DePaul Law Review

Volume 44
Issue 1 *Fall 1994*

Article 6

The Eighth Amendment "Punishment" Clause after Helling v. McKinney: Four Terms, Two Standards, and a Search for Definition

Jonathan A. Vold

THE EIGHTH AMENDMENT "PUNISHMENT" CLAUSE AFTER *HELLING v. McKINNEY*: FOUR TERMS, TWO STANDARDS, AND A SEARCH FOR DEFINITION

"To-day we have naming of parts."[1]

INTRODUCTION

Among the many broad yet rudimentary directives of our Constitution,[2] few have defied definition more consistently than the "punishment" clause of the Eighth Amendment.[3] As of early 1994, Supreme Court justices have recited the six words "nor cruel and unusual punishment inflicted" in no less than 120 opinions.[4] Yet throughout this lode of case law, simple definitions of these words, much less a lasting construction of the clause as a whole, have been elusive, evaded, and sometimes explicitly refused.[5] Even where basic definitions can be inferred from the Court's opinions, the adjectives "cruel" and "unusual" tend to be reduced to synonyms of the same amorphous sort: "cruel" becomes "wanton" or "deliberately indifferent;"[6] "unusual" transforms to "unreasonable," "unnecessary" or

---

1. Henry Reed, *Naming of Parts in* COLLECTED POEMS 49 (John Stallworthy ed., 1991) (describing the didactic dissection of a rifle). Here is the first stanza:

> To-day we have naming of parts. Yesterday,
> We had daily cleaning. And to-morrow morning,
> We shall have what to do after firing. But to-day,
> To-day we have naming of parts. Japonica
> Glistens like coral in all of the neighbouring gardens,
> And to-day we have naming of parts.

Id.

2. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 93-94 (1993) ("[T]he text of the Constitution is often extremely vague . . . . On so many of the central constitutional questions, the words of the Constitution tell us much less than we need to know.").

3. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII.

4. This includes both majority and non-majority opinions in which the clause is more than incidentally mentioned. The words "cruel and unusual punishment," have appeared, without extensive discussion, in over 2500 cases and certiorari decisions. Search of WESTLAW, SCT & SCT OLD libraries (Sept. 23, 1994).

5. While this article primarily considers the elusiveness of punishment clause definitions, it also notes how a number of cases have completely evaded any discussion on particular meanings of the clause and how some cases have explicitly refused to separate the terms.

6. *See infra* notes 248-57 and accompanying text (discussing the Supreme Court's various interpretations of "cruel").

"serious."[7] In direct analysis, the Court has given surprisingly little explicit attention to the verb "inflicted" or to the object "punishment"[8] and practically no reference to the clause's passive voice and lack of a receiver.[9]

Instead of considering the clause by its components, the Court has typically confined the terms to extratextual "standards," applying "contemporary standards of decency" and subjective and objective standards of proof.[10] Recently however, the Court has carefully shaped these standards in such a way that an aggrieved claimant has a fairly clear understanding of what to plead; never having to specifically address whether an occurrence qualifies as an "infliction," or as something that is "cruel," "unusual" or even "punishment."[11]

During the Bill of Rights' adoption process, delegates voiced concern that the terms of the Eighth Amendment's third clause were too difficult to define and that this would one day render the clause meaningless.[12] In *Helling v. McKinney,*[13] the Supreme Court's most recent assessment of the clause, a seven justice majority chose not to expressly consider what constituted "punishment," and instead applied formalized standards of objective and subjective review.[14] In response, the dissent expressed a concern that "punishment" no longer meant what it "always meant."[15] Neither the majority nor the dissent took time to define the words "cruel," "unusual" or "inflicted." Although it is unlikely that the punishment clause or any of its terms will become absolutely meaningless, the *Helling* majority's exclusive attention to standards and the dissent's concern with a singular definition raise a time worn question: exactly what meaning should be attached to the punishment clause and its terms?

---

7. *See infra* notes 258-65, 294-95 and accompanying text (discussing the Court's various interpretations of "unusual").

8. *See infra* notes 266-77, 292-93 and accompanying text (discussing the meanings occasionally assigned to "punishment" and "inflicted").

9. *See infra* notes 282-91 and accompanying text (discussing the punishment clause's scope as to the proscription of whose punishment upon whom).

10. *See infra* notes 90-167 and accompanying text (reviewing the development of these standards).

11. *See infra* notes 361-71 and accompanying text (explaining the dual standard test as articulated in Helling v. McKinney).

12. *See infra* notes 19-29 and accompanying text (briefly noting the legislative history of the clause).

13. 113 S. Ct. 2475 (1993).

14. *Id.* at 2475-82.

15. *Id.* at 2483 (Thomas, J., dissenting).

Part I of this article, by focusing on the history and evolution of Supreme Court case law, considers the various interpretations of the punishment clause, including the occasional definitions of its terms, explanations of its standards, and constructions of the clause as a whole.[16] After presenting the spectrum of past Supreme Court interpretations, Part I directs special attention to the latest conflicting interpretations in *Helling v. McKinney*.[17]

Part II analyzes the range and multiple dimensions of past and present Supreme Court interpretations.[18] Finally, Part III concludes that there can be no rigid definitions of the individual words and standards of the punishment clause; that the pervasive lack of static is perhaps as it should be; and that the whole of the words "nor cruel and unusual punishment inflicted" should and likely always will stand greater than terse meanings of its parts.

I. BACKGROUND

Before appraising the Supreme Court's current understanding of the Eighth Amendment punishment clause, the manner in which the Court has construed the clause over the years must be considered. The initial section of this article traces the history of the punishment clause from its origins through over two-hundred years of case law, concentrating especially on the Court's development of term definitions, standards of application, and general clause interpretations.

A. Origins of the Clause

Before the Eighth Amendment's existence, early governments exercised a practically unchecked power to punish.[19] This power eventually prompted calls for protection by Massachusetts Bay colonists who declared in 1641: "For bodilie [sic] punishments we allow

16. *See infra* notes 30-167 and accompanying text (reviewing the history of Supreme Court interpretations of the punishment clause).

17. *See infra* notes 168-238 and accompanying text (summarizing the majority and dissenting opinions in Helling v. McKinney).

18. *See infra* notes 239-354 and accompanying text (discussing the dimensions of term meanings, standards of review, and overall interpretations) and notes 355-88 and accompanying text (observing the appearance of these dimensions in *Helling*).

19. *See generally* THURSTON GREENE, THE LANGUAGE OF THE CONSTITUTION 617-55 (1991) (tracing the documentary usage of the word "punishment" before its incorporation in the Eighth Amendment, beginning with the power bestowed on Christopher Columbus in 1492 to punish civil and criminal offenders in the Western Hemisphere).

amongst us none that are inhumane, Barbarous or cruel."[20] In 1689, the English Bill of Rights declared that "cruel and unusual punishments [ought not to be] inflicted."[21] After gaining independence, many colonists initially adopted this permissive version of the clause in their earliest state constitutions.[22] In several instances, however, they converted "ought not" into "shall not."[23]

At the national level, early federal legislators proposed the clause in its mandatory form as part of the Constitution's Bill of Rights.[24] This undoubtedly reflected the passions of such regional statespersons as Patrick Henry, who fervently advocated the adoption of a mandatory clause at the Virginia Convention.[25] However, members of the First Congress devoted little discussion to the clause's national acceptance. Only two representatives spoke for the record,[26]

---

20. Colonial Laws of Mass. 43 (1889) *cited in* In re Kemmler, 136 U.S. 436, 447 n.1 (1890); *see also* FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS (1909-1911) *cited in* GREENE, *supra* note 19, at 622 (noting that in 1643, punishment of criminals in the New Haven Colony had to be "according to the mind of God, revealed in his word, touching such offences, does not exceed stocking and whipping"). A protest against cruel and barbarous treatment may date back to 1583, when Sir Robert Beale is said to have vainly asserted such protection under the Magna Carta. Furman v. Georgia, 408 U.S. 238, 316 (1972) (Marshall, J., concurring); *see generally* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969) (discussing the history prior to the enactment of the Eighth Amendment punishment clause).

21. GEORGE B. ADAMS AND H. MORSE STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1927), *cited in* GREENE, *supra* note 19, at 628. In the sixteenth century case of Titus Oates, an English minister was punished by being defrocked. Granucci, *supra* note 20 at 856-60. Dissenters argued that the punishment was "barbarous, inhuman, and unchristian . . . and contrary to law." Granucci, *supra* note 20, at 858 (quoting the dissenting minority of the House of Lords in the T. Oates decision, D.D.1 (1689)). This eventually prompted the House of Commons to declare the punishment protected. Granucci, *supra* note 20, at 857-59. As for the particular combination of the terms "cruel" and "unusual," this may have occurred inadvertently in a transfer from a draft referring to "illegal and cruel" punishments. *See* Furman v. Georgia, 408 U.S. 238, 319 (1972) (Marshall, J., concurring) (discussing the history of the terms "cruel" and "unusual in the Eighth Amendment context).

22. *See Furman*, 408 U.S. at 319 (discussing the verbatim inclusion of the clause in Virginia's Declaration of Rights of 1776 and the subsequent adoption by four other states). According to Granucci, the clause was considered "constitutional 'boilerplate,' " and often adopted with little discussion. Granucci, *supra* note 20, at 840.

23. MASS. CONST. of 1780 and N. H. CONST. of 1784, *cited in* GREENE, *supra* note 19, at 634, 635.

24. James Madison submitted the first draft of the Bill of Rights to Congress on June 8, 1789. This included the punishment clause, worded exactly as it would be adopted. 1 ANNALS OF CONG. 431-34 (1789).

25. 2 ELLIOT'S DEBATES 447-49 (2d ed. 1881). Henry feared unchecked punishments would be inflicted with torturous and relentless severity. *Id.*

26. 221 ANNALS OF CONG. 754 (1789). Unfortunately, no records were kept of the subsequent Senate deliberations. *See* LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 7 (1975) (noting the dearth of records from these important Senate deliberations).

with one objecting that the import of the words in the clause was too indefinite,[27] and the other opining rhetorically that:

> the clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?[28]

With no further debate, the representatives voted on the clause and approved it for adoption.[29]

B. Supreme Court Interpretations.

For ease of analysis, the history of the Supreme Court's construction of the Eighth Amendment punishment clause can be divided into three periods: 1) from 1791 until 1890, 2) from 1890 until 1976, and 3) present day, from 1976. From 1791 to 1890, the first century of the clause's existence, the Court considered very few punishment cases and applied the clause only on a limited, ad hoc basis.[30] In the next period, roughly spanning eighty-five years, (1890 to 1976), the Court began to generally develop "evolving standards of decency" as a necessary element of Eighth Amendment construction.[31] Finally, since 1976, the Court has construed the clause with

---

27. William L. Smith of South Carolina, 1 ANNALS OF CONG. 754 (1789).

28. Samuel Livermore of New Hampshire, 1 ANNALS OF CONG. 754 (1789). In 1791, whipping and ear cropping, as well as branding and pillorying, were common punishments. Joseph L. Hoffman, *The "Cruel and Unusual Punishment" Clause: A Limit on the Power to Punish or Constitutional Rhetoric? in* THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS 139, 139 (David J. Bodenheimer & James W. Ely, Jr. eds., 1993). However, other extreme punishments which were acceptable at the time of the English Bill of Rights' adoption in 1689 were for the most part rejected by 1791. *Id.* (noting the move away from punishments of hanging, disemboweling, beheading and quartering, and burning at the stake as the proscribed punishment for treason).

One hundred eighty years later, Justice Thurgood Marshall would recognize Mr. Livermore's remarks in the First Congress as an acknowledgement "that a prohibition against cruel and unusual punishments is a flexible prohibition that may change in meaning as the mores of a society change." Furman v. Georgia, 408 U.S. 238, 321 n.19 (1972) (Marshall, J., concurring).

29. 1 ANNALS OF CONG. 754 (1789). The House sent the Bill of Rights to the Senate on August 24, 1789. The Senate accepted the amendment without change on September 25, 1789. On December 15, 1791, all of the eleven states ratifying the Bill of Rights accepted the punishment clause as part of what would become the Eighth Amendment. *See generally* BERKSON, *supra* note 26, at 7-8.

30. *See* infra notes 33-47 and accompanying text (explaining the limited circumstances in which the Supreme Court applied the cruel and unusual punishment clause in earlier cases).

31. *See* infra notes 48-51, 90-110 and accompanying text (explaining the evolution of "evolving standards of decency" as applied to the Eighth Amendment).

the careful application of both subjective and objective standards of proof.[32]

1. *The Early Cases.*

In the hundred years after the Eighth Amendment's ratification, the Supreme Court mentioned the punishment clause in only a handful of cases.[33] In fact, the first notable reference to the clause did not occur until *Pervear v. Massachusetts*,[34] seventy-six years after the Eighth Amendment's ratification.[35] The *Pervear* Court refused to extend Eighth Amendment protection to state legislation, but revealed in dicta that it saw nothing cruel or unusual in a three-month sentence to hard labor.[36]

A decade later, in *Wilkerson v. Utah*,[37] the Court issued its first substantive ruling on cruel and unusual punishment, scrutinizing uncodified modes of a general execution law.[38] The *Wilkerson* court declined to give the clause an exact meaning, but found it "safe to affirm" that the punishment clause forbade such unnecessary cruelty as the torture of being dragged to a hanging site.[39] The court added that death by shooting, however, was not cruel and unusual punishment.[40]

The Court reaffirmed *Wilkerson* in *In re Kemmler*[41] which speculatively added to the list of proscribed punishments the archaic penalties of burning at the stake, crucifixion, and breaking on the wheel,[42] yet refused to be offended by the newly "unusual" mode of death by electrocution.[43] More definitively, the *Kemmler* Court

---

32. *See* infra notes 111-238 and accompanying text (detailing the construction of the clause using both subjective and objective standards of proof).

33. Other than the three cases discussed herein, the Supreme Court incidentally referred to the clause in six other cases between 1791 and 1890. Search of WESTLAW, SCT OLD library (Oct. 3, 1994). Of these, Wilkes v. Dinsman, 48 U.S. 89 (1849), is perhaps the most noteworthy. The *Wilkes* Court, reviewing military punishments, noted a strong presumption that "punishment inflicted was not immoderate, and not unreasonable." *Id.* at 132.

34. 72 U.S. 475 (1866).

35. *See supra* note 29 (noting the amendment's ratification in 1791).

36. 72 U.S. at 480. The defendant was convicted of selling liquor without a license. *Id.*

37. 99 U.S. 130 (1878).

38. *Id.* at 134-35. As Utah was a territory, the law's applicability to the states was not an issue. *Id.* at 130.

39. *Id.* at 135-36.

40. *Id.* at 135.

41. 136 U.S. 436 (1890).

42. *Id.* at 446.

43. *Id.* at 446-47.

stated, "[p]unishments are cruel when they involve torture or a lingering death . . . something inhumane and barbarous, something more than mere extinguishment of life."[44]

In the twentieth century, the specific focus of *Wilkerson* and *Kemmler* on death penalty inflictions would be revisited, expanded, and thoroughly discussed.[45] This century opened, however, with *Weems v. United States,*[46] a "hard labor" case that would have significant impact on the interpretation of the punishment clause for capital and non-capital punishment cases alike.[47]

2. *The Transitional Cases of Weems* and *Trop*

In 1910, with *Weems v. United States,*[48] the Supreme Court forcefully renounced interpretations of the punishment clause that looked "backwards" for meaning and evoked the need for a progressive understanding of the clause.[49] Four decades later, in *Trop v. Dulles,*[50] a plurality of the Court refined this evocation. Relying directly on *Weems'* call for progressiveness, the *Trop* plurality called for interpretations that reflected the country's "evolving standards of decency."[51] This phrase characterized the second stage of the punishment clause's constructional history.

---

44. *Id.* at 447.

45. The death penalty debate would culminate in the 1970's, first with Furman v. Georgia, 408 U.S. 238, 240 (1972) (holding that Georgia's capital punishment law violated the Eighth and Fourteenth Amendments), and then with Gregg v. Georgia, 428 U.S. 153 (1976) (allowing the death penalty to be evaluated on a case by case basis). Whether the death penalty itself is cruel and unusual punishment is beyond this article's scope, but the nine separate opinions in *Furman* combine to provide a full and lengthy discussion of the issue.

While capital punishment will not be directly considered here, capital punishment cases, particularly *Gregg*, will be considered to help shed light on the Court's general progress in constructing the punishment clause. *See infra* notes 111-20 and accompanying text (discussing the *Gregg* plurality's application of dual standards of proof to punishment clause claims).

46. 217 U.S. 349 (1910).

47. For a discussion of the impact of *Weems*, see generally Pressly Millen, Note, *Interpretation of the Eighth Amendment* — Rummel, Solem, *and the Venerable Case of* Weems v. United States, 1984 DUKE L. J. 789, 800-03 (noting that the methods used to interpret the Eighth Amendment in *Weems* better follows the drafter's intent than its more recent counterparts).

48. 217 U.S. 349.

49. *Id.*

50. 356 U.S. 86 (1958).

51. *Id.* at 101.

a. "Contemplations . . . of What May Be"[52]

After issuing punishment clause rulings in only five cases,[53] the Supreme Court began in *Weems v. United States*[54] to change the direction of its interpretive focus from "backwards" to "forwards."[55] Ironically, the *Weems* Court was not directly presented with the Eighth Amendment, but rather with an identical clause in the Philippine Bill of Rights, which the Court held would be given the "same meaning."[56] To arrive at this conclusion, the *Weems* Court took three analytical steps. First, on a primary level, the Court expressed an imperative to interpret constitutional law in a broad manner.[57] Next, the Court reviewed the historical and contemporary debate over the Eighth Amendment clause.[58] Finally, the Court carefully defined the clause in terms of its application to a particular Philippine penal code.[59]

From the outset, the *Weems* Court refused to exactly define the cruel and unusual punishment in fixed terms.[60] Instead, the Court

---

52. Weems v. United States, 217 U.S. 349, 373 (1910).

53. Besides *Wilkerson* and *Kemmler*, the Court also considered the clause in Howard v. Fleming, 191 U.S. 126 (1903), and Pervear v. Commonwealth, 72 U.S. 475 (1866); O'Neil v. Vermont, 144 U.S. 323 (1892).

The dissent of *O'Neil*, 144 U.S. at 370-71 (Harlan, J., dissenting), followed by the majority in *Howard*, 191 U.S. at 134-37, introduced the issue of proportionality, requiring the punishment to fit the crime. This issue would also be noted briefly in Weems v. United States, 217 U.S. 349, 379-82 (McKenna, J., majority), 385-86 (White, J., dissenting) (1910). Like the death penalty issue, proportionality would later become the subject of extensive debate. More recently, in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), Justice Scalia and Chief Justice Rehnquist formed a plurality in favor of abandoning proportionality as an Eighth Amendment consideration. *Harmelin*, 111 S. Ct. at 2684-92. For a thorough discussion on proportionality see, Pamela L. Bailey, Note, Harmelin V. Michigan: *Is The Eighth Amendment's Proportionality Guarantee Left An Empty Shell?*, 24 PAC. L.J. 221 (1992).

54. 217 U.S. 349 (1910).

55. *Id.* at 376-77 (distinguishing state cases according to whether or not they "look[ed] backwards for examples by which to fix the meaning of the clause"). Thus, *Weems'* alternative to the "backwards-looking" method of interpretation was not wholly original.

56. *Id.* at 367 ("[T]he provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning.").

57. *Id.* at 373-75. Although these "steps" were not announced or clearly separated, the process is generally evident in the opinion.

58. *Id.* at 368-73, 375-77.

59. *Id.* at 377-82.

60. In framing the issue, the Court purported to seek an exact definition. The court stated that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided." *Id.* at 368. It further noted that "[n]o case has occurred in this court which has called for an exhaustive definition." *Id.* at 369. However, the Court rejected this ostensible pursuit of a general definition of the clause in its primary level of analysis by limiting it's definition to the Philippine code section. *Id.* at 373-75.

found that the clause "may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[61] The Court considered that the Constitution's "meaning and vitality" had often developed broadly, "against narrow and restrictive construction."[62] Thus, "our contemplation cannot be only of what has been but of what may be."[63]

While refusing to commit to a static meaning, the Court still needed to apply a contemporary understanding of the clause. In reaching this understanding, the Court noted a long running debate over the clause's application which sides were formed even before the Eighth Amendment was nationally proposed.[64] On the one side was Patrick Henry of the Virginia Convention[65] and "those who believed as he did."[66] On the other side was William Wilson of the Pennsylvania Convention[67] and "those who thought like Wilson."[68]

Patrick Henry was the epitome of a "man of action" who would "take no chances."[69] Observing Henry's side of the debate, the Court noted a concern for potential abuses of power, such as extor-

---

61. *Id.* at 378.

62. *Id.* at 373.

63. *Id.* Justice McKenna's stirring discourse deserves a more extensive repeating here:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Id.

64. *See* Millen, *supra* note 47, at 801-03 (discussing *Weems'* establishment of debate paradigms).

65. *See supra* note 25 and accompanying text (discussing Patrick Henry's advocacy of a punishment clause with mandatory restrictions).

66. *Weems*, 217 U.S. at 372.

67. *See* 2 ELLIOT'S DEBATES, supra note 25, at 416, 454 (discussing William Wilson's advocacy of no judicial involvement).

68. *Weems*, 217 U.S. at 372.

69. *Id.* ("Henry and those who believed as he did would take no chances . . . . They were men of action, practical and sagacious, not beset with vain imagining . . . .").

tion and oppression: "[I]t must have come to them [the founders] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation."[70] The *Weems* Court determined that the founders created the punishment clause out of fear that those given power might be tempted to a "coercive cruelty."[71]

In contrast, William Wilson strongly believed "the spirit of liberty could be trusted" to legislators.[72] Proponents of Wilson's "trust" argument assigned a more passive definition to the clause, narrowly relating it to historical atrocities.[73] Among his more notable proponents was Justice Joseph Story, who commented that "[t]he provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious behavior."[74] The *Weems* Court noted similar views held by contemporary state courts.[75] For example, one court queried whether at the end of the 1800's the clause was not obsolete.[76]

If Wilson's proponents saw any purpose at all in the punishment clause, they believed it served as an "admonition," either to the courts alone[77] or, more expansively (although still an admonition and not a command), to all government departments.[78] For the *Weems* majority, Henry's "temptation" concerns clearly prevailed over Wilson's "trust" argument.[79] At the same time, while rejecting

---

70. *Id.*

71. *Id.* at 373.

72. *Id.* at 372 (citing generally from 2 ELLIOT'S DEBATES (1881)). For a complete look at Wilson's argument, see 2 ELLIOT'S DEBATES, *supra* note 25, at 418-529.

73. *Weems*, 217 U.S. at 373.

74. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 710 (Ronald D. Rotunda & John E. Nowak eds., 1987).

75. *Weems*, 217 U.S. at 376. "Other cases have given a narrower construction, feeling constrained thereto by the incidences of history." *Id.* "Other cases might be cited in illustration, some looking backwards for examples by which to fix the meaning of the clause . . . ." *Id.* at 376-77. The *Weems* court cites one backwards looking opinion with particular contempt: "In Commonwealth v. Wyatt . . . the whipping post had to be justified and was justified. In comparison with the 'barbarities of quartering, hanging in chains, castration, etc.,' it was easily reduced to insignificance. The court in the latter case pronounced it 'odious but not unusual.' " *Id.* at 377 (quoting Commonwealth v. Wyatt, 6 Rand. 694 (Va. 1828)).

76. *Id.* at 376 (citing Hobbs v. State, 32 N.E. 1019, 1021 (Ind. 1893)).

77. *See Hobbs*, 32 N.E. at 1021 ("The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years").

78. *See* STORY, *supra* note 74, at 710 (interpreting the clause as a broadly applied admonition).

79. This can be inferred from the Court's abhorrence at looking backward for meaning. *Weems*, 217 U.S. at 376-77.

the "admonition" interpretation,[80] the Court chose to adopt the broader view of this theory, which justified a judicial review of the Philippine legislation.[81]

The law in question was a penal code which imposed a sentence of twelve years and one day to twenty years imprisonment, a perpetually chained ankle and wrist, "hard and painful labor," and a total restriction from outside assistance.[82] In reviewing this law, the Court attached certain definite meanings to the terms of the punishment clause, thus providing the third and final step of its analysis.[83] The *Weems* Court held that the penal law was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment [and] unusual in its character."[84] Moreover, the Eighth Amendment applied to punishments according to "degree and kind."[85] As for the degree of the Philippine punishment, the Court was troubled with the lack of proportionality with the crime[86] and concerned about the reach of the punishment beyond penal purposes.[87]

---

80. *Id.* at 376 (suggesting the clause is not obsolete, but warning the Court not to inflict punishments which do not fit the crime).

81. *Id.* at 377. The court also found justification in President Theodore Roosevelt's 1902 actions over the Philippine Commission. *Id.* at 367; *see* Kepner v. United States, 195 U.S. 100, 104 (1904) (discussing the President's order of 1900 and the act of 1901 which bound the Philippine Islands to our government's Bill of Rights).

82. *Weems*, 217 U.S. at 364. This was called the penalty of "cadena temporal," adopted from the Spanish penal code. It was accompanied, in this case, by "accessory penalties," which included civil interdiction, perpetual disqualifications, and lifetime surveillance. *Id.* at 364, 380.

83. *Id.* at 377-82.

84. *Id.*

85. *Id.* By comparison, the dissent in *Weems*, which would have applied the Eighth Amendment only to review a court sentencing, argued that "cruel" is equated with the infliction of "unnecessary bodily suffering through a resort to inhumane methods for causing bodily torture." *Id.* at 409 (White, J., dissenting). If the question was merely "severe," it was strictly a question for legislators. *Id.* at 405. The dissent tied "unusual" to the degree, mode, kind and extent of punishment. *Id.* at 409-10.

86. *Id.* at 380-82 (majority); *id.* at 385-86 (dissent, interpreting majority). For more on proportionality, see *supra* note 53 (discussing the dissenting opinion of O'Neil v. Vermont, 144 U.S. 323 (1892) and its progeny).

87. *Weems*, 217 U.S. at 380-81. Regarding a legitimate exercise of punishment, the court noted that "[t]he purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.* at 381. This focus on purpose was repeated in Trop v. Dulles, 356 U.S. 86 (1958). *See infra* notes 96-99 and accompanying text (discussing the *Trop* decision's distinction between purposeful punishment and punishment merely labeled as such). The Court later emphasized the "penalogical purpose" behind administrative treatment and prison conditions in Rhodes v. Chapman, 452 U.S. 337, 345-47 (1981) and Whitley v. Albers, 475 U.S. 312, 318-26 (1986). *See infra* notes 130-38 and accompanying text (noting the *Rhodes* opinion's tolerance for intended harshness).

Although the *Weems* Court argued against confinement of the punishment clause to a fixed, historical definition, it nevertheless provided what was by far the most particular construction of the clause in its first 120 years of existence.[88] With *Weems'* blessing, the particularity of the Supreme Court interpretations would increase in the next eighty-five years.[89] Yet, the Court would rarely match *Weems* in the range of its detail.

b. "Evolving Standards of Decency"[90]

In the fifty years following the *Weems* decision, the Supreme Court decided only a few punishment clause cases.[91] Among these was *Trop v. Dulles*,[92] a case that conspicuously contributed to the Court's ongoing construction of the punishment clause. *Trop* is perhaps best known for coining the "evolving standards of decency" phrase,[93] although it explicitly did so as a rephrasing of *Weems'* call for nonstatic interpretations of the clause.[94] On its own, *Trop* may have also contributed to further understanding of the punishment clause by assigning new meaning to several of the clause's individual

---

88. See *supra* notes 60-63, 84-87 and accompanying text (discussing the *Weems* court's construction of the cruel and unusual punishment clause).

89. *See* supra notes 90-238 and accompanying text (discussing the evolution of the Supreme Court's interpretation of the cruel and unusual punishment clause from 1910 to today).

90. The term "evolving standards of decency" was first articulated in Trop v. Dulles, 356 U.S. 86 (1958). For discussion of the *Trop* decision, see *infra* notes 92-104 and accompanying text.

91. The three cases after *Weems* were Badders v. United States, 240 U.S. 391 (1916), United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921), and Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947). Of these, the most significant case was *Resweber*, which held that an electrocution effort which took two attempts did not amount to cruel and unusual punishment. *Resweber*, 329 U.S. at 464. Perhaps more importantly, four justices in *Resweber* extended the Eighth Amendment to the states through the Fourteenth Amendment. *Id.* at 462-63. This extension would be endorsed by the majority holdings in Robinson v. California, 370 U.S. 660, 660-68 (1962) and Powell v. Texas, 392 U.S. 514, 517-37 (1968). *See infra* note 108 (discussing *Robinson* and *Powell*).

92. 356 U.S. 86 (1958). *Trop* was the next significant case following *Resweber*.

93. *Trop*, 356 U.S. at 101 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). More extensively, the *Trop* opinion stated:

> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

Id. at 103-04.

94. *Id.* at 100-01 (noting immediately before the "evolving standards" directive that the *Weems* court "recognized . . . that the words of the Amendment are not precise, and that their scope is not static").

terms.[95]

The central question in *Trop* was whether statutory expatriation of a former convict was considered punishment.[96] Led by Chief Justice Earl Warren, a four member plurality determined that it did not matter whether the law in question was labeled a penal law[97] or was simply penal in character.[98] Punishment, the plurality opinion argued, was defined by purpose; thus, a statute that deprived a person of rights was punitive in nature if that was the legislature's intent.[99]

The *Trop* opinion noted further that the words "cruel and unusual" could either reflect the "basic prohibition against inhumane treatment" or might hold distinct meanings.[100] Separating the terms, the Court found "unusual" to mean "something different from that which is generally done."[101] By application, this included denationalization, a punishment similar to that in *Trop*.[102] The opinion did not expressly define "cruel", but inferred that the stripping of a person's citizenship was cruel because its destructiveness, despite the lack of physical mistreatment, made it "more primitive than torture."[103] The opinion further stated that "[i]t is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the pun-

---

95. For a discussion of the meanings attached to those terms by the *Trop* court see *infra* notes 100-05 and accompanying text.

96. *Trop*, 356 U.S. at 94.

97. *Id.* at 94-95 ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! . . . Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.").

98. *Id.*

99. *Id.* at 96-98. In contrast with the statutory intent, punishment could not be determined by a statute's penal result; thus, deportation, intended to enforce immigration laws, was not the same as denationalization, intended to punish an individual. *Id.* at 98.

100. *Id.* at 100-01 n.32 (noting a split between courts). An example of one court's reluctance to separate the terms can be seen in the notable subsequent circuit court case of Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, C. J.) ("We choose to draw no significant distinction between the word 'cruel' and the word 'unusual'. . . . We would not wish to place ourselves in the position of condoning punishment which is shown to be only 'cruel' but not 'unusual' or vice versa.").

101. *Trop*, 356 U.S. at 100-01 n.32. The separate definition of "unusual" was later considered by a two-justice plurality in Harmelin v. Michigan, 111 S. Ct. 2680, 2691 (1991) (citing Webster's Dictionary's 1828 edition and Webster's 2d International Dictionary to show that the word "unusual" had the same meaning in 1828 " 'such as [does not] occu[r] in ordinary practice,' " as it has today " '[s]uch as is [not] in common use' ") (alterations in original).

102. *Trop*, 356 U.S. at 94-95.

103. *Id.* at 101.

ishment obnoxious."[104]

Despite these other pronouncements in the *Trop* opinion, its declaration of "evolving standards" would remain its most enduring contribution to case law. While the directive has occasionally taken different forms[105] and is now commonly credited to the majority opinion of *Estelle v. Gamble*,[106] it continues to be recited as an objective element of the punishment clause analysis more than thirty-five years after its declaration in *Trop* and eighty-five years after its progressive roots in *Weems*.[107]

3. *Modern Cases and the Application of Standards.*

After *Trop*, the number of punishment cases reviewed by the Supreme Court began to increase.[108] As this occurred, the Court started supplementing *Trop's* "evolving standards of decency" with

---

104. *Id.* at 102. A fifth justice, Justice Brennan, concurred with the Warren opinion in this regard, asserting that "[t]he uncertainty, and the consequent psychological hurt" were substantial contributors to the ultimate judgment. *Id.* at 111 (Brennan, J., concurring). However, Brennan did not base his concurrence on the Eighth Amendment but on the unreasonable relation in this case between crime and punishment. *Id.*

105. *See, e.g.*, Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) ("contextual and responsive to 'contemporary standards of decency' "); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("the minimal civilized measure of life's necessities . . . under the contemporary standard of decency"); Furman v. Georgia, 408 U.S. 238, 329 n.37 (1972) (Marshall, J., concurring) ("flexible . . . as public opinion changed"); Robinson v. California, 370 U.S. 660, 666 (1962) ("in the light of contemporary human knowledge").

106. 429 U.S. 97, 103 (1976) (requiring application of "contemporary standards of decency as manifested in modern legislation"). As noted, *Estelle* was not the first majority decision after *Trop* to adopt the "evolving standards" directive. *See supra* note 105 (discussing earlier cases adopting this standard).

107. *See supra* notes 48-89 and accompanying text (showing *Weems* to be the origin of "evolving standards").

108. The increase was largely the result of Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968), the two cases immediately following *Trop*. These cases permanently extended the Eighth Amendment to state activities through the Fourteenth Amendment Due Process Clause. *Robinson*, 370 U.S. at 667; *Powell*, 392 U.S. at 531-32. Because states legislate, sentence and administer punishment more extensively than the federal government, *Robinson* and *Powell* opened the Supreme Court's doors to a significant amount of litigation. At the time of *Trop*, the eighth amendment had been law for 167 years, yet the Supreme Court had substantively considered the punishment clause in only seven other cases. *See* Arthur J. Goldberg and Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777 n.17 (1970) (listing the cases up to *Powell* in which the Supreme Court substantially discussed the clause). After *Robinson* and *Powell*, the Court heard 19 cases in 10 years; between 1968 and 1993 it addressed the issue of cruel and unusual punishment in approximately 100 cases. Search of WESTLAW, SCT library (Oct. 3, 1994).

Substantively, both *Robinson* and *Powell* considered the issue of whether a person could be punished for the "status" or "condition" of being a substance abuser. The cases concluded that punishment of status alone is cruel and unusual. *Powell*, 392 U.S. 514, 533; *accord Robinson*, 370 U.S. at 667.

standards of subjective proof.[109] Eventually, the Court required a dual consideration of these standards, shaping the subjective standard as a measure of a contextual state of mind and the objective standard as a measure of contextual seriousness.[110]

a. The Development of Objective and Subjective Measures

Eighteen years after the *Trop* case, in *Gregg v. Georgia*,[111] a three justice plurality found that the *Trop* "standards of decency" were relevant, but not conclusive.[112] While the evolving "standards of decency" required courts to measure public attitudes according to "objective indicia," free from "subjective judgment,"[113] the *Gregg* plurality believed courts also had to consider whether punishment was "excessive,"[114] either by involving "unnecessary and wanton infliction of pain"[115] or by being "grossly out of proportion" to the crime's severity.[116]

A majority of the Court in *Estelle v. Gamble*[117] endorsed the *Gregg* formula with a slight, yet important, variation. The *Gregg* opinion indicated that courts had to consider both the "objective"

---

109. *See infra* notes 121-41 (discussing the subjective standards).

110. *See infra* notes 168-238 (discussing the application of each of the two standards in *Helling*).

111. 428 U.S. 153 (1976) (allowing states to impose capital punishment for murder convictions).

112. *Id.* at 173.

113. *Id.*

114. *Id.* "A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'. . . This means, at least, that the punishment not be 'excessive.' " *Id.* (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)). The *Gregg* plurality was careful to point out, however, that in making its subjective judgment of excessiveness, the judiciary still owed a certain amount of deference to legislators. *Id.* at 174-76.

115. *Id.* at 173 (citing Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting)). The term "unnecessary and wanton infliction of pain" is actually an interpretation of an interpretation of an interpretation. Initially, the Court in Wilkerson v. Utah interpreted the punishment clause as a bar against "unnecessary cruelty." 99 U.S. 130, 136 (1878); *see supra* notes 38-41 and accompanying text (discussing the *Wilkerson* case and what constitutes "unnecessary cruelty"). The court used a similar phrase, "unnecessary pain," in Louisiana *ex rel.* Francis v. Resweber, which also referred to "the wanton infliction of pain." 329 U.S. 459, 463 (1947). In Furman v. Georgia, dissenting Chief Justice Burger objected to any isolation of the word "unnecessary" and interpreted these phrases as strictly prohibiting "the wanton infliction of physical pain." 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting). Finally, the joint opinion in *Gregg* coined the phrase "unnecessary and wanton infliction of pain," directly crediting the Burger dissent in *Furman*. *Gregg*, 428 U.S. at 173.

116. *Gregg*, 428 U.S. at 173. For the background and development of proportionality constructions, see *supra* note 53.

117. 429 U.S. 97 (1976) (finding the denial of prisoner's medical care to be unconstitutional). *Estelle* followed *Gregg* by only four months.

standard of decency and the "subjective" standard of excessiveness.[118] By contrast, the Court in *Estelle* ostensibly required the Court to consider a choice of standards, stating: "we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' . . . *or* which 'involve the unnecessary and wanton infliction of pain.' "[119] In future cases, however, the Court returned to *Gregg's* dual consideration of the standards with no allowance for choice.[120]

b. Subjective Measures of a Contextual State of Mind.

As noted, *Estelle v. Gamble* followed the language of both *Trop* ("evolving standards") and *Gregg* ("unnecessary and wanton standard").[121] Additionally, *Estelle* added its own terms to the spectrum of Supreme Court interpretations. Noting that prison officials owed a common-law duty of care to its prisoners,[122] the Court specifically concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."[123] While the "deliberate indifference" standard applied broadly to the denial, delay, interference, or responsive indifference to a prisoner's medical needs, it did not apply to inadvertent failures.[124]

---

118. *See supra* notes 111-16 and accompanying text (noting *Gregg's* deeming of the *Trop* standard as "relevant," but "not conclusive").

119. *Estelle*, 429 U.S. at 102-03 (citations omitted) (emphasis added). *Estelle* did not refer directly to excessiveness, but noted that grossly disproportionate punishments were also proscribed. *Id.*

The either-or language in *Estelle* is somewhat clouded by another statement in the case that combines the alternatives: "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation . . . ." *Id.* at 103 (referring to the nonpenalogical denial of medical care to prisoners). Nevertheless, a combination of the alternatives in one instance does not preclude the *Estelle* Court's call for separate consideration of the alternatives.

120. The Court later applied the dual standards consideration in Rhodes v. Chapman, 452 U.S. 337 (1981). *See infra* notes 129-31 and accompanying text (discussing the application in *Rhodes*).

121. *See supra* note 119 and accompanying text (discussing the *Estelle* Court's reliance on these phrases).

122. *Estelle*, 429 U.S. at 103-04, (noting codifications of common law in 22 states and exemplifying the common law rule in Spicer v. Williamson, 132 S.E. 291 (1926)). In *Spicer*, the court held, "[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." *Spicer*, 132 S.E. at 293.

123. *Estelle*, 429 U.S. at 104 (citation omitted). For the derivation of the "unnecessary and wanton infliction of pain" phrase, see *supra* note 115.

124. *Estelle*, 429 U.S. at 104-05.

Estelle's "deliberate indifference" standard would eventually take a prominent place in reviewing conditions of confinement cases.[125] However, for the next sixteen years the Supreme Court clearly avoided extending *Estelle's* standard to other instances.[126] In *Ingraham v. Wright,*[127] the Court stated in dicta that only the "unnecessary and wanton infliction of pain" would constitute cruel and unusual punishment in prison condition and treatment cases.[128] Five years later, a majority of the Court subscribed to this view in *Rhodes v. Chapman,*[129] holding that conditions of confinement claims required a showing of an unnecessary and wanton infliction.[130] *Rhodes* expressly refused to extend the "wanton and unnecessary" standard to include acts of deliberate indifference, reasoning that harsh conditions may sometimes be an intentional part of the penalty.[131]

The Court adhered to this reasoning in *Whitley v. Albers*[132] which held that harmful treatment would be measured by an "obduracy and wantonness" standard unless it "purported to be punishment."[133] The *Whitley* Court explained that *Estelle's* deliberate indifference standard might be appropriate in some cases, but in the context of a prison official's use of disciplinary force, the Court had to inquire whether the official acted " 'maliciously and sadistically' " or in " 'good faith.' "[134] In any case, the measuring standard in-

---

125. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991). For a discussion of *Wilson,* see *infra* notes 136-141 and accompanying text.

126. The next extension of the standard was in Youngberg v. Romeo, 457 U.S. 307 (1982). *See infra* note 128 (discussing the extension in *Youngberg*).

127. 430 U.S. 651 (1977) (addressing the issue of whether the Eighth Amendment applied to corporal punishment of school children).

128. *Id.* at 669-71. The *Ingraham* Court held that the Eighth Amendment applied only to punishment of criminal behavior, and thus was inapplicable to corporal punishment of school children. *Id.* at 671 n.40; *see also Youngberg,* 457 U.S. at 325 (holding that the Eighth Amendment was not the measure for protection of persons who were voluntarily committed). *But see* DeShaney v. Winnebago County, 489 U.S. 189, 198 (1989) (suggesting that children in state custody may be able to claim deliberate indifference to serious medical needs).

129. 452 U.S. 337 (1981) (allowing double celling of prisoners as long as there was no unnecessary and wanton treatment).

130. *Id.* at 347. *Rhodes* also required a violation of contemporary standards, thus rejecting *Estelle's* alternative consideration of the objective and subjective standards. *Id.*

131. *Id.*

132. 475 U.S. 312 (1986) (applying the punishment clause to a prison official's use of deadly force during a prison riot).

133. *Id.* at 319.

134. *Id.* at 320-21 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033) (1973)). This standard would later be used in Hudson v. McMillian, 112 S. Ct. 995 (1992), which would call *Whitley's* test "the core judicial inquiry"

volved more than an ordinary standard of care.[135]

The deliberate indifference standard was again used in *Wilson v. Seiter*.[136] *Wilson* extended the application of *Estelle's* standard to all inhumane prison condition cases where there was a deprivation of "a single, identifiable human need."[137] This standard included the inadequate medical care *Estelle* had prohibited,[138] as well as deprivations of food, warmth, exercise and protection from other inmates.[139] The Court further held that beyond an objective showing of sufficient harm, the deprivation's subjective effect on the prisoner was irrelevant.[140] Instead, the Court required a subjective consideration of the prison official's deliberative intent, declaring this to be an integral part of the meaning of punishment.[141]

c. Objective Measures of Contextual Seriousness

Besides discussing the subjective "deliberate indifference" standard, the *Wilson* Court made several references to an objective standard,[142] marking the Supreme Court's definite return to the *Gregg*

---

for excessive use of force claims. *Hudson*, 112 S. Ct. at 999.

135. *Whitley*, 475 U.S. at 319. *Whitley* also cited Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), a case which equated deliberate indifference with criminal recklessness. *Whitley*, 475 U.S. at 321.

136. 111 S. Ct. 2321 (1991) (considering the applicability of the punishment clause to various conditions of prison confinement).

137. *Id.* at 2327. The primary question continued to be whether the conduct was "wanton," but this varied according to the constraints on the prison official. The court held that a "deliberate indifference standard" applied to cases involving nonmedical conditions because the constraints in these cases were similar to the constraints in medical condition cases. *Id.*

138. The *Estelle* Court was necessarily concerned with medical treatment, but its ruling was not expressly limited to that point. *See supra* note 122 and accompanying text (discussing the general duty of care owed to prisoners).

139. *Wilson*, 111 S. Ct. at 2326-27.

140. The court refused to find relevance in the prisoner's contention that there was no " 'detriment to bodily integrity, pain, injury or loss of life.' " *Id.* at 2326 (quoting Respondent's Brief 28-29). However, this was "assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim." *Id.*

141. *See id.* at 2325 (citing Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985). " 'The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word meant today; it is what it meant in the eighteenth century.' " *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973). The court further noted, " '[t]he thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose.' " *Id.* (quoting *Johnson*, 481 F.2d at 1032). The court in *Wilson* concluded: "[a]n intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate." *Id.* at 2326.

142. *Id.* at 2324 (explaining the objective component as asking, "[W]as the deprivation sufficiently serious?" and the subjective component as asking, "[D]id the officials act with a sufficiently culpable state of mind?"). Justice White's concurring opinion argued that only the objective component should be considered. *Id.* at 2329-30 (White, J., concurring).

plurality's dual inquiry in Eighth Amendment jurisprudence.[143] However, just as *Gregg's* subjective standard had transformed over time from an excessiveness inquiry to an inquiry into state of mind,[144] the objective standard had assumed different proportions as well.[145] From *Trop* to *Wilson,* the Court changed its objective inquiry from a general question of contemporary values to a more particular question of fact-based seriousness.[146]

In *Gregg,* the plurality generally defined the objective standard in terms of derivative contemporary values.[147] This opinion called for a consideration of "objective indicia that reflect the public attitude,"[148] and gave strong deference in this inquiry to legislators and jurors.[149] A year later, a plurality of the Court in *Coker v. Georgia*[150] advised other courts not only to defer to legislators and the public, but to consider objective factors derived from them "to the maximum possible extent."[151] The Court further extended this deference in later cases to the objective decisions of prison administrators[152] and security guards.[153]

At the same time, the Court began to allow an objective inquiry into particular factors of severity or seriousness. In *Hutto v. Finney,*[154] the Court approved a lower court's consideration of certain prison condition factors, including prisoners' diet, overcrowding, vandalism, rampant violence and the unprofessional conduct of prison officials.[155] By contrast, in *Rhodes v. Chapman,*[156] the Court

---

143. *See supra* notes 108-20 and accompanying text (discussing the development of the dual inquiry).

144. *See supra* notes 121-41 and accompanying text (discussing the post-*Gregg* development of the subjective standard).

145. *See infra* notes 147-67 (discussing the changing proportions of the objective standard).

146. *See supra* notes 90-120, 147-67 and accompanying text (discussing the changing focus of the objective standard through the years).

147. 428 U.S. 153, 173 (1976).

148. *Id.*

149. *Id.* at 174-75, 181-82.

150. 433 U.S. 584 (1977) (plurality opinion).

151. *Id.* at 592. *Coker* is cited with approval by a majority in Rummel v. Estelle, 445 U.S. 263, 274-75 (1980).

152. *See* Rhodes v. Chapman, 452 U.S. 337, 349 n.14, 352 (1981) (allowing prison administrators to determine whether double celling is cruel and unusual punishment); Bell v. Wolfish, 441 U.S. 520, 547 (1979)("Prison officials must be free to take appropriate actions.").

153. *See* Whitley v. Albers, 475 U.S. 312, 321-22 (1986) (stating that prison security guards deserved deference when faced with "riotous inmates").

154. 437 U.S. 678 (1978).

155. *Id.* at 687 (stating that "[t]he court was entitled to consider the severity of those violations in assessing the constitutionality of conditions in the isolation cells"); *see also Rhodes,* 452 U.S. at 347 (characterizing *Hutto* as finding prison conditions "constituted cruel and unusual punishment

rejected a prison conditions claim against double celling because there were no intolerable conditions, no deprivations of essentials, no violence, and no pain.[157]

A decade later, in *Wilson v. Seiter*,[158] the Court characterized the *Rhodes* decision as focusing on the punishment clause's objective component by asking whether the prisoner's deprivations were "sufficiently serious".[159] A year later, the Court further explained in *Hudson v. McMillian*[160] that the *Rhodes* measure of "seriousness" was "contextual and responsive to 'contemporary standards of decency.' "[161] Thus, in the context of prison condition complaints, only extreme deprivations were sufficiently grave, while routine discomfort was " 'part of the penalty that criminal offenders pay for their offenses against society.' "[162] Likewise, a prisoner's medical needs had to be more serious than a person with unqualified access.[163] Claims regarding an official use of force,[164] on the other hand, did not require a significant injury, although the force generally had to be excessive.[165] The dissent in *Hudson* objected to this contextual application of seriousness, arguing that a use of force causing only insignificant harm "may be immoral, it may be tortious, it may be criminal, . . . but it is not 'cruel and unusual punishment.' "[166] In

---

because they resulted in unquestioned and serious deprivation of basic human needs").

156. 452 U.S. 337 (1981).

157. *Id.* at 347-48.

158. 111 S. Ct. 2321 (1991).

159. *Id.* at 2324. The "seriousness" requirement may be attributed to Estelle v. Gamble. 429 U.S. 97, 105 (1976). The *Estelle* Court noted that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [42 U.S.C.] § 1983." *Id.*

160. 112 S. Ct. 995 (1992) (applying the punishment clause to a prison guard's infliction of minor injuries).

161. *Id.* at 1000 (quoting *Estelle*, 429 U.S. at 103). *Hudson* required a dual inquiry, asking if officials had a "sufficiently culpable state of mind" as well as if the "alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Id.* at 999 (citing *Wilson*, 111 S. Ct. at 2326).

162. *Id.* at 1000 (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

163. *Id.* (citing *Estelle*, 429 U.S. at 103-04).

164. *See supra* note 133-35 and accompanying text (discussing Whitley v. Albers, 475 U.S. 312 (1986), which distinguished the use of disciplinary force from other punishment cases).

165. 112 S. Ct. at 1000. *Hudson* measures excessiveness according to society's expectations and prohibiting malicious and sadistic use of force without evidence of significant injury, but allows "*de minimis* uses of physical force, [if not] 'repugnant to the conscience of mankind.' " *Id.* (quoting *Whitley*, 475 U.S. at 327 and *Estelle*, 429 U.S. at 106 to which it attributes the "repugnant to the conscience" standard). The phrase actually derives from due process jurisprudence, specifically from Palko v. Connecticut, 302 U.S. 319, 323 (1937). It was initially applied to the punishment clause in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471-72 (1947) (Frankfurter, J., concurring).

166. *Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting). The dissent further stated,

the dissent's opinion, the objective standard required the plaintiff's injury to be "serious" regardless of the nature of the punishment.[167]

d. The Application of Dual Standards in *Helling v. McKinney*

Within two years of *Wilson* and *Hudson*, the Court refined its dual standard review in the prison condition case of *Helling v. McKinney*.[168] In *Helling*, a Nevada prisoner shared a cell with an inmate who smoked five packs of cigarettes a day.[169] The prisoner claimed the cigarettes "burned continuously,"[170] and sued prison officials for assigning him to the cell space, for selling cigarettes without warning inmates of secondary smoke dangers, and for affecting and jeopardizing his health.[171] The prisoner claimed relief under 42 U.S.C. § 1983,[172] and evoked the Eighth Amendment punishment clause as his qualifying right.[173]

Between the filing of the suit in 1987 and its consideration by the Supreme Court in 1993,[174] prison officials moved the prisoner away

---

> To reject the notion that the infliction of concededly 'minor' injuries can be considered 'cruel' or 'unusual' 'punishment' (much less cruel *and* unusual punishment) is not to say that it amounts to acceptable conduct. Rather, it is to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various states.

Id. at 1010. *Cf.* Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991) (Scalia, J., in the portion of his opinion in which one justice joined and three justices concurred) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."); *see also* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding that "although a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment' "), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973). *But see* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . . ."), *cert. denied,* 479 U.S. 816 (1986). *See also* Jackson v. Bishop, 404 F.2d 571, 578 (1968) (showing a reluctance to condone punishment which is cruel but not unusual).

167. *Hudson,* 112 S. Ct. at 1010.

168. 113 S. Ct. 2475 (1993).

169. *Id.* It is beyond the scope of this article to consider the factual import of this case apart from the case's development of Eighth Amendment interpretation. For a complete discussion on the unique substantive implications of environmental tobacco smoke in prisons, see Jeffrey S. Kinsler, *Exposure to Tobacco Smoke Is More Than Offensive, It Is Cruel And Unusual Punishment,* 27 VAL. U. L. REV. 385 (1993).

170. 113 S. Ct. at 2478.

171. *Id.* The prisoner alleged health problems caused by the smoke as well as the jeopardy of developing future health problems, but the courts limited the focus to the issue of the prisoner's jeopardy because evidence did not support the claim of any current health problem. *Id.*

172. 42 U.S.C. § 1983 (1988) (civil action for deprivation of rights).

173. *Helling,* 113 S. Ct. at 2476.

174. The suit was filed in January, 1987. Brief for Respondent 1992 WL 51200, at *1, Helling v. McKinney, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter Brief for Respondent]. The case

from the heavy smoker,[175] and instituted a formal policy against smoking in certain public areas.[176] Nevertheless, because the prisoner remained subject to future assignment with another heavy smoker, the litigation proceeded.[177]

Beyond its factual intrigue, the prisoner's punishment claim eventually spawned a number of legal questions.[178] At the trial court level, however, the magistrate compressed the range of potential questions into two fundamental issues: the prisoner's right to a smoke free environment and of the prison officials' culpability.[179] Regarding the first issue, the magistrate considered whether a prisoner had a constitutional right to a smoke-free environment.[180] Noting that society had not yet resolved the issue of smoke-free environments, the Court concluded that no such right presently existed.[181] Turning to the second issue, the magistrate allowed the prisoner to alternatively prove the prison officials' culpability by showing their deliberate indifference to his serious medical needs.[182] The magistrate, however, found no evidence of this sort and granted the defendants' motion for a directed verdict.[183]

On the prisoner's appeal, the Ninth Circuit Court of Appeals reconsidered the two issues spelled out by the lower court, and splintered both of them.[184] On the first issue, the appellate court agreed

---

was argued before the Supreme Court on January 13, 1993, and decided June 18, 1993. *Helling*, 113 S. Ct. at 2475.

175. The move occurred in February, 1991. Brief for Respondent, *supra* note 174, at *8.

176. The prison adopted the smoking policy on January 10, 1992, restricting common-area smoking to designated areas and permitting smoke-free dormitory settings and bunk assignments on a space available basis. *Helling*, 113 S. Ct. at 2482 (citing App. to Brief for United States as *Amicus Curiae* A1-A2).

177. *Id.* at 2482. Ironically, the prisoner's attorney raised the issue of mootness before the Supreme Court while the state's attorneys argued to press on. *See* Brief for Respondent, *supra* note 174, at *10; Brief for Petitioner, 1992 WL 512101 at *1-*2, Helling v. McKinney, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter Brief for Petitioner].

178. The claim generated a litany of legal questions, addressing such concerns as society's right to a smoke-free environment, the involuntary imposition on prisoners, the permissible levels of smoke exposure, the type and temporal nature of the harm, the relevant degree of risk, the seriousness of the consequences, the defendant's role and affirmative duties, the *mens rea* required, and, ultimately, the meaning and application of Eighth Amendment terms. For an illustration of the range of questions considered, see *Prisons and Jails: Cruel and Unusual Punishment; Inmate's Involuntary Exposure to Environmental Tobacco Smoke*, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1993) (giving an editorial summary of the Oral Arguments).

179. *Helling*, 113 S. Ct. at 2478 (citing App. to Pet. for Cert. D2-D3).

180. *Id.*

181. *Id.* (citing App. to Pet. for Cert. D3, D6).

182. *Id.* (citing App. to Pet. for Cert. D6-D10).

183. *Id.*

184. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991).

that a prisoner has no constitutional right to a smoke-free environment.[185] However, the Court determined that it was not an all-or-nothing issue; the levels of smoke exposure were variable, and society's standards of decency would not tolerate unreasonably dangerous levels of involuntary exposure.[186] Similarly, the court affirmed the magistrate's finding that the plaintiff had not proven deliberate indifference to his immediate medical symptoms and therefore had no claim to present damages.[187] Nevertheless, the appellate court held the plaintiff had stated a valid cause of action based on the risk of future harm to his health.[188] With both issues expanded, the court returned the case to the magistrate with directions to allow the prisoner to prove that the level of smoke exposure constituted an unreasonable danger to his future health.[189]

Prison officials promptly sought Supreme Court review.[190] In response, the Supreme Court granted certiorari, vacated the appellate court's judgment, and remanded the case[191] for further consideration in light of its recent emphasis on the deliberate indifference standard in *Wilson v. Seiter*.[192] On reconsideration, the appellate court acknowledged the subjective requirement of *Wilson*, but continued to call for objective proof of an unreasonable health risk.[193] Underlining its previous holding that both degree of exposure and future risk of harm should be considered, the appellate court reinstated its remand to the lower court.[194]

Prison officials petitioned once again for Supreme Court review, this time noting a split among appellate courts on the objective proof issue.[195] The Supreme Court granted certiorari a second

---

185. *Id.* at 1507-09.

186. *Id.* at 1508-09.

187. *Id.* at 1511.

188. *Id.* at 1509. The court found scientific opinions supported the plaintiff's claim of potential harm after a sufficient level of exposure. *Id.* at 1505-07.

189. *Id.* at 1509.

190. McKinney v. Anderson, 924 F.2d 1500 (1991) (decided on February 1, 1991); Helling v. McKinney, 112 S. Ct. 291 (1991) (certiorari was granted October 15, 1991).

191. 112 S. Ct. 291 (1991).

192. 111 S. Ct. 2321 (1991). *Wilson* held deliberate indifference was required as a subjective element in eighth amendment claims, particularly those which alleged inhumane conditions of confinement. *See supra* notes 136-39 and accompanying text (discussing *Wilson's* extension of the *Estelle* standard).

193. McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir. 1992).

194. *Id.*

195. Helling v. McKinney, 113 S. Ct. 2475, 2479 (1993). The split involved a conflict between the Ninth Circuit in McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (objectively inquiring whether the prisoner was subjected to an unreasonable risk) and a Tenth Circuit opinion in Clem-

time.[196] In an opinion authored by Justice Byron White, the Court reassessed the prisoner's claim and found that the proper inquiry was whether the prisoner had met both subjective and objective elements of proof.[197]

Six justices joined Justice White's opinion, which, after a review of the facts and a terse dismissal of an assertion against jurisdiction, briefly summarized the present scope of the Eighth Amendment punishment clause.[198] In its opinion, the Court found that the punishment clause applied to a prisoner's treatment in prison, as well as to the conditions of the prisoner's confinement; a fact which it claimed was "undisputed."[199] Underlying this undisputed fact was the state's affirmative duty toward its prisoners to care for those who cannot care for themselves.[200] A breach of this duty, and thus a violation of the Eighth Amendment, occurred whenever a prison official was deliberately indifferent to a prisoner's serious medical needs.[201] The Court further held the deliberate indifference standard applied equally to both treatment cases and condition cases.[202]

The defendants did not challenge the application of the deliberate indifference standard. Instead, they argued that the requisite "serious medical needs" could arise only upon a prisoner's current suffering, and not upon threats of future harm.[203] The Court quickly rejected this distinction by listing several analogous situations in which the risk of harm would itself be sufficient,[204] including instances of infectious or contagious diseases in close quarters,[205] un-

---

mons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) (requiring an objective inquiry of whether prisoner's harm was sufficiently serious).

196. Helling v. McKinney, 112 S. Ct. 3024 (1992) (granting certiorari).

197. *Helling*, 113 S. Ct. at 2475-82. Justice White retired shortly after this opinion was issued.

198. Defendants argued that because plaintiff's original complaint did not explicitly raise the issues of degree of exposure and potential health effects, the appellate court improperly considered these issues. *Id.* at 2479 (citing Pet. for Cert. 25-29). The court chose to address these issues because they were the questions on which certiorari was granted. *Id.*

199. *Id.* at 2480. *But see* the dissent's apparent dispute of this summary, *id.* at 2482-85 (Thomas, J., dissenting), discussed *infra* at text accompanying notes 218-38. Arguably, though, "undisputed" refers here to the petitioner's brief, which does not challenge these general tenets. *See* Petitioner's Brief, *supra* note 177.

200. *Helling*, 113 S. Ct. at 2480, (citing DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989)).

201. *Id.* (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

202. *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321 (1991)).

203. *Id.*; *see also* Petitioner's Brief, *supra* note 177, at *14.

204. *Helling*, 113 S. Ct. at 2480.

205. *Id.* at 2480-81. The Court generally objected to dangerous conditions created by the presence of communicable disease and specifically cited to Hutto v. Finney, 437 U.S. 678 (1978) (enjoining crowded cells in which the risk of hepatitis and venereal disease exists) and Gates v.

safe drinking water[206] and life-threatening utility hazards.[207] Without commitment, the Court noted an argument by an amicus curiae that not all risks would be "sufficiently grave" or would cause "proximate harm."[208] However, while not precluding a future consideration of these suggestions, the Court held it would be premature in this case to rule on the degree of a risk.[209]

Although the Court would not consider the degree of a harm's risk, the Court considered and ruled on the issue of degree of the harm itself.[210] As part of the objective standard of proof, the Court held that the level of harmful exposure is a necessary element of an Eighth Amendment claim.[211] Thus, in addition to showing deliberate indifference, the prisoner complaining of second-hand smoke also had to show a level of exposure so unreasonably high that it violated contemporary standards of decency.[212] Although this essentially reflected the appellate court's directions,[213] the Supreme Court revised the appellate court's description of the objective standard by requiring more than a statistical, scientific inquiry.[214]

To satisfy both the objective and subjective standards, the Court further required current observations of what was being claimed — in other words, the punisher's indifference and prisoner's exposure to harm had to be ongoing.[215] The court realized that this would make the plaintiff's case difficult, particularly because prison officials had moved the prisoner away from the high levels of the initial smoke exposure,[216] and because the realities of prison administration seri-

---

Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (objecting to "the mingling of inmates with serious contagious diseases").

206. *Id.* at 2480 (speculating on the viability of such a claim without having to wait for an attack of dysentery).

207. *Id.* at 2481 (citing Youngberg v. Romeo, 457 U.S. 307 (1982) which held that subjecting prisoners to unsafe conditions is cruel and unusual punishment).

208. *Id.* (citing Brief for United States as Amicus Curiae 19).

209. *Id.* ("We cannot rule at this juncture that it will be impossible for McKinney . . . to prove an Eight Amendment violation based on exposure to ETS.").

210. *Id.* at 2481-82.

211. *Id.* at 2482.

212. *Id.* at 2481-82. The Court also indicated that it would consider what society would find indecent as applied to anyone, not just prisoners. *Id.*

213. *See supra* notes 184-94 and accompanying text (noting the appellate court's acknowledgement of the subjective standard and continued call for objective proof).

214. *Helling,* 113 S. Ct. at 2482.

215. *Id.*

216. *Id.*; *see supra* notes 174-77 and accompanying text (explaining the changing situation of the prisoner while this case was being litigated).

ously limit the plaintiff's ability to prove his case.[217]

Two justices dissented, claiming that the seven justice majority had overly expanded the Eighth Amendment.[218] In an opinion written by Justice Clarence Thomas[219] and joined by Justice Antonin Scalia,[220] the dissent centered its contentions almost exclusively on the past and present meanings of punishment.[221] Turning to dictionaries spanning from 1771 to 1828,[222] the dissent first derived a general meaning for "punishment" as the Eighth Amendment framers understood it.[223] The definitions varied among the five sources cited,[224] but the dissent constructed a general summary: punishment was "the penalty imposed for the commission of a crime."[225] From this, the dissent concluded that "judges or juries — but not jailers -- impose 'punishment.' "[226] The original intent of the framers contained no other meaning, the dissent argued, as the framers were responding strictly to sentencing and legislative abuses.[227] It noted that while one state did express an early concern for prison conditions in its own constitution,[228] that concern merely supplemented the state's reference to punishment, and thus did not change "the

---

217. *Helling*, 113 S. Ct. at 2482.

218. *Id.* at 2482-85 (Thomas, J., dissenting).

219. *Id.* at 2482. Justice Thomas also dissented in Hudson v. McMillian, the last Supreme Court case before *Helling* to analyze the punishment clause, and the only previous punishment case considered while Justice Thomas was a member of the Court. *Hudson*, 112 S. Ct. 995, 1004 (1992) (Thomas, J., dissenting).

220. *Helling*, 113 S. Ct. at 2482. Justice Scalia also joined Justice Thomas's *Hudson* dissent. *Hudson*, 112 S. Ct. at 1004. In addition, Scalia authored a plurality opinion in Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (permitting mandatory life imprisonment for a drug offense and arguing for a traditional interpretation of the punishment clause) and the majority opinion in Wilson v. Seiter, 111 S. Ct. 2321 (1991) (limiting the deliberate indifference standard to specific conditions of confinement).

221. *Helling*, 113 S. Ct. at 2483-84.

222. *Id.* at 2483 (citing 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1771); 2 T. SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780); J. WALKER, A CRITICAL PRONOUNCING DICTIONARY (1791); 4 G. JACOB, THE LAW DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW (1811); and 2 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

223. *Id.*

224. All definitions related punishment to either crime or illegal transgression, but two particularly described the act of punishment as a "penalty"; two as an "infliction imposed in vengeance"; and one as "any pain or suffering inflicted" *Id.* (citations omitted).

225. *Id.*

226. *Id.* at 2484.

227. *Id.* at 2483 (citing to Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) which suggests that the 1689 English Declaration of Rights was strictly a response to sentencing abuses, and to 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 111 (2d ed. 1854) which suggests a bar on Congress from inventing and annexing cruel and unheard of punishments).

228. *Id.* at 2483-84 (citing the DEL. DECLARATION OF RIGHTS, art. I, § XI (1792)).

ordinary meaning of the word."[229]

With support from an authoritative 1990 definition,[230] the dissent concluded that punishment should mean today what it has "always meant."[231] Summarily tracing historical precedent, the dissent noted that the Supreme Court did not reach conditions of confinement issues until 185 years after the Eighth Amendment was ratified.[232] Even when the issue was finally raised and decided in *Estelle v. Gamble*,[233] the Court failed to analyze or even extensively discuss the text, relying only on the assertions of lower courts.[234] Thus, *Estelle* may have been wrongly decided; the dissenters may have been intimated, suggesting that they might one day vote to overrule it.[235] For now, though, they would reject any extension beyond *Estelle's* "serious injury" requirement,[236] accepting neither the *Hudson v. McMillian* extension to "minor injuries"[237] nor the present extension to what was perceived by the dissenting justices as the "mere *risk* of injury."[238]

III. ANALYSIS

The *Helling* decision presents an interesting vantage point from which to see how, over the course of time, the Supreme Court has given distinct dimensions of meaning to the Eighth Amendment punishment clause. On a fundamental level, the Court has either expressed or implied an elementary dimension of meaning by producing separate definitions for the *key terms* of the clause.[239] More recently, the Court has shaped the meaning of the clause according to a second dimension, bound by particular *objective and subjective*

---

229. *Id.*

230. *Id.* (citing BLACK'S LAW DICTIONARY 1234 (6th ed. 1990) which defines punishment as 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").

231. *Id.* According to the dissent, this definition "does not encompass a prisoner's injuries that bear no relation to his sentence." *Id.*

232. *Id.* at 2484.

233. 429 U.S. 97 (1976); *see also supra* notes 117-26 and accompanying text (discussing the *Estelle* decision).

234. *Helling*, 113 S. Ct. at 2484-85.

235. *Id.* at 2485.

236. *Id.* (citing *Estelle*, 429 U.S. at 107-08).

237. *Id.* (citing Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting and adopting a lower court's conclusion that the injuries were "minor")).

238. *Id.* at 2482, 2485.

239. *See infra* notes 246-301 and accompanying text (summarizing and analyzing definitive interpretations by the Supreme Court).

standards of inquiry.[240] Within a third dimension, the Court has occasionally assigned meaning to the *clause as a whole.*[241] These dimensions of meaning have frequently overlapped, and in some cases the Court's construction of the clause appears to have been truly three-dimensional.[242]

In both the majority and dissenting opinions of *Helling v. McKinney,*[243] however, the Supreme Court justices have clearly favored a one-dimensional approach. In the majority opinion, seven justices joined to focus only on particular standards of inquiry, to the exclusion of term definitions or an overall interpretation of the clause.[244] By contrast, the two dissenters called for the definition of one word, "punishment," without consideration of standards or overall meaning.[245] As a result, all nine justices have chosen to name "parts" of the punishment clause without regard to its meaning as a whole. Each of these partial methods of construction has promoted an understanding of the punishment clause which is static, narrow and incomplete.

A. Dimensions of Meaning

Before critiquing the Supreme Court's most recent constructions of the punishment clause in *Helling v. McKinney,* it is helpful to review and then analyze the range of meaning the Court has assigned to the clause in each of its dimensions of construction, including the range of elementary definitions, standards of inquiry, and overall interpretations. In each of these dimensions, it is clear that an absolute meaning for the punishment clause has been constantly elusive.

1. Elementary Definitions

The four main terms of the punishment clause are "cruel," "un-

240. *See infra* notes 302-36 and accompanying text (summarizing and analyzing the Supreme Court's use of standards).

241. *See infra* notes 337-54 and accompanying text (summarizing and analyzing overall interpretations).

242. Trop v. Dulles, 356 U.S. 86 (1958), Gregg v. Georgia, 428 U.S. 153 (1976), and Estelle v. Gamble, 429 U.S. 97 (1976), are examples of relatively three-dimensional cases which, although not absolutely balanced, are not as lop-sided as other cases seem.

243. 113 S. Ct. 2475 (1993).

244. *See infra* notes 361-71 and accompanying text (discussing the majority's myopia).

245. *See infra* notes 372-88 and accompanying text (discussing the dissent's myopia).

usual," "punishment," and "inflicted."[246] Two other terms might also warrant definition because of their conspicuous absence: the subject of the clause's prohibition and the indirect object of the clause's protection.[247]

The word "cruel" was first defined explicitly by the Court in *In re Kemmler*.[248] The *Kemmler* Court declared, "Punishments are cruel when they involve torture or a lingering death . . . something inhumane and barbarous, something more than mere extinguishment of life."[249] Nineteen years later, the Court in *Weems v. United States*[250] noted that "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation."[251] *Weems* also equated cruelty with a punishment's "excess of imprisonment and that which accompanies and follows imprisonment."[252] The Court explained that punishment might be excessive if its degree reached beyond penal purposes or if it was disproportionate to the crime.[253] Legitimate penal purposes included repression of crime and reformation of the criminal.[254] Thus, punishment without a legitimate purpose was "cruel."[255] Following *Weems*, a plurality in *Trop v. Dulles*[256] further inferred punishment could be "cruel" even in the absence of physical mistreatment if it involved "total destruction of . . . status" or "primitive torture," with such a threat of disastrous consequence as to make the punishment "obnoxious."[257]

The word "unusual" was first implicitly linked to punishments that were "unnecessary,"[258] or not commonly occurring.[259] The

246. U.S. CONST., amend. VIII.

247. The directive "cruel and unusual punishment [shall not be] inflicted" does not specify a subject (*who* shall not?) nor an indirect object (inflicted upon *whom*?).

248. 136 U.S. 436 (1890).

249. *Id.* at 447.

250. 217 U.S. 349 (1910).

251. *Id.* at 372.

252. *Id.* at 377. The *Weems* dissent defined cruel as being more than severe, but consisting of "unnecessary bodily suffering through a resort to inhumane methods for causing bodily torture." *Id.* at 409 (White, J., dissenting).

253. *Id.* at 376-82.

254. *Id.* at 381; *see also* Wilson v. Seiter, 111 S. Ct. 2321 (1991) (recognizing the purposes of disciplinary chastisement and deterrence).

255. *Weems*, 217 U.S. at 381.

256. 356 U.S. 86 (1958).

257. *Id.* at 101-03.

258. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (referring to "unnecessary cruelty"). *Wilkerson's* use of "unnecessary" to qualify cruelty made the term implicitly distinct from "cruel." Thus, "unnecessary" may be attached here to "unusual," the only other descriptive term of the punishment clause. *But see* the dissent in *Weems*, 217 U.S. at 409 (White, J., dissenting) (equating cruelty with "unnecessary bodily suffering").

Court did not expressly attempt to define this term further until *Weems v. United States,*[260] in which punishment was considered unusual according to its character or kind.[261] Later, *Trop v. Dulles*[262] explicitly defined unusual as "something different from that which is generally done."[263] More recently, in *Harmelin v. Michigan,*[264] a two justice plurality quoted from past and present dictionaries, holding that unusual meant in the early nineteenth century what it means today, " 'such as [does not] occu[r] in ordinary practice.' "[265]

The word "punishment," carefully defined by the dissent in *Helling v. McKinney,*[266] was not expressly considered until *Trop v. Dulles.*[267] The *Trop* plurality, purporting to consider "punishment" apart from considerations of cruelty and unusualness, concluded punishment was defined by an act's purpose and fundamental nature, but not by its effect.[268] Legislative acts were penal if that was the legislator's intended purpose.[269] On the other hand, an act could be "penal in nature"[270] regardless of whether lawmakers attached a penal label to the act.[271] Twenty three years later, in *Rhodes v.*

---

259. *See In re* Kemmler, 136 U.S. 436, 446-47 (1890) (considering electrocution as a new mode of death penalty).

260. 217 U.S. 349 (1910).

261. *Id.* at 377-82. The *Weems* dissent defined unusual more specifically, linking the word to a punishment's degree, mode, kind and extent. *Id.* at 409-10.

262. 356 U.S. 86 (1958).

263. *Id.* at 100-01 n.32.

264. 111 S. Ct. 2680 (1991).

265. *Id.* at 2691 (quoting WEBSTER'S DICTIONARY (1828)).

After *Trop,* the Court's attention to standards began to effectively replace contemporary definitions of "cruel" and "unusual." One may infer from this replacement that a punishment was implicitly deemed unusual if it was objectively serious or unreasonable by contemporary standards. *See supra* notes 154-67 and accompanying text (discussing the objective seriousness standard), and notes 142-153 and accompanying text (discussing the development of contemporary standards measured by objective indicia). Likewise, a punishment was considered cruel if it was "wanton" or subjected with "deliberate indifference." *See supra* note 115 and accompanying text (discussing the development of the "unnecessary and wanton" standard), and notes 121-24 and accompanying text (discussing the introduction of the deliberate indifference standard). On the other hand, in Wilson v. Seiter, the Court declared the deliberative intent of a prison official to be an integral part of the meaning of "punishment." 111 S. Ct. 2321, 2324-25 (1991).

266. *See supra* notes 224-29 and accompanying text (considering five dictionary definitions of punishment).

267. 356 U.S. 86 (1958).

268. *Id.* at 97-98.

269. *Id.* at 96-98.

270. *Id.* at 97.

271. *Id.* at 97-99. *Trop* considered the character, or "nature," of a denationalization law to determine whether the law was part of a prisoner's "punishment." *Id.* However, *Weems* related character to the term unusual. *See* Weems v. United States, 217 U.S. 349, 377 (1910). Moreover, *Trop's* focus on penal purposes is similar to *Weems'* relation of "cruel" to punishments that ex-

Chapman,[272] the Court applied *Trop's* considerations of "purpose" and "character," or "nature," by excusing harsh prison conditions that were an intentional "part of the penalty."[273] Similarly, in a later opinion,[274] the Court excepted harmful treatment that "purport[ed] to be punishment."[275] In 1992, the Court, in *Hudson v.McMillian*,[276] inferred that punishment included, at least in part, the discomfort which society expected prisoners to endure.[277]

The Court has never expressly defined "inflicted" in punishment clause cases. However, the word has independent importance, as is apparent in *Helling v. McKinney's*[278] consideration of the harms or threats of harm which an infliction might cause.[279] Often, the Court has implied that an infliction has not occurred unless some amount of physical harm has occurred.[280] On the other hand, the Court has suggested in a number of cases that an infliction might occur without current bodily suffering.[281]

Consideration of the word "inflicted" also draws attention to the open ends of the punishment clause.[282] While the Court has occasionally considered the questions of whose infliction warrants scrutiny, and upon whom, it has typically done so without direct reference to the Eighth Amendment's terms.[283] As a result, its answers are not always consistent with one another. On the issue of who may

---

tend beyond penal purposes. *Id.* It may be argued, then, that *Trop* does not really consider the term punishment without its qualifiers. If this is so, few, if any, Supreme Court cases have defined "punishment" except by its contextual cruelty or unusualness.

272. 452 U.S. 337 (1981).

273. *Id.* at 347.

274. Whitley v. Albers, 475 U.S. 312 (1986).

275. *Id.* at 319.

276. 112 S. Ct. 995 (1992).

277. *Id.* at 1000.

278. 113 S. Ct. 2475 (1993).

279. *See supra* notes 203-09 and accompanying text (discussing instances in which the punishment clause would protect against the risk of harm without any current suffering).

280. *See, e.g.*, Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (distinguishing between "minor" and "serious" injuries).

281. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) (acknowledging that subjecting prisoners to unsafe conditions is cruel and unusual punishment); Hutto v. Finney, 437 U.S. 678 (1978) (enjoining crowded cells in which the risk of hepatitis and venereal disease exists); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974)(objecting to the mingling of inmates with serious, contagious diseases).

282. *See supra* text accompanying notes 299-301 (explaining how definitions of the clause's terms vary depending upon the court applying them).

283. *See e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Wilkerson v. Utah, 99 U.S. 130 (1878); Pervear v. Massachusetts, 72 U.S. 475 (1866); *see also supra* notes 72-81 and accompanying text (discussing Wilson's "trust" argument, which does not intrinsically consider the clauses's possible breadth).

be said to inflict an Eighth Amendment punishment, the Court has gradually applied a liberal construction, originally limiting the clause to judicial inflictions,[284] but later extending its application to legislative inflictions,[285] and finally allowing review of administrative inflictions.[286] However, on the issue of who may be said to suffer an Eighth Amendment infliction, the Court has not been as expansive. Review has been rigidly limited to convicted prisoners,[287] specifically excluding prisoners awaiting conviction or acquittal,[288] involuntarily committed mental patients,[289] wards of the state[290] and corporally punished school children.[291]

Giving meaning to the punishment clause strictly by considering elementary definitions may have inherent shortcomings. Particular term definitions have never been truly definitive for all applications and have often required considerations in context. Punishment, for instance, has been identified according to a prison official's intent in some cases[292] and society's expectations in others.[293] Unusual has ranged in meaning from unnecessary[294] to uncommon.[295] Synonymous meanings of cruel ranged from torturous[296] to lingering[297] to wanton to deliberately indifferent.[298]

At the same time, arriving at the punishment clause's meaning without considering the meaning of its parts can cause a critical

---

284. *See* Pervear v. Massachusetts, 72 U.S. 475 (1866) (refusing to extend Eighth Amendment protection to state legislation).

285. Wilkerson v. Utah, 99 U.S. 130 (1878).

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

287. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

288. *Id.*

289. Youngberg v. Romeo, 457 U.S. 307, 325 (1982).

290. DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 199 n.6 (1989). *DeShaney* does suggest that the deliberate indifference standard was relevant to establishing the standard of care a state owes its wards, but the Court did not actually apply the Eighth Amendment in this case. *Id.* at 198.

291. *Ingraham*, 430 U.S. at 670.

292. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991) (finding a prison official's deliberative intent to be an integral part of the meaning of "punishment"); Trop v. Dulles, 356 U.S. 86, 96-98 (1958) (defining punishment according to its purpose rather than its label).

293. Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (discussing societies expectations and citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981) which describes a prisoner's routine discomforts as the price society expected the prisoner to pay).

294. *See supra* note 258 (discussing the use of "unnecessary" in Wilkerson v. Utah, 99 U.S. 130 (1878)).

295. *In re* Kemmler, 136 U.S. 436, 446-47 (1890).

296. *Id.* at 447.

297. *Id.*

298. *See supra* note 265 (noting an implicit relationship between "cruel" and the Court's applications of a subjective standard).

oversight. For example, while the Court has fairly grappled, at least implicitly, with definitions of some of the punishment clause's terms,[299] it has devoted disproportionate discussion to other parts of the clause, such as the scope of its verb (inflict) or the identities of its implied subject (the inflictor) and indirect object (the inflictee).[300] While each of these terms has occasionally been discussed,[301] the terms' meanings have not been as carefully defined as other elements, which may lead to unfair presumptions.

2. *Standards of Inquiry*

For the last thirty five years, the Supreme Court has applied, in place of term definitions, explicit standards of objective[302] and subjective inquiry[303] to punishment clause cases. However, as with its definitions of terms, the Court's application of this second dimension of construction has been inconsistent. In addition, these standards of inquiry may not fairly incorporate the meaning of all the terms or the punishment clause as a whole.

The objective standard was first pronounced in plural form, without any subjective accompaniment, as "evolving standards of decency" in *Trop v. Dulles*.[304] "Decency," according to the plurality, was marked by society's progressive maturity.[305] In *Robinson v. California*,[306] the evolving standards were to be measured "in the light of contemporary human knowledge."[307] In *Furman v. Georgia*,[308] one justice considered the meaning of the punishment clause to fluctuate "as public opinion changed."[309] In *Estelle v. Gamble*,[310] the Court again returned to "decency" as the standards' anchor, but

---

299. *See supra* notes 246-81 and accompanying text (illustrating the attempt to define the clause's terms).

300. *See supra* notes 282-91 and accompanying text (discussing the attention given to these "open ends" of the punishment clause).

301. *See supra* notes 248-98 and accompanying text.

302. *See supra* notes 142-67 and accompanying text (following the development of objective standards since their 1958 introduction).

303. *See supra* notes 121-41 and accompanying text (following the development of subjective standards since they were introduced in 1976).

304. 356 U.S. 86, 101 (1958).

305. *Id.* ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

306. 370 U.S. 660 (1962).

307. *Id.* at 666.

308. 408 U.S. 238 (1972).

309. *Id.* at 329 n.37 (Marshall, J., concurring).

310. 429 U.S. 97 (1976).

now decency secured "contemporary standards . . . manifested in modern legislation."[311]

If "decency" was the anchor, then the yardstick, according to a plurality in *Gregg v. Georgia*,[312] was the "objective indicia" of public attitudes.[313] The yardstick holders were lawmakers,[314] jurors,[315] and, later, prison officials.[316] In 1977, the Court declared it would defer "to the maximum possible extent" to these measurers.[317] However, within four years, the Court twice set aside its rule of deference in cases in which it considered objective severity,[318] or the lack thereof,[319] apparent. By 1991, the Court was methodically allowing judicial objectivity inquiries as to whether deprivations were "sufficiently serious."[320] In 1992, the Court said its objective standards were contextual, measurable by considerations of extreme seriousness in some cases[321] and excessive force in others.[322]

Objective standards, identified by *Trop v. Dulles'* "evolving standards of decency," were the Court's only application of inquiry guidelines for eighteen years,[323] until a plurality declared, again in *Gregg v. Georgia*,[324] that courts should also make a subjective judgment about whether a punishment was "excessive."[325] This inquiry considered whether a penalty matched the relative severity of the crime;[326] alternatively, it could ask whether an infliction of pain was

311. *Id.* at 103.

312. 428 U.S. 153 (1976).

313. *Id.* at 173.

314. *Id.* at 174-75, 181-82.

315. *Id.* at 181-82.

316. *See* Whitley v. Albers, 475 U.S. 312, 321-22 (1986); Rhodes v. Chapman, 452 U.S. 337, 349 n.14, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 547 (1979); *see also* notes 152-53 and accompanying text (discussing the deference to prison officials).

317. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). This opinion was cited with approval by a majority in Rummell v. Estelle, 445 U.S. 263, 274-75 (1980).

318. Hutto v. Finney, 437 U.S. 678, 687 (1978) (holding a court could consider severity in assessing a prison conditions claim).

319. *Rhodes*, 452 U.S. at 347-48 (rejecting a prison conditions claim because there were no intolerable conditions).

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

321. Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (requiring extreme deprivations in prison condition cases).

322. *Id.* (requiring excessive force, as opposed to a significant injury, in a claim against a prison guard's official use of force).

323. 356 U.S. 86, 101 (1958). The standard set forth in 1958 by the *Trop* plurality was not significantly altered until 1976 in Gregg v. Georgia, 428 U.S. 153 (1976).

324. 428 U.S. 153 (1976).

325. *Id.* at 173.

326. *Id.*

"unnecessary and wanton."[327] Four months later, in *Estelle v. Gamble*,[328] a majority of the Court restated the *Gregg* plurality's general "unnecessary and wanton" requirement as specifically involving "deliberate indifference to serious medical needs" in the case of prison deprivations.[329] The following year, however, the Court indicated that the proper inquiry in prison condition cases was *only* the unnecessary and wanton infliction of pain.[330] The Court later returned to the deliberate indifference standard for all cases involving a single, identifiable deprivation.[331] Thus, in eighteen years of the subjective inquiry's existence, the definition of the standard changed three times.

Neither the objective nor the subjective standards of review have been consistently defined by the Court. For its objective standards, the Court has inconsistently designated measuring "indicia"[332] and irregularly applied such terms as "serious" and "excessive" in its objective inquiry.[333] The Court has also used the words "excessive" and "serious" in defining its subjective standards,[334] and has flip-flopped on the suitableness of a "deliberate indifference" inquiry.[335] With these inconsistencies, construing the punishment clause strictly by applying objective and subjective standards of review is clearly problematic. Those who are potentially liable for violating the punishment clause have no guidance on how to conduct themselves. Those who are potential victims, meanwhile, will have a diminished reason to seek the protection the Constitution might provide them.

Another problem with the standards of objectivity and subjectivity is that they may not sufficiently reflect the meaning of the punishment clause or of its terms.[336] For instance, an exclusive concen-

---

327. *Id.*

328. 429 U.S. 97 (1976).

329. *Id.* at 104.

330. Ingraham v. Wright, 430 U.S. 651, 670 (1977).

331. Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991).

332. *See supra* notes 304-22 and accompanying text (discussing the various "yardsticks" used).

333. *See supra* notes 160-67 and accompanying text (noting the distinctions made in Hudson v. McMillian). The *Hudson* Court considered the measures of seriousness and excessiveness to be objective elements which were responsive to contemporary standards of decency. Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992).

334. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (introducing as a subjective inquiry the "deliberate indifference to serious medical needs"); Gregg v. Georgia, 428 U.S. 153, 173-76 (1976) (defining a subjective inquiry of excessiveness).

335. *See supra* notes 323-31 (noting the Court's "deliberate indifference" flip-flop over 18 years' time).

336. *See supra* notes 111-67 (discussing the objective and subjective standards of proof).

tration on objective seriousness and a subjective state of mind may find fault with a punishment that is not unusual by society's standards. Alternatively, by looking for gross indecency and excessiveness, aggregate cruelties may be unjustly excused or unfairly difficult to prove.

3. *Overall Interpretations.*

The irony of the Supreme Court's complex development of partitioned standards of inquiry is that these standards originated from simple guidances which were clearly meant to be applied to the clause's overall construction: *Trop v. Dulles'* evolving standards of decency required, very generally, the law to reflect a "maturing society";[337] before that, *Weems v. United States* called broadly for punishment considerations not "only of what has been, but of what may be."[338] These exemplify overall understandings of the punishment clause, a third dimension of construction which strives not only to contemplate the forest of the clause's meaning, but also to appreciate its vitality.

For one hundred years, the Supreme Court reviewed punishment clause claims on an ad hoc basis, refusing to give the punishment clause an "exact meaning."[339] In this regard, the *Weems* Court was not unprecedented when it did not fix the meaning of the clause,[340] nor was it the first to recognize that the words of the clause were not precise.[341] However, *Weems* was the first Supreme Court case to give the clause clear vitality, by providing it with a practical overall meaning; the punishment clause was more than an admonition, it was meant to be a check on the abuse of power by all branches of

---

337. 356 U.S. 86, 101 (1958).

338. 217 U.S. 349, 373 (1910). The *Weems* Court also found, in language similar to *Trop*, that the punishment clause "may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

339. *See* Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (declining to give the clause an exact meaning but ruling ad hoc on the case presented); *see also Weems*, 217 U.S. at 369 ("No case has occurred in this court which has called for an exhaustive definition.").

In fact, it was after more than 175 years, with the arrival of standards of inquiry in Weems v. United States, that the Court first started to methodically assign exacting definitions to the punishment clause. *Id.*

340. *Id.* at 376-77.

341. According to the *Trop* plurality, *Weems* recognized . . . that the words of the Amendment are not precise." 356 U.S. at 100-01. However, *Weems* itself noted that, despite the Court having several occasions of review, "[w]hat constitutes a cruel and unusual punishment has not been exactly decided." 217 U.S. at 368.

government.[342] The *Trop v. Dulles* plurality[343] later continued this argument, asserting that the punishment clause was not merely good advice but a rule of government intended to be applied.[344]

Unfortunately, in applying this rule, the Court has assigned meanings that have moved, in the course of time, from flexible to fixed. For example, the *Trop* opinion generally noted that the words "cruel and unusual" could be construed as reflecting a "basic prohibition against inhumane treatment," apart from the distinct meanings of parts of the clause.[345] *Trop* also considered that human dignity was "'[t]he basic concept underlying the Eighth Amendment."[346] In *Gregg v. Georgia,*[347] a plurality relied on *Trop v. Dulles'* "basic" understanding of dignity to establish its more particular "excessiveness inquiry."[348] Later, in *Hudson v. McMillian,*[349] a majority of the Court held the "core judicial inquiry" in excessive use of disciplinary force cases was whether a prison guard acted maliciously or sadistically.[350]

As with the other dimensions of punishment clause construction, overall interpretations are not infallible. In one extreme, they may be reduced to rigid standards of diminished practicality;[351] in the other extreme, they may be applied without duly considering the elementary meanings of the clause's parts.[352] For the above reasons, definitions and standards should always supplement and balance an overall construction, or such construction will be of little use.

On the other hand, a fundamental interpretation can add consistency to dual standards or particular definitions that might not otherwise be there. A general construction, whether it is centered on an instruction to be "progressive"[353] or a reminder to consider "dig-

342. *Weems,* 217 U.S. at 376.

343. 356 U.S. 86 (1957).

344. *Id.* at 103-04.

345. *Id.* at 100-01 n.32.

346. *Id.* at 100.

347. 428 U.S. 153 (1976).

348. *Id.* at 173.

349. 112 S. Ct. 995 (1992).

350. *Id.* at 999.

351. Arguably, this is what has happened since *Weems* and *Trop. See supra* text accompanying notes 304-38 (discussing the development of standards of inquiries).

352. This has also happened since the earlier cases. *Cf.* Weems v. U.S., 217 U.S. 349 (1910) (providing particular definitions alongside its general call for progressiveness) with any of the post-*Trop* cases.

353. *Weems,* 217 U.S. at 378.

nity,"[354] guides judges, punishers and the punished in a way that ensures the Eighth Amendment punishment clause will not become static yet will always have practical meaning.

B. Constructions in Helling v. McKinney

The Supreme Court delivered majority and dissenting opinions in *Helling v. McKinney*[355] after six years of litigation,[356] with two rounds of arguments before the Ninth Circuit Court of Appeals,[357] and two rounds of arguments before the Supreme Court.[358] Throughout this odyssey, the question presented to the judiciary remained the same: what does it take to implicate and prove six words of the Constitution? Arguably, the question remains unanswered.

The majority in *Helling* declared that the proof depended upon dual standards of inquiry.[359] These standards apparently combined to exclusively restate the punishment clause's six words in absolute terms. The dissent argued that the proof turned dispositively on an exact definition of only one of the words: punishment.[360] The other terms were apparently secondary. By focusing on these exclusive and particular understandings of the punishment clause, both the majority and the dissent in *Helling* disregarded significant parts of the clause and detracted from the meaning of the clause as a whole.

1. Proof by Dual Standards

The *Helling* majority's holding, reduced to a single rule, required a prisoner claiming a wrongful prison condition to show deliberate indifference of prison officials towards the exposure of the prisoner to an unreasonably grave risk of harm.[361] The indifference component was subjective, and was to be measured in light of the prison officials' present conduct and attitudes;[362] the unreasonable risk component was objective, and was to be measured by contemporary

354. Trop v. Dulles, 356 U.S. 86, 100 (1958).

355. 113 S. Ct. 2475 (1993).

356. *See supra* note 174 and accompanying text.

357. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992).

358. The Supreme Court initially remanded the case in 1991 for application of the *Wilson* standards. Wilson v. Seiter, 111 S. Ct. 2321 (1991). The case came before the Court a second time in 1993. *Helling*, 113 S. Ct. 2475.

359. 113 S. Ct. at 2475-82.

360. *Id.* at 2482-85.

361. *Id.* at 2481-82.

362. *Id.* at 2482.

standards of decency.[363]

The majority never strayed far from its dual standard discussion, although it did elaborate on these standards.[364] Most significantly, the Court explained that deliberate indifference may exist with regard not only to current health and safety problems but also where there is needless suffering that is certain or very likely to cause serious health problems, even if there are no prevailing symptoms.[365] On the other hand, deliberate indifference had to be reflected in the authorities' current attitudes and conduct, and was limited by "the realities of prison administration."[366]

The Court also explained that an unreasonable risk required an unwilling exposure to harm that today's society would not tolerate and would find indecent when applied to anyone, not just prisoners.[367] However, a prisoner must show actual, current exposure to himself or herself.[368]

Throughout its opinion, the majority constantly remained more concerned with formalistic proof than with a comprehensive understanding of the punishment clause. Beyond the key words and phrases of "deliberate indifference" and "contemporary standards," the majority limited its overall construction to adding an allowance for present recognitions of future harms.[369] The significance of this new construction is questionable, however, as the "present recognitions" requirement effectively negates the idea of "future harms," or at least makes them difficult to prove.[370]

As for the elementary text of the clause, the majority does at least imply that prison officials may be deemed inflictors by their indifference, and that prisoners may be inflicted by being exposed.[371] Nevertheless, there is no discussion of term definitions, leaving potential inflictees, when applying the Court's standards to their various circumstances, left to wonder: Am I being punished? Is the way I am suffering unusual? At what point does my suffering become cruel? And how can this be recognized as an infliction?

---

363. *Id.*
364. *Id.* at 2480-82.
365. *Id.* at 2480.
366. *Id.* at 2482.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 2480-82.
371. *Id.*

2. *Proof by Singular Definition*

The dissent in *Helling v. McKinney* keenly noted the majority's unasked questions, or at least one of them.[372] After agreeing, reluctantly, that prison deprivations causing actual, serious injuries might implicate the Eighth Amendment,[373] but disagreeing that the rule of *Estelle v. Gamble*[374] should extend to "the mere threat of injury,"[375] the dissent admonished both the majority and the authors of *Estelle* for failing to analyze the text of the punishment clause, especially the word punishment itself.[376] Exhaustively, the dissent offered its own consideration of what punishment should mean.[377] However, it completely ignored the other words of the punishment clause, and avoided any discussion of standards or overall construction. Moreover, even its singular definition of punishment can be criticized.

Punishment, according to the dissent, has "always meant"[378] what the most recent Black's Dictionary defines it to mean: 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."[379] Although the dissent supplemented this definition with several others from history and case law,[380] this was presented as its express conclusion. Still, the dissent argued further that "judges or juries — but not jailers — impose 'punishment.' "[381] This argument ignores what punishment has allegedly "always meant."[382] It also disregards the word's use in context. Finally, the dissent's argument pretends that law and language can never evolve.

First, the Black's definition of punishment does not exclude jailers from imposing punishment, unless it is read to include only inflictions imposed "by . . . the judgment and sentence of a court."[383] The removed words are critical, however. In part, the more com-

372. *Id.* at 2484-85 (Thomas, J., dissenting).
373. *Id.* at 2485.
374. 429 U.S. 97 (1976).
375. *Helling*, 113 S. Ct. at 2485 (Thomas, J., dissenting).
376. *Id.* at 2482-85.
377. *Id.*
378. *Id.* at 2483.
379. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).
380. *See supra* notes 221-29 and accompanying text (noting some of the sources to which the dissent turned).
381. *Helling*, 113 S. Ct. at 2484.
382. *Id.* at 2483.
383. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

plete definition recognizes inflictions dealt "by the authority of . . . the judgment and sentence of a court,"[384] which should include those who administer the judgment. Moreover, the administrators themselves are not posited over the prisoners except "by the authority of the law," which the dictionary definition also allows.[385]

Second, the word punishment must be considered in context, alongside "cruel," "unusual," and "inflicted." The Black's definition only considers punishment in the "usual" sense, when the legislature and the judiciary condone it; it does not clearly extend to "unusual," unauthorized punishments, such as the acts of a vigilante who takes the law into his or her own hands and claims the right to punish. Moreover, punishment is not actually "inflicted" until after the sentence has been imposed; courtroom determinations do not punish nearly as much as the acts and omissions after the sentencing.[386] Indeed, more often it is what follows that can be most cruel to the prisoner.

Ultimately, the word punishment, as with any word, should not be considered to "always mean" anything, least of all what it meant at one point two hundred years ago. This is precisely the static and backwards glancing that the *Weems* and *Trop* opinions opposed,[387] and by arguing in favor of such static, the dissent merely reverts to the fears of the framers, that the punishment clause may one day become meaningless.[388]

3. *Proof by Comprehensive Construction*

While neither the majority nor the dissenting opinion in *Helling v. McKinney* strived to comprehensively construe the punishment clause, the majority can at least be said to have advanced past developments of the clause's "standards,"[389] and the dissent can be said to have invited more careful considerations of the meaning of "punishment."[390] Thus, despite the interpretive shortcomings of

---

384. *Id.*

385. *Id.*

386. *See, e.g.*, text accompanying note 162 (discussing the deprivations and discomforts prisoners are expected to endure as part of their punishment).

387. *See supra* notes 60-63, 92-95 and accompanying text (repeating lengthy arguments presented in *Weems* and in *Trop* arguing for a constructive vitality).

388. *See supra* notes 27-28 and accompanying text (recalling the questions from William Smith and Samuel Livermore of the indefiniteness of the Eighth Amendment punishment clause).

389. Helling v. McKinney, 113 S.Ct 2475, 2475-82 (1993); *see supra* notes 210-17 (discussing the majority standard).

390. Id. at 2482-85; *see supra* notes 222-238 and accompanying text (discussing the dissent's

these two opinions, the *Weems v. United States'* call for non-static interpretation[391] continues to be heeded by the Court, incidentally if not intentionally.

However, while evolutionary interpretation includes an evolution of the meaning of each part of the punishment clause, the clause as applied must also be allowed to evolve as a whole. Both majority and dissent, each by stubbornly insisting on myopic constructions of the punishment clause, have hindered this process. It is true that *Helling* has apparently extended the scope of the clause to include serious risks as well as actual harms, but it remains to be seen how practical this extension is, given the Court's prohibitive tolerance for "the realities of prison administration,"[392] its absolute requirement of proving currently recognizable exposures, attitudes and conduct,[393] and its insistence on strict compliance with both standards.[394] It may even turn out that *Helling v. McKinney* will discourage prisoners' protections by the Eighth Amendment. It is clear, however, that *Helling* will not be the last word on the punishment clause, whose meaning, against all strictures, will undoubtedly continue to evolve.

IV. CONCLUSION

The Eighth Amendment punishment clause, with its six words "nor cruel and unusual punishment inflicted," has been a part of our country's Constitution for over two hundred years. Standing as one of the pillars in our foundation of law, the clause has prompted many to seek a lasting meaning of these words. However, as with much, if not all, of our Constitution, meaning can be assigned in myriad ways. Individual words might be defined for all times, as the dissenters in *Helling v. McKinney* proposed for the word "punishment." Absolute standards of proof, shaped by case law, might be proffered for a class of applications, as the *Helling* majority ordered for prison condition cases.

But strict methods of construction cannot be the only means of interpretation. Individual terms must be considered in context and according to contemporary meaning. Standards must not stray away

---

definition of punishment).

391. 217 U.S. 349, 373 (1910).

392. *Helling*, 113 S. Ct. at 2482.

393. *Id.*

394. *Id.*

from individual term meaning, nor from any meaning the clause might have as a whole. Ideally, term definitions, application standards, and overall understandings of the clause should add to one another as complementary dimensions of construction. Finally, by all means, the clause should not become too strictly construed or statically understood but should be allowed to evolve, or, as several framers feared, all meaning will be lost.

Jonathan A. Vold