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Is a Word Just a Word? Whether "Sadism" Should Be a Required Element of an Eighth Amendment Excessive Force Claim

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IS A WORD JUST A WORD? WHETHER "SADISM" SHOULD BE A REQUIRED ELEMENT OF AN EIGHTH AMENDMENT EXCESSIVE FORCE CLAIM

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I. INTRODUCTION

Any given day, nearly 2.3 million people in the United States are held by the American criminal justice system, with nearly 1.5 million locked up as convicted inmates in state prisons, federal prisons, or local jails.[1] Mass incarceration in the United States has created a carceral state where correctional facilities are "chronically overcrowded and short-staffed" and inmates are held "under conditions that increase volatility and the risk of violence while decreasing the amount of control prison officials have over the institution."[2] In April 2019, the Department of Justice issued a gruesome 56-page report on violence in Alabama prisons and gave the State forty-nine days to respond with a remedial plan, else face a federal lawsuit for violations of the prohibition on cruel and unusual punishments.[3] Now, more than ever, it is important to look at prisons across the country and ensure the inmates are being held in humane and constitutional settings.

Inmates lose certain rights upon entering prison.[4] Namely, the Supreme Court has held that inmates do not have Fourth Amendment protection against unreasonable searches and seizures, as the right to privacy is "fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."[5] Yet, the Court has also stated that no "iron curtain" exists between prisons and the Constitution;[6] an inmate retains constitutional rights which are not incompatible with the inner workings of the prison.[7]

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1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019,* PRISON POLICY INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

2. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887 (2009).

3. Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, NEW YORK TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html?module=inline; Kim Chandler, *Fed's Report Condemning Alabama Prisons: State Vows Action*, WBMH.ORG (Apr. 8, 2019), https://wbhm.org/2019/feds-report-condemning-alabama-prisons-state-vows-action/.

4. *See e.g.*, Hudson v. Palmer, 468 U.S. 517, 527-28 (1984).

5. *Id.*

6. *Id.* at 523.

7. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (States must ensure that all inmates have meaningful access to the courts); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (Regulations restricting an inmate's free exercise of religion are constitutional only if reasonably related to legitimate

If an inmate feels that those rights have been deprived, the resort is a federal lawsuit through 42 U.S.C. § 1983, "the workhorse of modern civil rights litigation."[8]

One of the rights that an inmate retains in prison is the right to be free from excessive force. For citizens outside of prison, this protection stems from the Fourth Amendment's prohibition on unreasonable searches and seizures.[9] For pre-trial detainees, this protection comes from the Due Process Clause of the Fourteenth Amendment.[10] Convicted inmates, however, find their protection from excessive force in the Eighth Amendment's prohibition on cruel and unusual punishment.[11] The Court has been clear that the Eighth Amendment does not guarantee an inmate freedom from pain in prison, rather the Eighth Amendment protects against the "unnecessary and wanton infliction of pain."[12]

The Court has consistently stated that prison officials should be given great deference in how their institutions are managed.[13] In the context of excessive force claims, the Supreme Court held in *Whitley v. Albers* that "the question [of] whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or *maliciously and sadistically* for the very purpose of causing harm.'"[14] A circuit split has developed over the role of the word "sadistically" in the Court's Eighth Amendment jurisprudence.[15]

The Eighth Circuit has held repeatedly that the words "maliciously" and "sadistically" have different meanings, and the two together establish a higher level of intent than either would alone.[16] In 2018, the Ninth

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penological objectives).

8. Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*,7 SCHOLAR 151, 152 (2005).

9. Graham v. Conner, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").

10. *Id.* at 395, n.10 ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.").

11. Whitley v. Albers, 475 U.S. 312, 327 (1986) ("We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified.").

12. *Id.* at 319 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

13. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.").

14. *Whitley,* 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973) (Friendly, J.)) (emphasis added).

15. *See* Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994); Hoard v. Hartman, 904 F.3d 780 (9th Cir. 2018).

16. *See* Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994); Parkus v. Delo*,* 135 F.3d 1232, 1233-34

Circuit chose not to follow the Eighth Circuit, instead holding that excessive force does not require that a prison official acted "sadistically," or for his own pleasure, in any way.[17] In the Ninth Circuit's view, "[s]ometimes a word is just a word."[18]

This Note analyzes whether it was appropriate for the Ninth Circuit to disregard a word that the Supreme Court has used repeatedly — "sadistically" — and whether "sadism" *should* be a required element of an Eighth Amendment excessive force claim. This Note concludes that it was proper for the Ninth Circuit to hold that "sadism" is not a required element of an Eighth Amendment excessive force claim. This Note also concludes that requiring an inmate prove the prison official had the subjective intent to harm gives the official enough protection, while also ensuring that an inmate is afforded the opportunity to seek legal redress in a fair and just manner.

The remainder of this Note proceeds as follows. Part II provides background on Eighth Amendment jurisprudence and the circuit split between the Eighth and Ninth Circuits over whether "sadism" is a required element of an Eighth Amendment excessive force claim. Part III analyzes whether the word "sadistically" is properly viewed as part of the Court's *Whitley* holding, dicta, or something else altogether. Part III then discusses whether an inmate should have to prove "sadism" on the part of a prison official. Finally, Part IV provides a brief conclusion and a look toward the future in this area of law.

II. BACKGROUND

Part A of this section begins with an overview of the history of the Eighth Amendment to the U.S. Constitution, its meaning to the Framers, and the current standards by which a violation of the Eighth Amendment is found. Part B then describes the development of Eighth Amendment jurisprudence with respect to excessive force and deliberate indifference claims against prison officials. Finally, Part C details the current circuit split on whether an inmate must prove that a prison official acted "sadistically" when using force to succeed on an excessive force claim.

A. The Eighth Amendment

The Eighth Amendment to the Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

(8th Cir. 1998); Jackson v. Gutzmer, 866 F.3d 969, 974 (8th Cir. 2017).

17. *Hoard*, 904 F.3d at 782.

18. *Id.* at 789.

punishments inflicted."[19] Almost identical language appeared in the English Bill of Rights of 1689.[20] It is generally believed that the primary concern of the Framers in drafting the Eighth Amendment was to prohibit torture and other barbaric methods of punishment, but legal scholars have debated whether this interpretation is correct.[21] The Supreme Court refused to deviate from this narrow purpose of the Eighth Amendment throughout the Nineteenth Century.[22] In *Wilkerson v. Utah,* the Supreme Court declined to "define with exactness" the protections of the Eighth Amendment.[23] Instead, the Court upheld Utah's use of execution by being "shot, hanged, or beheaded," holding only that punishments of "torture . . . and all others in the same line of *unnecessary cruelty,* are forbidden by that amendment."[24]

In *Weems v. United States*, the Court first took the position that the Eighth Amendment should be broadened in scope to cover any instances of disproportionate punishment.[25] "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[26] It was not until 1958, in *Trop v. Dulles*, that the Supreme Court established the modern standard by which Eighth Amendment claims are judged.[27] The Court cited *Weems* for the principle that the words of the Eighth Amendment are not precise, and their scope is not static.[28] Chief Justice Warren, writing for the majority, then stated: "The Amendment must draw its meaning from *the evolving standards of decency* that mark the progress of a maturing society."[29]

B. "Unnecessary and Wanton Infliction of Pain"

In *Gregg v. Georgia,* a joint opinion of the Court synthesized prior

19. U.S. CONST. amend. VIII.

20. English Bill of Rights of 1689 ("That excessive bail *ought* not to be required, nor excessive fines imposed, nore [sic] cruel and unusual punishments inflicted.") (emphasis added), https://avalon.law.yale.edu/17th_century/england.asp.

21. *See* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969) (arguing that the conclusions of the American Framers were based on a misinterpretation of the English Bill of Rights, spawning an American doctrine that the words "cruel and unusual" proscribed torture, not excessive punishment).

22. *See* Wilkerson v. Utah, 99 U.S. 130 (1879); *In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . .").

23. *Wilkerson*, 99 U.S. at 135-36.

24. *Id.* (The Court in an earlier portion of the opinion gives a particularly grisly list of what it considers "torture", the list of which is unnecessary to repeat here).

25. Weems v. United States, 217 U.S. 349 (1910).

26. *Id.* at 366-67.

27. Trop v. Dulles, 356 U.S. 86 (1958).

28. *Id.* at 100-01.

29. *Id.* (emphasis added).

precedent into a series of workable tests.[30] An assessment of contemporary values to determine whether a challenged sanction offends "evolving standards of decency" requires looking to objective indicia that reflect the public attitude toward that sanction.[31] When a form of punishment is being challenged in the abstract, for example, whether the death penalty may ever be imposed for murder, two additional inquiries must be made. First, the punishment must not involve "unnecessary and wanton infliction of pain," and second, the punishment must not be "grossly out of proportion to the severity of the crime."[32] Broadly speaking, the Court held that a sanction imposed "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."[33]

Four-months after *Gregg*, the Court issued its opinion in *Estelle v. Gamble* and made clear that the Eighth Amendment proscribes the "unnecessary and wanton infliction of pain."[34] In *Estelle,* an inmate brought a 42 U.S.C. § 1983 claim against prison officials, arguing that his denial of medical treatment constituted "cruel and unusual punishment" in violation of the Eighth Amendment.[35] Justice Marshall, writing for the Court, found that whether it is a doctor ignoring a prisoner's need for treatment, or a prison guard intentionally denying or delaying treatment, "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[36] Justice Marshall was clear to distinguish medical accidents or even mere negligence from the type of "deliberate indifference" that would amount to an Eighth Amendment violation.[37] In his dissent, Justice Stevens argued that the Court was placing improper significance on the subjective motivations of a prison official.[38] In his opinion, the constitutional standard should turn on the "character of the punishment rather than the motivation of the individual who inflicted it."[39]

C. "Maliciously and Sadistically"

While *Estelle* established the general requirement that an Eighth

30. Gregg v. Georgia, 428 U.S. 153 (1976).
31. *Id.* at 173.
32. *Id.*
33. *Id.* at 183.
34. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
35. *Id.* at 99-101.
36. *Id.* at 104 (internal citations omitted).
37. *Id.* at 105-06.
38. *Id.* at 116 (Stevens, J., dissenting).
39. *Id.*

Amendment violation requires the "unnecessary and wanton infliction of pain," the Court held ten-years later in *Whitley v. Albers* that a more searching inquiry is necessary when looking at claims of excessive force against prison officials.[40] In *Whitley*, a prison official wounded an inmate by gunshot during a prison riot.[41] Justice O'Connor, writing for the Court, agreed with the reasoning of *Estelle* that mere negligence on the part of a prison official does not establish a claim of cruel and unusual punishment, and phrased the standard as "obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause."[42]

While agreeing that "deliberate indifference" was an appropriate standard for the specific facts of *Estelle,* the Court found that the standard did not "adequately capture the importance" of protecting prison staff, visitors, or other inmates during a security disturbance.[43] The Court reasoned that prison staff must be granted a wide-ranging deference when it comes to policies and practices related to preserving order and discipline.[44] The Court also explicitly stated that no judge nor jury should "freely substitute their judgment for that of officials who have made a considered choice" and that no case should go to a jury if the evidence does not go beyond a "mere dispute over the reasonableness of a particular use of force."[45] The Court held that the question of whether actions of a prison staff member inflicted "unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[46]

The Court lifted the language of this new standard directly from the Second Circuit case of *Johnson v. Glick*.[47] In *Johnson,* a prison guard allegedly attacked an inmate unprovoked and then withheld medical attention for over two hours.[48] In this pre-*Gregg* and pre-*Estelle* case, the Second Circuit found that constitutional protection against excessive force by state officials is not limited to the specific commands of the Eighth Amendment.[49] Instead, acts of brutality by correctional officers can amount to "conduct that shocks the conscience" of a court, therefore depriving an inmate of liberty without due process of law in violation of

40. Whitley v. Albers, 475 U.S. 312 (1986).
41. *Id.* at 314-17.
42. *Id.* at 319.
43. *Id.* at 320.
44. *Id.* at 321-22 (citing Bell v. Wolfish, 441 U.S. 520, 547 (1979)).
45. *Id.* at 322.
46. *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973) (Friendly, J.)).
47. Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) (Friendly, J.).
48. *Id.* at 1029-30.
49. *Id.* at 1032.

the Fourteenth Amendment.[50] The Second Circuit reasoned that while not every push or shove to an inmate amounted to a constitutional violation, several factors could be used to determine if a due process violation occurred.[51] The factors included the need for force, the fit between the need for force and the force used, the extent of the injury inflicted, and "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[52]

The Second Circuit listed the subjective intent of the prison staff member as only one factor in determining if a due process violation occurred.[53] In *Whitley*, Justice O'Connor found the last factor to be the ultimate question and quoted the others as only relevant to the ultimate determination of subjective intent.[54] Justice O'Connor then stated that it is the Eighth Amendment, not the Fourteenth Amendment, that serves as the "primary source of protection" to prison inmates.[55] Justice O'Connor stated it would be surprising if "conduct that shocks the conscience of the court" in violation of the Fourteenth Amendment were not also inconsistent with the "evolving standards of decency" in violation of the Eighth Amendment.[56] The Court made clear, however, that the Due Process Clause offers no further protection for prison inmates than the Cruel and Unusual Punishments Clause, and that excessive force claims against prison officials should be brought under the Eighth Amendment.[57]

The Court clearly stated that all Eighth Amendment cases "mandate inquiry into a prison official's state of mind" and "some mental element must be attributed to the inflicting officer" before an act may be deemed cruel and unusual punishment.[58] In the years since *Whitley,* the Court has consistently emphasized that the ultimate question for the factfinder to determine in Eighth Amendment excessive force claims brought by inmates is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[59] In reaffirming the subjective standard of *Whitley* in the years since*,* the Court

50. *Id.* at 1032-33 (citing Rochin v. California*,* 342 U.S. 165 (1952)).

51. *Id.* at 1033.

52. *Id.*

53. *Id.*

54. Whitley v. Albers, 475 U.S. 312, 321 (1986) ("As the District Judge [sic] correctly perceived, 'such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' 481 F.2d, at 1033, are relevant to that ultimate determination.").

55. *Id.* at 327.

56. *Id.* (quoting Rochin v. California*,* 342 U.S. 165, 172 (1952); Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

57. *Whitley*, 475 U.S. at 327.

58. Wilson v. Seiter, 501 U.S. 294, 299-300 (1991).

59. *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992); Wilkins v. Gaddy, 559 U.S. 34, 37 (2010).

also made clear that it is not the *extent* of an inmate's injuries that forms the basis of an Eighth Amendment excessive force claim.[60] In *Hudson v. McMillian,* the Court found that when prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated," thus establishing an Eighth Amendment claim even without serious injury.[61]

D. The Circuit Split

In *Kingsley v. Hendrickson* in 2015, the Supreme Court addressed the question of whether a subjective intent standard or an objective unreasonableness standard applies to an excessive force claim by a pre-trial detainee, as opposed to a convicted inmate.[62] In *Kingsley*, an individual who had been held in a Wisconsin county jail awaiting trial on a drug charge alleged that jail officials slammed his head into a concrete bunk, applied a Taser to him for five seconds, and left him alone and handcuffed for fifteen minutes.[63] First, the Court found that, because a pre-trial detainee cannot be punished, his protections flow from the Due Process Clause of the Fourteenth Amendment and not the Eighth Amendment.[64] Then, the Court held that a court must use an objective standard of reasonableness when judging whether the force used against a pre-trial detainee is excessive.[65] Toward the end of his majority opinion, Justice Breyer acknowledged that ruling in favor of an objective standard when judging Fourteenth Amendment claims of pre-trial detainees "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners."[66] The Court, however, did no more than address this possibility.[67]

In *Kingsley,* the Supreme Court clearly left the door open for plaintiffs and courts to question whether a subjective standard is the proper way to judge Eighth Amendment violations.[68] What has developed instead is a narrower circuit split over whether the subjective mental state of "sadism"

60. *Hudson*, 503 U.S. at 9.

61. *Id.* (drawing a distinction between excessive force claims and deliberate indifference to medical needs claims, where an Eighth Amendment claim arises only if medical needs are "serious").

62. Kingsley v. Hendrickson, 135 S.Ct. 2466, 2470 (2015).

63. *Id*.

64. *Id.* at 2475.

65. *Id.* at 2472-73.

66. *Id.* at 2476.

67. *Id.*

68. *See* Michael S. DiBattista, Note, *A Force to Be Reckoned with: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After Kingsley*, 48 COLUM. HUM. RIGHTS L. REV. 203 (2017).

is a required element of an Eighth Amendment excessive force claim.[69] This circuit split has specifically developed around controversies related to jury instructions and how the standard of liability defined.

1. Eighth Circuit Precedent

One year after the Supreme Court reaffirmed the *Whitley* "good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm" standard for excessive force claims brought by convicted inmates, the Eight Circuit heard *Cummings v. Malone.*[70] At trial in that case, a jury found two prison officials liable for violating an inmate's Eighth Amendment rights when they beat him on multiple occasions.[71] The jury was instructed, in part, as follows:

> In determining whether the force, if any, as used in these instructions, was excessive, you must consider such factors as the need for the application of force that was used, the extent of the injury inflicted and whether the force was applied in [sic] good faith effort to achieve a legitimate purpose or *maliciously* for the very purpose of causing harm.[72]

On appeal, the Eight Circuit found that these instructions did not adequately state the law of Eighth Amendment liability and therefore constituted reversible error.[73] The court held that it was error for the district court not to clearly state which "unnecessary and wanton infliction of pain" standard was applicable (i.e. "deliberate indifference" or "maliciously and sadistically").[74] The Eighth Circuit also held that, because the "Supreme Court has held that the malicious and sadistic standard is the 'core judicial inquiry' in excessive force claims," it was an error for the district court to merely list the standard as one factor among many in the jury instructions.[75] The Eighth Circuit did not explicitly hold that failure to mention "sadistically" in the instruction was an error.

While the court in *Cummings* did not explicitly find the word "sadistically" to be essential to the jury instructions at issue, it was not long before the court would revisit the issue. In *Howard v. Barnett,* not even one year after *Cummings,* the Eight Circuit interpreted *Cummings* as standing for the proposition that when faced with an excessive force claim, a jury must find that a prison official acted both "maliciously" *and*

69. *See* Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994); Hoard v. Hartman, 904 F.3d 780 (9th Cir. 2018).

70. Cummings v. Malone, 995 F.2d 817 (8th Cir. 1993).

71. *Id.* at 819.

72. *Id.* at 821 (emphasis added).

73. *Id.* at 822.

74. *Id.*

75. *Id.*

"sadistically."[76] The court found that the use of the word "sadistically" by the Supreme Court carried a certain significance, because "maliciously" and "sadistically" have two different meanings, and "the two together establish a higher level of intent than would either alone."[77] The court, using standard dictionary definitions, found that one acts "'maliciously' by undertaking, without just cause or reason, a course of action intended to injure another," whereas one acts "'sadistically' by engaging in extreme or excessive cruelty or by delighting in cruelty."[78] The Eighth Circuit rejected the argument that the term "sadistically" was "surplusage and not a required element" and also rejected the argument that its inclusion could confuse the jury into believing that a prison official could not violate the Eighth Amendment without deriving "sexual satisfaction" from the use of excessive force.[79]

The Eighth Circuit has since been consistent in holding that the term "sadistically" is not surplusage.[80] In *Parkus v. Delo,* the court rejected an inmate's argument that the district court overstated the state of mind a prison official must have by defining "sadistic behavior in terms of 'extreme or excessive cruelty or delighting in cruelty' as opposed to 'regular cruelty.'"[81] The Eighth Circuit found that the definition from *Howard* properly focused the jury on the subjective motivations of the prison official.[82] The Eighth Circuit also found that its "delighting in cruelty" definition of "sadistically" was essentially the same as the definition approved by the Third Circuit, "to inflict pain on the person for one's own pleasure."[83]

As recently as 2017, the Eighth Circuit again stated "[t]he word 'sadistically' is not surplusage."[84] In *Jackson v. Gutzmer,* the Eighth Circuit reversed the denial of qualified immunity for a prison official who authorized the use of a restraint board in response to an inmate he perceived to be self-injurious.[85] Qualified immunity "shields a government official from liability unless his conduct violates 'clearly

76. Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994).

77. *Id.*

78. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367, 1997–98 (unabridged 1981); BLACK'S LAW DICTIONARY 956, 958, 1336 (6th ed. 1990); THE AMERICAN HERITAGE DICTIONARY 759, 1084 (2d ed. 1982)).

79. *Id.* at 871.

80. *See* Parkus v. Delo, 135 F.3d 1232, 1233-34 (8th Cir. 1998); Jackson v. Gutzmer, 866 F.3d 969, 974 (8th Cir. 2017).

81. *Parkus*, 135 F.3d at 1234.

82. *Id.*

83. *Id.* (quoting Douglas v. Owens, 50 F.3d 1226, 1232-33 n.13 (3rd Cir. 1995)).

84. *Jackson*, 866 F.3d at 974.

85. *Id.* at 978 (It is worth noting that the prison official fully complied with Department of Corrections procedures by videotaping the restraint, obtaining prior medical clearance, and consulting with a nurse to ensure the restraints were not injurious or painful to the inmate. *Id.* at 977).

established statutory or constitutional rights of which a reasonable person would have known.'"[86] The inmate had argued at the district court level and the appellate level that the restraint board was used, not because he was self-injurious, but instead as punishment and retaliation for seeking medical attention.[87] Because the totality of the circumstances justified the use of the restraint board and the inmate did not present any evidence that the prison official acted maliciously or sadistically, qualified immunity was appropriate.[88]

2. Hoard v. Hartman[89]

On December 21, 2012, Sean Hoard, an inmate in the Intensive Management Unit at Snake River Correctional Institution in eastern Oregon, requested a razor for personal use.[90] When it did not work, Hoard broke the razor and flushed it down the toilet in his cell out of frustration.[91] When a prison official was unable to retrieve the razor, the official ordered a full search of Hoard's cell.[92] It was shortly after this that Hoard alleged that one Officer Hartman slammed Hoard's head against a steel door.[93] Hoard alleged that when he came to his senses, his pants and underwear were down to his ankles, leaving him exposed to other inmates.[94] Hoard alleged that after this, Officer Hartman proceeded to slam Hoard's head against the floor, causing his cut forehead to scrape across a steel drain.[95] A few days after this, Hoard attempted suicide, fueled in part by his embarrassment at being exposed to fellow inmates, inmates he considered to be predators.[96] Hoard was placed on a liquid diet for a time, prescribed painkillers and a mouthguard, but still suffered continuous pain for years after the incident.[97]

Prison officials testified at trial that Hoard began thrashing during the search of his cell and the force they used was "minimal."[98] The altercation was not videotaped and the internal memos from Officer Hartman and

86. Burns v. Eaton, 752 F.3d 1136, 1139 (8th Cir. 2014) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

87. *Jackson*, 866 F.3d at 978.

88. *Id.* at 976-78.

89. Hoard v. Hartman, 904 F.3d 780 (9th Cir. 2018).

90. *Id.* at 782-83.

91. *Id.* at 783.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 783-84.

96. *Id.* at 784.

97. *Id.*

98. *Id.*

others did not mention Hoard's injuries, but a prison report prepared afterwards described blood on the floor.[99]

Hoard filed a *pro se* complaint alleging constitutional and state law violations against several prison officials, and after a two-day trial his Eighth Amendment excessive force claim against Officer Hartman reached the jury.[100] The jury was instructed that Hoard had to prove that Officer Hartman "'used excessive and unnecessary force against the plaintiff under all the circumstances' . . . 'acted maliciously and sadistically for the purpose of causing harm,' and that Officer Hartman's acts harmed Hoard."[101] Midway through deliberations, the jury asked for definitions of the terms "maliciously" and "sadistically", and the judge responded with a supplemental instruction stating:

The term "maliciously" in the instructions has its ordinary meaning, which is "having or showing a desire to cause harm to another." Likewise, the term "sadistically" has its ordinary meaning, which in this context means "having or deriving pleasure from extreme cruelty."[102]

The jury returned a verdict in favor of Officer Hartman. Several jurors, however, commented after that they had reservations about the lack of a video recording of the incident and the incomplete nature of the officer's reports from the incident.[103]

On appeal, the Ninth Circuit held that the Constitution does not require proof of sadism, and therefore the supplemental jury instructions were plainly erroneous and likely prejudiced the outcome of the case.[104] Rather than zero in on the terms "maliciously and sadistically" in Supreme Court precedent, the Ninth Circuit focused on the phrase "for the very purpose of causing harm," finding that "officer intent—not officer enjoyment—serves as the dividing factor between constitutional and unconstitutional applications of force."[105]

The Ninth Circuit expressly declined to follow the Eighth Circuit's interpretation of *Whitley*.[106] In the court's view, court opinions are different than statutes, where each word chosen is worthy of "searching

99. *Id.*

100. *Id.* at 785 (The district court liberally construed Hoard's complaint as raising four claims: a § 1983 claim for violating Hoard's Fourteenth Amendment right to due process; a § 1983 excessive force and deliberate indifference claim against each of the officers involved; supplemental state common law claims against all Defendants; and state constitutional claims against Officer Hartman and another officer).

101. *Id.* at 786.

102. *Id.*

103. *Id.*

104. *Id.* at 787.

105. *Id.* at 788.

106. *Id.*

analysis."[107] The Ninth Circuit then noted: "Sometimes, a word is just word."[108] The court pointed to the fact that the Supreme Court has never addressed the phrase "maliciously and sadistically" separately from the specific intent to cause harm as evidence that intent to cause harm is all that is needed for Eighth Amendment liability.[109] Thus, under the Ninth Circuit's reasoning, "maliciously and sadistically" serve a purely rhetorical function, present in Court precedent only to emphasize "the cruelty inherent in harming an inmate for no other reason than to cause harm."[110] The question before the Ninth Circuit was not whether an officer who harms an inmate for personal enjoyment has violated the Eighth Amendment, but rather "whether proof of sadism is *required* for excessive force claims."[111] The Ninth Circuit held it is not.[112]

The Ninth Circuit went on to state that requiring Hoard to prove sadism, or personal enjoyment on the part of Officer Hartman, "placed a heavy thumb on the scale in favor of the Defendants."[113] The Ninth Circuit concluded by stating that the Eighth Amendment "reflects this country's fundamental respect for humanity. . . . That respect is lost when courts close the doors to relief by asking plaintiffs to prove that they were the victims of not just cruelty, but sadism as well."[114]

III. DISCUSSION

Part A of this section begins with an analysis of whether the Ninth Circuit was correct to disregard "sadistic" as "just a word" or whether its inclusion in Supreme Court holdings necessarily elevates it to an element of an excessive force claim brought by a convicted inmate. Part B then addresses whether "sadistic intent" *should* be a required element of an excessive force claim brought by an inmate and concludes that proof of sadism should not be required. The requirement that an inmate prove a subjective intent to harm gives prison officials room to protect themselves and other inmates, while also ensuring that an inmate is afforded the opportunity to seek legal redress in a fair and just manner.

107. *Id.* (quoting United States v. Muckleshoot Indian Tribe, 235 F.3d 429, 433 (9th Cir. 2000)).
108. *Hoard*, 904 F.3d at 789.
109. *Id.*
110. *Id.*
111. *Id.* (emphasis in original).
112. *Id.*
113. *Id.* at 792.
114. *Id.* (internal citation omitted).

A. Is a Word "Just a Word?"

Before analyzing whether "sadism" *should* be a required element of an Eighth Amendment excessive force claim brought by an inmate, it is first necessary to discuss whether it was proper for the Ninth Circuit to rule that it is not. The Ninth Circuit stated with a certain brazenness, that "[s]ometimes, a word is just a word."[115] And yet, the Supreme Court has made clear that it has the ultimate say in interpreting the Constitution.[116] Can a word chosen by the Supreme Court really be "just a word"?

The Ninth Circuit cited its own case of *United States v. Muckleshoot Indian Tribe* for the principle that "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis."[117] In *Muckleshoot,* the Ninth Circuit interpreted a district court opinion regarding fishing rights and was tasked with deciding whether the district court meant to include a right to shellfish in the area along with fin fish.[118] In such a case, a district court judge could not have foreseen every possible controversy that would arise from his word choice.[119] It is not controversial to say an appellate court has great leeway in interpreting what a lower court meant.

Here, however, the Ninth Circuit is dealing with the words of the Supreme Court, which has the power to create binding law on each of the courts of appeals, a concept known as "vertical *stare decisis.*"[120] The Supreme Court has stated that *stare decisis* preserves "a jurisprudential system that is not based upon 'an arbitrary discretion'"[121] and also "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[122] But not every word of a Supreme Court opinion is binding on a lower court.

Naturally, a lower court is bound only by the higher court's holding.[123]

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115. *Id.* at 789.

116. *See generally* Marbury v. Madison 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that, in the end, our own judgment will be brought to bear . . . .").

117. United States v. Muckleshoot Indian Tribe, 235 F.3d 429, 433 (9th Cir. 2000).

118. *Id.* at 431.

119. *See also* Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944) ("To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court.").

120. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 956-57 (2005) ("Vertical stare decisis is generally considered absolute.").

121. Patterson v. McClean Credit Union, 109 S. Ct. 2363, 2370 (1989) (citing THE FEDERALIST No. 78, 490 (A. Hamilton) (H. Lodge ed. 1888)).

122. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

123. *See* Abramowicz, *supra* note 120 at 957.

The holding of a case is the court's "determination of a matter of law pivotal to its decision; a principle drawn from such a decision."[124] Everything else in an opinion is *dicta,* which carries no precedential value and is not binding on lower courts.[125] The distinction between holding and *dicta* can be difficult and is fodder for lawyers.[126] If the use of the word "sadistically" in Supreme Court jurisprudence is mere *dicta,* then the Ninth Circuit was free to disregard it.

When looking at the decisions in *Whitley* and *Hudson,* the word sadistically is not *dicta*. In *Whitley,* the Court stated that the "question of whether the measure taken inflicted unnecessary and wanton pain and suffering *ultimately turns on* 'whether force was applied in a good faith effort to maintain or restore discipline *or* maliciously and sadistically for the very purpose of causing harm.'"[127] In *Hudson,* the Court stated: "[W]e *hold* that whenever prison officials stand accused of using excessive physical force . . . the *core judicial inquiry* is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, *or* maliciously and sadistically to cause harm."[128] In light of this language from the Supreme Court, it cannot be said that the word "sadistically" is *dicta,* and for that reason the Ninth Circuit correctly found that it needed another route to its holding that "sadism" is not required in an excessive force claim.

Having established that the word "sadistically" is used in the explicit holdings of *Whitley* and *Hudson*, it follows that the Eighth Circuit is correct in finding the word is not "surplusage."[129] The Supreme Court has also stated, however, that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute."[130] Perhaps the most helpful tool for solving this impasse is in how Judge Aldisert dissected *stare decisis,* an abbreviation of "*stare decisis et non quieta movere* (to stand by or adhere to decisions and not disturb that which is settled)."[131] In Judge Aldisert's opinion, subsequent courts are bound in *stare decisis* to what the court *did,* not what the court *said*.[132]

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124. BLACK'S LAW DICTIONARY (11th ed. 2019).

125. *See* Ruggero J. Aldisert *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 631-32 (1990), http://digitalcommons.pepperdine.edu/plr/vol17/iss3/2.

126. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010).

127. Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973) (Friendly, J.)) (emphasis added).

128. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (emphasis added).

129. Jackson v. Gutzmer, 866 F.3d 969, 974 (8th Cir. 2017) (quoting Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994)); *see also* Parkus v. Delo, 135 F.3d 1232, 1234 (8th Cir. 1998).

130. Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

131. Aldisert, *supra* note 125 at 607.

132. Aldisert, *supra* note 125 at 607.

The Ninth Circuit in *Hoard* applied somewhat of a variation of Judge Aldisert's analysis by stating that the strongest evidence against sadism being a required element of an excessive force claim is that the Supreme Court has never addressed "maliciously and sadistically" separately from the specific intent to cause harm.[133] The Ninth Circuit highlights that on one occasion, the Court omitted any mention of "maliciously and sadistically" altogether and simply explained that "a purpose to cause harm is needed for Eighth Amendment liability . . . ."[134] But the case in which that phrasing appears is one dealing with the Fourth and Fourteenth Amendments, not the Eighth Amendment, and to prop it up as evidence of the proper excessive force standard is to parse the language of an opinion and elevate *dicta* to the status of holding.[135] It would have been stronger for the Ninth Circuit to point to the fact that the Court has never held that a correctional officer possessed a sadistic intent, meaning deriving pleasure from causing pain.

The cause of this confusion can be traced back to Justice O'Connor's opinion in *Whitley.* In the Ninth Circuit's view, *Whitley* was not intended to substantively change the law on excessive force beyond requiring an intent to cause harm.[136] But requiring an intent to cause harm, and therefore an inquiry into a correctional officer's subjective state of mind, *was* a major shift in the Court's Eighth Amendment jurisprudence. In shifting the focus from the objective acts to the subjective state of mind, Justice O'Connor lifted her key "question" directly from *Johnson v. Glick.* As stated previously, the list of factors Judge Friendly enumerated in *Johnson v. Glick* were under a "shocks the conscience" due process analysis.[137] Judge Friendly would have been hard pressed to find a judge whose conscience would not have been shocked by a sadistic prison guard inflicting pain on inmates for his own pleasure. The phrase "maliciously and sadistically" fit neatly into a long list of factors that *could* shock the conscience of a court, but none of Judge Friendly's factors were sufficient and none were dispositive.[138] Instead, a "malicious and sadistic" intent was one factor that "if present, could enable a [pretrial detainee] plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a [substantive due process] claim."[139]

Justice O'Connor latched onto the last factor of *Johnson v. Glick* as the

133. Hoard v. Hartman, 904 F.3d 780, 789 (9th Cir. 2018).

134. *Id.* (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 854 (1998)).

135. Cty. of Sacramento v. Lewis, 523 U.S. 833, 842-43 (1998).

136. *Hoard*, 904 F.3d at 789.

137. Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973) (Friendly, J.).

138. *Id.* ("In determining whether the constitutional line has been crossed, a court must look to *such factors as* . . ." (emphasis added)).

139. Whitley v. Albers, 475 U.S. 312, 329 n.1 (1986) (Marshall, J., dissenting) (quoting *Johnson*, 481 F.2d at 1033).

new subjective test for an Eighth Amendment excessive force violation. This shift away from the objective "unnecessary and wanton infliction of pain" standard to a purely subjective analysis was major. Perhaps Justice O'Connor wanted to quote Judge Friendly's Second Circuit opinion to give the change in law some legitimacy, or perhaps she liked the turn of phrase. Either way, adopting a single factor from a due process analysis to fit a new subjective test under the Eighth Amendment is the true source of this confusion.

B. Should "Sadism" Be an Element of Excessive Force?

In *Howard,* the Eighth Circuit stated that "'maliciously' and 'sadistically' have different meanings, and the two together establish a higher level of intent than would either alone."[140] Having established that it was not improper for the Ninth Circuit to rule that "sadism" is not a required element of an Eighth Amendment excessive force claim, the question remains as to whether it should be. Should a plaintiff inmate be required to prove that a prison guard acted "sadistically" when using force in order to prevail on an Eighth Amendment claim? When considering Supreme Court precedent combined with the practical implications of such a rule, an inmate should not be required to prove that a prison guard acted "sadistically."

First, whether a corrections officer derives pleasure from his acts has no bearing on the harm done to the inmate. Take, for example, the case of Sean Hoard. If Hoard began thrashing during the search of his cell to the point that the prison officials were at risk, then the use of force would have been necessary to ensure the safety of the officials.[141] Protecting prison officials or other inmates through the use of force falls squarely within the State's police power.[142] It was in this type of scenario that the Court in *Whitley* was most concerned with protecting officers from liability.[143] And the Court has indicated it is comfortable with reality that a certain level of physical force, including force that causes pain, is a part of prison life.[144] Requiring a subjective inquiry into the prison official's intent is designed to insulate guards from liability whose actions are taken

140. Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994).

141. *Hoard*, 904 F.3d at 784.

142. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations . . . as will protect the public health and the public safety.").

143. *Whitley*, 475 U.S. at 321-22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1986)) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

144. *See* Hudson v. McMillian, 503 U.S. 1, 9-10 (1992).

"in response to riotous inmates" or "breaches of prison discipline" by preventing a judge or jury from substituting their judgment.[145]

The *Whitley* standard, however, is not designed to "insulate from review actions *taken in bad faith and for no legitimate penological purpose.*"[146] If the prison official slammed Hoard's head into his cell door unprovoked, then this would be an "unnecessary and wanton infliction of pain."[147] Whether the prison official derived pleasure from the harm he caused does not change the nature of the harm that was done to Hoard. A prison official sadistically causing harm for his own enjoyment may offend society's standards of decency *more* than prison official who acts cold and emotionlessly. But either way, the pain caused to Hoard, and inmates like him, is still unnecessary and wanton. Holding the official liable for acting with no other intent than to cause harm would protect Hoard's Eighth Amendment rights, while insulating prison officials who act in good faith and through reasoned choices.

Second, requiring proof of a sadistic intent would be a near impossible hurdle for plaintiff inmates to overcome. In tort law, an actor is liable for battery if "(a) he acts *intending* to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results."[148] In criminal law, the State may be required to prove that a crime was "premeditated," meaning it was "done with willful deliberation and planning; consciously considered beforehand; plotted in advance."[149] Each of these comes with its own challenges for a claimant But nowhere else in the law is it required to prove that an actor *enjoyed* what he did. Subjective enjoyment may be offered by an attorney as circumstantial proof of intent, but it is never a requisite element.

Without a smoking gun statement from a prison official, there is simply no way that a plaintiff inmate could prove a prison official's subjective enjoyment. A prison official enjoys the protection of "qualified immunity" and cannot be held liable for excessive force "unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"[150] Qualified immunity is said to protect all but "the plainly

145. *Whitley*, 475 U.S. at 322.

146. *Id.* (emphasis added).

147. *Id.* at 320.

148. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

149. *Premeditated*, BLACK'S LAW DICTIONARY (11th ed. 2019).

150. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

incompetent or those who knowingly violate the law."[151] For that reason, prison officials do not need the shield of an impossibly high level of intent.

Third, if inmates do not have a path to the courts through 42 U.S.C. § 1983, prisons have no incentive to properly train their officials or protect inmates from excessive force violations. After the jury's verdict in *Hoard,* the jurors expressed discomfort at the "incomplete" nature of the prison reports.[152] One juror went as far as to state that things needed to be addressed in this kind of situation.[153] Hoard's encounter with prison officials was not video recorded.[154] Without the threat of litigation, and without the threat of monetary settlements and/or injunctions, prisons have no incentive to avoid encounters like the one between Officer Hartman and Sean Hoard. This is contrary to public policy. In fact, prisons should see to it that every interaction between a guard and an inmate is video recorded. Doing so will not only protect the inmate, but it will also protect guards who act professionally from frivolous lawsuits. More cameras combined with better training could protect inmates like Sean Hoard. However, if Hoard's claim were to be decided at the summary judgment stage because he has no proof of Officer Hartman's sadism, then the status quo will continue without end.

Lastly, the inherent dignity of the person, no matter their crime, requires fairness in the law. The Eighth Amendment stands as a testament to this country's "fundamental respect for humanity" by protecting every citizen from cruel and unusual punishment.[155] The Ninth Circuit stated, "[t]hat respect is lost when courts close the doors to relief by asking plaintiffs to prove that they were the victims of not just cruelty, but sadism as well."[156] For this reason, the question in an Eighth Amendment excessive force case should be whether force was applied in a good-faith effort to maintain or restore discipline, or *only* with the intent to cause harm.

IV. CONCLUSION

Congress and the Supreme Court have always been hesitant to expand the path of an inmate to the courts. The Prison Litigation Reform Act of 1996 made it so inmates must exhaust all of their administrative remedies

151. Malley v. Briggs, 475 U.S. 335, 341 (1986).

152. Hoard v. Hartman, 904 F.3d 780, 786 (9th Cir. 2018).

153. *Id.*

154. *Id.* at 784.

155. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

156. *Hoard*, 904 F.3d at 786.

before filing a Section 1983 action related to prison conditions.[157] The Anti-Terrorism and Effective Death Penalty Act of 1996 placed strict procedural limits on an inmate's ability to file for federal *habeas* relief, while narrowing the substantive grounds by which a federal judge could grant *habeas* relief.[158] In *Lewis v. Casey,* the Supreme Court held that in order to show that a prison has restricted an inmate's right to access a court, the inmate must show that he has suffered actual harm.[159] Further, the Court held that inmates do not have a constitutional right to law libraries or legal resources, only a constitutional right to access the courts.[160] Congress and the Supreme Court are continually worried about a flood of frivolous lawsuits overrunning the court systems.

The Eighth Amendment prohibition on cruel and unusual punishment, however, stands for the proposition that in the United States there are certain things that we, as a country, will not allow. A prison official's use of excessive force without penological justification must be included in the list of what the Eighth Amendment prohibits. As it stands now, the Eighth Circuit's requirement that an inmate prove "sadism" on the part of a prison official has made it such that cruel and unusual punishment can occur without the prison or the officer facing real consequences. The Ninth Circuit was correct to find that "sadism" should not be a required element of an excessive force claim because reading that high level of subjective intent into the Eight Amendment analysis simply dilutes the appropriate standard and removes Eight Amendments protections from those who really need them—inmates.

The Court in *Kingsley* indicated a willingness to reconsider the subjective *Whitley* standard altogether and instead hold that an objective standard applies to excessive force claims filed by convicted inmates. With the appointments of Justices Gorsuch and Kavanaugh, it is unclear if a majority exists to support an objective standard. If and when the Court is next faced with an excessive force claim, at a bare minimum, the Court should follow the Ninth Circuit's opinion in *Hoard* and find that "sadism" is not a required element of an excessive force claim.

Justice Kennedy stated in his concurrence in *Davis v. Ayala*, "Prisoners are shut away – out of sight, out of mind."[161] But as Justice Brandeis famously said, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[162] Giving an inmate the

157. 42 U.S.C. § 1997e(a).

158. 28 U.S.C. § 2254.

159. Lewis v. Casey, 518 U.S. 343, 349 (1996).

160. *Id.* at 350.

161. Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

162. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933).

fighting chance of receiving a just outcome against his abuser will help ensure humane conditions and fair treatment for inmates across the country.