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The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent

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COMMENTS

The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent

I. Introduction

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] From the time the Eighth Amendment was ratified until today, "punishment" has referred to the penalty imposed for the commission of a crime.[2] Traditionally, the prohibition against cruel and unusual punishments has been applied to methods of execution[3] or to sentences imposed upon convicted criminals.[4] In recent years, however, the United States Supreme Court has interpreted the prohibition against cruel and unusual punishments to apply to deprivations that were not inflicted as part of the sentence for a crime.[5] Justice Thomas has

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1. U.S. CONST. amend. VIII.

2. *See* Helling v. McKinney, 113 S. Ct. 2475, 2483 (1993) (Thomas, J., dissenting) (citing several English language and legal dictionaries of the period).

3. *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution); *In re* Kemmler, 136 U.S. 436 (1890) (hanging); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (firing squad). In later cases, the constitutionality of the death sentence itself was at issue. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

4. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910) (fifteen years hard labor imposed for falsifying government document).

5. *See* Helling v. McKinney, 113 S. Ct. 2475 (1993) (exposure of inmate to environmental tobacco smoke); Hudson v. McMillian, 112 S. Ct. 995 (1992) (use of excessive physical force against an inmate); Wilson v. Seiter, 111 S. Ct. 2321 (1991) (overall conditions of confinement); Rhodes v. Chapman, 452 U.S. 337 (1984) (double celling of inmates); Hutto v. Finney, 437 U.S. 678 (1978)

characterized this expansion of the Cruel and Unusual Punishments Clause as "beyond all bounds of history and precedent"[6] and has questioned the premise on which the recent expansion of Eighth Amendment rights is based: That deprivations suffered by a prisoner constitute punishment for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence.[7]

This Comment will examine whether Justice Thomas's characterization is correct and thus, whether his criticism is justified. Section II reviews the historical meaning of the Eighth Amendment Cruel and Unusual Punishments Clause. Next, it traces the Supreme Court jurisprudence interpreting that clause, including the recent trend of the clause's expansion to include deprivations not inflicted as part of a criminal sentence. The third section analyzes the expansion of the Cruel and Unusual Punishments Clause for historical and precedential validity and consistency. Finally, Section IV proposes a method of analyzing prison deprivation cases that is consistent with the original intent of the Cruel and Unusual Punishments Clause and those principles upon which the Eighth Amendment was based.

II. Tracing the History of the Eighth Amendment and its Jurisprudence

A. The Original Intent of the Eighth Amendment Prohibition Against Cruel and Unusual Punishments

The phrase "cruel and unusual punishments" first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary.[8] The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved.[9] However, American drafters, who adopted the

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(general conditions of confinement); Estelle v. Gamble, 429 U.S. 97 (1976) (inadequate medical treatment of an inmate).

6. Helling v. McKinney, 113 S. Ct. 2475, 2482-83 (1993) (Thomas, J., dissenting); Hudson v. McMillian, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting). Justice Scalia joined in both dissenting opinions.

7. *McKinney*, 113 S. Ct. at 2483 (Thomas, J., dissenting).

8. Gregg v. Georgia, 428 U.S. 153, 169 (1979). *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 852-53 (1969). This article provides an extensive history of the origin and meaning of the Cruel and Unusual Punishments Clause.

The language of the English Bill of Rights and the Eighth Amendment of the United States Constitution are virtually identical. Granucci, *supra* at 855.

9. Granucci, *supra* note 8, at 860.

English phraseology in drafting the Eighth Amendment, were primarily concerned with proscribing "tortures" and other "barbarous methods of punishment."[10]

George Mason, one of Virginia's delegates to the Constitutional Convention, proposed a bill of rights and a constitution for his state government which included the prohibition against cruel and unusual punishments.[11] Following Virginia's example, eight other states adopted the clause in their constitutions.[12] The federal government inserted it into the Northwest Ordinance of 1787, and it became the Eighth Amendment to the United States Constitution in 1791.[13]

According to Justice Thomas, if there is any affirmative historical evidence as to whether injuries sustained in prison might constitute "punishment" for Eighth Amendment purposes, that evidence is consistent with the ordinary meaning of the word.[14] In other words, when the founding generation wished to make prison conditions a matter of constitutional guaranty, they knew how to do so.[15] In support of this proposition, Justice Thomas relied on the Delaware Constitution's analogue of the Eighth Amendment, which provided that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; *and in the construction of jails a proper regard shall be had to the health of prisoners.*"[16]

There is little doubt that the original drafters of the Eighth Amendment's prohibition against cruel and unusual punishments were

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10. *See id.* at 841-42. Apparently, George Mason and the framers of the United States Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights of 1689, substituting in its place the principles subscribed to by Sir Robert Beale and Reverend Nathanial Ward. *Id.* at 860. Beale was a member of Parliament, had studied law at Oxford, and served as counsel for Puritan ministers who were being deprived of their benefices; in 1853 he published a manuscript entitled *A Book against Oaths Ministered in the Courts of Ecclesiastical Commission. Id.* at 848. Ward was a minister and another Puritan attorney who, after being deprived of his benefice, set sail for Massachusetts; he drafted *Body of Liberties* which was enacted into law by that colony in 1641. *Id.* at 850-51.

11. Granucci, *supra* note 8, at 840. Section 9 of Mason's Declaration of Rights states: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This was a verbatim copy of the wording in the English Bill of Rights of 1689. *Id.*

12. *Id.*

13. *Id.* By that time, the Cruel and Unusual Punishments Clause was considered to be constitutional boilerplate. "The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective . . . ." *Id.* at 840 n.8.

14. Helling v. McKinney, 113 S. Ct. at 2483 (Thomas, J., dissenting).

15. *Id.* at 2483-84.

16. *Id.* (citing DEL. DECLARATION OF RIGHTS, Art. I, § XI (1792) (emphasis added)).

primarily concerned with the use of tortures and other barbarous methods of punishment.[17] Thus, Justice Thomas correctly asserted that the Framers did not contemplate that the Eighth Amendment would be applied to the conditions of confinement of those properly convicted of crimes.[18] Whether the Eighth Amendment has been improperly expanded beyond the bounds of history and precedent to apply to those conditions today, however, is best determined after reviewing the United States Supreme Court's Eighth Amendment jurisprudence.

B. Eighth Amendment Supreme Court Jurisprudence

Following the adoption of the Cruel and Unusual Punishments Clause, both state and federal jurists accepted the view that it prohibits the more inhumane methods of punishment.[19] Because the United States did not resort to the same barbarous punishments as Stuart England, the clause was rarely invoked in court.[20] Attempts to extend the clause to cover punishments that were disproportionate to the offense were rejected throughout the nineteenth century, and therefore, commentators believed that the clause was obsolete.[21]

The Supreme Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman

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17. There is sufficient commentary to establish the interpretation which the Framers placed on the phrase "cruel and unusual." In the Massachusetts convention of 1788, an objection was made to the lack of limitations on the *methods* of federal punishments: "[Congress is] nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." Granucci, *supra* note 8, at 841 (emphasis in original) (citing 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881)).

In the Virginia convention, Patrick Henry was a vehement objector to the lack of a bill of rights. Fearing the use of "tortures" and "barbarous" punishments, he specifically complained of the lack of a prohibition on cruel and unusual punishments. Granucci, *supra* note 8, at 841 (citing 3 ELLIOT, *supra*, at 447-48). In the same discussion, George Mason, drafter of the Virginia Declaration of Rights, expressed his interpretation of the Cruel and Unusual Punishments Clause as one which included torture within its prohibition. Granucci, *supra* note 8, at 841-42 (citing 3 ELLIOT, *supra*, at 452).

18. Helling v. McKinney, 113 S. Ct. at 2482-83 (Thomas, J., dissenting); Hudson v. McMillian, 112 S. Ct. at 1010 (1992) (Thomas, J., dissenting).

19. Granucci, *supra* note 8, at 842. It appears that decapitation, the rack, or any torturous means of extorting a confession were among the methods of punishment that concerned those who supported the Eighth Amendment. *Id.*

20. *Id.*

21. *Id.* (citing 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 694 (8th ed. 1927)); *see* Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

techniques of punishment.[22] The mode of execution was at issue, not the constitutionality of the death sentence itself, and the criterion used to evaluate the challenged mode was its similarity to torture and other barbarous methods.[23] Since then, the Court has not confined the prohibition embodied in the Eighth Amendment to only those barbarous methods of punishment that were generally outlawed in the 18th Century; instead, the Court has interpreted the Amendment "in a flexible and dynamic manner."[24] The meaning of the Cruel and Unusual Punishments Clause has not been fixed, but has been allowed to grow "as public opinion has become enlightened by a humane justice."[25] Apparently, the Court has recognized that the vitality of the Constitution depends on the application of its principles to a much wider set of circumstances than those which first gave rise to those principles.[26]

The expansion of the Eighth Amendment began in 1910 when the Court, in *Weems v. United States*,[27] rejected for the first time the proposition that the Eighth Amendment reaches only punishments that are inhuman, barbarous or torturous.[28] The Amendment was not scrutinized again in any significant manner until the late 1950s and 1960s. In 1958, the Court concluded that the Eighth Amendment barred the use of

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22. *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . . "); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . .").

23. Gregg v. Georgia, 428 U.S. at 170; *see In re* Kemmler, 136 U.S. at 447; *Wilkerson*, 99 U.S. at 136. *See also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (holding that a second attempt at electrocution did not violate the Eighth Amendment, because it was "an unforeseeable accident" and "[t]here was no purpose to inflict unnecessary pain involved in the proposed execution.").

24. *Gregg*, 428 U.S. at 171 (citing Weems v. United States, 217 U.S. 349 (1910)).

25. *Id.* (quoting *Weems*, 217 U.S. at 378); *see* Furman v. Georgia, 408 U.S. 238, 429-30 (1972) (Powell, J., dissenting); Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

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

27. 217 U.S. 349 (1910).

28. 217 U.S. at 368. In *Weems*, the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* (imprisonment for a term less than life) for the crime of falsifying an official document. At the time, *cadena temporal* included imprisonment for at least 12 years and one day, in chains, and at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. The Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment. *Weems*, 217 U.S. at 366. It did not rely on that factor, however, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.* at 368. Rather, the Court focused on the lack of proportion between the crime and the offense, concluding that "a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 366-67. That decision was hailed as a triumph of enlightenment over history. *See* Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910).

denationalization as a punishment,[29] and in 1962, the Court determined that the Eighth Amendment imposed substantive limits on what could be made criminal and punished.[30]

Later, the Court struggled to, but could not, resolve the issue of whether the punishment of death was *per se* cruel and unusual and thus violative of the Eighth Amendment.[31] In *Gregg v. Georgia*,[32] however, the Court eventually concluded that the death penalty was not *per se* unconstitutional.[33] The Court in *Gregg* held that a penalty may not be excessive[34] and that, when a form of punishment in the abstract is under consideration, the inquiry into excessiveness has two aspects.[35] First, the punishment must not involve the unnecessary and wanton infliction of pain.[36] Second, the punishment must not be grossly out of proportion to the severity of the crime.[37]

In 1976, the same year as the *Gregg* decision, Eighth Amendment jurisprudence reached a pivotal turning point. The Supreme Court, in *Estelle v. Gamble*,[38] first applied the Eighth Amendment to a deprivation that was not specifically part of the sentence, but was suffered during imprisonment.[39] The Court held that deliberate indifference by prison

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29. Trop v. Dulles, 356 U.S. 86, 101 (1958). In determining its constitutionality, the Court first concluded that denationalization was "punishment" and thus subject to scrutiny under the Eighth Amendment. *Id.* at 97.

30. Robinson v. California, 370 U.S. 660 (1962). In *Robinson*, the Court found it unconstitutional for a state to make narcotic drug addiction a criminal offense, holding, in effect, that it is "cruel and unusual" to impose any punishment at all for the mere status of addiction. *Robinson* is also often cited for the proposition that the Eighth Amendment is applicable to the States by way of the Fourteenth Amendment. *Id.* at 666.

31. Furman v. Georgia, 408 U.S. 238 (1972). Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist would have held that capital punishment is not unconstitutional *per se*. Justices Brennan and Marshall would have reached the opposite conclusion. While agreeing that the statutes then before the Court were invalid as applied, Justices Douglas, Stewart and White left open the question of whether such punishment may ever be imposed.

32. 428 U.S. 153 (1976).

33. *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.) (stating that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

34. *Id.* at 173.

35. *Id.*

36. *Id.*; *see also Furman*, 408 U.S. at 392-93 (Burger, C.J., dissenting); Weems v. United States, 217 U.S. 349, 381 (1910); Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

37. *Gregg*, 428 U.S. at 173; *see also* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion; dictum); *Weems*, 217 U.S. at 367.

38. 429 U.S. 97 (1976).

39. *Estelle*, 429 U.S. at 97. In this case, an inmate sued the state corrections department's medical director and two correctional officials, claiming that they subjected him to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury allegedly sustained while he was engaged in prison work. *Id.*

personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment.[40] The Court rejected the inmate's claim, however, on the ground that the treating physician against whom the complaint had been made did not have a sufficiently culpable state of mind.[41]

After significantly expanding the Eighth Amendment's scope in *Estelle*, in *Ingraham v. Wright*[42] the Court declined to apply the prohibition against cruel and unusual punishments to corporal punishment in public schools, distinguishing between the prisoner and the schoolchild.[43] Prison brutality, the Court observed, is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.[44] The Court recognized, however, that the Eighth Amendment only protects the incarcerated criminal against the unnecessary and wanton infliction of pain.[45]

In 1981, Eighth Amendment jurisprudence reached another threshold in *Rhodes v. Chapman*,[46] a case in which the Court first considered the limitation that the Amendment imposes upon the conditions in which a

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40. *Id.* at 106. Only the "unnecessary and wanton infliction of pain" is proscribed by the Eighth Amendment. *Id.* at 104; Gregg v. Georgia, 428 U.S. at 173 (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court concluded that a prisoner advancing such a claim must, at a minimum, allege "deliberate indifference" to "serious" medical needs. *Estelle*, 429 U.S. at 106.

Estelle relied in large measure on the earlier case, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), which did not involve a prison deprivation case, but an effort to subject a prisoner to a second electrocution after the first attempt failed by reason of a malfunction in the electric chair. 329 U.S. at 459. Justice Reed, writing for a plurality of the Court, emphasized that the Eighth Amendment prohibited "the *wanton* infliction of pain." *Id.* at 463 (emphasis added). Because the first attempt had been thwarted by an "unforeseeable accident," the Court held that the officials lacked the culpable state of mind necessary for the punishment to be regarded as "cruel," regardless of the actual suffering inflicted. *Id.* at 464.

41. *Estelle*, 429 U.S. at 107.

42. 430 U.S. 651 (1977).

43. *Ingraham*, 430 U.S. at 671. Even this case, which seemingly involved a straightforward constitutional issue, was decided by a 5-4 vote, demonstrating the highly controversial nature of the expansion of the Eighth Amendment beyond its traditional boundaries. Justices White, Brennan, Marshall, and Stevens dissented. Justice White's dissenting opinion emphasized that the language of the Constitution did not limit nor modify the prohibition against cruel and unusual punishments, and therefore, that the Eighth Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment was imposed. *Id.* at 685. Justice White also argued that *Estelle*, decided earlier in the same term, demonstrated that the applicability of the Eighth Amendment was not confined to criminal punishments, since *Estelle* held that the Eighth Amendment also applied to the deliberate indifference to a prisoner's medical needs which is merely misconduct by a prison official. *Id.* at 688 n.4.

44. *Id.* at 669 (quoting Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)).

45. *Ingraham*, 430 U.S. at 669-70.

46. 452 U.S. 337 (1981).

State may confine those convicted of crimes.[47] Rejecting the inmates' contention that double celling constituted cruel and unusual punishment,[48] the Court concluded that the evidence did not demonstrate that double celling inflicted unnecessary or wanton pain or was grossly disproportionate to the severity of the crimes warranting imprisonment.[49]

After *Rhodes*, the Eighth Amendment standard for prison conditions was that prison conditions cannot deny an inmate the minimal civilized measure of life's necessities, or they are considered to constitute cruel and unusual punishment.[50] The obvious corollary to this standard, however, is that conditions which are not considered to be cruel and unusual by contemporary standards are not unconstitutional, and to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.[51]

The next case facing the Court, *Whitley v. Albers*,[52] involved violence by prison officials in response to a riot by inmates.[53] In *Whitley*, the Court held that a guard did not violate the Eighth Amendment when he shot an inmate during a prison riot, because the guard had not acted with a sufficiently culpable state of mind.[54] In

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47. 452 U.S. at 344-45. Here, cellmates at the Southern Ohio Correctional Facility, a maximum security prison, brought a class action against state officials seeking relief and alleging that the lodging of two inmates in a single cell ("double celling") constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 340. *Rhodes* was the first case in which the parties disputed whether the conditions of confinement at a particular prison actually constituted cruel and unusual punishment. In a previous case, the state prison administrators did not dispute the district court's conclusion that the conditions in two Arkansas prisons constituted cruel and unusual punishment. *See* Hutto v. Finney, 437 U.S. 678, 685 (1978).

48. *Rhodes*, 452 U.S. at 339.

49. *Id.* at 348. More specifically, the Court found that the considerations on which the lower court relied amounted to a theory that double celling inflicted pain, but that the conditions of confinement did not rise to the level of the unnecessary and wanton infliction of pain that violates the Eighth Amendment. *Id.* at 348-49.

50. *Id.* at 347.

51. *Id.*

52. 475 U.S. 312 (1986).

53. *Whitley*, 475 U.S. at 312. *Whitley* made it clear that *Rhodes* had not eliminated the subjective component of the Cruel and Unusual Punishments Clause. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

54. *Whitley*, 475 U.S. at 312. The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. *Id.* at 320. The Court justified its deviation from the "deliberate indifference" standard of *Estelle v. Gamble*, because in the context presented in that case, the state's responsibility to attend to the medical needs of prisoners did not, nor would it ordinarily, clash with other equally important governmental responsibilities. *Id.* But, in the context of quelling a prison uprising, prison officials must take into account the very real threats that the unrest presents to inmates and prison officials

particular, *Whitley* determined that in the prison riot context, officials violate the Eighth Amendment when they act maliciously and sadistically with the purpose of causing harm.[55] Accordingly, as the Court reasoned, conduct that does not purport to be punishment must involve more than ordinary lack of due care for the prisoner's interests or safety if it is to be deemed cruel and unusual punishment.[56]

In 1991, the Court synthesized its Eighth Amendment jurisprudence in *Wilson v. Seiter*,[57] affirming that both the objective and subjective components of the Eighth Amendment must be satisfied in order to constitute cruel and unusual punishment.[58] *Wilson*, thus, extended the deliberate indifference standard first articulated in *Estelle* to claims concerning conditions of confinement.[59]

In 1992, in *Hudson v. McMillian*,[60] the Court removed the objective component of the Eighth Amendment under certain circumstances, holding that the use of excessive force against an inmate may constitute cruel and unusual punishment even though no serious injury is suffered.[61] Whenever prison officials maliciously and sadistically use force to cause harm, the Court held that contemporary standards of decency are violated, whether or not significant injury is evident.[62] Thus, the Court determined that the appropriate inquiry

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alike, in addition to the possible harm to inmates against whom the force might be used. *Id.*

55. *Id.* at 320-21; Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973).

56. *Whitley*, 475 U.S. at 319. Inadvertence or error in good faith are not sufficient to make one's conduct rise to the level of the conduct prohibited by the Cruel and Unusual Punishments Clause. *Id.*

57. 111 S. Ct. 2321 (1991).

58. *Wilson*, 111 S. Ct. at 2321. In *Wilson*, an inmate alleged that the poor conditions of his confinement *per se* amounted to cruel and unusual punishment and argued that he should not be required to establish that the officials had acted culpably. *Id.* at 2322-23. The Court rejected the argument, emphasizing that an inmate who seeks to establish that prison deprivation amounts to cruel and unusual punishment must satisfy both the objective and subjective components of the Eighth Amendment. *Id.* at 2324.

59. Hudson v. McMillian, 112 S. Ct. 995, 999 (1992). Strictly speaking, *Estelle* was not a conditions of confinement case; it was a complaint against inadequate medical attention by a prison official to an inmate's injury.

60. 112 S. Ct. 995 (1992).

61. *Hudson*, 112 S. Ct. at 995. In *Hudson*, an inmate alleged that security officers violated the Eighth Amendment's prohibition on cruel and unusual punishments by placing him in handcuffs and shackles, taking him out of his cell, and punching him in the mouth, eyes, chest, and stomach while holding him, causing minor bruises and swelling to his face, mouth, and lip. *Id.* at 997.

62. *Id.* at 1000. Under the *Whitley* approach, the extent of injury suffered by an inmate is one factor that may suggest whether the use of force was thought to be necessary under the circumstances or instead was such a wanton and unjustified infliction of harm that it must be considered tantamount to a knowing willingness that it occur. *Id.* at 999. The Court did concede, however, that not every malevolent touch by a prison guard gives rise to a federal cause of action. *Id.* at 1000. The Eighth

whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.[63]

Recently, the Court relaxed the objective component of the Eighth Amendment in another way, holding that it applied to a prisoner's risk of injury from environmental tobacco smoke (ETS).[64] The case was remanded to the district court to give the inmate the opportunity to prove both the objective and subjective elements necessary for an Eighth Amendment violation.[65] With respect to the objective factor, the inmate was required to show that he, himself, was being exposed to unreasonably high levels of ETS.[66] With respect to the subjective factor, the inmate was required to show that prison officials showed deliberate indifference to his exposure.[67]

The Supreme Court's Eighth Amendment jurisprudence certainly has come a long way since the days of deciding whether a particular method of execution was cruel and unusual. In recent years, the Court has struggled with the application of Eighth Amendment principles as the context of the cases before it has changed. Now, an Eighth Amendment prison claim has both an objective component, whether the deprivation was sufficiently serious, and a subjective component, whether the officials acted with a sufficiently culpable state of mind.[68] Accordingly, the eighteenth century commentators who thought that the Cruel and Unusual Punishments Clause was dead would be shocked not only at its revival, but also at its growth and expansion in the last several decades, as would the Framers of the Constitution. Whether they would be dismayed depends on whether or not there is a justification for this recent trend.

Amendment's prohibition against cruel and unusual punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. *Hudson*, 112 S. Ct. at 1000.

63. *Id.* at 999.

64. Helling v. McKinney, 113 S. Ct. 2475 (1993). The Court held that an inmate stated a valid cause of action under the Cruel and Unusual Punishments Clause when he alleged that prison officials, with deliberate indifference, exposed him voluntarily to ETS which posed an unreasonable risk to his health. *Id.* at 2481.

65. *Id.* at 2481-82.

66. *Id.* at 2482. In addition, the prisoner had to show that the risk of which he complained was not one that today's society chooses to tolerate. *Id.*

67. *McKinney*, 113 S. Ct. at 2482. The prison officials' deliberate indifference was to be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the court of appeals. *Id.*

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

III. A Methodology for Applying the Eighth Amendment to Prison Deprivation Cases within the Bounds of History and Precedent

At first glance, the preceding history of Eighth Amendment jurisprudence seems like a very natural and humane way for the law to evolve. But when one attempts to resolve the question of whether the Eighth Amendment was designed to protect inmates from the conditions of their confinement, the answer is not clearly discernible from the Supreme Court's Eighth Amendment jurisprudence. As its history indicates, the original intent of the Eighth Amendment certainly did not contemplate such protection.[69]

A closer analysis will reveal that confinement in a prison *is* a form of punishment subject to scrutiny under Eighth Amendment standards. The Court's reasoning, however, has made Eighth Amendment jurisprudence more confusing than is necessary, and its most recent decisions extending the protection of the Amendment to minor injuries[70] and the mere risk of deprivation[71] *have* exceeded the bounds of history and precedent. While protecting inmates from inhumane conditions of confinement is a desirable goal, the Court's primary duty is to interpret the Constitution in a manner consistent with its text and history. As will be demonstrated, the two need not be mutually exclusive.

A. The Need to Define Punishment for Eighth Amendment Purposes: A Limited Judicial Role is Appropriate

As the historical background of the Eighth Amendment indicated, when the Amendment was ratified, the word "punishment" referred to the penalty imposed for the commission of a crime.[72] That is also the primary definition of the word today. As a legal term of art, "punishment" has always meant a fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court for some crime or offense committed by him.[73] While it is appropriate to let the "evolving standards of decency that mark the progress of a maturing society"[74] dictate what constitutes cruel and unusual punishment, it is inappropriate for the Court to let contemporary

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69. *See supra* section II.A.

70. Hudson v. McMillian, 112 S. Ct. 995 (1992).

71. Helling v. McKinney, 113 S. Ct. 2475 (1993).

72. *McKinney*, 113 S. Ct. at 2483 (Thomas, J., dissenting) (citing several English language and legal dictionaries of the period); *see also* Granucci, *supra* note 8, at 840-44.

73. *McKinney*, 113 S. Ct. at 2483; BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

74. Estelle v. Gamble, 429 U.S. 97, 102 (1976); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

notions of decency dictate the meaning of punishment under the Eighth Amendment.

If the Eighth Amendment's reach is expanded to non-punishments, the Court will have ignored its own wise admonitions about its limited role.[75] Previously, the Court warned that it must be cautious when interpreting the Eighth Amendment so that it would not become the ultimate arbiter of the standards of criminal responsibility across the nation.[76] The Court realized that any decision by the Court that a given punishment is impermissible under the Eighth Amendment cannot be reversed without amending the Constitution, which effectively terminates the ability of the people to express their preference through the normal democratic processes.[77]

B. The Court has Avoided Directly Confronting the Issue of What Constitutes Punishment

To justify its expansion of the reach of the Cruel and Unusual Punishments Clause, the Court has consistently cited general principles of early Eighth Amendment cases, none of which applied to prison deprivations.[78] *Estelle v. Gamble*[79] relied on earlier cases which had held that the Eighth Amendment proscribed more than physically barbarous punishments.[80] The Court's discussion of the Amendment's history in *Estelle* was only cursory, and it amounted to a judicial side-stepping of the crux of the issue at hand: whether the Eighth Amendment should be applied to prison deprivations not meted out as punishment by a statute or judge.[81] Although the Court purported to rely upon its previous decisions interpreting the Eighth Amendment, none of the cases it cited held that the Eighth Amendment applied to prison deprivations or even addressed a claim that it did.[82]

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75. *See* Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (stating that Supreme Court must proceed cautiously in making an Eighth Amendment judgment).

76. Gregg v. Georgia, 428 U.S. 153, 176 (1976); Powell v. Texas, 392 U.S. 514, 533 (1968).

77. *Gregg*, 428 U.S. at 176.

78. *See* Gregg v. Georgia, 428 U.S. at 171 ("[A] principle to be vital must be capable of wider application than the mischief which gave it birth. Thus the Clause forbidding cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.") (citations, internal quotations omitted); Estelle v. Gamble, 429 U.S. at 102 ("The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures.") (citations, internal quotations omitted).

79. 429 U.S. 97 (1976).

80. *Estelle*, 429 U.S. at 102 (citing Gregg v. Georgia, 428 U.S. at 171, Trop v. Dulles, 356 U.S. at 100-01, and Weems v. United States, 217 U.S. at 373).

81. *McKinney*, 113 S. Ct. at 2484 (Thomas, J., dissenting).

82. *Id.* (citations omitted). All of the cited cases involved challenges to a sentence imposed for

Estelle relied most heavily on the Eighth Circuit opinion in *Jackson v. Bishop*[83] which, like *Estelle* itself, simply *asserted* that the Eighth Amendment applies to prison deprivations.[84] In *Jackson*, the Eighth Circuit failed to clarify the meaning of punishment under the Eighth Amendment,[85] and as previously indicated, that definition is the crucial issue in these types of cases. The court avoided the controversy by refusing to draw any meaningful distinction between punishment imposed by way of a sentence statutorily prescribed and punishment imposed for prison disciplinary purposes; it merely asserted that the Eighth Amendment's proscription seemingly applied to both.[86] However, distinguishing these two types of cases is critical to make any sensible analysis under the Eighth Amendment.

In *Rhodes v. Chapman*, the Court acknowledged that "cruel and unusual" applies to the constitutional limitation upon punishments.[87] However, the Court failed to directly confront the issue of whether conditions of confinement are really punishment within the meaning of the Eighth Amendment in that opinion. Relying on *Hutto v. Finney*,[88] the Court unconvincingly found that confinement in a prison is a form of punishment subject to scrutiny under the Eighth Amendment standards.[89] *Hutto* cites no authority for this proposition, though.[90] Therefore,

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a criminal offense. Gregg v. Georgia, 428 U.S. 153 (1979), Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), *In re* Kemmler, 136 U.S. 436 (1890), and Wilkerson v. Utah, 99 U.S. 130 (1879) were death penalty cases. Weems v. United States, 217 U.S. 349 (1910), involved a challenge to a sentence imposed for the crime of falsifying a document, and Trop v. Dulles, 356 U.S. 86 (1958), presented the question of whether revocation of citizenship amounts to cruel and unusual punishment upon those who desert the military.

83. 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

84. *McKinney*, 113 S. Ct. at 2485. While sitting on the Eight Circuit bench, Justice Blackmun wrote the opinion in *Jackson*. After drafting the opinion, Justice Blackmun moved up to the Supreme Court and was sitting on the Supreme Court when the Court decided *Estelle v. Gamble*. The text or history of the Eighth Amendment was not adequately discussed in either case.

85. *Jackson*, 404 F.2d at 571.

86. *Id.* at 580-81. The *Jackson* case can be distinguished from *Estelle* in that the plaintiff in *Jackson* challenged the use of the "strap" as a disciplinary measure in Arkansas prisons. Arguably, this action calls for the application of the Eighth Amendment, because it is sufficiently analogous to imposing a sentence for a criminal law violation. Furthermore, it is quite different from a claim for inadequate medical care or other condition of confinement. *See McKinney*, 113 S. Ct. at 2485 n.2 (dissenting opinion).

87. *Rhodes*, 452 U.S. at 337. Specifically, the court asserted, "The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be 'cruel and unusual.'" *Id.* at 345.

88. 437 U.S. 678 (1978).

89. *Rhodes*, 452 U.S. at 345 (citing Hutto v. Finney, 437 U.S. at 685).

90. *See Hutto*, 437 U.S. at 685. Not only did the *Hutto* case cite no authority for the proposition, but the Court, in *Hutto*, acknowledged that the "[p]etitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in

although it did not review the history of the Amendment nor adequately address the issue, the Court relied on the same general principles cited in *Estelle* and nonetheless concluded that these principles apply when the conditions of confinement compose the punishment at issue.[91]

C. The Subjective Component: Distinguishing Conditions of Confinement Cases from Prison Official Misconduct Cases Makes Sense

To justify extending the reach of the Eighth Amendment to prison deprivations cases, the Court in *Estelle* introduced the state of mind requirement of deliberate indifference.[92] Justice Stevens, who dissented in *Estelle*, opposed this requirement from its inception.[93] Asserting that intent should not be a necessary part of an Eighth Amendment violation, Justice Stevens thought that the issue of whether the constitutional standard had been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.[94] This debate has continued through even the most recent cases.[95]

In *Wilson v. Seiter*,[96] Justice Scalia's majority opinion emphasized that the source of the intent requirement is the Eighth Amendment itself. If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before the pain can qualify as punishment.[97] Justice White's concurring opinion found that the majority's intent requirement was not only inconsistent with precedent, but also impossible to apply in many cases.[98] Justice White made an important point when he criticized the majority's lack of guidance on the question of whose intent should be examined.[99] Instead of focusing on the conditions of confinement as the punishment in question, the Court should consider the confinement itself. By doing this, the Court will not be expanding the Eighth Amendment beyond its original intent, because the confinement

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Arkansas' prisons, including its punitive isolation cells, constituted cruel and unusual punishment." *Id.*

91. *Rhodes*, 452 U.S. at 347.
92. Estelle v. Gamble, 429 U.S. 97, 104-105 (1976).
93. *Id.* at 116 n.13 (Stevens, J., dissenting).
94. *Id.* at 116.
95. *See* cases cited *supra* note 5.
96. 111 S. Ct. 2321, 2325 (1991).
97. *Id.* at 2325.
98. *Id.* at 2330 (concurring opinion of White, J., joined by Marshall, Blackmun, and Stevens, JJ.).
99. *Id.*

would have been formally meted out as punishment by the statute or the sentencing judge.[100]

By failing to distinguish the analysis used in cases in which inmates contest various conditions of confinement from that used in those in which inmates decry the infliction of pain by prison officials, the Court is missing a somewhat obvious but critical point.[101] In the former cases, the conditions of confinement are necessarily part of the punishment imposed by the state,[102] and as such *the state* is the actor whose intent should be considered. Because the intent of the state to imprison one of its inmates is always present, the subjective component of the Eighth Amendment will always be satisfied in a conditions of confinement case.

In *Hudson v. McMillian*,[103] the Court left open the issue of whether isolated and unauthorized acts by prison officials are punishment under the Eighth Amendment.[104] This will be a critical question in future cases of this type. Several circuit courts have held that the use of force by prison officials is beyond the scope of punishment prohibited by the Eighth Amendment where the dispute was a personal one between the official and a prisoner and was against prison policy.[105] Following the logic applied above, such a holding makes sense because the state in such a case does not intend to inflict the pain involved as a part of the prisoner's punishment. In the past, the Court has looked to the intent of the individual prison official involved to satisfy the intent requirement, whether the deprivation involved conditions of confinement or excessive force by prison guards.[106] As the previous discussion indicates,

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100. *Id.* at 2325.

101. The majority opinion of the Court in *Wilson* discussed the state of mind required to satisfy the subjective component of the Eighth Amendment. The majority saw no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement. "[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Wilson*, 111 S. Ct. at 2326-27.

102. *Cf.* Ingraham v. Wright, 430 U.S. at 669. "Prison brutality . . . is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." *Id.* (internal quotations, internal citations omitted).

103. 112 S. Ct. 995 (1992).

104. *Id.* at 1001-02.

105. *See id.* at 1001; George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980) (concluding that a single, unauthorized assault by a guard does not constitute cruel and unusual punishment); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding that a spontaneous attack by a guard is cruel and unusual, but does not fit the 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) (determining that a guard's decision to supplement a prisoner's official punishment by beating him is punishment), *cert. denied*, 479 U.S. 816 (1986).

106. *See, e.g.*, Whitley v. Albers, 475 U.S. 312 (1986); Rhodes v. Chapman, 452 U.S. 337

however, it is logical to separate these two types of cases, and in keeping within the history and text of the Eighth Amendment, it is appropriate to exclude isolated and unauthorized acts by prison officials from the scope of the Eighth Amendment's protection.[107]

D. "Serious Deprivation": The Objective Component Must Be Enforced

Having determined that the requirement of intent is necessarily met in a conditions of confinement case,[108] courts cannot provide relief for every conditions of confinement case. A prisoner must meet an objective standard before the courts can grant relief under the Eighth Amendment.[109] The appropriate objective requirement of the Eighth Amendment is embodied in the Court's conclusions that the Constitution does not mandate comfortable prisons[110] and that only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation.[111] To be deemed a violation of the Amendment, the contested condition or conditions must deprive the inmate of a single, identifiable human need such as food, warmth, or exercise.[112] Thus, nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.[113]

In determining what conditions deny an inmate the minimal civilized measure of life's necessities, the Court should adhere to its own admonitions[114] and defer to the legislative determination of the States as to what conditions their prisons must conform.[115] Prison conditions

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(1981).

107. The Eighth Amendment is not the only recourse for prisoners. The inmates would still be able to seek redress for the acts of prison officials under state prisoner grievance procedures or state tort law.

108. *See supra* Section II.C.

109. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991); Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

110. *Wilson*, 111 S. Ct. at 2324; *Rhodes*, 452 U.S. at 349.

111. *Wilson*, 111 S. Ct. at 2324; *Rhodes*, 452 U.S. at 347.

112. *Wilson*, 111 S. Ct. at 2327.

113. *Id.*

114. *See* Rhodes v. Chapman, 452 U.S. 337, 351 (1981); Gregg v. Georgia, 428 U.S. 153, 174, 176 (1979).

115. *Gregg*, 428 U.S. at 174. The joint opinion of Justices Stewart, Powell and Stevens strongly supported this proposition with the caveat that the Eighth Amendment, as a restraint upon the exercise of legislative power, naturally subjects legislative decisions to judicial review. *Id.* Legislative measures adopted by a representative body provide an important means of ascertaining contemporary values, however, those judgments alone cannot be determinative, because the Eighth

are allowed to be restrictive and even harsh, as they are part of the penalty that criminal offenders pay for their offenses against society.[116] To a certain extent, states should be allowed to impose restrictive and harsh conditions upon its inmates. Then, it would be understood that an inmate is intentionally subjected to the conditions of the prisons, as they are permitted to exist in that jurisdiction.

Controversy exists today as to the amount of harm that may be inflicted upon prisoners before the Eighth Amendment affords them some protection. In *Hudson v. McMillian*, the Court granted certiorari to determine whether "significant injury" is required in order to establish a violation of the Cruel and Unusual Punishments Clause.[117] The Court gave two reasons for refusing to fix the standard required to establish sufficient harm in a deprivation case. First, since the Eighth Amendment requires that a claimant allege and prove unnecessary and wanton infliction of pain, the Court must have due regard for differences in the kind of conduct against which an Eighth Amendment objection has been lodged.[118] Second, because the Eighth Amendment's prohibition of cruel and unusual punishments derives meaning from evolving standards of decency, there can be few absolute limitations.[119]

Concluding that the objective component of an Eighth Amendment claim is contextual and responsive to contemporary standards of decency, the Court held that, in the excessive force context, when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated whether or not significant injury is evident.[120] The Court also excluded from constitutional recognition *de minimis* uses of physical force so long as such force is not of the sort repugnant to the conscience of mankind.[121] In dicta, the Court indicated that "extreme deprivations" would be required to make out a

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Amendment was intended to safeguard individuals from legislative power. *Id.* at 174 n.19. Therefore, since the Amendment would bar some punishments, whether legislatively approved or not, the Eighth Amendment imposes an obligation on the judiciary to judge the constitutionality of certain forms of punishment. Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring); *id.* at 433 (Powell, J., dissenting).

116. *Rhodes*, 452 U.S. at 347.

117. Hudson v. McMillian, 112 S. Ct. 995, 998 (1992).

118. *Id.* at 1000; Whitley v. Albers, 475 U.S. 312, 320 (1986).

119. *Hudson*, 112 S. Ct. at 1000; *Rhodes*, 452 U.S. at 346.

120. *Hudson*, 112 S. Ct. at 1000.

121. *Id.*

conditions of confinement claim[122] or a claim based on medical needs.[123]

The decision in *Hudson* departed company from history and precedent. The cases preceding it established that prisoners seeking to prove that they have been subjected to cruel and unusual punishment must always show a serious deprivation.[124] Despite the *Hudson* majority's assertion to the contrary,[125] *Wilson v. Seiter* made explicit the serious deprivation requirement, describing the inquiry mandated by the objective component as whether the deprivation was "*sufficiently serious.*"[126] The Court's conclusion in *Hudson*, however, rested on the notion that the Eighth Amendment prohibits the unnecessary and wanton infliction of "pain" rather than injury.[127] Thus, in the context of claims alleging the excessive use of physical force, the majority asserted that the serious deprivation requirement would be satisfied by no serious deprivation at all.[128] If the suggestion that these types of claims should be excluded from the Eighth Amendment's protection was followed, these types of cases would be appropriately dismissed.

Wilson notwithstanding, the Court has continued to relax the requirement that there be a serious deprivation in order to establish an Eighth Amendment violation. In *Helling v. McKinney*, a conditions of confinement case, the Court also departed from the serious deprivation standard, holding that the Eighth Amendment applies to a prisoner's mere *risk* of injury.[129] With respect to the objective factor, the inmate now is required to show on remand that he, himself, was being exposed to unreasonably high levels of ETS and that society considers the risk to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.[130] For the same reasons as noted

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122. *Id.* "Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (internal quotations omitted; internal citations omitted).

123. *Id.* "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are serious." *Id.* (internal quotations omitted; internal citations omitted).

124. *Hudson*, 112 S. Ct. at 1010 (Thomas, J., dissenting).

125. *Id.* at 1001.

126. *Id.* at 1007; Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (emphasis added).

127. *See Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring).

128. *Id.* at 1007.

129. Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993). Risk of serious deprivation is *not* the equivalent of serious deprivation.

130. *Id.* at 2482.

above, this decision goes beyond the history and precedent of the Eighth Amendment and therefore should be reversed.

IV. Conclusion

In its desire to protect inmates from inhumane conditions of confinement, the Supreme Court has extended the protection of the Eighth Amendment to those conditions. Although the original intent of the Eighth Amendment did not contemplate the protection of prisoners from the *conditions* of confinement, confinement in a prison *itself* is a form of punishment subject to scrutiny under Eighth Amendment standards. The Court has determined that both a subjective and an objective standard must be used to determine whether an Eighth Amendment violation is present.

The subjective standard requires an intent to deprive the inmate of a specific human need. Confinement by its very nature is an intentional deprivation by the state of *various* liberties. Because the conditions of confinement are necessarily part of the punishment of confinement, they satisfy the subjective requirement and thus, are subject to the scrutiny of the Court under the Eighth Amendment. The Court's reasoning, however, has focused on the intent of individual prison officials, making Eighth Amendment jurisprudence more confusing than is necessary. By focusing on the state's intent to imprison, conditions of confinement can be brought under the Eighth Amendment without expanding the Amendment beyond its natural scope.

The Court has left open the question whether the isolated and unauthorized acts of prison officials constitute punishment under the Eighth Amendment. By adopting an approach which limits the Eighth Amendment's protection to those deprivations considered by the state to be part of the punishment of confinement, this question should be answered in the negative. Because these isolated and unauthorized acts are not intended as part of the punishment of confinement, it would be inappropriate to consider them under the Eighth Amendment.

The objective standard requires a serious deprivation before the Eighth Amendment will provide protection. In its most recent decisions, the Court has strayed from this standard, failing to interpret the Constitution in a manner consistent with its history and precedent. To prevent further devolution, the Court must reaffirm the principle that only serious deprivations deserve scrutiny under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

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