# SUPREME COURT OF THE UNITED STATES

No. 92–7247

DEE FARMER, PETITIONER *v.* EDWARD BRENNAN, WARDEN, ET AL.

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

[June 6, 1994]

JUSTICE THOMAS, concurring in the judgment.

Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated." *McGill* v. *Duckworth*, 944 F. 2d 344, 348 (CA7 1991). Today, in an attempt to rectify such unfortunate conditions, the Court further refines the "National Code of Prison Regulation," otherwise known as the Cruel and Unusual Punishments Clause. *Hudson* v. *McMillian*, 503 U. S. ___, ___ (1992) (slip op., at 12) (THOMAS, J., dissenting).

I adhere to my belief, expressed in *Hudson* and *Helling* v. *McKinney*, 509 U. S. ___ (1993) (THOMAS, J., dissenting), that "judges or juries—but not jailers—impose `punishment.'" *Id.*, at ___ (slip op., at 4). "Punishment," from the time of the Founding through the present day, "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.'" *Id.*, at ___ (slip op., at 2) (quoting Black's Law Dictionary 1234 (6th ed. 1990)). See also 2 T. Sheridan, A General Dictionary of the English Language (1780) (defining "punishment" as "[a]ny infliction imposed in vengeance of a crime"). Conditions of confinement are not punishment in any

recognized sense of the term, unless imposed as part of a sentence. See *Helling*, *supra*, at ___ (slip op., at 6) (THOMAS, J., dissenting). As an original matter, therefore, this case would be an easy one for me: because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute "punishment" under the Eighth Amendment.

When approaching this case, however, we do not write on a clean slate. Beginning with *Estelle* v. *Gamble*, 429 U. S. 97 (1976), the Court's prison condition jurisprudence has been guided, not by the text of the Constitution, but rather by "evolving standards of decency that mark the progress of a maturing society." *Id.*, at 102 (internal quotation marks omitted). See also *ante*, at 6; *Helling, supra*; *Hudson, supra*. I continue to doubt the legitimacy of that mode of constitutional decisionmaking, the logical result of which, in this context, is to transform federal judges into superintendents of prison conditions nationwide. See *Helling*, *supra*, at ___ (slip op., at 4–6) (THOMAS, J., dissenting). Although *Estelle* loosed the Eighth Amendment from its historical moorings, the Court is now unwilling to accept the full consequences of its decision and therefore resorts to the "subjective" (state of mind) component of post-*Estelle* Eighth Amendment analysis in an attempt to contain what might otherwise be unbounded liability for prison officials under the Cruel and Unusual Punishments Clause. Cf. *McGill*, *supra*, at 348.

Although I disagree with the constitutional predicate of the Court's analysis, I share the Court's view that petitioner's theory of liability—that a prison official can be held liable for risks to prisoner safety of which he was ignorant but should have known—fails under even "a straightforward application of *Estelle*." *Helling*, *supra*, at ___ (slip op., at 6) (THOMAS, J., dissenting). In adopting the "deliberate indifference" standard for challenges to prison conditions, *Estelle* held that mere "inadverten[ce]" or "negligen[ce]" does not violate the Eighth Amendment. 429 U. S., at 105–106. "From the

outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving `serious' injury inflicted by prison officials acting with a culpable state of mind." *Hudson, supra*, at ___ (slip op., at 4) (THOMAS, J., dissenting). We reiterated this understanding in *Wilson* v. *Seiter*, 501 U. S. 294, 305 (1991), holding that "mere negligence" does not constitute deliberate indifference under *Estelle*. See also, *e. g.*, *Whitley* v. *Albers*, 475 U. S. 312, 319 (1986). Petitioner's suggested "should have known" standard is nothing but a negligence standard, as the Court's discussion implicitly assumes. *Ante*, at 10–12. Thus, even under *Estelle*, petitioner's theory of liability necessarily fails.

The question remains, however, what state of mind *is* sufficient to constitute deliberate indifference under *Estelle*. Given my serious doubts concerning the correctness of *Estelle* in extending the Eighth Amendment to cover challenges to conditions of confinement, I believe the scope of the *Estelle* "right" should be confined as narrowly as possible. Cf. *Helling*, *supra*, at ___ (slip op., at 6) (THOMAS, J., dissenting). In *Wilson*, the Court has already held that the highest subjective standard known to our Eighth Amendment jurisprudence—"maliciou[s] and sadisti[c]" action "for the very purpose of causing harm," *Whitley*, *supra*, at 320–321 (internal quotation marks omitted)—"does not apply to prison conditions cases." *Wilson, supra*, at 303. The Court today adopts the next highest level of subjective intent, actual knowledge of the type sufficient to constitute recklessness in the criminal law, *ante*, at 10, 13, noting that "due regard" is appropriate "for prison officials' `unenviable task of keeping dangerous men in safe custody under humane conditions.'"[1] *Ante*, at 18 (quoting *Spain* v. *Procunier*, 600 F. 2d 189, 193 (CA9 1979) (Kennedy, J.)).

Even though the Court takes a step in the right direction by adopting a restrictive definition of deliberate indifference, I cannot join the Court's opinion. For the reasons expressed more fully in my

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[1]The facts of this case demonstrate how difficult that task can be. When petitioner was taken out of general prison population for security reasons at USP-Lewisburg, he asserted that he "d[id] not need extra security precautions" and filed suit alleging that placing him in solitary confinement was unconstitutional. See *Farmer* v. *Carlson*, 685 F. Supp. 1335, 1342 (MD Pa. 1988). Petitioner's present claim, oddly enough, is essentially that *leaving him* in general prison population was unconstitutional because it subjected him to a risk of sexual assault.

dissenting opinions in *Hudson* and *Helling*, I remain unwilling to subscribe to the view, adopted by *ipse dixit* in *Estelle*, that the Eighth Amendment regulates prison conditions not imposed as part of a sentence. Indeed, "[w]ere the issue squarely presented, . . . I might vote to overrule *Estelle*." *Helling*, *supra*, at ___ (slip op., at 6) (THOMAS, J., dissenting). Nonetheless, the issue is not squarely presented in this case. Respondents have not asked us to revisit *Estelle*, and no one has briefed or argued the question. In addition to these prudential concerns, *stare decisis* counsels hesitation in overruling dubious precedents. See *ibid.* For these reasons, I concur in the Court's judgment.[2] In doing so, however, I remain hopeful that in a proper case the Court will reconsider *Estelle* in light of the constitutional text and history.

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[2]I do not read the remand portion of the Court's opinion to intimate that the courts below reached the wrong result, especially because the Seventh Circuit has long followed the rule of law the Court lays down today. See *McGill* v. *Duckworth*, 944 F. 2d 344 (CA7 1991); *Duckworth* v. *Franzen*, 780 F. 2d 645 (CA7 1985). Rather, I regard it as a cautionary measure undertaken merely to give the Court of Appeals an opportunity to decide in the first instance whether the District Court erroneously gave dispositive weight to petitioner's failure to complain to prison officials that he believed himself at risk of sexual assault in general prison population. *Ante*, at 23–24. If, on remand, the Seventh Circuit concludes that the District Court did not, nothing in the Court's opinion precludes the Seventh Circuit from summarily affirming the entry of summary judgment in respondents' favor.