SUPREME COURT OF THE UNITED STATES

No. 91–1958

DONALD L. HELLING, ET AL., PETITIONERS *v.* WILLIAM MCKINNEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 1993]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Last Term, in *Hudson* v. *McMillian*, 503 U. S. 1 (1992), the Court held that the Eighth Amendment prohibits the use of force that causes a prisoner only minor injuries. Believing that the Court had expanded the Eighth Amendment "beyond all bounds of history and precedent," *id.*, at ___ (slip op., at 12), I dissented. Today the Court expands the Eighth Amendment in yet another direction, holding that it applies to a prisoner's mere *risk* of injury. Because I find this holding no more acceptable than the Court's holding in *Hudson*, I again dissent.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Court holds that a prisoner states a cause of action under the Cruel and Unusual Punishments Clause by alleging that prison officials, with deliberate indifference, have exposed him to an unreasonable risk of harm. This decision, like every other "conditions of confinement" case since *Estelle* v. *Gamble*, 429 U. S. 97 (1976), rests on the premise that deprivations suffered by a prisoner constitute "punishmen[t]" for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence. As I suggested in *Hudson*, see 503 U. S., at ___ (slip op., at 2–4), I have serious doubts about this premise.

At the time the Eighth Amendment was ratified, the word "punishment" referred to the penalty imposed for the commission of a crime. See 2 T. Cunningham, A New and Complete Law-Dictionary (1771) ("the penalty of transgressing the laws"); 2 T. Sheridan, A General Dictionary of the English Language (1780) ("[a]ny infliction imposed in vengeance of a crime"); J. Walker, A Critical Pronouncing Dictionary (1791) (same); 4 G. Jacob, The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law 343 (1811) ("[t]he penalty for transgressing the Law"); 2 N. Webster, American Dictionary of the English Language (1828) ("[a]ny pain or suffering inflicted on a person for a crime or offense"). That is also the primary definition of the word today. As a legal term of art, "punishment" has always meant a "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him." Black's Law Dictionary 1234 (6th ed. 1990). And this understanding of the word, of course, does not encompass a prisoner's injuries that bear no relation to his sentence.

Nor, as far as I know, is there any historical evidence indicating that the framers and ratifiers of the Eighth Amendment had anything other than this common understanding of "punishment" in mind. There is "no doubt" that the English Declaration of Rights of 1689 is the "antecedent of our constitutional text," *Harmelin* v. *Michigan*, 501 U. S. ___, ___ (1991) (opinion of SCALIA, J.) (slip op., at 6), and "the best historical evidence" suggests that the "cruell and unusuall Punishments" provision of the Declaration of Rights was a response to *sentencing* abuses of the King's Bench, *id.*, at ___ (slip op., at 8). Just as there was no suggestion in English constitutional history that harsh prison conditions might constitute cruel and unusual (or otherwise illegal) "punishment," the debates surrounding the framing and ratification of our own Constitution and

Bill of Rights were silent regarding this possibility. See 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (Congress should be prevented from "inventing the most cruel and unheard-of punishments, *and annexing them to crimes*") (emphasis added); 1 Annals of Cong. 753–754 (1789). The same can be said of the early commentaries. See 3 J. Story, Commentaries on the Constitution of the United States 750–751 (1833); T. Cooley, Constitutional Limitations 694 (8th ed. 1927).

To the extent that there is any affirmative historical evidence as to whether injuries sustained in prison might constitute "punishment" for Eighth Amendment purposes, that evidence is consistent with the ordinary meaning of the word. As of 1792, the Delaware Constitution's analogue of the Eighth Amendment provided that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; *and in the construction of jails a proper regard shall be had to the health of prisoners*." Del. Declaration of Rights, Art. I, §XI (1792) (emphasis added). This provision suggests that when members of the founding generation wished to make prison conditions a matter of constitutional guarantee, they knew how to do so.

Judicial interpretations of the Cruel and Unusual Punishments Clause were, until quite recently, consistent with its text and history. As I observed in *Hudson*, see 503 U. S., at ___ (slip op., at 3–4), lower courts routinely rejected "conditions of confinement" claims well into this century, see, *e. g.*, *Negrich* v. *Hohn*, 246 F. Supp. 173, 176 (WD Pa. 1965) ("Punishment is a penalty inflicted by a judicial tribunal in accordance with law in retribution for criminal conduct"), and this Court did not so much as intimate that the Cruel and Unusual Punishments Clause might reach prison conditions for the first 185 years of the provision's existence. It was not until the 1960s that lower courts began applying the Eighth Amendment to prison deprivations, see, *e. g.*, *Wright* v. *McMann*, 387 F. 2d 519, 525–526 (CA2 1967); *Bethea* v. *Crouse*, 417 F. 2d 504, 507–508 (CA10 1969), and it was not until 1976, in *Estelle* v. *Gamble*, 429 U. S. 97 (1976), that this Court first did so.

Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose "punishment." At a minimum, I believe that

the original meaning of "punishment," the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged. It was certainly not discharged in *Estelle* v. *Gamble*.

The inmate in *Estelle* claimed that inadequate treatment of a back injury constituted cruel and unusual punishment. The Court ultimately rejected this claim, but not before recognizing that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment. *Id.*, at 104. In essence, however, this extension of the Eighth Amendment to prison conditions rested on little more than an *ipse dixit*. There was no analysis of the text of the Eighth Amendment in *Estelle*, and the Court's discussion of the provision's history consisted of the following single sentence: "It suffices to note that the primary concern of the drafters was to proscribe `torture[s]' and other `barbar[ous]' methods of punishment." *Id.*, at 102. And although the Court purported to rely upon "our decisions interpreting" the Eighth Amendment, *ibid.*, none of the six cases it cited, see *id.*, at 102–103, held that the Eighth Amendment applies to prison deprivations—or, for that matter, even addressed a claim that it does. All of those cases involved challenges to a sentence imposed for a criminal offense.[1]

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[1]*Gregg* v. *Georgia*, 428 U. S. 153 (1976), was a death penalty case, as were *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), *In re Kemmler*, 136 U. S. 436 (1890), and *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947). *Weems* v. *United States*, 217 U. S. 349 (1910), involved a challenge to a sentence imposed for the crime of falsifying a document, and *Trop* v.

The only authorities cited in *Estelle* that supported the Court's extension of the Eighth Amendment to prison deprivations were lower court decisions (virtually all of which had been decided within the previous 10 years), see *id.*, at 102, 104–105, nn. 10–12, 106, n. 14, and the only one of those decisions upon which the Court placed any substantial reliance was *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968). But *Jackson*, like *Estelle* itself, simply *asserted* that the Eighth Amendment applies to prison deprivations; the Eighth Circuit's discussion of the problem consisted of a two-sentence paragraph in which the court was content to state the opposing view and then reject it: "Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both." *Id.*, at 580–581. As in *Estelle*, there was no analysis of the text or history of the Cruel and Unusual Punishments Clause.[2]

To state a claim under the Cruel and Unusual

Dulles, 356 U. S. 86 (1958), presented the question whether revocation of citizenship amounts to cruel and unusual punishment when imposed upon those who desert the military.

[2]*Jackson* may in any event be distinguishable. That case involved an Eighth Amendment challenge to the use of the "strap" as a disciplinary measure in Arkansas prisons, and it is at least arguable that whipping a prisoner who has violated a prison rule is sufficiently analogous to imposing a sentence for violation of a criminal law that the Eighth Amendment is implicated. But disciplinary measures for violating prison rules are quite different from inadequate medical care or housing a prisoner with a heavy smoker.

Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment*. The text and history of the Eighth Amendment, together with pre-*Estelle* precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle*. I need not make that decision today, however, because this case is not a straightforward application of *Estelle*. It is, instead, an extension.

In *Hudson*, the Court extended *Estelle* to cases in which the prisoner has suffered only minor injuries; here, it extends *Estelle* to cases in which there has been no injury at all.[3] Because I seriously doubt that *Estelle* was correctly decided, I decline to join the Court's holding. *Stare decisis* may call for hesitation in overruling a dubious precedent, but it does not demand that such a precedent be expanded to its outer limits. I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk*

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[3]None of our prior decisions, including the three that are cited by the Court today, see *ante*, at 6–7, held that the mere threat of injury can violate the Eighth Amendment. In *Hutto* v. *Finney*, 437 U. S. 678 (1978), the defendants challenged the district court's *remedy;* they did not dispute the court's conclusion that "conditions in [the] prisons . . . constituted cruel and unusual punishment." *Id.*, at 685. *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), involved the liberty interests (under the Due Process Clause) of an involuntarily committed mentally retarded person, and *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189 (1989), involved the due process rights of a child who had been beaten by his father in the home.

of injury can violate the Eighth Amendment.

Accordingly, I would reverse the judgment of the Court of Appeals.