court held that de minimis injury is conclusive evidence that de minimis force was used. The court found the Fourth Circuit's reading of *Hudson* "unsatisfactory" because any wanton use of force against a prisoner, even absent concurrent injury, should preclude dismissal of an excessive force claim under the Eighth Amendment.

3. The Eighth Circuit: *United States v. Miller*

Case law from the Eight Circuit closely follows the Third and Sixth Circuits' excessive force jurisprudence. In *United States v. Miller*, the Eighth Circuit was faced with a case where the petitioner suffered only a "'busted' and bloodied lip" and a hurt leg; however, the facts surrounding the use of force showed much more malicious intent than the injuries suggested. When inmate Climmie Jones was acting disorderly, Officer Arlen Whitley took him into a detoxification room to "cool off." In the room, Jody Ray Miller, another officer, punched Jones with a closed fist, causing Jones to fall onto the floor. Then, Miller, who was wearing boots, kicked and stomped on Jones's upper body. Other officers who were present during the beating stated that Miller had no penological reason for the force, especially because Jones was not resisting. Nevertheless, Officer Miller argued that there was inconclusive evidence of cruel and unusual punishment because Jones's injuries were not serious. The Eighth Circuit disagreed, finding Miller's "unjustified attack" excessively.

211. 25 F.3d 1259 (4th Cir. 1994) (en banc); see also infra notes 248–57 and accompanying text (discussing *Norman v. Taylor* and the Fourth Circuit's interpretation of the injury requirement).
212. *Brooks*, 204 F.3d at 108.
213. *Id.*; see also *Carrasco v. Campagna*, No. C 03-4727 SBA (PR), 2005 WL 2171884 (N.D. Cal. Aug. 30, 2005). In *Carrasco v. Campagna*, the U.S. District Court for the Northern District of California highlighted the circuit split as to whether a prisoner must prove more than de minimis injury in excessive force cases. *Id.* at *5. The U.S. Court of Appeals for the Ninth Circuit has not addressed the issue, except in a surface manner in *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002), a case that discussed the physical injury standard that should be applied to cases filed under the Prison Litigation Reform Act (PLRA). In *Oliver*, the Ninth Circuit noted that it did not agree with the Fifth Circuit, which requires that a prisoner prove an injury that is more than de minimis. *Id.* at 628. The court further stated that the Fifth Circuit's reading of *Hudson* "does not accurately describe the Eighth Amendment standard enunciated by the Supreme Court." *Id.*
214. 477 F.3d 644 (8th Cir. 2007).
215. *Id.* at 646.
216. *Id.*
217. *Id.*
218. *Id.* Jody Ray Miller also called Climmie Jones derogatory racial epithets. *Id.*
219. *Id.* Officer Arlen Whitley spoke up against Officer Miller by alerting authorities that Miller told him to write a "good report," which would leave out any mention of the assault on inmate Jones. *Id.*; cf. infra Part III.B (discussing the documented problem within correctional facilities that officers substantiate colleagues' fabricated stories to assist them in dodging punishment for using excessive force).
220. *Miller*, 477 F.3d at 647.
sadistic and cruel. Furthermore, the court stated that "the fact that Miller may have been able to inflict even greater injuries upon Jones [did] not make the attack any less malicious or sadistic."

4. The Tenth Circuit: United States v. LaVallee

In United States v. LaVallee, the Tenth Circuit agreed that Hudson did not state that an inmate must prove a particular quantum of injury to sustain an excessive force claim. LaVallee stemmed from a three-year government probe into widespread prisoner abuse and document falsification at the U.S. Penitentiary Administrative Maximum Facility in Florence, Colorado (ADX Florence). The investigation uncovered a conspiracy among certain prison guards to abuse aggressive prisoners as a way to notify them that hostile behavior would not be tolerated at ADX Florence. The probe also revealed the officers' failure to properly report the excessive force through memoranda or videotape as required by ADX Florence policy.

In defending themselves against the charges, the named officers argued that the U.S. District Court for the District of Colorado erred in giving jury instructions that allowed the jury to convict even if the prisoners only presented de minimis injuries. The LaVallee court quoted Brooks in holding that the Eighth Amendment proscribes cruel and unusual force: "A contrary holding would mean that 'a prisoner could constitutionally be attacked for the sole purpose of causing pain as long as the blows were inflicted in a manner that resulted in visible (or palpable or diagnosable) injuries that were de minimis.'" The Tenth Circuit held that the jury instructions were proper and that a prisoner need not prove a "certain level or type of injury" to prevail on a claim of excessive force under the Eighth Amendment. Furthermore, in keeping with the arguments of the Third

---

221. Id.
222. Id. But see Cummings v. Malone, 995 F.2d 817, 822–23 (8th Cir. 1993) (inferring that the Eighth Circuit requires a showing of more than de minimis injury); infra note 244 and accompanying text (discussing a case from a district court within the Eleventh Circuit that cited to Cummings as Eighth Circuit authority on the injury requirement in an excessive force case).
223. 439 F.3d 670 (10th Cir. 2006).
224. Id. at 687–88.
225. Id. at 677. United States v. LaVallee consolidated five cases that resulted from the investigation. Id.
226. Id. at 678.
227. Id.
228. Id. at 687. The jury instructions defined "bodily injury" as "(1) a cut, abrasion, bruise, burn, or disfigurement; (2) physical pain; (3) illness; (4) impairment of the function of a bodily member, organ, or mental faculty; or (5) any other injury to the body no matter how temporary." Id.
229. Id. at 688 (quoting Brooks v. Kyler, 204 F.3d 102, 108 (3d Cir. 2000)).
230. Id.
Circuit in *Brooks*, the *LaVallee* court also rejected the Fourth Circuit's holding in *Norman v. Taylor*.

5. The Eleventh Circuit: *Johnson v. Breeden*

In *Johnson v. Breeden*, the Eleventh Circuit also appeared to follow the plain meaning of *Hudson*, although confusion has resulted from some contrary dicta in the opinion. The facts in *Johnson* were in dispute. After a prison guard questioned inmate Ernest Johnson about his possession of food from the prison store on a day when he was not allowed to have that food, a disagreement broke out. Johnson claimed that officers choked, punched, and kicked him, then threw him to the floor and beat him with batons until he lost consciousness. Conversely, the officers claimed that Johnson acted disorderly when confronted about the foodstuffs, and that he injured himself when he fell on a heater and hit his head during the altercation. A hospital examination uncovered that Johnson sustained a closed head injury with swelling, an eyebrow laceration, and multiple bruises on his face, shoulders, and upper back.

On appeal, the officers took issue with portions of the U.S. District Court for the Northern District of Georgia's jury instructions, which were "substantially verbatim" Eleventh Circuit jury instructions. The last provision of the instructions state, "Of course, when prison officials maliciously and sadistically use force to cause harm, the result would be cruel and usual punishment regardless of the significance of the injury to the inmate." The Eleventh Circuit held generally that the jury instructions were not defective. Although the level of injury was not directly at issue in *Johnson*, the jury instructions demonstrate that, in the Eleventh Circuit, an inquiry into the degree of injury is not required.

However, the *Johnson* court noted in dicta something seemingly contrary to the jury instructions. In discussing the subjective inquiry in an Eighth

231. *Id.* at 687; see *supra* notes 212–13 and accompanying text (highlighting the Third Circuit's view of *Norman v. Taylor*). But see *infra* notes 248–57 and accompanying text (discussing *Norman* and the Fourth Circuit's interpretation of the injury requirement).

232. 280 F.3d 1308 (11th Cir. 2002).

233. See *infra* notes 241–45 and accompanying text (discussing case law within the Eleventh Circuit that demonstrates this confusion).

234. *Johnson*, 280 F.3d at 1312.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1313. The officers argued that the jury should have to find that the officers acted with specific intent before they could be held liable for excessive force under the Eighth Amendment. *Id.* at 1314. The Eleventh Circuit disagreed, stating that the test was malicious and sadistic force and an intent to violate the inmate's rights to be free of cruel and unusual punishment. *Id.* at 1315.

239. *Id.* at 1314; cf. *Harris v. Chapman*, 97 F.3d 499, 505 (11th Cir. 1996) ("[T]he Supreme Court has suggested that the type of punishment, rather than some arbitrary quantity of injury, may be relevant for Eighth Amendment claims.").

240. *Johnson*, 280 F.3d at 1316.
Amendment case, the court stated that "[a]cting with specific malevolent intent to cause harm, at least where (as here) more than de minimis injury results, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment." Because of this dicta, the Eleventh Circuit supplied lower courts with conflicting information as to the injury requirement in the Eleventh Circuit. Conflicting opinions from those district courts, and even the Eleventh Circuit itself, demonstrate this confusion.

For example, the U.S. District Court for the Middle District of Alabama cited Johnson in stating that the test for an excessive force claim was (1) malicious and sadistic intent and (2) more than de minimis injury. Likewise, the U.S. District Court for the Middle District of Florida agreed that more than de minimis injury is necessary and cited various other circuit courts that also take this stance. Conversely, the U.S. District Court for the Southern District of Alabama aligned with the Eleventh Circuit jury instructions discussed in Johnson and with the text of Hudson in finding that the injury sustained is but one factor, and that the level of injury is relevant to an Eighth Amendment inquiry, but does not end it.

B. De Minimis Injury, a Constitutional Bar: The Second, Fourth, Fifth, and Seventh Circuits' Approach

As demonstrated by case law from the Third, Sixth, Eighth, Tenth, and Eleventh Circuits, the Hudson opinion explicitly stated that a prisoner need not prove that he suffered serious injury to prevail on an Eighth Amendment excessive force claim. The policy reason for this stance is that, if courts required a showing of serious injury, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." Nevertheless, some circuits have read beyond the plain meaning of the Hudson text to

241. Id. at 1321.
242. See infra notes 243–45 and accompanying text (discussing confusion in courts within the Eleventh Circuit about what level of injury is required).
243. McReynolds v. Ala. Dep't of Youth Servs., 426 F. Supp. 2d 1247, 1255 (M.D. Ala. 2006); see also McReynolds v. Ala. Dep't of Youth Servs., 204 F. App'x 819, 822 (11th Cir. 2006) (where the Eleventh Circuit agreed with the U.S. District Court for the Middle District of Alabama that more than de minimis injury is required, thereby contradicting Eleventh Circuit jury instructions). But see supra note 239 (noting that in Harris, 97 F.3d at 505, the Eleventh Circuit clearly affirmed that the central inquiry is into the force used, not the quantum of injury sustained).
244. See Enriquez v. Landers, No. 2:02CV510FTM-VMC-SPC, 2005 WL 2405829, at *8 (M.D. Fla. Sept. 29, 2005) (citing Norman v. Taylor, 25 F.3d 1259, 1263–64 (4th Cir. 1994); Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993)); see also Cummings v. Malone, 995 F.2d 817, 822–23 (8th Cir. 1993); infra Part II.B (discussing cases from the Second, Fourth, Fifth, and Seventh Circuits that require more than de minimis injury to prevail on an Eighth Amendment excessive force claim).
246. See supra notes 118–22 and accompanying text; supra Part II.A.
find that, although a prisoner need not prove "serious" or "significant" injury, he must prove more than de minimis injury to prevail.

1. The Fourth Circuit: Norman v. Taylor

Norman v. Taylor, a case from the Fourth Circuit, provides a detailed explanation for interpreting Hudson to require more than de minimis injury. In that case, inmate Allain Delont Norman was waiting to be processed for admission to the Norfolk City Jail. When Norman began to light up a cigarette, Officer Otis Taylor rushed towards him, swinging his cell keys at Norman's face to stop the act. Taylor's keys clipped Norman's hand, and Norman claimed that the impact caused his hand to swell. Norman argued that he filed at least fifteen doctor request forms regarding the injury, but Taylor controverted this evidence by showing that Norman's medical records were void of any reports referencing the injury to his hand. Taylor further denied that he hit Norman at all.

In an eight to five decision, the Fourth Circuit affirmed the entry of summary judgment, holding that Norman's moving papers were void of any facts from which the court could infer that he was injured at all, or at least in more than a de minimis way. The court supported its holding by looking to a particular statement in Hudson, that "the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not de minimis for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim." The court believed that this statement "seemed to affirm by negative implication... that de minimis injury can serve as conclusive evidence that de minimis force was used." The court noted and summarily dismissed that its reading of this passage was in tension with the analyses of other circuits but did not cite specifically to cases that held differently. The court was nonetheless satisfied that its interpretation...
was correct: that the Supreme Court meant that injuries could be so trifling to justify a belief that an officer did not use excessive force.257

Conversely, Judge Kenneth Hall, writing for the five-judge dissent, argued that there were genuine issues of material fact that precluded summary judgment.258 Judge Hall found that the majority's negative implication of Hudson was not necessarily improper because the extent of an inmate's injury in certain situations could be so minor as to infer that the force used was proportionately minimal.259 However, on the facts, the dissent highlighted Norman's affidavit, which stated that he suffered "great pain and swelling" after being struck by a "large set of brass keys," rendering him without full mobility of his hand three years after the incident.260 Thus, Norman's injuries were not so trifling as to infer necessarily that the force was de minimis.261

2. The Second Circuit: Gibeau v. Nellis

One year after the Fourth Circuit stated its holding in Norman, the Second Circuit agreed that more than de minimis injury must be shown. In Gibeau v. Nellis,262 inmate Jacques Pierre Gibeau was involved in an altercation after he complained about the prison coffee and dumped his cup of coffee onto the floor in front of a corrections officer.263 Following this action, an officer directed him to return to his cell, at which Gibeau balked. A group of guards then forced Gibeau toward his cell and responded to the inmate's resistance by punching and slapping him.264 Once officers forced Gibeau into his cell, Officer James Lytle entered and, while Gibeau was restrained in handcuffs, struck him three times with a penlight.265 When the entire disturbance settled, Gibeau had suffered a broken finger, wrist injuries, bruising of the left temple, and blurred vision.266

After a jury found that Lytle had used unnecessary and excessive force but had not caused Gibeau any injuries, and the district court denied his motion for judgment notwithstanding the verdict, Gibeau appealed.267

257. Id.
258. Id. at 1264 (Hall, J., dissenting).
259. Id. at 1265.
260. Id. (citation omitted) (internal quotation marks omitted). Judge Kenneth Hall also emphasized that Norman had suffered "pain, fear, and possible psychological damage," which heightened the inmate's injury beyond that which the majority characterized as "a sore thumb." Id. at 1265-66 (citation omitted) (internal quotation marks omitted).
262. 18 F.3d 107 (2d Cir. 1994).
263. Id. at 108.
264. Id. at 109.
265. Id. A penlight is a six-inch long, one-half-inch diameter flashlight. Id.
266. Id.
267. Id.
appeal, Gibeau argued that, even though his head contusion could have resulted from the tussle with the officers who forced him into his cell, *Hudson* enabled him to recover for the pain, suffering, and fear Lytle caused him when he struck him with the penlight. 268 The Second Circuit disagreed, stating that Gibeau’s reliance on *Hudson* was misplaced because *Hudson* "merely holds that the Eighth Amendment may be violated where excessive force causes any injury that is more than *de minimis*; it does not hold that there is necessarily a compensable injury under Section 1983 whenever excessive force has been used." 269

3. The Fifth Circuit: *Siglar v. Hightower* and *Gomez v. Chandler*

The Fifth Circuit first weighed in on its interpretation of the *Hudson* standard in *Siglar v. Hightower*, 270 a case filed under the PLRA. 271 In that case, a prison guard stopped inmate Lee Andrew Siglar in the hall while returning from breakfast. 272 After the officer found a biscuit from breakfast in the inmate’s jacket pocket, the officer called for backup. 273 Officer Ejike Nwose responded to the call and, although unprovoked, verbally and physically abused Siglar. 274 Furthermore, Siglar claimed that Nwose twisted his arm behind his back and twisted his ear for no apparent reason. 275

In deciding whether Siglar had been subjected to excessive force when the officer twisted his ear, leaving it bruised and sore for three days, the court claimed that it looked to the Eighth Amendment standards to guide its decision, "[t]hat is, the injury must be more than *de minimis*, but need not be significant." 276 The court found that "a sore, bruised ear" was a *de minimis* injury, which served as dispositive evidence that Siglar had not raised a valid Eighth Amendment claim. 277

The Fifth Circuit expanded on the *Siglar* holding in *Gomez v. Chandler*. 278 The *Gomez* opinion did not make it clear why prison guards assaulted inmate Juan Gomez. However, Gomez claimed that the officials slammed him to the concrete floor, punched him in the face, and scraped his

268. Id. at 110.
269. Id. But see Hudson v. McMillian, 503 U.S. 1, 9 (1992) (stating that malicious use of force for the sole purpose of causing harm is excessive whether or not significant injury results); supra Part II.A (discussing cases that understand *Hudson* to require an inquiry into the force used, rather than the injury sustained).
270. 112 F.3d 191 (5th Cir. 1997).
271. See id. at 193; see also supra note 213 (discussing *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002), a case brought under the PLRA that also discussed the Eighth Amendment injury requirement).
272. *Siglar*, 112 F.3d at 193.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
278. 163 F.3d 921 (5th Cir. 1999).
face along the floor. Additionally, he alleged officers kicked him about the face and head. As a result, Gomez sustained cuts, scrapes, and contusions to the face, head, and body. The court conceded that Hudson placed the greatest emphasis on the inquiry into the degree of force, but noted that Hudson did not specifically state that an excessive force claim can prevail when there is no or only de minimis physical injury. The court then opined that, although a prisoner must have suffered more than de minimis injury, the Fifth Circuit has "no categorical requirement that the physical injury be significant, serious, or more than minor." Gomez succeeded on his excessive force claim primarily because the court found that his injuries were more than de minimis. In so holding, the court compared Gomez’s injuries to Siglar’s. Although the court’s discussion focused on the application of force, which in Siglar was “far briefer and of a character far less intense and less calculated to produce real physical harm,” the holding, nevertheless, turned on the fact that Gomez had received medical treatment, while Siglar had not, and that Gomez suffered more extensive injuries than Siglar’s bruised ear.

4. The Seventh Circuit: Outlaw v. Newkirk

Lurking in the background of the opinions from the circuits that require some minimum quantum of injury is the precarious inference that in every case de minimis injury is conclusive evidence that the force applied was also de minimis. The Seventh Circuit expressly stated this contention in Outlaw v. Newkirk. In that case, inmate Ricky Outlaw claimed that Officer Cameron Mable “slammed” the cuffport hatch—a small door within the cell door—on his hand when Outlaw placed his hand in the cuffport

279. Id. at 924-25.
280. Id. at 925.
281. Id.
282. Id. at 923; see also Brown v. Lippard, 472 F.3d 384, 386-87 (5th Cir. 2006) (stating that the Fifth Circuit had “never directly held that injuries must reach beyond some arbitrary threshold to satisfy an excessive force claim,” but that no injury or minor injury will not support an Eighth Amendment claim).
283. Gomez, 163 F.3d at 924; see supra notes 182-83 and accompanying text (commenting that the Court has failed to explain to lower courts what injuries would suffice in any one of these categories).
284. Gomez, 163 F.3d at 924 (“We conclude that on this record Gomez... has made a sufficient showing of a more than de minimis physical injury so as to preclude summary judgment to the contrary.”).
285. Id.
286. Id. at 924-25.
287. See, e.g., Norman v. Taylor, 25 F.3d 1259, 1262 (4th Cir. 1994) (“[D]e minimis injury can serve as conclusive evidence that de minimis force was used.”); Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994) (“This type of minor injury further supports our conclusion that at most this incident was a de minimis use of force not intended to cause pain or injury to the inmate.”). But see, e.g., United States v. LaVallee, 439 F.3d 670, 687 (10th Cir. 2006) (rejecting this contention); Brooks v. Kyler, 204 F.3d 102, 108 (3d Cir. 2000) (disagreeing that de minimis injury should mandate dismissal).
288. 259 F.3d 833 (7th Cir. 2001).
while holding some trash. The officer argued that, as he was closing the cuffport, Outlaw attempted to throw garbage at him through it, and, therefore, the cuffport’s force on Outlaw’s hand was accidental. Mable alternatively argued that inmates threaten to throw “harmful matter,” like garbage, feces, and urine, at prison officials regularly through the cuffports. Thus, his use of force to close the door was justified because it was a good faith attempt to maintain prison security and protect his own safety. Outlaw claimed that he suffered severe pain resulting from his swelled and bruised wrist.

The Seventh Circuit affirmed the U.S. District Court for the Northern District of Indiana’s entry of summary judgment. In so holding, the court applied the Hudson test, looking directly at the force used, and agreed that Mable may have either closed the door by accident or deliberately to maintain order. Although the Hudson inquiry could have ended there, the court nonetheless went on to note that “the minor nature of Outlaw’s injuries strongly suggested that the force applied by Mable was de minimis.” Interestingly, the court disregarded a strained and contentious history between Outlaw and Mable that even the officer conceded to be true. The court skirted this issue by claiming that the Supreme Court had not yet included nonviolent conflicts between inmates and prison officials as one of the factors to consider in determining whether the force on the occasion at issue was used maliciously or sadistically for the sole purpose of causing harm.

III. WHY NEITHER SERIOUS NOR MORE THAN DE MINIMIS INJURY SHOULD BE REQUIRED

This Note has highlighted the split between the many circuits over whether a prisoner must prove more than de minimis injury to sustain an Eighth Amendment excessive force claim. Some circuit courts hold that a

289. Id. at 834.
290. Id. at 835.
291. Id.
292. Id.
293. Id. at 834.
294. Id. at 842.
295. Id. at 839.
296. Id. (citing DeWalt v. Carter, 224 F.3d 607, 620 (7th Cir. 2000), where the Seventh Circuit dismissed an inmate’s claim because the use of force was an isolated shove into a door frame without any additional violence, and where the bruises were not particularly serious). But see infra notes 319–20 and accompanying text (quoting a dissenting judge in the Fourth Circuit who urged that de minimis injury is not necessarily indicative of de minimis force).
297. Outlaw, 259 F.3d at 836.
298. Id. at 840. The court opined that a strained relationship could not constitute evidence that Cameron Mable used excessive force on that particular occasion. Id.; accord supra Part I.C.1 (discussing the hands-off doctrine where courts gave deference to a prison official’s actions even if the facts could have been interpreted that the guard overstepped his bounds by looking at the inmate’s moving papers).
prisoner need not prove serious injury, thus strictly adhering to Justice O'Connor's *Hudson* opinion.299 Conversely, other circuits have read into Justice O'Connor's opinion and, by negative implication, hold that a prisoner must suffer more than a trifling level of injury to prevail.300 Part III.A argues that the more than de minimis injury requirement is a guise that courts are using to return to the hands-off doctrine, providing prison officials far too much deference in cases of patently excessive force. Part III.B posits that the more than de minimis injury requirement violates the evolving standards of decency that guide the Eighth Amendment. Ultimately, Part III.C advocates that, because prisoners cannot redress constitutional violations without the assistance of federal courts, the only way to rectify this split is if the Supreme Court intervenes and refines its excessive force standard to state that no minimum quantum of injury is required.

A. A Criticism of Courts' More than De Minimis Injury Requirement as a Way to Remain Hands-Off to Prison Administration

Prior to the 1970s, the Court showed immense restraint in getting involved in prison management.301 The Court viewed itself and the lower courts as without the expertise to reform prisons and in a precarious position to show respect both for the decisions made by state legislatures that are politically accountable and for prison officials who understand the day-to-day operations of correctional facilities.302 Between 1976 and 1992, however, the Court parted from the hands-off doctrine.303 The Court involved itself in conditions-of-confinement cases where prisoners alleged that they were unconstitutionally deprived of medical care,304 forced to reside in cells without a requisite amount of personal space,305 subjected to deadly force in the midst of a prison altercation,306 and submitted to live in overcrowded, unsanitary, and other similarly inhumane conditions.307 The Court's departure from its own precedent of nonintervention spoke volumes to lower courts, prison reformers, and the general public that the judiciary

299. See supra Part II.A.
300. See supra Part II.B.
301. See supra notes 141–47 and accompanying text (discussing the pre-Gamble hands-off doctrine to which the Court stringently adhered).
302. See supra notes 146, 149–55 and accompanying text.
303. See, e.g., Turner v. Safley, 482 U.S. 78, 84 (1987); Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 562 (1979); MUSHLIN, supra note 22, at 9 (commenting that, since the early 1970s, "the Court has continually asserted that the [hands-off] doctrine has no place in its constitutional jurisprudence" (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989))). But see White, supra note 153, at 776–77 (citing a shift during the 1980s and 1990s back to the hands-off doctrine when the Court rejected inmate challenges to searches on privacy grounds, access to legal literature, visitation rights, and First Amendment rights in the religious realm, among others).
306. See generally White v. Albers, 475 U.S. 312 (1986); supra Part I.A.1.c.
would not stand idly by while inmates were robbed of basic human rights and necessities.\textsuperscript{308}

When \textit{Hudson} reached the Court, the previous prison cases had readied most of the Justices to affirm that the Constitution proscribes the use of needless force meted out as punishment, and further, that significant injury is not a condition precedent to an excessive force claim.\textsuperscript{309} Even though \textit{Hudson} imposed an extremely high burden for prisoners to prove—malicious and sadistic force used for the sole purpose of causing harm—Justice O'Connor's opinion was hailed as a victory for the prisoners' rights bar.\textsuperscript{310}

In the wake of \textit{Hudson}, however, a handful of circuit courts have misguidedly employed the negative pregnant\textsuperscript{311} in interpreting \textit{Hudson}. Rather than reading the plain meaning of the opinion—that an inmate need not prove serious injury—these circuits have instead required some quantum of injury that is more than de minimis, itself an undefined term.\textsuperscript{314}

\textsuperscript{308} See Feeley & Swearingen, \textit{supra} note 179, at 442 (admiring judicial intervention in prison cases because such activism was "both a cause and an effect of change: cause, because judges forced change upon reluctant and recalcitrant prison officials, and effect because litigation reinforced trends that were already well-underway and widely embraced.... because judges drew on a well-defined model that had long been promoted within the corrections field itself").

\textsuperscript{309} See Van Slyke, \textit{supra} note 144, at 1729–30 (commenting that the \textit{Hudson} Court clearly articulated that in excessive force cases, the evolving standards of decency may be violated even without permanent marks on an inmate's body); \textit{supra} notes 116–22 and accompanying text (discussing the majority opinion in \textit{Hudson} that held that extent of injury is merely one of many factors in determining whether a prison official used force maliciously and sadistically for the sole purpose of causing harm).

\textsuperscript{310} See \textit{Fliter}, \textit{supra} note 23, at 172 (calling the \textit{Wilson} decision a "setback for prisoner litigants" and noting that proof of intent "places a greater burden" on prisoners); Van Slyke, \textit{supra} note 144, at 1730 (opining that the extension of \textit{Whitley} to all excessive force cases imposes on prisoners "a virtually insurmountable burden of proof" that "creates a roadblock to obtaining redress for inmates' grievances"); \textit{supra} notes 115, 126, 127, 131 and accompanying text (discussing the arguments for and against the extension of the \textit{Whitley} standard to all excessive force cases).


\textsuperscript{312} See \textit{BLACK'S LAW DICTIONARY}, \textit{supra} note 182, at 1061 ("A negative pregnant is a denial implying its affirmative opposite by seeming to deny only a qualification of the allegation and not the allegation itself. An example is the statement, 'I didn't steal the money last Tuesday,' the implication being that the theft might have happened on another day."); \textit{see also supra} note 255 (noting that the \textit{Brooks} court found that using the negative pregnant to interpret \textit{Hudson} was "risky and unsatisfactory").

\textsuperscript{313} See \textit{infra} Part III.B. \textit{But see supra} notes 211, 213, 231, 255 and accompanying text (noting the other circuits that disagree with the idea that \textit{Hudson} prescribes, by negative implication, a fixed quantum of injury to sustain an Eighth Amendment claim).

\textsuperscript{314} See \textit{supra} note 182 and accompanying text (observing that the Court and lower courts have failed to define what constitutes de minimis injury for an Eighth Amendment inquiry); \textit{cf. supra} notes 183–84 and accompanying text (commenting that various Eighth Amendment vocabulary has not been adequately defined by the Court).
The more than de minimis injury requirement appears to hark back to 
pre-Gamble, where prisoners were considered slaves of the state, stripped of 
their most basic rights once they entered prison.\textsuperscript{315} Without explicitly 
stating it, these circuits seem to affirm the once-held belief that prisoners 
may forfeit their substantive constitutional right to be free from cruel and 
unusual punishment—even in cases where force is meted out as punishment\textsuperscript{316}—where the prison officials are lucky enough to inflict only 
minor, fleeting injuries that may require minimal or no medical attention.\textsuperscript{317} 
Moreover, because the general public does not appear to care any more 
about prisoners' rights now than it did when the hands-off doctrine was in 
full effect,\textsuperscript{318} this enables courts to further acquiesce in the face of needless 
constitutional violations.

In these circuits, one is only left to wonder, as Judge Francis 
Murnaghan—the sole dissenter in a post-Norman case in the Fourth 
Circuit—did when he asked his fellow judges to think about applying their 
standard to certain scenarios,\textsuperscript{319} Judge Murnaghan queried how the more 
than de minimis injury requirement could ever apply in situations where a 
prisoner “thrown from a prison balcony, is fortunate to incur only minor 
scrapes and bruises. Or . . . an inmate who, although beaten intensely in the

\begin{flushleft}
\textsuperscript{315} See White, \textit{supra} note 153, at 777 (“The shift back to the hands-off approach 
represents in juridical form the more practical dynamic of violence as a mode of 
punishment.”); \textit{supra} notes 142–47 (explaining the stance that courts took toward prisoners 
prior to the 1970s).
\textsuperscript{316} See, \textit{e.g.}, \textit{supra} notes 270–77 and accompanying text (noting in \textit{Siglar v. Hightower} 
that the court found that the inmate did not demonstrate sufficient injury, even though an 
officer caused the inmate’s ear to be bruised and sore for three days for absolutely no 
penological reason).
\textsuperscript{317} See \textit{supra} text accompanying note 137 (highlighting Justice Thomas’s dissent in 
\textit{Hudson} where he callously stated that “insignificant harm” cannot be redressed in a court 
because such harm does not evince the use of cruel and unusual punishment).
\textsuperscript{318} See, \textit{e.g.}, \textit{JULIAN V. ROBERTS & MICHAEL J. HOUGH, UNDERSTANDING PUBLIC 
ATTITUDES TO CRIMINAL JUSTICE} 93–94 (2005) (citing a 2001 study’s finding that six out of 
ten Americans surveyed agreed that “criminals don’t mind being sent to prison” and urging 
that “[i]t is critically important, therefore, that the public have a more realistic idea of the 
nature of life in prison” (internal quotation marks omitted)); Jessica Feierman, \textit{Creative 
Prison Lawyering: From Silence to Democracy}, 11 \textit{GEO. J. ON POVERTY L. 
& POL’Y} 249, 269 (2004) (stating that prisoners are politically unpopular, few people care about conditions 
of confinement, and the public is ignorant about what transpires inside correctional facilities, 
thus enabling inmate abuse and dismal confinement conditions to “spiral out of control”); 
A23 (“Most people don’t care about prisoners. Once someone goes behind bars, he ceases to 
be a normal person. And once he ceases to be a normal person, it is unlikely he will ever be 
considered normal again.”); Robert Weisberg & David Mills, \textit{Violence Silence: Why No 
2089095 (arguing that prison violence is so pervasive that it “has become a cliché within 
mainstream culture,” resulting in a total indifference to excessive force in prisons by the 
general public and judges alike); \textit{cf. supra} note 144 and accompanying text (commenting on 
public apathy that has historically been felt toward prisoners’ rights).
\textsuperscript{319} See Taylor v. McDuffie, 155 F.3d 479, 486–87 (4th Cir. 1998) (Murnaghan, J., 
dissenting).
\end{flushleft}
stomach, back, chest, or groin, displays no greater outward signs of physical injury than that which the majority terms 'temporary swelling.'

Hudson provided a basic framework and imposed a high burden, requiring that (1) the allegedly offending guard used malicious and sadistic force for the sole purpose of causing harm (subjective intent), and (2) the force rose to a constitutionally violative level, by looking at the need for the force used, the threats facing the official, any attempt to temper the severity of the force, and the resulting injuries (objective harm). However, the application of the hands-off doctrine by the circuits requiring more than de minimis injury creates an even more elevated burden for prisoners and, arguably, an insurmountable standard to obtain redress. This heightened standard begs the question: what will stop courts within these circuits from ever using the backdoor reasoning that the injury was insufficient, even in situations like those posed by Judge Murnaghan?

Furthermore, since the enactment of the PLRA only a few years after Hudson was handed down, prisoners are now faced with even greater obstacles to relief. Congress passed the PLRA in part because it considered prisoners pestiferous litigants who have nothing better to do with their free time than file suits to achieve some form of remedy. Moreover, Congress did not want courts to load their already unmanageable dockets with frivolous cases that had little or no recovery. However, because Hudson announced that excessive force claims are not frivolous when force is meted out as punishment, circuits imposing the requirement of a particular level of injury are merely adding insult to injury by appending this additional, unfounded, and unsubstantiated roadblock that Hudson did not prescribe.

320. Id. at 486. Judge Francis Murnaghan’s dissent criticized the majority for drawing a negative implication that was in direct conflict with the text of Hudson and that bought into the “fiction that de minimis injury means de minimis force.” Id.; see also Hudson v. McMillian, 503 U.S. 1, 13-14 (1992) (Blackmun, J., concurring) (agreeing with the majority’s holding because “to hold to the contrary . . . might place various kinds of state-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a telltale ‘significant injury’—entirely beyond the pale of the Constitution”).

321. See supra text accompanying notes 116, 119 (detailing the Hudson factors).

322. See supra notes 158-61 and accompanying text (explaining the onerous requirements the PLRA imposed on prisoners to sustain a claim in federal court).

323. See Robbins v. Chronister, 402 F.3d 1047, 1055 (10th Cir. 2005) (Hartz, J., dissenting); Witzke v. Femal, 376 F.3d 744, 750 (7th Cir. 2004) (“Prisoners often have an abundance of time, while facing a restricted number of enjoyable activities with which to pass the time other than filing federal suits.”).

324. See supra notes 156–62 and accompanying text (discussing the PLRA’s purpose and the requirements it sets out for prisoners filing for redress in federal courts).

B. Why the More than De Minimis Injury Requirement Offends the Evolving Standards of Decency

Not only does the more than de minimis injury requirement appear to invoke the hands-off doctrine, it also clearly violates the evolving standards of decency upon which the Eighth Amendment is predicated. For example, the de minimis injury requirement enables prison officials to intercept an excessive force claim and perpetuates a known problem in correctional facilities—that prison officials substantiate each other’s fabricated stories and falsified documents in the face of constitutional violations. Because medical documentation forms part of a record that must be construed as true for summary judgment purposes, many prison officials are dodging punishment for excessive force because of cronyism and corroboration of false medical records. In circuits that require more than de minimis injury, prison officials can falsify documents to say that inmates suffered negligible or no injury and seemingly survive an excessive force claim without question.

The Court has explained that deliberate indifference to medical care does not accord with the evolving standards of decency; therefore, when prison medical staff or colleague officials vouch for each other to remove any possible sting of an Eighth Amendment violation, evolving standards of decency are contravened. As such, it is the responsibility of courts not to end the inquiry at the quantum of injury, as it is possible that the court may never know the extent of injury truly suffered.

326. See generally supra Part I.A.2 (discussing the importance of looking to the evolving standards of decency in determining what comports with the Eighth Amendment).

327. See, e.g., United States v. LaVallee, 439 F.3d 670, 678–79 (10th Cir. 2006) (exposing situations at the U.S. Penitentiary Administrative Maximum Facility in Florence, Colorado, where officers colluded to falsify medical records and other documents after various violent inmate beatings); Editorial, supra note 10 (discussing California’s correctional officer union that interferes with administrative and criminal investigations of excessive force in order to enforce the code of silence that is prevalent across California’s prisons).

328. See, e.g., Sanders-El v. Spielman, 38 F. Supp. 2d 438, 439 n.1 (D. Md. 1999) (“[I]t would seem that the law must entertain the possibility that health care providers in a prison setting might bring certain biases to their occupation, be they... the need to maintain good working relationships with correctional officers, [or] pressures exerted and felt within the chain of command... ”); Purdy, supra note 1 (reporting that a prison nurse conceded that he would be reluctant to report excessive force because “life can be made difficult if you don’t have cooperation from the security staff”).

329. See, e.g., Purdy, supra note 1 (discussing a case at the Clinton Correctional Facility where a prisoner suffered bruised ribs and a separated shoulder that took two months to heal, but the nurse on duty that day falsely reported that there were “no apparent injuries”); Testimony of John Boston, supra note 177, at 15 (noting that excessive force generally engenders other correctional officer misconduct, including false reports, reliance on a code of silence, complicity, and patent dishonesty that only further stimulates inmate abuse); cf. United States v. Miller, 477 F.3d 644, 647 (8th Cir. 2007) (noting that several jailers wrote false reports stating that the inmate had been resisting officials and acting in a combative manner, thus justifying the use of force).

330. See supra notes 100–02 and accompanying text.
C. A Return to the Plain Meaning of Hudson: The Third, Sixth, Eighth, Tenth, and Eleventh Circuits’ Approach Is Proper

It appears that little has changed in the realm of excessive force since Hudson. Prison continues to be a dangerous place for prisoners and correctional officers alike. Moreover, the use of excessive force has not diminished so substantially that it is no longer fodder for the news. Even correctional facilities’ “strict rules” against excessive force are consistently violated and always at the expense of prisoners’ substantive constitutional right against the infliction of cruel and unusual punishment.

Courts must rectify such constitutional violations by employing the Hudson standard: that a prisoner’s injury is one of many factors that must be addressed and, further, that the level of force—whether it was used unnecessarily and wantonly for the sole purpose of causing harm—is the fundamental inquiry in such cases. Importantly, Hudson explicitly stated that the level of injury should not be employed as a dispositive factor. As such, courts should be wary of finding that an inmate’s de minimis injury is conclusive evidence that the prison official used de minimis force. When an inmate is attacked by a prison official for no reason, or for a justified reason but in a malicious and sadistic way to cause harm, even if the injury is de minimis in either situation, a violation has occurred. Thus, the extent of the injury should never be the sole inquiry, and a case should not turn on the improper inference that de minimis injury means de minimis force was used.

This Note does not advocate that every claim of excessive force warrants judicial intervention. Rather, as the Hudson Court held, it argues that the level of injury must be examined as one of many factors of the objective inquiry in an Eighth Amendment excessive force case. Under the factors test, a court is required to look at the totality of the circumstances—whether the force was even warranted under the given circumstances, whether it was used for the sole purpose of causing harm, if the offending official could have tempered the situation in any way so as not to use force, and, also,

331. See supra notes 1-10 and accompanying text (noting various news articles published since Hudson, reflecting the lack of change in correctional officers’ use of excessive force).
332. See supra text accompanying note 3.
333. See supra note 116 and accompanying text.
334. See Hudson v. McMillian, 503 U.S. 1, 7 (1992) (“The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.”).
335. See supra note 320 and accompanying text (commenting that Judge Murnaghan, a dissenting judge to the Fourth Circuit’s negative implication of Hudson, believed the jump from de minimis injury to de minimis force was a dangerous “fiction”).
336. See Taylor v. McDuffie, 155 F.3d 479, 487 (4th Cir. 1998) (Murnaghan, J., dissenting) (“[O]fficers in our circuit are free to use excessive or unjustified force against inmates, so long as they are careful or fortunate enough to leave only minor traces of their blows.”); supra note 320 and accompanying text.
337. See supra note 123 (citing an often quoted statement that not every push or shove in prison invokes the Eighth Amendment).
338. See Hudson, 503 U.S. at 7.
what level of injury the prisoner sustained.339 Because of colluding prison
officials who deny that force was used or injuries were sustained,340 or
because injuries might not manifest in a way that a court deems sufficient
for this inquiry, prisoners are in a catch-22: they face the wrath of their
superiors, and their only avenue of redress is blocked.

Moreover, this Note urges that officials who engage in deprivations of
prisoners’ constitutional rights should not expect deference from federal
courts and, furthermore, that courts should similarly not buy into the fiction
that prisoner abuse is not occurring rampantly throughout U.S. correctional
facilities. The Cruel and Unusual Punishments Clause is rendered moot
without the intervention of federal courts, the entities responsible for
upholding the meaning of this important clause.341 The Eighth Amendment
“was designed expressly to protect the weak and powerless from the
passions, or the reckless neglect, of the majority and its leaders.”342 It is
time for the circuit courts requiring more than de minimis injury to enforce
the Cruel and Unusual Punishments Clause so that correctional officers no
longer retain the power to violate prisoners’ constitutional rights. Perhaps
the only way to ensure that these circuit courts align with Hudson is for the
Supreme Court once again to intervene on the issue of excessive force and
qualify the level of injury, if any, that prisoners must prove. Unless and
until the Court weighs in, a handful of circuit courts will continue to
obstruct unjustly prisoners’ access to redress that they deserve when their
substantive constitutional rights are violated.343

CONCLUSION

In July 2008, the U.S. Department of Justice, Civil Rights Division,
released a scathing ninety-eight-page report regarding conditions at the
Cook County Jail (CCJ) in Chicago, Illinois.344 Specifically, the report
detailed twenty-three instances of prisoner abuse and excessive force at CCJ
and highlighted situations where officers initially used force appropriately,
but continued to engage in unnecessary and wanton physical violence even

339. See supra note 116 and accompanying text (explaining the factors test for an
excessive force claim).
340. See supra notes 327–30 and accompanying text.
341. See supra Part I.C.2 (highlighting arguments from judges, scholars, and
commentators who believe that federal courts must intervene in excessive force cases).
to state that affording prison officials broad discretion to maintain order cannot be given in
exchange for “judicial abdication from the enforcement of basic constitutional rights of
inmates to a reasonably safe and sanitary environment.” Id.
343. See Taylor v. McDuffie, 155 F.3d 479, 487 (4th Cir. 1998) (Murnaghan, J.,
dissenting) (“I expect that soon the Supreme Court will place the Fourth Circuit back on the
course intended by Hudson. Until that day, I fear the injustice that awaits [prisoners] in our
nation’s jails.”).
344. See generally Letter from Grace Chung Becker, Acting Assistant Attorney Gen., and
Patrick J. Fitzgerald, U.S. Attorney, N. Dist. of Ill., to Todd H. Stroger, Cook County Bd.
President, and Thomas Dart, Cook County Sheriff (July 11, 2008), available at
after the inmates were under control. Illinois courts are now keenly aware of CCJ's systemic use of excessive force, and the jail is required to make important changes to its policies and practices, or face possible legal action by the state.

Because not every prisoner who faces the wrath of his superiors has the state's attorney watching prison guards' actions—as is the case with CCJ—prisoners will continue to file for redress in federal courts after prison officials subject them to excessive force in violation of the Eighth Amendment. However, even though Hudson provided a definitive factors test to analyze Eighth Amendment excessive force cases, the Court failed to define explicitly an essential element for the test—the level of injury required to sustain a claim—thereby creating an ambiguity and a dichotomy in the wake of the seminal case. Some circuits correctly follow Hudson in holding that a prisoner does not need to prove significant injury to prevail, while other circuits have marred the standard, requiring some quantum of injury that is more than de minimis, even though Justice O'Connor's opinion did not prescribe such a factor.

As a result, prisoners who sustain virtually the same injuries in different prisons could face disparate outcomes depending on the arbitrary fact of which circuit's law controls their cases. Unfortunately, courts that require more than de minimis injury are reviving the hands-off doctrine and, in doing so, supporting a culture of violence in prison. Since 1976, the hands-off stance has been criticized by the Supreme Court and legal commentators because court intervention is an essential avenue for prisoners when superiors violate prisoners' constitutional rights. Moreover, if courts can dismiss a case based solely on the de minimis injury threshold requirement, this violates the evolving standards of decency that are essential benchmarks of Eighth Amendment objectives. With these standards desecrated, not only are inmates harmed, but the will of the general public and the words of the Constitution are also contravened.

The circuits that require more than de minimis injury do not appear ready to step down from their stance; therefore, it is important for the Supreme Court to resolve this circuit split and announce that no fixed quantum of injury is required. This is what Hudson prescribed, and this is the only reasonable application of the case when excessive force is used wantonly and unnecessarily in violation of the evolving standards of decency that mark the progress of a maturing society.

345. *Id.* at 9–18.
346. *Id.* at 98.