

Day 1 Assignment:

Estelle v. Gamble (U.S. 1976), pp. 770-775; Rhodes v. Chapman (U.S. 1981), pp. 788-798 (includes notes on Bell v. Wolfish, Hutto v. Finney); Wilson v. Seiter (U.S. 1991), pp. 802-803. Please also read the background reading on prison medical care, [Private Health Care in Jails Can Be A Death Sentence](#), N.Y. Times (Feb. 27, 2005), supp. 26-40

We already talked about:

Jackson v. Bishop (8th Cir. 1968), pp. 811-815. (Blackmun, circuit judge)

Famous case: leading case on corporal punishment in prison.

Use of the strap as a punishment.

District court: Corporal punishment must be less discretionary: rules, not excessive, notice, etc.

State interest:

- a) Obedience
- b) Work incentive
- c) absence of other methods of discipline (segregation, denial of privileges)

Court of Appeals:

Rules are not enough: they can be (and often are) ignored,

the results can be sadistic and terrible;

inability to draw the line between ok whipping and not ok whipping.

Anyway, whipping has terrible effects; engenders bitterness and hatred.

Doctrinal point for this discussion: It's cruel and unusual.

Notable features of case: The strap is intended as punishment within punishment. So doesn't raise the issue of general prison conditions. This is true of many of the first few years of prison cases – they concern conditions in the hole, bread and water diets, and corporal punishment.

But pretty soon we get to general prison conditions, which are part and parcel of punishment by prison:

Estelle v. Gamble (U.S. 1976) (Marshall, J.), pp. 770-775.

Notice that part of this case is about the work obligations of inmates in Texas; old time prison farm.

First question, are prison conditions covered at all. Prior Supreme Court cases are all about sentences, not conditions. (Not only the length of sentence, but the type; labor, denaturalization, death)

Court: Yes:

a) Eighth Amendment follows evolving standards of decency. (from Trop v. Dulles, a case about denaturalization)

b) unnecessary and wanton infliction of pain is unconstitutional (cite is to Gregg v. Georgia, which upheld the death penalty, generally).

Court: This covers obligation to provide medical care. After all, its denial can result in torture or lingering death, or pain and suffering without penological purpose. (See gruesome examples on page 773 n. 10)

So what's the standard? "Deliberate indifference" – which, says, the court "constitutes the "unnecessary and wanton infliction of pain" referenced in *Gregg v. Georgia*.

What does this mean? Inadvertent failure to provide adequate medical care is not enough. Negligence does not state a claim. It's deliberate indifference. (p. 773) Here, we've got malpractice at most; that isn't enough.

Stevens dissent:

- 1) There may be quite a bit more than malpractice here.
- 2) The test shouldn't be "deliberate indifference," which directs attention at the subjective state of mind of the defendant. "Whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." (p. 775)

Hutto v. Finney (1978) p. 797-798

Arkansas conditions, which are unbelievably terrible. Note that this is one about conditions in punitive segregation.

Rhodes v. Chapman (U.S. 1981) (Powell, J.), pp. 788-796

Double celling in a maximum security Ohio prison in Lucasville.

Note: brand new facility, with everything you can think of.

Cells are 63 square feet (that is, 9x7). They have a bed that takes up 3x7 of that, plus toilet, nightstand, and sink. So that probably leaves 5x7 or less "unencumbered space." This is very small, but there's a dayroom to which inmates have access nearly all the time.

The facility is overcrowded, in that it was designed to hold 1600 and instead houses 2300 inmates. What's the effect? Not a problem with food, ventilation, smell, heat or cold, noise, library, education, medical care, violence. Perhaps a problem with idleness.

Court: Standard is the evolving standards of decency.

What's the best argument against double celling on this? In 1975, it looked like the evolving standards of decency didn't allow it. But now it's 1981; we've gone from 358,000 (1970) to 500,000 (1980) – a 40% increase. (This was dwarfed by the increase that was about to happen, from 1980 to 1990; 500,000 to 1,150,000, well over 100% increase.)

Describes Estelle, Hutto, and states: "Conditions other than those in *Gamble* and *Hutto*, alone and in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble*." (p. 791)

In this case, double celling didn't work an unconstitutional deprivation: food, medical care, sanitation, violence. "The Constitution does not mandate comfortable prisons." Idleness isn't punishment. "We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution" (pp. 791-792)

Brennan, concurring: Agrees that the question is effect on the inmate in concrete physical ways: physical plant, sanitation, safety, etc. But way more expansive about what counts. It's an actual effect test.

Bell v. Wolfish (pp. 796)

Bell is about jail inmates – again, a terrible choice by prison litigators. Court: Same thing.

Wilson v. Seiter (U.S. 1991) (Scalia, J.), pp. 802-803

Two issues:

- 1) State of mind: subjective part of the test. Wanton, etc.
- 2) What kind of deprivation? objective part of the test.

on the first, follows through on what Justice Stevens said was the problem in *Estelle v. Gamble* – the focus on subjective state of mind. Note: (Whitley was about an inmate shot by a guard during a riot.)

ADDITIONAL EXCERPT [HANDOUT]:

As a preliminary matter, we must address petitioner's contention that the Court of Appeals erred in dismissing, before it reached the state-of-mind issue, a number of claims (inadequate cooling, housing with mentally ill inmates, and overcrowding) on the ground that, even if proved, they did not involve the serious deprivation required by *Rhodes*. A court cannot dismiss any challenged condition, petitioner contends, as long as other conditions remain in dispute, for each condition must be "considered as part of the overall conditions challenged," Brief for Petitioner 36. Petitioner bases this contention upon our observation in *Rhodes* that conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. 452 U.S., at 347.

As other courts besides the Court of Appeals here have understood, our statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts. Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets. Compare *Spain v. Procnier*, 600 F.2d 189, 199 (CA9 1979) (outdoor exercise required when prisoners otherwise confined in small cells almost 24 hours per day) with *Clay v. Miller*, 626 F.2d 345, 347 (CA4 1980) (outdoor exercise not required when prisoners otherwise had access to day room 18 hours per day). To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. 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. While we express no opinion on the relative gravity of the various claims that the Sixth Circuit found to pass and fail the threshold test of serious deprivation, we reject the contention made here that no claim can be found to fail that test in isolation.

After disposing of the three claims on the basis of *Rhodes*, the Court of Appeals proceeded to uphold the District Court's dismissal of petitioner's remaining claims on the ground that his affidavits failed to establish the requisite culpable state of mind. The critical portion of its opinion reads as follows:

"[T]he Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim." 893 F.2d, at 867.

It appears from this, and from the consistent reference to "the Whitley standard" elsewhere in the opinion, that the court believed that the criterion of liability was whether the respondents acted "maliciously and sadistically for the very purpose of causing harm," *Whitley*, 475 U.S., at 320-321. To be sure, mere negligence would satisfy neither that nor the more lenient "deliberate indifference" standard, so that any error on the point may have been harmless. Conceivably, however, the court would have given further thought to its finding of "[a]t best . . . negligence" if it realized that that was not merely an argument a fortiori, but a determination almost essential to the judgment. Out of an abundance of caution, we vacate the judgment of the Sixth Circuit and remand the case for reconsideration under the appropriate standard.

The totality of conditions issue seems minor. But it isn't. How do you go about proving one of these cases?

Day 2 assignment: Finish up with Rhodes v. Chapman and discuss Wilson v. Seiter (already assigned); Hudson v. McMillian, pp. 816-821; Helling v. McKinney, pp. 801-802; and Farmer v. Brennan, pp. 803-808. We'll also discuss Human Rights Watch, **No Escape: Male Rape in U.S. Prisons**, supp. 41-55, and David Grann, **The Brand**, The New Yorker, supp. 56-70. I don't imagine we'll actually get through all of that, so some of it will go to Friday. The other reading for Friday will be **42 U.S.C. § 1983**, supp. 91; **Civil Rights of Institutionalized Persons Act** ("CRIPA"), selected sections, supp. 92-93; and the U.S. Department of Justice **findings letter** re. unconstitutional conditions at the Shelby County Jail (June 27, 2001). supp. 71-90.

Hudson v. McMillian, pp. 816-821 (O'Connor, 1992)

Officers worked the plaintiff over, at Angola. He was in restraints. He was hurt but not grievously; loosened some teeth, suffered some bruises. He brought suit under § 1983, and was pro se though the litigation in the court of appeals. In the Supreme Court, he filed a pro se cert. petition, and it was granted; the head of the ACLU's National Prison Project, Al Bronstein, was appointed counsel.

Court found for him and awarded him \$800. This is a typical kind of award in a pro se inmate case; it's really hard to prove up damages all by yourself.

Issue 1: Subjective: What's the state of mind required? "Unnecessary and wanton infliction of pain."

Choices:

- a) Deliberate indifference,
- b) good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Court picks b, from Whitley v. Albers.

Issue 2: Objective: How serious an injury is required?

For deliberate indifference, we know that we need a serious need; minimal measure of life's necessities. The issue is whether we're going to have a similar cabining of liability here.

Court: No. This test doesn't need it. (We need it for deliberate indifference why?)

There is, however, a de minimis exception. But that really means minor.

Thomas, oddly enough, first says that the Eighth Amendment probably doesn't cover conditions at all, then says that the deliberate indifference test is the right one. But he wants only serious injury covered.

Add'l excerpt from Thomas dissent:

Until recent years, the Cruel and Unusual Punishment Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration. In *Weems v. United States*, 217 U.S. 349 (1910), the Court extensively chronicled the background of the amendment, discussing its English antecedents, its adoption by Congress, its construction by this Court, and the interpretation [p19] of analogous provisions by state courts. Nowhere does *Weems* even hint that the Clause might regulate not just criminal sentences, but the treatment of prisoners. Scholarly commentary also viewed the Clause as governing punishments that were part of the sentence. See T. Cooley, *Constitutional Limitations* 329 ("It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law, could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual") (emphasis added). See also 3 J. Story, *Commentaries on the Constitution of the United States* 750-751 (1833).

Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.

"[I]t is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."

Stroud v. Swope, 187 F.2d 850, 851-852 (CA9), cert. denied, 342 U.S. 829 (1951). See also *Sutton v. Settle*, 302 F.2d 286, 288 (CA8 1962) (per curiam), cert. denied, 372 U.S. 930 (1963); *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953, 954-956 (CA7 1956), cert. denied, 353 U.S. 964 (1957); *Banning v. Looney*, 213 F.2d 771, 771 (CA10 1954) (per curiam); *Sarshik v. Sanford*, 142 F.2d 676 (CA5 1944).

It was not until 1976 -- 185 years after the Eighth Amendment was adopted -- that this Court first applied it to a prisoner's complaint about a deprivation suffered in prison. *Estelle v. Gamble*, 429 U.S. 97 (1976).

[Mention *Hope v. Pelzer*, hitching post]

Helling v. McKinney pp. 801-802 (1993)

Deliberate indifference to serious *risk* of injury can violate the Eighth Amendment.

Add'l excerpt: Thomas, J, dissenting:

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

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

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

Farmer v. Brennan (1994) (Souter, J.), casebook p. 803-808

Dee Farmer, another pro se complainant: pre-operative transsexual in federal prison, brings a Bivens action. Does the prison even have a constitutional obligation to protect? Yes: *DeShaney*, uniform lower court holdings. But when?

Objective: Substantial risk of serious harm.

Subjective: Deliberate indifference.

But what *is* deliberate indifference? Courts of appeals say recklessness.

But civil and criminal definitions of recklessness vary; in civil law, should have known, in criminal law, known.

Court: criminal definition; that's the only thing consonant with the "punishment" language.

Subjective knowledge may – but need not be – inferred from the obviousness of the risk.

Once knowledge is proven, obligation is of reasonable safety. (p. 807)

NOTE INCONSISTENCY WITH ESTELLE.

Does the deliberate indifference standard work for this problem? Is deliberate indifference really the nature of the problem. According to the Human Rights Watch Report you got, yes.