RECENT DEVELOPMENTS

LIMITATIONS OF THE VOTING RIGHTS ACT OF 1965: *Presley v. Etowah County Commission*, 112 S. Ct. 820 (1992).

The Voting Rights Act of 1965 requires jurisdictions with a history of denying black citizens the right to vote to submit all changes in their voting practices to the United States Attorney General for approval before implementation.[1] Before *Presley v. Etowah County Commission*,[2] the Supreme Court had held that preclearance was required for new practices that might cause minority vote dilution, as well as for those that directly affected the right to cast a ballot.[3] In *Presley*, the Court abandoned its prior commitment to analyzing a practice's potential for vote dilution and instead focused narrowly on whether a proposed practice was a change "with respect to voting."[4]

Presley held that changes in the decisionmaking power of elected officials are changes in governance and not changes in voting; therefore, they are not subject to preclearance.[5] By focusing on whether a practice is a change in voting rather than considering whether a practice could result in vote dilution, *Presley* limits the effectiveness of the Voting Rights Act. States subject to preclearance may now frustrate minority voting by implementing sophisticated methods of vote dilution, the very result that Section 5 of the Act was intended to prevent.[6] The Court's analytical shift is especially troubling because Congress expressly approved of the Court's broad interpretation of Section 5 when it renewed the legislation in 1982.[7]

The Voting Rights Act of 1965 was enacted to combat persistent and pervasive tactics used to deprive black Americans of the right to vote.[8] Concluding that case-by-case litigation under the Fifteenth Amendment was too cumbersome and often resulted in jurisdictions merely exchanging one discriminatory tactic for another, Congress passed the Voting Rights Act to "shift the advantage of time and inertia from the perpetrators

1. 42 U.S.C.A. § 1973c (1992).
2. 112 S. Ct. 820 (1992).
3. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).
4. *Presley*, 112 S. Ct. at 832 (quoting 42 U.S.C.A. § 1973c).
5. *See id.*
6. *See* South Carolina v. Katzenbach, 383 U.S. 301, 334-335 (1966).
7. S. REP. No. 417, 97th Cong., 2d Sess. 6-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 183-192 [hereinafter S. REP. No. 417].
8. *See Katzenbach*, 383 U.S. at 328.

of the evil to its victims."[9] Section 4 of the Act suspended literacy and good character tests in jurisdictions with a history of using them to disenfranchise blacks.[10] Section 5 required jurisdictions covered by Section 4 to submit changes in voting practices to the United States Attorney General for approval.[11] Taken together, these provisions eliminated the most egregious disenfranchisement tactics.

Although the initial interpretation of Section 5 was narrow, in 1969 the Supreme Court held in *Allen v. State Board of Elections* that even changes having subtle effects on voting required preclearance.[12] The Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[13] The Court held that altering the procedures for casting a write-in ballot, altering the requirements for independent candidates, changing from single district to at-large voting, and changing an elective office to an appointed one all required preclearance under Section 5.[14]

After *Allen*, federal courts consistently held that transfers of authority from elected offices to appointed ones were also covered.[15] In *Presley*, however, the Supreme Court held that Section 5 did not cover transfers of power from elected offices to appointed ones, or from elected officials to larger elected bodies controlled by the majority.[16]

Presley concerned electoral changes in two Alabama counties that prevented newly-elected black commissioners from exercising the authority traditionally associated with their positions. County Commissioners in Etowah and Russell counties con-

9. *Id.*

10. In the 1970 amendments to the Voting Rights Act, Congress extended the suspension of literacy and other tests nationwide for five years. H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3281-3282. In the 1975 amendments, Congress made the ban permanent. S. REP. No. 295, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774.

11. A covered jurisdiction can either submit the change to the United States Attorney General for approval or seek a declaratory order in the U.S. District Court for the District of Columbia that the proposed change does not have the purpose or effect of denying or abridging the right to vote based on race. 42 U.S.C.A. § 1973c (1992).

12. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969).

13. *Id.* at 569 (paraphrasing Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

14. *See id.* Concluding that a change requires preclearance does not mean that the Court believes the change is discriminatory, but merely that the change has the potential for discrimination. *See* Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 42 (1978).

15. *See Presley*, 112 S. Ct. at 833 (Stevens, J., dissenting).

16. *See id.* at 832.

trolled the maintenance, repair, and construction of roads in their districts.[17] Pursuant to a 1986 consent decree, the number of commissioners in Etowah County was increased and at-large voting was replaced by single-district voting.[18] In response to these changes, two new commissioners were elected, including Commissioner Presley, Etowah County's only black commissioner in recent history.[19]

In 1987, soon after the election, the four holdover members of the commission passed two resolutions that diminished the authority of the new members. The "Road Supervision Resolution" gave the four holdover commissioners joint responsibility for overseeing the maintenance and repair of all of the county's roads, including the roads in the new districts.[20] In addition, each holdover commissioner continued to supervise the road shop in his district.[21] The new commissioners were given other responsibilities. Commissioner Presley was to oversee maintenance of the county courthouse.[22] On the same day the commission passed the "Common Fund Resolution," which provided that funds for all county repairs be kept in a common fund, and transferred the authority to make repairs from individual commissioners to the commission as a whole.[23] As a result of these resolutions, Commissioner Presley—unlike his predecessors—had no independent control over the roads in his district.

The "Unit System" passed in Russell County was similar to the "Common Fund Resolution." Like the commissioners in Etowah County, each Russell County commissioner had controlled expenditures for routine road repair and maintenance for his district.[24] The "Unit System," passed in 1979 after a commissioner had been indicted for corruption, transferred control over road repair and maintenance for each district from the elected commissioner to the county engineer whom the entire commission appointed.[25]

The plaintiffs in the two counties filed a single complaint in

17. *See id.* at 825.
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 825-26.
24. *See id.* at 826.
25. *See id.* at 826-27.

the District Court for the Middle District of Alabama alleging that the counties had violated Section 5 of the Voting Rights Act by not seeking preclearance for the changes.[26] The three judge panel held that changes in the authority exercised by elected officials required "preclearance when they 'effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters.' "[27] Applying that standard, the court held that Etowah County's "Road Supervision Resolution" required preclearance, but that its "Common Fund Resolution" and Russell County's "Unit System" did not.[28] The plaintiffs appealed.[29]

The Supreme Court rejected the standard that the district court had used, but nonetheless affirmed the district court's decision. Justice Kennedy, writing for the majority,[30] held that the changes in these cases fell outside the scope of Section 5 because they did not pertain to voting. The Court reasoned that because the number of ballots cast remained the same and the changes involved the decisionmaking authority of elected officials, the changes did not pertain to voting but rather to the internal workings of state government.[31] The majority noted that "cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain only to voting."[32] Although the categories described in *Allen*[33] do not "exhaust the statute's coverage," the Court emphasized that subsequent cases had all fallen into one of the *Allen* categories.[34] The Court concluded that the Voting Rights Act was not an "all-purpose anti-discrimination statute" and that holding these changes to be outside its scope would not diminish its effectiveness.[35]

The appellants argued that the Etowah County Common

26. *See id.* at 827.

27. *Id.* (quoting App. to Juris. Statement in No. 90-711, at 13a-14a).

28. *See id.*

29. Decisions from a three-judge panel can be appealed directly to the Supreme Court. 28 U.S.C.A. § 2284 (1992). *See* Allen v. State Bd. of Elections, 393 U.S. 544, 562 (1969).

30. Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Thomas. Justice Stevens filed a dissenting opinion that Justices White and Blackmun joined.

31. *See Presley*, 112 S. Ct. at 828-829, 831.

32. *Id.* at 828.

33. *See supra* notes 12-14 and accompanying text.

34. *Id.*

35. *Id.* at 832.

Fund Resolution constituted a change in voting because after the resolution each commissioner had less authority than before; therefore, the value of a voter's ballot was diminished.[36] The Court believed that adoption of this view would require most changes in local government, including budgetary changes, to be submitted for preclearance because a ballot for a well-funded official would be worth more than a ballot for a poorly funded one.[37] Concluding that such a result would expand Section 5 beyond Congress's intentions, the Court rejected the argument.[38]

The Court stated that Russell County's "Unit System" could not be a change in voting and was not included in the *Allen* categories because transferring authority from elected to appointed officials is not the same as transforming an elected office into an appointed one.[39] The Court emphasized that the majority in *Allen* held that a change from an elected office to an appointed one requires preclearance because "after the change, [the citizen] is prohibited from electing an officer formerly subject to the approval of the voters."[40] Thus, reasoned the majority, transferring the salient power from an elected official to an appointed one is not the same because "[b]oth before and after the change the citizens of Russell County were able to vote for the members of the Russell County Commission."[41]

Justice Stevens, joined by Justices White and Blackmun, dissented. Justice Stevens posited that there was no significant difference between making an elected office appointed and transferring all the salient power from an elected office to an appointed one, or to a larger body of elected officials controlled by the majority.[42] He emphasized that Section 5 was intended to be flexible to prevent new methods of discrimination.[43] Justice Stevens noted that the Court in *Allen* stated that Section 5 should be given "the broadest possible scope" and that Section 5 was "aimed at the subtle, as well as

36. *See id.* at 829.
37. *See id.*
38. *See id.*
39. *See id.* at 830.
40. *Id.* (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569-70 (1969)).
41. *Id.* The majority did not decide whether such a transfer of power could ever "rise to the level of a de facto replacement of an elective office." *Id.* at 831.
42. *See id.* at 838 (Stevens, J., dissenting).
43. *See id.* at 836 (Stevens, J., dissenting).

the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[44]

Justice Stevens also emphasized that Section 5 defined voting as "all action necessary to make a vote effective," and that Congress had explicitly endorsed the Court's broad interpretation of Section 5.[45] Since *Allen*, he pointed out, federal courts had consistently held that Section 5 covered transfers in decision-making that might adversely affect minority voters.[46] Noting that in the current fiscal year the Justice Department processed over 17,000 preclearance requests and that 99% of them were approved without delay, Justice Stevens dismissed as "simply hyperbole" the majority's fear that Section 5 would intrude on the ability of state governments to function.[47]

Furthermore, the dissent noted, under the majority's interpretation it is unclear whether Etowah County's Road Supervision Resolution would require preclearance.[48] The Road Supervision Resolution, deemed to require preclearance by the district court below, transferred all the salient power from a newly elected black commissioner to the holdover white commissioners.[49] Because the district court's holding on the resolution was not appealed, the Court did not address it. However, given that the majority held that changes in the distribution of power among elected officials are not changes in voting,[50] it seems likely that the Court would have exempted this transfer of power from preclearance.[51]

Justice Stevens believed that if the Court were concerned about overexpansion of Section 5, it could have reversed the decision on more narrow grounds than those that the appellants or the United States Attorney General suggested.[52] Justice Stevens argued that at the very least, re-allocations of the authority of an elective office enacted after a black candidate's

44. *Id.* (Stevens, J., dissenting) (quoting *Allen*, 393 U.S. at 565, 567).
45. *Id.* at 835, 837 (Stevens, J., dissenting).
46. *See id.* at 833 (Stevens, J., dissenting).
47. *Id.* (Stevens, J., dissenting).
48. *See id.* at 839 n.24 (Stevens, J., dissenting).
49. *See id.* at 825.
50. *Se id.* at 830.
51. *See id.* at 839 n.24 (Stevens, J., dissenting).
52. *See id.* at 834. (Stevens, J., dissenting). The United States Attorney General had argued that any change in the authority of an elected official required preclearance. *Id.* at 829. The dissent lamented that the Court departed from precedent by rejecting the Attorney General's interpretation. *Id.* at 834. (Stevens, J., dissenting).

victory or after a consent decree should be precleared.[53] That standard would include the Etowah changes but not the Russell County changes.[54] The dissent reasoned that a standard more consistent with precedent would embrace any change that "enhanc[es] the power of the majority over a segment of the political community that might otherwise be adequately represented."[55]

This second standard, which would encompass both the Etowah and Russell changes, correctly focuses on a practice's potential to diminish the impact of minority voting. As the dissent noted, this focus is consistent with the Court's past broad interpretation of the Voting Rights Act.[56] Although the majority claims to adhere to *Allen*'s broad interpretation of the Act,[57] *Presley* marks a retreat from the Court's prior commitment to guard against vote dilution and is incompatible with the intent of Section 5.

Recognizing the resourcefulness of states in abridging the right to vote, *Allen* and its progeny examined a change's potential impact on minority voting, often comparing a proposed change with practices known to cause vote dilution. In *Allen*, for example, the Court held that a switch to at-large voting required preclearance because it could have the same result as denying blacks the right to vote altogether.[58] In *Dougherty County Board of Education v. White*,[59] the Court held that a change requiring county employees to give up their jobs while running for election amounted to a filing fee and required preclearance.[60] Because the proposed change operated as a filing fee, the Court rejected the argument that it was a change in personnel practices and exempt from preclearance.[61] In *Perkins v. Mathews*,[62] the Court held that an annexation of predominantly white areas into a predominantly black district could di-

53. *See id.* at 839 (Stevens, J., dissenting).
54. *See id.* at 839-40 (Stevens, J., dissenting).
55. *Id.* at 840. (Stevens, J., dissenting).
56. *See id.* (Stevens, J., dissenting). This standard also avoids the majority's concern that all routine changes in governance, like budgetary changes, would require preclearance. Budgetary changes and other routine governmental decisions would only require preclearance if they had the potential to cause minority vote dilution.
57. *See id.* at 827.
58. *See Allen*, 393 U.S. at 569.
59. 439 U.S. 32 (1978).
60. *See id.* at 40.
61. *See id.*
62. 400 U.S. 379 (1971).

lute the black vote as surely as at-large elections and, therefore, required preclearance.[63]

The decision in *Presley*, in contrast, focused narrowly on whether the Etowah and Russell County practices should be classified as changes in voting. Had the *Presley* Court carefully analyzed the Etowah and Russell County changes, it would have realized that they are functionally indistinguishable from the changes in *Allen*. As the dissent noted, viewed in terms of the potential impact on the minority vote, there is no difference between making an elected office an appointed one—determined to require preclearance in *Allen*—and transferring the salient power from an elective office to an appointed one, or to a larger elected body controlled by the majority.[64]

Moreover, like the proposed annexation in *Perkins*, the changes in both counties could simulate the effects of at-large voting. In at-large voting, all voters in a jurisdiction vote for each of the county's representatives.[65] Consequently, if blacks are a majority in certain districts but an overall minority in the entire jurisdiction, this procedure allows white voters to exercise majority control over all the representatives.

This same potential for majority control was achieved in Etowah and Russell Counties. Before the consent decree and the contested changes in Etowah County, county commissioners, who were elected at-large, each controlled the road budget and road shop for his district. Pursuant to a consent decree the county switched to single-district voting and Commissioner Presley, the first black commissioner in recent history, was elected.[66] By transferring the authority for road expenditures from individual commissioners to the commission as a whole immediately after Commissioner Presley's election, the Common Fund Resolution diminished the minority vote almost as effectively as at-large voting had.

The Common Fund Resolution effectively allowed Etowah County to undo the changes that the consent decree mandated. Under at-large voting, the residents of Commissioner Presley's district would have been unable to elect a representative of their choice unless the white majority chose the same represen-

63. *See id.* at 390.
64. *See Presley*, 112 S. Ct. at 838 (Stevens, J., dissenting).
65. *See Perkins*, 400 U.S. at 390.
66. *See Presley*, 112 S. Ct. at 825.

tative. Under the consent decree, residents of Commissioner Presley's district can elect a representative of their choice, but, because of the Common Fund Resolution, this representative has no independent authority and can only effect changes with the support of the white majority on the commission. Hence, the Court erred in its assertion that these types of changes "ha[ve] no bearing on the substance of voting power, for it does not increase or diminish the number of officials for whom the electorate may vote."[67]

In addition, the Court's contention that these changes are outside the intent of the Voting Rights Act is implausible. The Court in *Allen* recognized that Section 5 was written broadly to encompass the sophisticated measures states might undertake to mitigate the impact of black voters.[68] Indeed, Congress expressly approved of the Court's broad interpretation of Section 5 as applying to practices that might cause vote dilution when it renewed the Act in 1970, 1975, and 1982.[69] The legislative history of the 1982 Amendments to the Voting Rights Act, for example, approvingly cites the holdings in *Allen* and *Perkins* that "preclearance applied to any change in law which could, even in subtle or indirect ways, infringe the right of minority citizens to vote and to have their vote fully count."[70]

In fact, as *Allen* recognized, a broad construction of Section 5 is necessary if it is to be effective. Before the Voting Rights Act, some jurisdictions blatantly denied blacks the right to vote by selectively employing literacy and good citizenship tests.[71] After Section 4 of the Voting Rights Act made these practices illegal, jurisdictions switched to more subtle methods of disenfranchisement, such as at-large voting.[72] Preventing these changes is essential to protect the gains that Section 4

67. *Id.* at 829.

68. *See Allen*, 393 U.S. at 566-69.

69. S. REP. No. 417, *supra* note 7, at 183-84.

70. *Id.* at 183.

71. *Id.* at 182.

72. "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; . . . at-large elections were substituted for elections by single-member districts, or combined with other sophisticated rules to prevent effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act. Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts." *Id.* at 183.

achieved.[73]

Although the Court is correct that Section 5 was not meant to be an "all purpose antidiscrimination statute,"[74] it was intended to thwart whatever tactics jurisdictions might employ to dilute the strengthened minority vote. The Court's narrow interpretation of the Voting Rights Act is contrary to both precedent and Congressional intent. By focusing on the outward classification of a practice rather than its potential for discrimination, the Court has eviscerated Section 5. States, subject to preclearance, may now diminish the power of minority voters by implementing sophisticated vote dilution mechanisms, precisely what Section 5 was enacted to prevent.

Carol A. Evans

THE CONFRONTATION CLAUSE AND HEARSAY STATEMENTS BY CHILD VICTIMS OF SEXUAL ABUSE: *White v. Illinois*, 112 S. Ct. 736 (1992).

The sexual molestation of children is an ever-increasing problem in the United States.[1] Many state legislatures have modified their evidentiary procedures governing the testimony of allegedly molested children at trial both to protect the victims of such abuse and to increase the conviction rates of child molesters.[2] In *White v. Illinois*,[3] the Supreme Court upheld the

73. *See Presley*, 112 S. Ct. at 836 (Stevens, J., dissenting).

74. *Id.* at 832.

1. In 1983, the American Humane Association reported 71,961 cases of child sexual abuse, an 852% increase over cases reported in 1976. *See Backlash Feared in Child Sex Abuse Cases*, WASH. POST, March 23, 1985, at A13. A more recent study indicates that up to one out of three female adults was sexually molested as a child. *See* AMERICAN BAR ASS'N, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED 7 (1985). A problem with compiling such figures is the high probability that sexual assault of a child will go unreported. *See generally* ROBERT GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 6 (1979); Carl M. Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, *in* SOCIAL WORK AND CHILD SEXUAL ABUSE 145 (Jon Conte & David Shore eds., 1982). Some commentators argue that child sexual abuse is not increasing. *See* John Patrick Grant, *"Face—to Television Screen—to Face": Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right*, 76 KY. L.J. 273, 274-75 (1987) (claiming that "no agreement exists that child abuse is increasing" and suggesting only that "reported" cases have increased).

2. *See* Josephine Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645-46 (1985). *See generally* David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) (describing the potential for lasting emotional injury caused by the treatment of child sexual abuse victims in court). For a more cur-

introduction at trial of a molested child's statements while barely acknowledging the ramifications of its decision on child sexual abuse cases. The Court held both that hearsay statements admitted at trial under "firmly rooted" exceptions to the hearsay rule[4] satisfy the Confrontation Clause,[5] and that such statements made by children are admissible even without a particularized showing of "necessity," namely, that the child is emotionally incapable of testifying. Yet the decision failed to recognize that these particular hearsay exceptions do not always apply well to children. The Court likewise neglected to explain its failure to apply the "necessity" requirement in this case. *White*'s ambiguity limits its potential impact on Sixth Amendment jurisprudence.

On April 16, 1988, a four-year old girl referred to as "S.G." was sexually molested. She awakened her babysitter, Tony DeVore, with screams in the night.[6] DeVore went to S.G.'s room and saw Randall White leaving it. S.G. told DeVore that White had "touched her in the wrong places," and that he also threatened to "whip her" if she screamed.[7] S.G. later repeated her claims to her mother, Tamara Grigsby, stating that White had "put his mouth on [her] front part."[8] Ms. Grigsby then called the police. S.G. told officer Terry Lewis the same story and repeated it to nurse Cheryl Reents and Dr. Michael Meinzen after she was brought to the hospital emergency room.[9] S.G. was emotionally unable to testify at White's trial.[10]

White's attorney objected on hearsay grounds to the trial court's admission of testimony by DeVore, Grigsby, Lewis, Reents, and Meinzen about S.G.'s descriptions of the assault.[11] The court permitted the testimony of all five under an Illinois

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rent compendium of such statutes, see Maryland v. Craig, 110 S. Ct. 3157, 3167-68, nn. 2-4 (1990).

3. 112 S. Ct. 736 (1992).

4. Hearsay consists of "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). For an explanation of the "firmly rooted" exceptions in *White*, see *infra* notes 12-13 and accompanying text.

5. The Sixth Amendment guarantees that the accused in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

6. *See White*, 112 S. Ct. at 739.

7. *Id.*

8. *Id.*

9. *See id.*

10. *See id.*

11. *See id.* at 739-40.

exception to the hearsay rule for spontaneous declarations[12] and also permitted Reents and Meinzen to testify under a separate exception for statements made by sexual abuse victims who are securing medical treatment or diagnosis.[13]

The Illinois Appellate Court affirmed White's conviction,[14] holding that the trial court had not abused its discretion under state law by admitting testimony about S.G.'s descriptions of the assault,[15] and rejecting White's Confrontation Clause challenge.[16] The Illinois Supreme Court denied review. The Supreme Court granted certiorari[17] but limited its review to the question whether admission of the challenged testimony violated White's rights under the Sixth Amendment's Confrontation Clause.

In an opinion authored by Chief Justice Rehnquist,[18] the Supreme Court upheld White's conviction. The Court first disposed of the United States' *amicus curiae* argument, which urged the Court to reject White's Sixth Amendment claim. The Government argued that because the Confrontation Clause was intended only to prevent prosecutions by *ex parte* affidavits,[19] and because S.G.'s out-of-court statements did not fit that descrip-

12. *See id.* at 740 n.1 (quoting People v. White, 555 N.E.2d 1241, 1246 (Ill. 1990) *aff'd sub nom.*, White v. Illinois, 112 S. Ct. 736 (1992)). The exception applies "to [a] statement made . . . while the declarant was under the stress or excitement caused by the event or condition." *Id.*

13. *See id.* at 740 n.2 (quoting ILL. REV. STAT. ch. 38, para. 115-13 (1989)). The Illinois statutory exception is broader than its generic "medical treatment" counterpart, a common law exception first adopted in Illinois in Greinke v. Chicago City Ry., 234 Ill. 564 (1908). The generic exception covers only objective statements as to medical history, symptoms, pain, or sensations. *See* MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 803.8 at 638 (5th ed. 1990). The sexual abuse victim-specific exception also covers statements about the "inception or general character of the cause of the symptom, pain or sensations." *Id.* at 642. This rule allows greater descriptive latitude and more incriminating statements about the "cause" of the pain or sensations. The rationale for applying this broader rule only to the victims of sexual abuse was "implicitly to adopt the position taken in several cases that in *child* sexual abuse prosecutions statements of the *child* victim identifying the perpetrator are admissible . . . to prevent a recurrence of the [emotional] injury." *Id.* (emphasis in original).

14. People v. White, 555 N.E.2d at 1243.

15. *See id.* at 1248, 1250.

16. *See id.* at 1255-56.

17. 111 S. Ct. 1681 (1991).

18. The Chief Justice was joined by Justices White, Blackmun, Stevens, O'Connor, Kennedy, and Souter. Justice Thomas filed an opinion concurring in part, and concurring in the judgment, in which Justice Scalia joined. For Justice Thomas's concurrence, see *infra* text accompanying notes 38-42.

19. *See White*, 112 S. Ct. at 740. The Court described an *ex parte* affidavit as a statement "where the circumstances surrounding the out-of-court statement's utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant." *Id.* at 741.

tion, she was not a "witness against" the petitioner within the text of the Clause.[20] The Court rejected the argument as an overly narrow reading of the Confrontation Clause, "which would virtually eliminate its role in restricting the admission of hearsay testimony."[21]

The Court then turned to petitioner's primary argument, that *Ohio v. Roberts*[22] required the Court to vacate White's conviction because S.G. was "available" but not produced at trial.[23] *Roberts* involved a Confrontation Clause challenge to the introduction at trial of previous testimony by a witness who was not produced at trial.[24] The *Roberts* Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable" for his statement to be admissible.[25] White argued that because Illinois did not show that S.G. was unavailable to testify, the Confrontation Clause barred her hearsay statements.[26]

In response, the Court pointed to its later decision in *United States v. Inadi*,[27] which limited *Roberts* to the proposition that "unavailability analysis" is part of a Confrontation Clause inquiry only when the challenged statements were made "in the course of a prior judicial proceeding."[28] The Court then applied the reasoning of *Inadi* to the hearsay statements in *White*. The Court reiterated the rationale behind hearsay exceptions:

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20. *Id.* at 740.

21. *Id.* at 741. The Court recognized the fact that " 'hearsay rules and the Confrontation Clause are designed to protect similar values,' " *id.* (quoting California v. Green, 399 U.S. 149, 155 (1970)), and " 'stem from the same roots,' " *id.* (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)), but also stated that "we have been careful 'not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements,' " *id.* (quoting Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990)). The Court then stated that the government's argument "comes too late in the day to warrant a re-examination of this approach." *Id.* at 741.

22. 448 U.S. 56 (1980).

23. *See White*, 112 S. Ct. at 741.

24. The witness had testified at a previous probable-cause hearing.

25. *Roberts*, 448 U.S. at 66.

26. *See White*, 112 S. Ct. at 741.

27. 475 U.S. 387 (1986).

28. *Id.* at 393-94. *Inadi* involved out-of-court statements made by a co-conspirator. The Court refused to extend the *Roberts* unavailability requirement to such statements for two reasons. First, unlike the prior in-court testimony in *Roberts*, Inadi's hearsay statements were offered *in context* and therefore had evidentiary weight that could not be replicated in court. *See id.* at 395. Second, the Court found little value in imposing an "unavailability rule" for introducing hearsay testimony that would require either a showing of the declarant's unavailability or his production at trial. *See id.* at 396.

Certain contexts[29] provide a degree of reliability that cannot be recaptured later in court.[30] The Court then distinguished such statements from the prior testimony in *Roberts*, where there was "no threat of lost evidentiary value" if the prior testimony were replaced with live testimony.[31] The Court stated that the preference for live testimony in cases such as *Roberts* allows cross-examination, and concluded that a statement that qualifies under a "firmly rooted" hearsay exception is so trustworthy that "adversarial testing can be expected to add little to its reliability."[32] The Court held that S.G.'s statements need not be treated differently from those in *Inadi*, and that evidence admitted under "spontaneous declaration" and "medical treatment" hearsay exceptions satisfies the Confrontation Clause.[33]

The Court turned to White's second argument that two previous child sexual assault cases[34] established a rule that hearsay testimony of a child victim should be permitted only on a showing of "necessity" to protect the child from any physical or psychological harm that might be caused by testifying at trial.[35] The Court determined that these cases involved only the question of what "in-court" procedures are required by the Confrontation Clause once a witness is testifying.[36] The Court reasoned that because S.G.'s statements were "out-of-court," there was no basis for "importing" the "necessity requirement" from the previous cases and held, without elaboration, that failure to show "necessity" did not invalidate S.G.'s statements.[37]

Justice Thomas's concurring opinion took issue with the

29. The rationale for permitting hearsay exceptions for spontaneous declarations or statements made in the course of securing medical treatment or diagnosis is that the contexts in which these statements are made "provide substantial guarantees of their trustworthiness." *White*, 112 S. Ct. at 742.

30. *See id.* The Supreme Court assumed that S.G.'s testimony "[fell] within the relevant hearsay exceptions," and thus analyzed the validity of the exceptions themselves rather than the propriety of their application to S.G. *Id.* at 740 n.4.

31. *Id.* at 743.

32. *Id.* (citing Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990)).

33. *See id.*

34. Maryland v. Craig, 110 S. Ct. 3157 (1990) (upholding a conviction that resulted from a trial in which a child witness testified via closed circuit television after a showing of necessity); Coy v. Iowa, 487 U.S. 1012 (1988) (vacating a conviction that resulted from a trial in which a child witness testified behind a screen, even though there had been no showing that this was necessary to protect the child from harm).

35. *See White*, 112 S. Ct. at 743.

36. *See id.* at 744.

37. *See id.*

Court's treatment of the United States' *amicus* argument.[38] Justice Thomas first reminded the Court that the Confrontation Clause specifically refers only to "witnesses against" the accused and stated that in this case the Court has "*assumed* that *all* hearsay declarants are 'witnesses against' a defendant" under the Clause.[39] Justice Thomas found that assumption defective.[40] After a brief historical survey, he argued that the Confrontation Clause should be read narrowly, and proposed that

> the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.[41]

Justice Thomas concluded that the Court's application of the Confrontation Clause to other types of hearsay tends to "constitutionalize the hearsay rule and its exceptions," although neither the language of the Clause nor the historical evidence supports such a doctrine.[42] His analysis, however, yielded the same disposition as did the majority's; S.G.'s testimony did not implicate the Sixth Amendment.

The Court's ultimate decision in *White* was viscerally satisfying, but it did not sufficiently address the appropriateness of applying the "spontaneous declaration" exception to children. The Court also left unexplained its rejection of the "necessity" requirement in cases involving the out-of-court statements of a child declarant. These problems raise questions about the impact *White* will have on Sixth Amendment jurisprudence, especially as applied to child victims of sexual abuse.

The Court's "constitutionalization" of two Illinois hearsay

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38. *See id.* (Thomas, J., concurring); *supra* text accompanying notes 19-21.

39. *Id.* (Thomas, J., concurring) (emphasis in original).

40. Justice Thomas briefly surveyed both the etymology and the history of the phrase "witnesses against." He first cited Wigmore's view that the phrase only refers to witnesses who actually appear and testify at trial. *See id.* at 744-45 (Thomas, J., concurring) (citing 5 JOHN WIGMORE, EVIDENCE, § 1397, at 159 (1974)). He then stated that this view was endorsed by Justice Harlan in Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring), and that Justice Scalia had so observed in Maryland v. Craig, 110 S. Ct. 3157, 3173 (1990) (Scalia, J., dissenting). Ultimately, he concluded that the "pure Wigmore-Harlan" reading may be improper. *White*, 112 S. Ct. at 745 (Thomas, J., concurring).

41. *White*, 112 S. Ct. at 747 (Thomas, J., concurring).

42. *Id.* at 748 (Thomas, J., concurring). "Constitutionalization" is the process by which extra-constitutional rules or guidelines become "incorporated" into the Constitution. When the requirements of the Confrontation Clause may be satisfied by the same test that establishes a valid exception to the hearsay rule, in essence the hearsay exception has been "constitutionalized."

rule exceptions may be *White*'s most general legacy. Ironically, as Justice Thomas pointed out, the Court has "repeatedly disavowed any intent to cause [this] result,"[43] and *White* contained such a disclaimer as well.[44] Nevertheless, the Court stated that "[w]here the proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."[45] This language essentially incorporates the hearsay exceptions into the Sixth Amendment.[46] At the very least, *White* indicates that the "spontaneous declaration" and "medical treatment" hearsay exceptions will satisfy the Confrontation Clause. If in the future the Court wishes to retreat from its seemingly general "incorporation" of "firmly rooted" hearsay exceptions, it could reason that the incorporation only applies in child sexual abuse cases.

The Court might have emphasized that the firmly-rooted hearsay exceptions applied to the victims of child sexual abuse have even greater "evidentiary weight" because of their context. In the actual case, the Court paid scant attention to the fact that *White* involved a four-year-old victim of sexual abuse.[47] The Court simply pegged S.G.'s testimony into the neat categories of "spontaneous declaration" and "medical examination," but a discussion of context might have bolstered the Court's rejection of petitioner's Confrontation Clause challenge. This reasoning would have made "child sexual abuse" another independent criterion of reliability, because of the uniquely exigent nature of out-of-court statements in these cases. Such a move would not have been particularly daring, as the premise behind hearsay exceptions is that an out-of-court

43. *Id.* at 748 (Thomas, J., concurring). Justice Thomas cited Idaho v. Wright, 110 S. Ct. 3139, 3141-3142 (1990), United States v. Inadi, 475 U.S. 387, 393 n.5 (1986), Dutton v. Evans, 400 U.S. 74, 86 (1970), and California v. Green, 399 U.S. 149, 155 (1970) as examples.

44. *See supra* note 21.

45. *White*, 112 S. Ct. at 743.

46. Justice Thomas also intimated that under the Court's approach the list of constitutionalized exceptions to the hearsay rule can change, *White*, 112 S. Ct. at 748, and so can the meaning of the Confrontation Clause. Concerns about this Constitutional treatment were well-grounded; the Illinois "medical treatment" exception in *White* differed from the general, otherwise "firmly rooted" medical treatment exception. *See supra* note 13.

47. The Court's analysis of the United States' *amicus* argument and petitioner's Confrontation Clause challenge rooted in *Ohio v. Roberts* fails to mention that a child victim of sexual abuse was involved. *See supra* text accompanying notes 19-33. Similarly, Justice Thomas's entire concurring opinion never addressed the fact that *White* involved the testimony of a molested child. *See supra* text accompanying notes 38-42.

statement was made in a "context" that provides "substantial guarantees of trustworthiness"[48] in the first place. The Illinois "medical treatment" hearsay exception applied exclusively to victims of sexual abuse was broader than the general "medical treatment" exception, and recognized a special context specifically rooted in child sexual abuse prosecutions.[49] Following the logic of the Illinois rule, the Court could have easily attributed greater evidentiary weight to S.G.'s statements than to the statements of the adult in *Inadi* because of the unique situation of child abuse victims.

By recognizing that statements made by child victims of sexual abuse may be deemed to have evidentiary value above and beyond the "spontaneous declaration" exception, the Court could have made a more general pronouncement about child sexual abuse hearsay statements *specifically*, which might have served as a future aid both to the prosecution of molesters and the protection of child witnesses.[50] Such an acknowledgement by the Court would also have recognized the inappropriateness of applying the usual "spontaneous declaration" hearsay exception to child victims of sexual abuse. The "spontaneous declaration" exception assumes that the "rationale, criteria, and application of the exception are identical for the statements of both children and adults."[51] This reasoning is faulty for two fundamental reasons: First, children are not as highly sexualized as adults and thus may not, as a rule, be nearly so shocked by their molestation as the exception might require.[52]

48. *White*, 112 S. Ct. at 742.

49. *See supra* note 13. Some commentators have suggested that the States should go even further than did Illinois. *See, e.g.*, John Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1 (1984) (arguing that the States should create entirely new hearsay exceptions to be applied solely to child victims of sexual abuse because of the problems surrounding the applicability of the current hearsay rules to children).

50. One commentator emphasizes another reason that this should be done: "child victim-witness cases are unique, as they are often situations in which the trauma that might preclude a child's testimony would also preclude the trial. . . . [T]he conviction rate is totally dependent on the state's ability to elicit the child's testimony." Sharon P. Brustein, Coy v. Iowa: *Should Children Be Heard And Not Seen?*, 50 U. PITT. L. REV. 1187, 1191, n.26 (1989). In many instances, forcing a child to testify in the presence of the accused does not increase the trial's fairness but rather prevents the trial entirely. *See id.* This conundrum was recognized in State v. Sheppard, 197 N.J. Super. 411, 417 (1984) where the court remarked: "nearly 90% of the child abuse cases were dismissed as a result of problems attending the testimony of children who could not deal with the prospect of facing . . . strangers in a courtroom setting."

51. Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1755 (1983); *see also*, Skoler, *supra* note 49, at 37.

52. *See, e.g.*, DAVID FINKLEHOR, SEXUALLY VICTIMIZED CHILDREN 65 (1979) (reporting

Second, a child's statement often follows a significant delay;[53] the child may keep silent until something compels him to relate what has happened.[54] Thus, in child sexual abuse cases, the traditional reasoning underlying the "spontaneous declaration" exception would bar a great deal of probative evidence that should be admitted. A better approach might be to weigh various factors such as

> [the] age of the child, his or her physical and mental condition, the exact circumstances of the alleged event, the language used by the child, the presence of corroborative physical evidence, the relationship of the accused to the child, the child's family, school, and peer relationships, and the reliability of testifying witness.[55]

Courts could then determine if the factors contained sufficient indicia of "truthfulness" to allow admission of the hearsay. This approach could be used to evaluate Illinois' sexual-assault victim-specific "medical treatment" hearsay exception as well.[56]

While the Court did provide some protection for child victims by rejecting petitioner's argument that a showing of "necessity" was required before certain hearsay testimony could be admitted under the Confrontation Clause,[57] the Court's analysis begs the question why these out-of-court statements should be considered different from in-court testimony. The most logical rationale parallels the Court's earlier analysis of the superior evidentiary value of out-of-court statements admitted under firmly rooted hearsay exceptions over in-court statements. Because in-court statements are less "contextually reliable," a showing of necessity is required to counterbalance the intrusion on Confrontation Clause rights that in-court protective measures arguably pose. This approach is a balancing test, requiring either contextual reliability under a firmly rooted

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that only 26% of women surveyed who were sexually assaulted as children felt shock and only 20% felt surprised).

53. This may be caused by such factors as "the victim's fears of not being believed, feelings of confusion and guilt, efforts to forget, and threats against the victim by the defendant." Yun, *supra* note 51, at 1757 (citations omitted).

54. *See id.*

55. *Id.* at 1758 (citations omitted).

56. *See supra* note 13.

57. The Court held that a showing of "necessity" was required to justify various in-court protective procedures taken once a child witness is testifying, but rejected petitioner's contention that necessity need be shown for the introduction of out-of-court statements. *See supra* text accompanying notes 34-37.

hearsay exception or less contextual reliability and a showing of necessity. Nevertheless, this analysis still fails to explain why an accused person's right to confront the witnesses against him should depend in any respect on the contextual reliability of those witnesses' hearsay statements. The Court's failure to analyze this issue leaves the *White* decision open to future interpretations of the distinction between in-court and out-of-court statements that might not comport with what the Court intended.

By omitting any justification for its treatment of the necessity requirement, the Court exposed itself to attack from two diametrically opposite fronts. First, if the Court explicitly intended to preserve the necessity requirement, it should have analyzed why it must be maintained. The lack of a supporting rationale will make it easier for a future Court to cite *White*'s hollow maintenance of the necessity requirement for in-court statements, formulate a new test balancing the rights of the accused and the rights of child witnesses, and strike down the requirement entirely. Conversely, if the Court intended to chip away at the necessity requirement, it should have stated its intent to reconsider the issue in the future. This oversight will make it easier for a future court to stress *White*'s maintenance of the "necessity" rule and to expand it.

Regardless of its inadequacies, the decision in *White* will have an impact on the prosecution of child molesters. It constitutionalized Illinois' spontaneous declaration and sexual-abuse victim-specific medical treatment exceptions to the hearsay rule under the Confrontation Clause.[58] Further, it eliminated the necessity requirement from the admission of out-of-court statements.[59] Both of these holdings will protect many children who are emotionally unable to testify at their abusers' trials. *White* is also the first Supreme Court decision to address the specific interplay of the Confrontation Clause and hearsay statements made by the child victims of sexual abuse. In this respect, the decision is something of a landmark. It would have only been fitting for the Court to have made a stronger, or at least a more substantively reasoned, pronouncement.

Jason A. Levine

58. *See supra* text accompanying notes 43-46.
59. *See supra* text accompanying notes 34-37.

THE EIGHTH AMENDMENT IN SECTION 1983 CASES: *Hudson v. McMillian*, 112 S. Ct. 995 (1992).

Until quite recently, the Eighth Amendment's proscription against "cruel and unusual punishment" was applied only to criminal sentences mandated by the legislature or meted out by the judiciary. Since 1976, however, the Supreme Court has designated a limited role for the Eighth Amendment in policing the conditions in which state[1] and federal prisoners are housed.[2] The Court has expressed its reluctance to regulate prisons in this manner and has advised lower courts to "proceed cautiously."[3] Nevertheless, the Court has held that inadequate medical care,[4] poor living conditions,[5] or excessive force during a riot[6] can violate the Eighth Amendment if the deprivation is serious and constitutes an "unnecessary and wanton infliction of pain."[7]

Because the Constitution prohibits only the "cruel and unusual," the Court has limited the application of the Eighth Amendment in these cases to those prison conditions that are significantly harmful to the prisoner.[8] Thus, the Court has required that claims arise from "serious" medical needs in medi-

1. The Eighth Amendment was incorporated into the Fourteenth Amendment and thus made applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

2. Throughout this article I will refer to the class of conditions now regulated as "prison conditions." One subset of prison conditions, as I use the term here, is "conditions of confinement" or "confinement conditions."

The Second Circuit Court of Appeals was the first court to use the Eighth Amendment to regulate prison conditions. *See* Johnson v. Glick, 481 F.2d 1028, 1031-32 (2d Cir. 1973). The Supreme Court first addressed such applications of the amendment in Estelle v. Gamble, 429 U.S. 97 (1976), in which claims by prison inmates that inadequate medical care violated the Eighth Amendment were rejected because the inmates had failed to demonstrate that prison officials were insensitive to serious medical needs.

3. Rhodes v. Chapman, 452 U.S. 337, 351 (1981).

4. *See* West v. Atkins, 487 U.S. 42 (1988); *Estelle*, 429 U.S. 97 (1976).

5. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991); *Rhodes*, 452 U.S. 337 (1981); *see also* Bell v. Wolfish, 441 U.S. 520 (1978) (rejecting application of the Eighth Amendment to the confinement conditions of pre-trial detainees, but affirming, in dicta, the Amendment's application to the conditions in which convicted prisoners are confined).

6. *See* Whitley v. Albers, 475 U.S. 312 (1986).

7. *Id.* at 319 (citing Ingraham v. Wright, 430 U.S. 651, 670 (1977)). The Court has held that the standards by which courts should judge whether a prison condition inflicts "unnecessary and wanton" pain depend upon the type of deprivation at issue. *See id.* at 320 and *infra* notes 34-36 and accompanying text.

8. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (arguing that to determine what is "cruel and unusual" courts should look to "evolving standards of decency").

cal care cases[9] or deprivations of the "minimal civilized measure of life's necessities" in confinement conditions cases.[10] This is the objective component of the Eighth Amendment test: "[W]as the deprivation sufficiently serious?"[11]

Moreover, because the Eighth Amendment requires that the prison condition at issue be a "punishment," the Court insists that the deprivation be intentional.[12] In medical care cases, for example, the Court requires, at a minimum, "deliberate indifference" on the part of the state actors.[13] Thus, the Court has fashioned a subjective component to the inquiry: "[D]id the officials act with a sufficiently culpable state of mind?"[14]

In *Hudson v. McMillian*,[15] the Supreme Court held that a prison guard violates the Eighth Amendment rights of an inmate whenever the guard exerts force "maliciously and sadistically to cause harm," irrespective of whether the inmate is seriously injured.[16] The excessive force test thus fashioned by the Court differs from the tests employed in other prison condition contexts in two respects: There is no prerequisite of serious deprivation and the subjective component—requiring sadistic and malicious intent rather than mere indifference—is heightened. The Supreme Court justified these departures by noting that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."[17]

Hudson constitutionally shields inmates from minor injuries and, in so doing, greatly expands the scope of the Eighth Amendment.[18] The extension of the Eighth Amendment to

9. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

10. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

11. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

12. In traditional Eighth Amendment cases, where the subject is a legislative or judicial act, the deprivation complained of is always a deliberate act. In prison conditions cases, by contrast, the deprivation may arise from negligence or recklessness. *See Wilson*, 111 S. Ct. at 2323-25; *see also* Whitley v. Albers, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness not inadvertence or error in good faith, that characterize the conduct prohibited" by the Eighth Amendment.); Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) ("[P]unishment is a *deliberate* act intended to chastise or deter." (emphasis added)); *Estelle*, 429 U.S. 97 (1976).

13. *Estelle*, 429 U.S. at 104.

14. *Wilson*, 111 S. Ct. at 2324.

15. 112 S. Ct. 995 (1992).

16. *Hudson*, 112 S. Ct at 999.

17. *Id.* at 1000. *See supra* note 8. The Court, in dicta, noted that *de minimis* use of physical force would not be an Eighth Amendment violation unless the use of force was "of a sort repugnant to the conscience of mankind." *Id.* at 1000. *See infra* note 57.

18. The absence of an objective component in the Court's test clearly expands the

cover nearly all prison guard attacks, without regard for the degree of injury inflicted on the inmate, is unwarranted by history, public policy, and logic. Its sole effect on the condition of government institutions will be to flood federal courthouses with prisoner complaints and to drown state prison officials in federal judicial decrees.

Keith Hudson was a prisoner in Camp J of the Angola State Penitentiary in Louisiana.[19] On October 30, 1983, Prisoner Hudson and Edward Allen, an Angola inmate housed in a different cell, were arguing. Correctional Officers Woods and McMillian approached Hudson's cell and told Hudson to end the disturbance.[20] Dissatisfied with Hudson's response, the officers removed Hudson from his cell for transport to administrative lockdown. The trial court found that on the way to the lockdown cells, with Hudson in restraints, the officers "used force on the plaintiff when there was no need to use any force."[21] The court also found that Lieutenant Arthur Mezo "expressly condoned the use of force in this instance."[22] Hudson sustained "minor" injuries—bruising and swelling of his face, mouth, and lip—but "required no medical attention."[23] Two days after the incident, Angola's medical specialist examined Hudson and did not observe any facial injuries.[24]

Eighth Amendment's scope. The purportedly heightened subjective component does not offset this expansion because the "malicious and sadistic" construct is a mere talisman for all that is not "a good-faith effort to maintain or restore discipline." *Id.* at 999. *See infra* notes 38 and 56 and accompanying text.

19. Angola is the nation's largest maximum security prison, and Mr. Hudson is housed within its "isolated maximum security outcamp." John Vodicka, *Prison Plantation: The Story of Angola*, SOUTHERN EXPOSURE, Winter 1978, at 33, 38; *see also* Thorne v. Jones, 585 F. Supp. 910, 912 (M.D. L.A. 1984). Angola has a long history of brutality and civil rights violations. *See, e.g.*, *Prisoners Sue Louisiana Over Medical Care*, NEW ORLEANS TIMES PICAYUNE, Jan. 4, 1992, at B4; David Snyder, *Inmate May Be Victim of His Victory*, NEW ORLEANS TIMES PICAYUNE, Jan. 2, 1992, at A1; David Snyder, *Violations Persist At Angola, U.S. Report Says*, NEW ORLEANS TIMES PICAYUNE, Dec. 8, 1991, at B1; Ed Anderson, *Judge Blasts State Inaction On Prisons*, NEW ORLEANS TIMES PICAYUNE, July 15, 1989, at B1; Watts v. Phelps, 377 So. 2d 1317, 1318 (La. Ct. App. 1979).

20. Hudson v. McMillian, No. 83-1385-A, at 3-5 (M.D. L.A. 1987) (available as appendix to Brief for Petitioner, Hudson v. McMillian, 112 S. Ct. 995 (1992) (No. 90-6531)).

21. *Id.* at 9.

22. *Id.* Hudson testified that Mezo had seen the other officers using force and had told his subordinates "not to have too much fun." *Id.* at 5.

23. *Id.* at 9. In addition, Hudson claimed that his dental plate was damaged. However, because Hudson did not suffer any discomfort from this damage and the prison fixed the dental plate, the trial court found that the "plaintiff suffered no harm . . . due to the broken plate." *Id.*

24. *See id.* The medical records of November 1, 1983, indicate only an unspecified problem with Hudson's teeth for which no treatment was necessary. *See id.* at 8.

Hudson brought suit under 42 U.S.C. § 1983 claiming that the Angola correction officers had violated his Eighth Amendment rights. The parties agreed to have the case heard before a federal magistrate, who determined that the actions of the officers were "excessive" and could only have been "motivated by malice."[25] He awarded Hudson $800.[26]

On appeal, the Fifth Circuit reversed.[27] The appellate court noted that "not every use of excessive force rises to a constitutional violation cognizable under 42 U.S.C. § 1983."[28] Indeed, the Fifth Circuit had previously held that a prisoner must suffer "a significant injury" to prevail under the Eighth Amendment in an excessive force claim.[29] Relying on the trial court's finding that Hudson had suffered "minor injuries," the Fifth Circuit held that no constitutional violation had occurred.[30]

The Supreme Court granted certiorari to determine whether the Fifth Circuit had erred in holding that the Eighth Amendment was not violated "as a result of a single incident of force by the respondents which did not cause a significant injury."[31] Justice O'Connor, writing for five members of the Court, reversed the Fifth Circuit, noting that "the absence of serious injury is . . . relevant to the Eighth Amendment inquiry," but not dispositive.[32] The majority confirmed the Court's previous rulings that any "unnecessary and wanton infliction of pain" violates the Eighth Amendment,[33] and noted that this standard is to be applied "with due regard for differences in the kind of conduct against which [the] objection is lodged."[34] Thus, the

25. *Id.* at 11.
26. *See id.* at 12.
27. Hudson v. McMillian, 929 F.2d 1014 (5th Cir. 1990).
28. *Id.* at 1015.
29. *See* Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990), which was announced in the time between the magistrate's decision in *Hudson* and the disposition of *Hudson* by the Court of Appeals. The *Huguet* standard additionally required that the injury "result directly and only from the use of force that was clearly excessive to the need," that the degree of force employed be "objectively unreasonable," and that the incident result in "an unnecessary and wanton infliction of pain." *Id.* at 841. The Fifth Circuit had derived its Eighth Amendment excessive force standard from its decision in a Fourth Amendment excessive force case, Johnson v. Morel, 876 F.2d 477 (5th Cir. 1990) (en banc), and the Supreme Court's holding in Whitley v. Albers, 475 U.S. 312 (1986).
30. *See Hudson*, 929 F.2d at 1015.
31. Hudson v. McMillian, 111 S. Ct. 1679 (1991).
32. Hudson v. McMillian, 112 S. Ct. 995, 999 (1992).
33. *Id.* at 998.
34. *Id.* at 1000 (citing Whitley v. Albers, 475 U.S. 312, 320 (1986)). The Court noted that because the Eighth Amendment "draws its meaning from the evolving standards of decency that mark the progress of a maturing society," that which constitutes "unnecessary and wanton" varies depending upon society's beliefs and expectations re-

standard for poor medical care is "deliberate indifference" to "serious" medical needs.[35] In conditions of confinement cases, the Court requires "extreme deprivations."[36] Reasoning that "in the excessive force context, society's expectations are different,"[37] the Court held that when prison guards use force, "the core judicial inquiry is . . . whether [the] force was applied in a good-faith effort to maintain or restore discipline, or [whether it was inflicted] maliciously and sadistically to cause harm;"[38] the extent of the inmate's injuries is immaterial. Because the trial court had determined that the force exerted by the guards was excessive, the court's finding that Hudson's injuries were minor provided "no basis for [the Fifth Circuit's] dismissal of his § 1983 claim," and thus the Supreme Court upheld the magistrate's award of damages.[39]

Justices Stevens and Blackmun filed separate concurring opinions. Justice Stevens wrote to protest the Court's utilization of the heightened "malicious and sadistic" subjective standard. He argued that a standard so difficult to meet ought to be reserved for the factual setting in which it was created—prison riots.[40] Justice Stevens would employ a pure "unnecessary and wanton" standard to cases of excessive force absent exigent circumstances.

Justice Blackmun noted his opposition to the "malicious and sadistic" standard as well.[41] In addition, he refuted judicial efficiency arguments proffered by *amici curiae*,[42] labeling them "audacious" and arguing that such concerns have "no appropriate role in interpreting the contours of a substantive constitutional right."[43] Finally, he noted that the Eighth Amendment's pro-

garding the conduct or condition at issue. *Id.* at 1000; *see also supra* note 8 and accompanying text.

35. *Id.* at 998; *see also supra* note 9.

36. *Id.* at 1000; *see also supra* note 10.

37. *Id.* at 1000. *See supra* note 34.

38. *Id.* at 999. This standard was borrowed from *Whitley*, a case challenging guards' imposition of force during a prison riot.

39. *Id.* at 1000, 1002.

40. As noted *supra* note 38, the "malicious and sadistic" standard was first used in *Whitley*. Prison riots are a unique circumstance, Justice Stevens argued, because such disturbances present challenging tasks to prison administrators—namely, maintaining order and preventing violent confrontations—that justify greater discretion and flexibility for prison officials. *See Hudson*, 112 S. Ct. at 1002 (Stevens, J., concurring).

41. *See Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring).

42. *See* Brief for Texas, Hawaii, Nevada, Wyoming, and Florida as Amici Curiae at 15, *Hudson*, 112 S. Ct. 995 (1992) (90-6531).

43. *Hudson*, 112 S. Ct. at 1003 (Blackmun, J., concurring).

scription against "unnecessary and wanton" pain is not limited to physical pain.[44]

Justice Thomas, joined by Justice Scalia, dissented. In an opinion that was widely criticized in the popular media,[45] Justice Thomas argued that the majority's decision exceeded previous precedent.[46] Like Justices Blackmun and Stevens, the dissenters argued that the "malicious and sadistic" standard is inappropriate in excessive force cases absent exigent circumstances.[47]

Justice Thomas argued that the majority unjustifiably dismissed the "objective component" of the Eighth Amendment analysis.[48] He contended that the Court had previously required a serious deprivation to "ensure that the Eighth Amendment did not transfer wholesale the regulation of prison life from executive officials to judges."[49] Arguing that the elimination of the objective requirement in excessive force cases would transform the Constitution into a "National Code of Prison Regulation,"[50] Justice Thomas advocated a serious deprivation requirement in excessive force cases similar to that imposed by the Court in other prison conditions cases.

Justice Thomas' criticism of the majority opinion is justified. The conduct of which Hudson complained is deplorable, but it should not be held unconstitutional. Nothing in this country's history, nor within the bounds of public policy or logic, compels such an extension of the Eighth Amendment. Moreover, this extension of constitutional rights will be accompanied by a torrent of negative consequences.

Although the Eighth Amendment was intended to protect those convicted of crimes, nothing in its drafting nor in the history of its interpretation suggests that it is to be interpreted

44. *See id.* at 1004 (Blackmun, J., concurring).

45. *See, e.g.*, *The Youngest, Cruelest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24; Mary McGrory, *Thomas Walks in Scalia's Shoes*, WASH. POST, Feb. 27, 1992, at A2; William Raspberry, *Confounding One's Supporters*, WASH. POST, Feb. 28, 1992, at A23. *Contra* L. Gordon Crovitz, *Justice Scalia's Ally on the Court—And Then Some*, WALL ST. J., Mar. 11, 1992, at A15; R.T. Lee, *Reconsidering Justice Thomas*, WASH. POST, Mar. 13, 1992, at A24.

46. *See Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting).

47. *See id.* at 1008 (Thomas, J., dissenting); *see also infra* note 48.

48. The dissent argued that the majority had attempted to compensate for the elimination of the objective component of the Eighth Amendment test by shoring up the subjective component. That is, the majority has heightened the "unnecessary and wanton" subjective component to compensate for the elimination of an absolute minimum level of injury. *See id.* at 1008 (Thomas, J., dissenting).

49. *Id.* at 1007 (Thomas, J., dissenting).

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

broadly.[51] Indeed, the Court has only recently extended its application to the operation of penal institutions.[52] Moreover, it has long been clear that prisoners possess a limited spectrum of constitutional rights,[53] because the penal system could not operate effectively otherwise.[54] Although the Supreme Court recently cautioned itself and lower courts against expanding the federal constitutional rights of prisoners,[55] the *Hudson* majority failed to heed that warning.

In distending the Eighth Amendment, the Court has provided a constitutional protection of tort-like proportions. Any intentional touching by a guard that is not justifiable[56] and results in some injury, however slight,[57] is actionable under 42 U.S.C. § 1983 as a violation of the Eighth Amendment. The *Hudson* doctrine amounts to a constitutional cause of action for intentional batteries against prisoners.[58] That a constitutional violation can be triggered by nothing more than an ordinary tort committed by a state employee is a major break with prior

51. The history of the Eighth Amendment is documented in Ingraham v. Wright, 430 U.S. 651, 664-68 (1977), and its original meaning discussed in Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

52. *See supra* note 2 and accompanying text.

53. *See* Bell v. Wolfish, 441 U.S. 520, 545-46 (1978) ("[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations."); Ellen K. Lawson, *Extending Deference To Prison Officials Under the Eighth Amendment*: Whitley v. Albers, 32 WASH. U. J. URB. & CONTEMP. L. 231, 238 n.45 (listing leading cases granting constitutional rights to prisoners).

54. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125-26 (1977) (holding that regulations prohibiting prisoners from soliciting other inmates to join the prisoners' labor union did not violate the First Amendment); Price v. Johnston, 334 U.S. 266, 285 (1948) (arguing that courts have the discretion to refuse to allow prisoners to argue or to be present at their appeals).

55. *See* Rhodes v. Chapman, 452 U.S. 337, 351 (1980) ("This Court must proceed cautiously in making an Eighth Amendment judgment because, unless we reverse it, a decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment." (internal quotation marks omitted)).

56. "Malicious and sadistic" as used by the Court seemingly captures all mental states that do not qualify as "good-faith efforts to maintain or restore discipline." *Hudson*, 112 S. Ct. at 999. That is, all force that is not justified by necessity is considered "malicious and sadistic." As such, it amounts to an intentional tort-like mental standard. *See supra* notes 18 and 38 and accompanying text.

57. The Court excepts injuries that are *de minimis unless* they are caused by a use of force that is "repugnant to the conscience of mankind." *Id.* at 1000. Because "maliciously and sadistically" applying force is usually repugnant, the qualification, in practice, will likely swallow the exception.

58. Under *Hudson*, a guard who maliciously attacks a group of inmates, prison visitors, and other guards commits a mere battery against some but violates the constitutional rights of others.

reasoning and precedent.[59] In a democracy, the people, acting through their legislators, ought to define what constitutes improper behavior on the part of public servants, for all but the most egregious and offensive conduct. Extending one provision of the Constitution to protect citizens from insignificant injuries dilutes the moral strength of all of the document's mandates.

The extension of the Eighth Amendment to reach minor injuries inflicted by prison guards is particularly unsound because many other remedies for such injuries exist. While it is true that the existence of a tort remedy ordinarily does not affect the scope of constitutional rights,[60] a judicial decision to augment constitutional protections ought to be made only after contemplation of the societal need for such an expansion.[61] Here no such need existed. Hudson had several remedies he chose not to pursue.[62] Inmates at other institutions have em-

59. In the Eighth Amendment context, see Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("[M]edical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Suits v. Lynch, 437 F. Supp. 38, 40 (D. Kan. 1977) ("[T]he protection of the Eighth Amendment . . . is no-where [sic] nearly so extensive as that afforded by the common law tort action of battery."); Sheffey v. Greer, 391 F. Supp. 1044, 1046 (E.D. Ill. 1975) ("[T]his Court believes the acts challenged must do more than offend some fastidious squeamishness or private sentimentalism. . . . Thus, a plaintiff must show more than he has suffered an intentional tort." (internal quotation marks and citation omitted)); *see also* Smith v. Dooley, 591 F. Supp. 1157, 1167 (W.D. L.A. 1984) ("42 U.S.C. § 1983 . . . does not grant a cause of action for every injury wrongfully inflicted by a state officer.") (citing Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), *aff'd mem.*, 778 F.2d 788 (5th Cir. 1985)). *Contra* Dailey v. Byrnes, 605 F.2d 858, 860 (5th Cir. 1980) ("We have frequently held that an unjustified beating at the hands of prison officials gives rise to a section 1983 claim." (internal quotation marks omitted)).

With regard to the Fourteenth Amendment, *compare* Baker v. McCollan, 443 U.S. 137, 146 (1979) ("[F]alse imprisonment does not become a violation of the fourteenth amendment merely because the defendant is a state official."); Paul v. Davis, 424 U.S. 693, 701 (1976) (refusing to "make of the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states").

60. *See* Ingraham v. Wright, 430 U.S. 651, 690 (1977) (White, J., dissenting) ("The availability of state remedies has never been determinative of the coverage or of the protections afforded by the Eighth Amendment.").

61. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 352 (1981) ("In discharging this [duty to protect constitutional rights], . . . 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.").

62. Hudson had potential remedies in administrative, statutory tort, and state constitutional law. *See* LA. ADMIN. CODE tit. 22:3309 (B); LA. CODE CRIM. PROC. ANN. art. 15:829 (West 1988); LA. CONST., art. I, § 3; LA. CONST., art. I, § 12; LA. CONST., art. I, § 20. *See also* Armstead v. Phelps, 449 So. 2d 1049 (La. Ct. App. 1984) (Camp J inmate brought claim under Louisiana Constitution.); Watts v. Phelps, 377 So. 2d 1317 (La. Ct. App. 1979) (same). In addition, prisoners at Angola have brought claims for beatings by guard under common law tort theories. *See* Bay v. Maggio, 417 So. 2d 1386 (La.

ployed common law and statutory tort law in seeking damages from prison guards for improper and excessive use of force.[63] Where no such remedies are available, a prisoner may have a due process claim.[64] Moreover, guards are subject to discipline in most states for malpractice,[65] willful violence against a prisoner,[66] or failure to report witnessed excessive force.[67] Because these alternative remedies assure that the use of excessive force is penalized and deterred, there was no practical need for the *Hudson* Court's extension of the Eighth Amendment.

Logic does not support the majority's excessive force test any more than does history or public policy. The *Hudson* majority was reluctant to hold that a single attack by a low-level prison guard is enough to trigger a constitutional claim.[68] Instead the Court relied on the trial court's finding that the Hudson beating was "not an isolated incident" and that Lieutenant Mezo "expressly condoned the use of force."[69] But while the Court

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Ct. App. 1982); Gullette v. Louisiana, 383 So. 2d 1287 (La. Ct. App. 1980); Mulcahy v. Louisiana, 334 So. 2d 509 (La. Ct. App. 1976).

63. *See, e.g.*, Birdo v. Debose, 819 S.W. 2d 212 (Tex. Ct. App. 1991); McCullough v. Wittner, 552 A. 2d 881 (Md. 1989); Myles v. Falkenstein, 317 So. 2d 292 (La. Ct. App. 1975); Roberts v. State, 307 N.E. 2d 501 (Ind. Ct. App. 1974); Saia v. Warden, 209 A. 2d 521 (Conn. Super. Ct. 1964). Many states have statutes prohibiting guards from using excessive force. *See* Brief for Petitioner at 21, Hudson v. McMillian, 112 S.Ct 995 (1992) (No. 90-6531) (listing eighteen states and their statutes); *see also* N.Y. CORRECT. LAW 137(5) (McKinney 1990); TEX. GOV'T CODE ANN. 500.002 (West 1990).

64. Indeed, both Justice Thomas and the respondents in *Hudson* agree that if a state does not have adequate civil remedies for prisoners who have suffered beatings, the prisoner can proceed against the state under the Fourteenth Amendment. *See Hudson*, 112 S. Ct. at 1011 (Thomas, J., dissenting); Brief for Respondents at 24, Hudson v. McMillian, 112 S. Ct. 995 (1992) (No. 90-6531). *Cf.* George v. Evans, 633 F.2d 413 (5th Cir. 1980) ("Whether or not an Eighth Amendment violation can be established, the use of undue force by a prison guard is actionable as a deprivation of fourteenth amendment due process rights.").

65. *See, e.g.*, FLA. STAT. ANN. 950.09; Powell v. Florida, 508 So. 2d 1307 (Fla.Dist. Ct. App. 1987); *see also* Wells v. Department of Pub. Safety and Corrections, 498 So. 2d 266 (La. Ct. App. 1986) (suspending and demoting an Angola Camp J corrections officer for violating prison guidelines).

66. *See, e.g.*, Harrah v. Leverette, 271 S.E. 2d 322, 332 (W. Va. 1980) ("[A]ny officer who practices brutality must be discharged from his employment."); *see also supra* note 63.

67. *See, e.g.*, Korin v. Department of Corrections, 585 A. 2d 559, 560 (Pa. Commw. Ct. 1991).

68. The *Hudson* majority takes no official position on whether a single beating by a single guard could constitute constitutionally cognizable punishment but strongly hints that it could not. *See Hudson*, 112 S. Ct. at 1001-02. In addition to the cases the Court cites, see also Martinez v. Rosado, 474 F. Supp. 758, 760 n.8 (S.D. N.Y. 1979); Cullum v. California Dep't of Corrections, 267 F. Supp. 524, 525 (N.D. Cal. 1967).

69. *Hudson*, 112 S. Ct. at 1002 (citing Hudson v. McMillian, No. 83-1385-A, *supra* note 20).

seemingly held that a pattern of conduct or condonation by high-level officials is necessary to create "official punishment," and that unauthorized conduct by prison guards does not constitute constitutionally-cognizable state action,[70] the Court nonetheless relied on the individual guard's mental state in determining whether the official punishment was a constitutional violation. If entrepreneurial prison guards truly lack the authority to "punish" on behalf of the state, the Court should focus its subjective requirement on the mental state of the senior officials who do have that authority because they are the constitutionally-relevant state actors. By not doing so, the Court creates an unnecessary and illogical duality.

The practical consequences of the *Hudson* excessive force standard are overwhelmingly negative. Prisoners, who generally have access to free legal services, have both the incentive and capability to bring lawsuits whenever they desire.[71] Indeed, the system is already heavily laden with prisoner suits.[72] Providing additional causes of action, especially for the redress of insignificant injuries, will undoubtedly encourage more prisoners to sue[73] and, in turn, delay justice to more worthy claims brought by prisoners and non-prisoners alike.[74]

Moreover, providing prisoners a constitutional cause of action will inspire inmates to file lawsuits in federal courts.[75] Before *Hudson*, prisoners with insignificant injuries were forced to seek redress in state courts under state tort or administrative law. Now, some of these inmates will instead litigate in the federal courts. The most basic precepts of federalism caution against expansions of constitutional rights that merely move

70. "Official punishment" is seemingly required by the language of the Eighth Amendment. *See supra* note 12; *see also* Clemmons v. Greggs, 509 F.2d 1338, 1339, 1340 (5th Cir. 1975) (stating that what the prison official did "boils down to a single act of a minor prison functionary" and thus was not a "punishment").

71. *See* In re Riddle, 372 P. 2d 304, 306 (Cal. 1962); *see also* Hayes v. Wimberly, 625 F. Supp. 967, 968-69 (E.D. Ark. 1986).

72. In the federal courts, for example, one out of every five civil cases is brought by a prisoner. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 18-19 (Mar. 31, 1990). State courts are similarly burdened.

73. *See, e.g.*, Miller v. Leathers, 913 F.2d 1085, 1089, 1092 (4th Cir. 1990) (Wilkinson, C.J., dissenting).

74. *Cf.* Procunier v. Martinez, 416 U.S. 396, 405 n.9 (1974) (stating that courts should exercise judicial restraint in prisoner cases because "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints").

75. The constitutional cause of action, of course, provides federal question jurisdiction to the federal courts under 42 U.S.C. § 1331.

the locus of adjudication from state courts to federal ones without modifying the legal ramifications of the underlying behavior.[76] *Hudson* is such an expansion.

Brutality is, unfortunately, a chronic affliction of many prisons in this country, including the Angola Penitentiary. Nevertheless, stretching the Eighth Amendment beyond the scope justifiable by history, public policy, and logic is lamentable. The Supreme Court will not solve this nation's most intractable problems by shaking its quill and distorting the meaning of the Constitution. *Hudson* will not create more humane prisons. Indeed, the decision will only encourage frivolous prisoner suits and shift the oversight of prisons from state courts to the federal judiciary.

Gregory P. Taxin

CRIMINAL ANTI-PROFIT STATUTES AND THE FIRST AMENDMENT: *Simon & Schuster, Inc. v. New York Crime Victims Board.*, 112 S. Ct. 501 (1991).

In *Simon & Schuster, Inc. v. New York Crime Victims Board.*,[1] the United States Supreme Court struck down Section 632-a of New York's Executive Law ("Section 632-a" or "the Son of Sam law"),[2] which had operated to seize and hold any revenue a criminal received from the commercial depiction of his crimes until the criminal's victims had a chance to claim compensation for their injuries. Forty-three states[3] and the federal government[4] have enacted similar statutes, and although the Supreme Court was careful to limit its holding to the New York law at issue,[5] *Simon* & Schuster foretells the demise of all these criminal anti-profit provisions.

When New York's Son of Sam killer was captured in 1977, it

76. *Hudson*-like beatings already may be remedied through a variety of methods. *See supra* notes 62-67 and accompanying text.

1. 112 S. Ct. 501 (1991).

2. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991).

3. *See* Karen M. Ecker & Margot J. O'Brien, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075 n.6 (1991) (listing state statutes).

4. *See* Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C. §§ 3681-3682 (1988).

5. *See Simon & Schuster*, 112 S. Ct. at 512.

was obvious that his story rights were of substantial value. To prevent the murderer from profiting from his infamy without first compensating the families of his victims, the New York State legislature passed Section 632-a.[6] Quickly dubbed the Son of Sam law, Section 632-a applied whenever any entity contracted with a person accused or convicted of a crime for the rights to the presentation of the crime or the criminal's thoughts about the crime.[7] A copy of the agreement had to be submitted to the New York Crime Victims Board ("the Board"),[8] and all payments due to the accused or convicted individual were required to be made to the Board, which would place the money in escrow.[9] After the establishment of the escrow account, victims of the contracting party had five years, other limitations periods notwithstanding, to obtain civil judgments that could be satisfied with funds from the account.[10] Upon the dismissal of charges, acquittal, or the passage of five years, any money remaining reverted to the accused or convicted person.[11]

In 1986, the Board became aware of a contract between Henry Hill and Simon & Schuster, Inc. Mr. Hill, a career mobster ensconced in the Federal Witness Protection Program, had agreed in 1981 to assist Simon & Schuster in the production of a book about his life in organized crime.[12] During the following years, Mr. Hill spent hundreds of hours relating tales of his exploits to author Nicholas Pileggi, and in January 1986 Simon & Schuster published their work as *Wiseguy: Life in a Mafia Family*.[13] The book received both critical and popular acclaim and sold over one million copies.[14]

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6. The sponsor of the bill, Sen. Emanuel R. Gold, wrote: "It is abhorent [sic] to one's sense of justice and decency that an individual, such as the [Son of Sam] killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal." *See* Memorandum of Sen. Emanuel R. Gold, 1977 New York State Legislative Annual 267.

7. A convicted person was defined to include "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted," as well as those convicted in a court of law. N.Y. EXEC. LAW § 632-a(10)(b).

8. *See id.* § 632-a(1).

9. *Id.* § 632-a(1).

10. *Id.* § 632-a(1), (7).

11. *Id.* § 632-a(3), (4).

12. *Simon & Schuster*, 112 S. Ct. at 507.

13. *Id.* at 506-07.

14. *See id.* at 507.

On January 31, 1986, the Board sent Simon & Schuster a letter. Citing the Son of Sam law, the Board directed the publisher to forward copies of all contracts regarding the production of *Wiseguy* and records of all payments made pursuant to the contracts.[15] Simon & Schuster complied with the request. On June 15, 1987, the Board served Simon & Schuster with a Proposed Finding and Order, finding that *Wiseguy* "contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes,"[16] and thus was subject to the provisions of Section 632-a.[17] The Board's proposed order required Simon & Schuster to pay the Board all current or future royalties owed to Mr. Hill and required Mr. Hill to transfer to the Board any money already paid to him. In the event that Mr. Hill failed to disgorge the money, Simon & Schuster was to reimburse the Board for those funds.[18]

After the proposed order became final, Simon & Schuster filed suit in the Southern District of New York seeking an order declaring that Section 632-a violated the First and Fourteenth Amendments and an injunction prohibiting the Board from enforcing the statute. The district court found for the Board.[19] Determining that the Son of Sam law "does not directly affect expressive activity and that it is directed at nonspeech activity,"[20] the court applied the balancing test enunciated in *United States v. O'Brien*.[21] It concluded that the law did not violate the First Amendment because it posed only an incidental burden on expression that was no greater than necessary to serve New York's important interest in victim compensation.[22] Simon & Schuster's Fourteenth Amendment claim was also rejected, the court holding that the language of the statute gave sufficient

15. *See id.*

16. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 780 (2d Cir. 1990).

17. *See Simon & Schuster*, 112 S. Ct. at 507.

18. *See id.*

19. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989).

20. *Id.* at 178.

21. 391 U.S. 367 (1968). The *O'Brien* Court held that

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

22. *See Simon & Schuster, Inc.*, 724 F. Supp. at 175-79.

notice of its scope.[23]

Considering only the First Amendment claim on appeal, the Second Circuit affirmed the district court's decision.[24] The appellate court found Section 632-a to be a direct, content-based restriction on speech and thus tested the statute under strict scrutiny[25] rather than the lesser *O'Brien* standard.[26] Nevertheless, the law passed muster as narrowly tailored to the State's compelling interest in "denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization."[27]

The Supreme Court reversed. Justice O'Connor, writing for the majority,[28] began by approving the Second Circuit's application of the strict scrutiny standard. The Court noted that Section 632-a singled out revenue derived from expression on a particular subject for a burden placed on no other income. The statute was thus a content-based restriction, and strict scrutiny the appropriate standard of review.[29]

Considering possible compelling interests that might serve to insulate the statute, Justice O'Connor determined that the State had legitimate interests in "ensuring that victims of crime are compensated by those who harm them"[30] and "ensuring that criminals do not profit from their crimes."[31] Combining these two interests, the majority concluded that "the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims."[32]

The majority then turned to New York's assertion of a nar-

23. *See id.* at 179-80.

24. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990).

25. Strict scrutiny demands that a statute: 1) be supported by a compelling interest; 2) not be overinclusive with respect to that interest; and 3) not be underinclusive with respect to that interest. *See* Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231-32 (1987) (holding that differential taxation of the press must be narrowly tailored to serve a compelling interest; regulation is not narrowly tailored if either underinclusive or overinclusive).

26. *See Simon & Schuster*, 916 F.2d at 780-81.

27. *Id.* at 793.

28. Chief Justice Rehnquist and Justices White, Stevens, Scalia, and Souter joined in Justice O'Connor's opinion. Justices Blackmun and Kennedy submitted separate concurrences. Justice Thomas did not participate in the decision.

29. *See Simon & Schuster*, 112 S. Ct. at 508.

30. *Id.* at 509.

31. *Id.* at 510.

32. *Id.* The Court assumed, for purposes of the case only, that income derived from the criminal's sale of the story of his crime was properly classified as profits of that crime. *Id.*

rower compelling interest in "ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries."[33] Any such interest was unavailing, Justice O'Connor concluded, because the State had failed to evince any reason to limit its seizure of the criminal's assets to those derived from his expression about his crime. Storytelling proceeds were not shown to be superior to a criminal's other assets for compensation purposes; nor was there any reason to value their recovery as fruits of crime over the recovery of any other form of criminal profit.[34] New York, the Court said, had simply "taken the *effect* of the statute and posited that effect as the State's interest;"[35] this shortcut would not be allowed.

Measuring the statute against what it had held to be the proper compelling interest, the Court found that "[a]s a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive."[36] Noting that Section 632-a could be applied to works containing only a passing mention of the author's crime and that the statute applied to people who admitted to crimes but who had never been accused or convicted, the Court found that the law "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."[37] Because Section 632-a was not narrowly tailored, the Court concluded, it was inconsistent with the First Amendment.

Two Justices concurred. Justice Blackmun believed the Court should have held that the law was underinclusive as well as overinclusive.[38] Justice Kennedy argued that statutes found to be content-based regulations of protected speech are *per se* unconstitutional without need for any further analysis.[39] The majority dismissed both concurrences in a footnote, stating that the overinclusiveness of the statute made it unnecessary to delve into these remaining issues.[40]

33. *Id.* (citing Brief for Respondents at 46, *Simon & Schuster* (No. 90-1059)). Because this interest was narrower, it would have had a better chance of surviving strict scrutiny.
34. *See id.*
35. *Id.*
36. *Id.* at 511.
37. *Id.*
38. *See id.* at 512 (Blackmun, J., concurring).
39. *See id.* at 512-15 (Kennedy, J., concurring).
40. *See id.* at 511 n.**.

With the *Simon & Schuster* decision, the Supreme Court has laid the groundwork for the invalidation of criminal antiprofit laws across the country. The Court struggled to limit its holding to the New York law at issue and avoid the instigation of a "judicial demolition project."[41] Despite this effort, the majority's establishment of strict scrutiny as the standard of review for Son of Sam statutes cleared the way for demolition to begin. The overinclusiveness that proved fatal to New York's law is easily rectified. However, strict scrutiny also demands that statutes not be underinclusive,[42] and this is a requirement that Son of Sam laws simply cannot meet.[43]

The Court based its decision to invalidate Section 632-a solely on the ground that the statute was overinclusive. In diagnosing overinclusiveness, the Court focused on the statute's explicit coverage of non-convicted persons and a statement at argument by the Board's counsel that the statute applied to works mentioning crime only incidentally. As if thrown into a panic by these features, the Court set forth a list of significant authors and literary works that could arguably come within the reach of Section 632-a if the statute were construed to give these features undue emphasis.[44] In striking down the statute, the majority articulated its fear that the statute might deter authors from writing similar works in the future.

This analysis, while dramatic, overlooks the reality that Section 632-a was not enacted to ensnare works like *The Autobiography of Malcolm X* or Thoreau's *Civil Disobedience*. Rather, the Son of Sam law was passed with authors like its namesake in mind, criminals whose notoriety stems primarily from their crimes and is likely to bring them significant gain while leaving their victims uncompensated.[45] Even granting that the statute does

41. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29 (1989) (Scalia, J., dissenting).

42. *See supra* note 25.

43. Some commentators have challenged the application of strict scrutiny to Son of Sam laws. *See* Ecker & O'Brien, *supra* note 3; Joel Rothman, *In Cold Type: Statutory Approaches to the Problem of Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255 (1980). Given the 8-0 division of the Court on this point, the argument seems moot.

44. *See Simon & Schuster*, 112 S. Ct. at 511. The Court refers to Martin Luther King, Jr., Sir Walter Raleigh, and Bertrand Russell among its list of authors whose works might be within reach of this unrealistic interpretation of Section 632-a.

45. *See* Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991), as evidence of the statute's limited scope where the New York Court of Appeals construed Section 632-a not to apply to victimless crimes; *see also* Memorandum of Sen. Emanuel R. Gold, *supra* note 6 ("[Section 632-a] would make it clear that *in all criminal situations*, the victim must be more important than the criminal." (emphasis added)).

contain language that technically allows it to be construed to reach works not reasonably classifiable as criminal profit, that is certainly not the law's purpose. Moreover, the law has never been applied in such a way.[46] Essentially, the Court held New York's Son of Sam law unconstitutional on the basis of an insignificant and speculative defect.[47]

Strained though it is, the striking of Section 632-a on overinclusiveness grounds did enable the Court to render a decision largely limited to the facts of the case. The provisions that rendered New York's statute overinclusive, coverage of non-convicted persons and coverage of works mentioning crime only incidentally, are tangential to the core purpose of Son of Sam laws and easily severable. At least one state, in fact, currently has a Son of Sam law in force that does not include the features that the Court identified as fatal.[48] Were the overinclusiveness found in New York's Section 632-a the primary defect in Son of Sam statutes generally, *Simon & Schuster* would stand merely as a gentle and harmless warning to state legislatures to scan their laws for similar overinclusive provisions and amend them if necessary.

Strict scrutiny, however, requires a court to screen a statute for underinclusiveness as well as overinclusiveness. Only Justice Blackmun, however, contemplated that Section 632-a might be underinclusive.[49] The majority failed to discuss the underinclusiveness issue—a failure that is hardly surprising given the majority's desire for a limited holding. Unlike the overinclusiveness used to strike Section 632-a, underinclusiveness is a flaw common to all Son of Sam statutes, and it is not curable by simple re-drafting. The fundamental idea behind these laws is to impose a burden on income derived from pro-

46. "[Section 632-a] has been invoked only a handful of times. As might be expected, the individuals whose profits the Board has sought to escrow have all become well known for having committed highly publicized crimes." *Simon & Schuster*, 112 S. Ct. at 506.

47. It is perhaps revealing that all argument relating to overinclusiveness occupied less than one page of Petitioner's 44-page brief. Brief for the Petitioner at 40-41, *Simon & Schuster* (No. 90-1059).

48. California's Son of Sam law does not reach persons who admit to crimes only outside the courtroom, nor does the law reach works containing only a passing mention of the author's crime. CAL. CIV. CODE § 2225(a)(1), (7) (West Supp. 1991).

49. Justice Blackmun's three-sentence concurrence merely identified the underinclusiveness problem without offering any elaboration. His cursory treatment leads one to believe that he felt the defect so obvious as to require no further explanation. *See Simon & Schuster*, 112 S. Ct. at 512 (Blackmun, J., concurring).

tected speech because of the content of that speech; the criminal's expression is taxed specifically because it concerns his past crimes. Such a selective encumbrance can only be upheld as narrowly tailored to serve a compelling interest. In this case, however, there is not compelling interest that does not require significantly broader measures for its achievement.

The Court suggested two possible compelling interests to support New York's Son of Sam law: victim compensation and separation of the criminal from ill-gotten gains. The Son of Sam law is clearly underinclusive with respect to compensating victims, because it reaches only those assets resulting from the publication of the criminal's thoughts or deeds without including other assets the criminal might have.[50] A victim can also be compensated from the sale of the criminal's house, the garnishing of future wages, or any other available funds. Money does not compensate any better by virtue of having been produced through expression; yet this is the only form of income that Son of Sam laws reach. Because the Son of Sam law's focus on a particular, speech-oriented type of asset is unnecessary to a plan for victim compensation, the statute is underinclusive with respect to that interest.[51]

Section 632-a was also woefully underinclusive with respect to New York's interest in depriving the criminal of the illegal gain.[52] First, Section 632-a stipulated that all money left in the escrow account at the end of five years was to be returned to the criminal. Next, the statute was held not to apply to criminals who perpetrated victimless crimes.[53] Accordingly, as long as a criminal had enough assets to satisfy outstanding claims, or where there were no outstanding claims, the criminal could still "profit" by writing about his crime.[54]

50. *See* Brief for the Petitioner at 30-31, *Simon & Schuster* (No. 90-1059) ("[T]he interest in victim compensation cannot begin to explain the [Son of Sam] law's restricted application to benefit only those few who are victimized by authors who write about their crimes.").

51. *See id.* at 30-33.

52. Simon & Schuster initially argued that book royalties are not in fact profits of crime but are more properly considered profits of authorship. *See id.* at 34-37; *see also* Stephen Clark, *The Son-of-Sam Laws: When the Lunatic, the Criminal, and the Poet are of Imagination All Compact*, 27 ST. LOUIS U. L.J. 207, 210 (1983). The Court, however, assumed that book royalties were profits of crime. *See supra* note 32.

53. *See* Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541 (1991).

54. Brief for the Petitioner at 38, *Simon & Schuster* (No. 90-1059), stated that the effect of these provisions is that "the law allows *all* criminals whose assets are adequate to compensate their victims to 'profit' by writing about their crimes."

More fundamentally, Son of Sam laws in general are underinclusive with respect to any deprivation interest because they leave untouched all forms of criminal profit other than income produced through expression. If book royalties are profits of crime, why not payments made to informants, ex-addict drug counselors, or a former burglar peddling his skills as a locksmith? In all of these cases, later gain stems from prior involvement in crime, yet the Son of Sam law only reaches the author's income.[55]

Looking beyond the confines of the *Simon & Schuster* opinion, commentators have suggested interests in deterrence,[56] punishment,[57] and rehabilitation[58] as compelling enough to justify the burden on protected speech imposed by Son of Sam laws. Ignoring other possible problems with these interests, none of them answers the central question why the state's power over a criminal's assets should extend only to those assets resulting from the exercise of free expression. To return to the previous example, if book royalties are seized to punish the author who is considered to have enriched himself through criminal activity, punishment is surely more fully realized by extending the statute's reach to all of the offender's illegal profits, however obtained. The same logic applies when the goal asserted is deterrence or rehabilitation.

The most plausible justification for treating assets derived from storytelling about crime differently than a criminal's other assets is that the victim of the crime sits in a special relationship to storytelling income by virtue of participation in the underlying story.[59] Accepting this premise,

> the statute may be seen as channeling profits from the media presentation to the victim because the profits in some respect belong (or should belong) to the victim since they are derived from an event in which he owns some type of proprietary or equitable interest.[60]

The Court, however, appears to have already rejected the idea

55. *See id.* at 38-39.

56. *See* Barbara F. Wand, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443, 456-58 (1979).

57. *See id.* at 458-59.

58. *See* Brief for the United States as Amicus Curiae at 13, *Simon & Schuster* (No. 90-1059).

59. *See* Brief for the Respondent at 47-48, *Simon & Schuster* (No. 90-1059); Wand, *supra* note 56, at 462.

60. *See* Wand, *supra* note 56, at 462.

of any such special relationship. Dismissing New York's claim that Section 632-a was supported by a narrow interest in benefitting a "special category"[61] of people who are victimized by criminals who seek to profit from their crime, the Court found that the State had failed to "offer any justification for a distinction between . . . expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims."[62] Accordingly, any argument that a special relationship provides a compelling interest for Son of Sam laws is doomed to fail.

On its surface, the *Simon & Schuster* decision does not seem momentous. The decision was limited to striking down only the New York law in question on readily curable overinclusiveness grounds. Because the Court applied strict scrutiny, however, Son of Sam laws everywhere must also survive challenges of underinclusiveness, which, as currently conceived, they will be unable to do. The ultimate result is that criminal anti-profit laws across the country are destined to fall as they face First Amendment tests.

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61. Brief for the Respondents at 47, *Simon & Schuster* (No. 90-1059).
62. *Simon & Schuster*, 112 S. Ct. at 510.