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Evolving Standards of Decency

An Analysis of the *Hudson v. McMillan* Supreme Court Case

"The idea of punishment as the purpose of imprisonment is plain enough – the person who has committed a wrong or hurt must suffer in return. The State, through its agent the prison, is entitled if not morally obligated to hurt the individual who has broken criminal law…by imposing painful conditions under which the prisoner must live within the walls," Gresham Sykes, a renowned American criminologist, wrote in his book *The Society of Captives*.[i] However, the Eighth Amendment's prohibition of "cruel and unusual punishment" legally restricts the extent to which prison officials can harm prisoners. The 1992 Supreme Court case *Hudson v. McMillan* examined whether using excessive physical force that does not cause serious injury constitutes "cruel and unusual punishment."[ii]

While serving a twenty-year sentence at the state penitentiary in Angolo, Louisiana, inmate Keith Hudson and another prisoner argued over Hudson's "washing of clothes in the toilet."[iii] Officer McMillan reprimanded Hudson while another officer handcuffed and shackled Hudson, and began to escort him to an isolation cell. En route, both officers punched and kicked Hudson even though he was compliant. A supervisor who observed the beating reportedly instructed the officers "not to have too much fun."[iv] As a result of the beating, Hudson suffered minor injuries such as bruising and a cracked dental plate.[v]

After the incident, Hudson filed a Section 1983 claim alleging that the prison guards violated the Eighth Amendment's prohibition of "cruel and unusual punishment" by beating him.[vi] A magistrate ruled that McMillan and Woods unnecessarily used force against Hudson and awarded him $800 in damages.[vii] However, the Fifth Circuit Court of Appeals reversed the decision because it found that Hudson failed to establish one of the four conditions necessary to prove that the State had violated the prohibition on cruel and unusual punishment. Thus, although Hudson proved that the State had unnecessarily inflicted pain, he failed to show that the state had caused him a "significant injury."[viii] Hudson then appealed the ruling to the Supreme Court. In a 7-2 vote, the Court held that the use of excessive force could constitute "cruel and unusual punishment" regardless of whether an inmate suffered serious injury.[ix] In his dissent, Justice Thomas argued that the majority had overstepped past precedents that clearly set forth the "serious injury" condition and therefore the majority had "extended the Eighth Amendment beyond all reasonable limits."[x]

The Supreme Court's ruling in the case of *Hudson v. McMillan* is wise because it considers evolving standards of decency in determining what constitutes "cruel and unusual punishment" while allowing for a case-by-case review of potential 8th Amendment violations.

At the heart of *Hudson v. McMillan* lies a judicial debate over whether to interpret the Eighth Amendment from the perspective of the Constitution's framers in 1791 or whether to analyze its prohibition of "cruel and unusual punishment" in terms of evolving standards of decency. David Strauss, a University of Chicago Professor who has argued eighteen cases before the Supreme Court and serves as Co-Editor for the *Supreme Court Review*, wrote that, in many instances, it is important to have a living Constitution:

> A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended…Technology has changed, the

> international situation has changed, the economy has changed, social mores have changed, all in ways that no one could have foreseen when the Constitution was drafted…So it seems inevitable that the Constitution will change, too. It is also a good thing, because an unchanging Constitution would fit our society very badly.[xi]

Under the philosophy of a "living Constitution" then it is not enough to only ban punishments that the framers considered "cruel and unusual" at the time of the Constitution's adoption. Instead, courts should also prohibit punishments that today are considered "cruel and unusual" even if they were widespread when the Constitution was adopted. Accordingly, in *Wilkerson v. Utah* (1878), the Supreme Court held that the 8th Amendment prohibits not just punishments such as disemboweling, beheading, and burning alive which predated the Constitution, but also "all others in the same line of unnecessary cruelty."[xii]

The Supreme Court has also considered evolving standards of decency when reaching other decisions. *Robinson v. California* (1962) concluded that it was illegal to jail a person for a narcotics addiction because a narcotics addiction constituted an "illness."[xiii] *Atkins v. Virginia* (2002) held that it was illegal to execute a mentally handicapped person, even though such executions occurred when the Constitution was adopted.[xiv] Similarly, *Roper v. Simmons* (2005) prohibited executing a person who committed a capital crime while under the age of 18, even though no such prohibition existed when the Constitution was adopted.[xv] All of the aforementioned cases established precedent that allowed the Court to follow the "living Constitution" model in the context of "evolving standards of decency" when interpreting the Eighth Amendment's ban on "cruel and unusual" punishment in *Hudson v. McMillan*.

The above analysis, however, stands in stark contrast with Justice Thomas's belief that the Court overstepped its authority when interpreting the meaning of the Eighth Amendment. Justice Thomas, in his dissent, wrote:

> From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but only that narrow class of deprivations involving "serious" injury inflicted by prison officials acting with a culpable state of mind. [xvi]

However, Justice Thomas failed to recognize that the Supreme Court has, in fact, ruled that certain actions constitute "cruel and unusual" punishment even if they do not cause lasting severe physical harm. The Court, in *Trop v. Dulles*, ruled that denationalization, or the taking away of a person's citizenship, violated the Eighth Amendment because it involves the "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture…"[xvii] *Trop v. Dulles* merely validated what everyone already knew: punishments that do not cause significant injury can still violate the Eighth Amendment. Indeed, few people would claim that the use of waterboarding, a form of torture that simulates drowning, is acceptable in prisons because it rarely causes severe physical harm. It is not an illogical leap then—or a "loosening of the… Eighth Amendment from its historical moorings," as Justice Thomson wrote—to apply the "cruel and unusual" clause in the case of Hudson's beating.[xviii] Instead, the Court recognized the validity of Justice Warren's argument in *Trop v. Dulles* that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[xix]

The real beauty in *Hudson v. McMillan* though lies in the court's ruling that prison cases involving a potential Eighth Amendment violation must be examined on an individual basis that determines whether the "force was applied in a good faith effort [to maintain order]" or if it was applied "maliciously and sadistically" for no valid purpose.[xx] In an environment as unpredictable as a prison, guards need the legal authority to enforce order via any reasonable means necessary. Accordingly, *Bell v. Wolfish* (1979) provided "prison administrators with…wide-ranging deference in the adoption and execution of policies and practices that, in

their judgment, are needed to preserve internal order and discipline and to maintain institutional security."[xxi] Strict laws detailing every action that a guard can and cannot take would be both impractical and detrimental to the efficiency of a prison. Moreover, mandatory minimum punishments for Eighth Amendment violations would be insensitive to the fact that prison guards operate in a highly stressful environment where quick thinking can sometimes lead to mistakes.

At the same time, however, the Court's insistence on a case-by-case examination of possible Eighth Amendment violations helps limit "cruel and unusual punishments" by forcing guards to take personal accountability for their actions when those actions serve no legitimate purpose.[xxii] After Phillip Zimbardo completed his famous Stanford Prison Study, he published a book called *The Lucifer Effect* in which he explained how good people could do evil acts. Zimbardo posited seven main factors that led the college students in the Stanford Prison Study to turn into cruel and sadistic prison guards. The seven factors are:

> Mindlessly taking the first small step, the dehumanization of others, the de-individualization of self, the diffusion of personal responsibility, blind obedience to authority, critical conformity to group norms, and passive tolerance of evil though inaction and indifference.[xxiii]

The court's insistence on a personalized review of potential Eighth Amendment violations will help prevent the situation described in *The Lucifer Effect*.[xxiv] Prison guards will be less likely to commit acts in violation of the 8th Amendment if they know that the Eighth Amendment's prohibition of "cruel and unusual punishment" can and will hold them accountable. In *Hudson v. McMillan*, the diffusion of responsibility that occurred when a supervisor watched the beating but did not stop it will occur less often because the law holds supervisors and guards equally accountable. The "mindlessly taking the first step" factor will essentially start to fade because prison officials will recognize the fact that any beating—however minor—could constitute a violation and cause severe repercussions.[xxv] The Court's ruling in *Hudson v. McMillan* provides

the perfect balance between accountability in ensuring ethical behavior and the freedom to enforce order in the prison system by using appropriate force.

The implications of *Hudson v. McMillan* extend far beyond ensuring that Thompson was compensated for his beating in a Louisiana penitentiary. Most importantly, the case paves the way for evaluating the Eighth Amendment in light of the "living Constitution" model. As attitudes concerning what constitutes appropriate punishment change in the United States, the Supreme Court may prohibit actions under the Eighth Amendment that were lawful when the Constitution was adopted. While Justice Thomson may deplore the changes, they ought to be celebrated because it demonstrates that the United States is a society that strives to live up to the highest ethical guidelines of its time. Contrary to Justice Thomas's opinion, I believe that the ruling in *Hudson v. McMillan* would have made at least one of our founding fathers proud. For it was Thomas Jefferson who said, "I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened institutions must advance also to keep pace with the times."[xxvi] In my view, justice has most certainly been served by the majority in *Hudson v. McMillan*.

[i] Gresham Sykes, *The Society of Captives* (Princeton: Princeton University Press, 1971), 9.
[ii] Cornell University Law School, "*Hudson v. McMillan*," *Legal Information Institute* < http://www.law.cornell.edu/supct/html/historics/USSC_CR_0503_0001_ZS.html> (October 27, 2011).
[iii] Darrell Ross, "Reviewing *Hudson v. McMillan* 10 Years Later," CorrectionsOne < http://www.correctionsone.com/corrections/articles/1842326-Use-of-force-for-COs-Reviewing-Hudson-v-McMillian-10-years-later/> (October 28, 2011).
[iv] Ibid.
[v] Ibid.
[vi] Ibid.
[vii] Justice O'Connor, "*Hudson v. McMillan*," (Decided February 25, 1992, Washington, D.C.)
[viii]Ibid.
[ix] Ibid.
[x] Justice Thomas, "*Hudson v. McMillan* Dissent," (Washington, D.C.)
[xi] David Strauss, "The Living Constitution," *University of Chicago Law School* <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss> (October 29, 2011).
[xii] Thomas G. Walker, "Eligible for Execution," *SAGE* < http://walker.cqpress.com/cases/wilkerson_vs_utah.asp> (October 27, 2011).
[xiii] U.S. Supreme Court Media, "*Robinson v. California*," Oyez <http://www.oyez.org/cases/1960-1969/1961/1961_554> (October 28, 2011).
[xiv] U.S. Supreme Court Media, "*Atkins v. Virginia*," *Oyez* <http://www.oyez.org/cases/2000-2009/2001/2001_00_8452/> (October 28, 2011).
[xv] U.S. Supreme Court Media, "*Roper v. Simmons*," *Ozey* <http://www.oyez.org/cases/2000-2009/2004/2004_03_633>(October 28, 2011).
[xvi] Justice Thomas, "*Hudson v. McMillan* Dissent," (Washington, D.C.)
[xvii] Legal Dictionary, "Cruel and Unusual Punishment," *The Free Dictionary* <http://legaldictionary.thefreedictionary.com/Cruel+and+Unusual+Punishment> (October 26, 2011).
[xviii] Justice Thomas, "*Hudson v. McMillan* Dissent," (Washington, D.C.)
[xix] Cornell University Law School, "*Trop v. Dulles,*" *Legal Information Institute* <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0356_0086_ZO.html> (October 29, 2011).
[xx] Justice O'Connor, "*Hudson v. McMillan*," (Decided February 25, 1992, Washington, D.C.)
[xxi] Justice Rehnquist, "*Bell v. Wolfish*," (Decided May 14, 1979, Washington D.C.)
[xxii] Justice O'Connor, "*Hudson v. McMillan*," (Decided February 25, 1992, Washington, D.C.)
[xxiii] Phillip Zimbardo, *The Lucifer Effect* (Random House Publisher, 2007).
[xxiv] Ibid.
[xxv] Ibid.
[xxvi] Thomas Jefferson, "Quotations on the Jefferson Memorial," *Monticello* <http://www.monticello.org/site/jefferson/quotations-jefferson-memorial> (October 30, 2011)