Acknowledging the 4th Strike

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Acknowledging the 4th Strike: Rethinking the right to inmate healthcare

** By M. Dylan McClelland

I. Introduction

Three strikes laws have become commonplace in America.¹ Often referred to as habitual offender laws, "3 Strikes" sentencing statutes require courts to award minimum mandatory sentences to serious offenders with prior convictions, typically two, for serious offenses.² The goal of these statutes is not only deterrence, but incapacitation, to remove the persistent offender from society.³ While the effects of Three Strikes laws may be debated as to their efficacy⁴ this Article concerns itself with the Fourth Strike inflicted by incarcerated criminals of all stripes. The Fourth Strike is the offense against society inflicted through inmate healthcare demands, abetted by an activist judiciary.

In 1974 a Texas prison withheld diagnosed and prescribed basic medical care from an inmate. The United States Supreme Court two years later held the inmate's treatment to constitute cruel and unusual treatment prohibited by the Eighth Amendment.⁵ In the 33 years which followed, an activist judiciary mauling Justice Marshall's words has enlarged inmates' rights litigation to a level threatening the solvency of an overstretched penological system.⁶ Incredibly, the Nation's highest court has entertained even second-hand smoking claims filed by inmates.⁷ This Article contends that years of misapplication of the Eighth Amendment have torn asunder the deliberate indifference standard enunciated by the U.S. Supreme Court in Estelle v. Gamble, and have imposed a reign of terror neither supportable under the Constitution's Eighth Amendment jurisprudence nor consistent with any rational conception of federalism in an era of scarce public resources. Part II explores the Supreme Court's opinion in Estelle, reexamining the Court's analysis under both a strict constructionist and more relaxed "living constitution"
 interpretations. Part III explores the unfolding saga of *Plata v. Schwarzenegger,* using the nation's largest state, California, as the epicenter for the event horizon on which inmate rights' and federalism approach each other. Part IV concludes the broad extension of the Eighth Amendment rights articulated in *Estelle* threatens the core of federalism, preventing states from making the essential choices upon which democracy rests.

II. Rethinking *Estelle v. Gamble:* is there a right to high quality prison healthcare?

The United States' Supreme Court's decision in *Estelle v. Gamble* set the constitutional standard for prison healthcare for decades to come. *J.W. Gamble, a Texas prison inmate was injured unloading a truck on November 9, 1973.* A prison medical officer examined and cleared him, but Gamble returned to the prison hospital in pain. *Within a day Gamble was diagnosed with lower back strain and prescribed rest and pain killers by the prison doctor.* What followed was either a cavalcade of prison administrative errors or willing indifference to Gamble’s plight, resulting in delays in Gamble medication, and a failure to abide by all of the doctor’s prescribed rest order. *It was undisputed, however, that Gamble received his medication for pain relief throughout the month.* Doctors also diagnosed a cardiac condition in Gamble for which he was prescribed medication to control an irregular cardiac rhythm. Following further chest pain Gamble again asked to see his doctor, but was refused by prison authorities. Gamble then filed a 1983 civil rights action for violation of the United States Constitution’s 8th Amendment. The District Court dismissed Gamble’s claim and was reversed by the 5th Circuit Court of Appeals. The United States Supreme Court accepted the State of Texas’ request for certiorari and in a unanimous opinion affirmed.

In an opinion authored by Justice Marshall, the Court created a governmental obligation to provide medical care to those whom it is punishing by incarceration. In so holding the Court held:

> The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that "it 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."
The Court’s decision was grounded in its Eighth Amendment jurisprudence and relied on the standard set down in capital punishment cases, that the Eighth Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” These principles are measured by the evolving standards of decency which mark the progress of a maturing society. Thus, the Estelle Court concluded the deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment. On the specific and limited facts before it, the Court’s opinion is eminently reasonable and consistent with the text and intent of the Eighth Amendment under either a textual interpretation or a more liberal analysis to the extent that willing difference to suffering could resemble torture. However, as demonstrated in Part III, the Estelle Court’s rationale expires beyond its facts and conclusion, and even under a flexible evolving standards of decency analysis, will not now support the demands being made in its name.

A. A Textual Analysis can support a specific inmate’s right to challenge specific treatment.

A textual analysis of the Estelle question, the right to inmate medical care, must appropriately begin with the Eighth Amendment itself:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

A triumph in brevity, the Eighth Amendment is a mere sixteen words. The primary concern of the drafters was to proscribe torture and other barbaric methods of punishment. Eighth Amendment challenges have typically focused on capital punishment and penal forfeiture challenges. Where the Court is considering an actual punishment, such as the imposition of the death penalty or a penal forfeiture, a textual analysis serves well. The question is simply whether the particular fine or punishment is cruel or unusual. However the question of inmate health care presents not an imposed sentence, but rather a circumstance of incarceration.

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19 Id. at 102 [citing, Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968)].
20 Id. [citing, inter alia, Gregg v. Georgia, 428 U.S. 153, 172-73 (1976)]
21 Id. at 104 [internal quotations, citations omitted].
23 U.S. CONST. 8th Amend. (1791).
25 See e.g., Gregg v. Georgia, supra [ death penalty], Blaze v. Rees, 128 S.Ct. 1520 (2008) [death penalty], United States v. Bajakian, 524 U.S. 321 (1998) [“the amount of the forfeiture must bear some relationship to the gravity of the offense that it was designed to punish.”].
The *Estelle* Court’s analysis focused too little on the factual aperture before it. The question before it was whether an 8th Amendment claim could lie for a specific inmate who was denied specific treatment, much to his suffering. Based on those facts the Court was not outside of the text of the Eighth Amendment in concluding that prison officials’ deliberate indifference to Gamble’s physical anguish could constitute torture. But the linchpin of the Court’s holding, from an originalist’s viewpoint, was the finding of “deliberate indifference.” If the Court’s conclusion derives from this finding, then it is reasonable. The specific willful apathy to Gamble’s plight might well have constituted a form of torture specifically applied to that one inmate. The Court recognized this fact, adding

“This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”

The Court was thus careful, confining its conclusion to a principle reflected in the 8th Amendment’s text and intent – the Framers’ desire to prohibit torture and other barbaric punishments.

**B. A Living Constitution**

A more generous “living Constitution” analysis considers an evolving society in its application of Constitutional text. It is this theory of interpretation which enlivens modern Supreme Court 8th Amendment jurisprudence. Among the current Court’s most recent 8th Amendment’s pronouncement’s was *Kennedy v. Louisiana* in which the high court struck down a Louisiana law imposing the death penalty for child rapists. In striking down the law the Court again recognized its modern rule:

Whether this requirement [the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense] has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that "currently prevail." The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society. This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."

Viewed under this evolving standard the *Estelle* Court is likely vindicated on its facts. There, the Court relied on a multitude of state laws and model correctional legislation requiring provision of medical care to prisoners in concluding that the deliberate indifference to an inmate’s

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27 *Id.* at 105.
30 *Id.* at 2649 [citations omitted].
serious medical needs violated the 8th Amendment. However, nothing in that conclusion supports the radical extension *Estelle* to structural reforms in state prisons, including those in the largest state. Nothing in Justice Marshall’s opinion envisioned the 4th Strike epidemic.

### III. *Plata v. Schwarzenegger*: California’s prison system plays a dangerous game of chicken.

Having more than a decade ago started the revolution in banishing Third Strikers, the Golden State is now under assault by Fourth Strikers. For years the federal courts have been in charge of California’s inmate healthcare facilities, with a receiver chosen by the court to reform the State’s correctional healthcare practices. As a result, the State of California has confronted demands from inmates to pay for everything from organ transplants and cancer treatment, to separate housing for transgender inmates. Such demands, all claiming to arise from the 8th Amendment, culminated this year in the prison receiver’s plan to spend $8 billion to reform California prisons by building seven new medical and mental health facilities for the state’s 33 adult prisons to include proposed amenities such as therapy rooms, basketball courts and bingo boards.

The prison receiver’s demands come amid California’s record $42 billion budget deficit, as the State struggles to make difficult choices for its law abiding citizens. But the conflict emanates from an inverted and tortured reading of *Estelle v. Gamble*. California’s predicament arises from a years old consent agreement placing the State’s prison healthcare system, blamed by a federal judge for one death per week, under the control of a court-appointed receiver. The settlement arose from alleged structural flaws in the California correctional system. And therein lies the usurpation of *Estelle*.

Although the California inmates challenged the prison healthcare system under the Eighth Amendment, their case bears no resemblance to *Estelle*. The California inmates did not challenge a specific act or acts of deliberate indifference to their medical needs by specific

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32 *Plata v. Davis*, 329 F.3d 1101 (9th Cir. 2003)
35 *Id*.
36 *Id.*, see also *Plata v. Davis*, supra.
37 *Plata v. Davis*, supra 329 F.3d at 1103 fn. 1.
government actors. Rather, their claims arose from claims of inadequate staffing and lack of standards. The California situation, hence, arises more likely from a lack of resources rather than a deliberate indifference to the suffering of inmates in need of medical care. Even the Estelle Court noted that:

“[n]ot every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”

The consequences of the broadening of Estelle could not be more stark, as they threaten to usurp state sovereignty. Clearly, few would argue California’s prisons should resemble a House of Horrors. However, the desire to be humane does not a fortiori require a state’s citizenry to subsidize optimal conditions in times of economic stress. While the inside of California’s prisons should not resemble a Medieval dungeon, neither should the society outside those walls. Selecting among difficult choices is inherently a political question unfit for judicial resolution.

IV. Conclusion: An expansive, without limits interpretation of Estelle threatens State sovereignty

The California prison receiver, installed by a federal court to safeguard Eighth Amendment rights, is seeking $8 billion dollars to upgrade California’s inmate healthcare to provide, inter alia, yoga rooms and inmate-friendly landscaped grounds, at a time when California like many states and the federal government, faces staggering deficits. Indeed, a federal court ordered California to appropriate and deliver $250 million to the receiver as a down payment for his plan. The California example illuminates the over-extension of Estelle, the disfigurement of the Eighth Amendment, and is a frightening glimpse at the future of state sovereignty.

Whether a particular state action violates the Eighth Amendment is determined by evolving standards of decency in a maturing society. In California, one federal court and its appointed receiver have determined that the state should spend $8 billion on inmate healthcare. While a mature society could likely reach consensus on healthcare for inmates such as suturing cuts, antibiotics for infections, and other inexpensive and efficacious treatments, no evidence exists that Californians, hardly a despotic and cruel people in the visage of Vlad the Impaler,

38 Id.
39 Id. at fn. 1.
40 Estelle v. Gamble, supra, 429 U.S. at 105.
41 See, James Madison, THE FEDERALIST PAPERS No. 44 (1788), “In the first place, as these constitutions invest the State legislatures with absolute sovereignty, in all cases not excepted by the existing articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.” Thus, the Constitution emboldened State sovereignty except where expressly limited.
42 Denny Walsh, State seeks to have prison receiver replaced, THE SACRAMENTO BEE, Jan. 28, 2009.
43 Id. The District Court’s Order was stayed pending appeal.
44 Kennedy v. Louisiana, supra, at 1249.
believe scarce resources should be spent on landscaped grounds, yoga, Bingo, and the redesign of prisons to accommodate the painfully small number of transgendered inmates in State custody.\(^45\) Moreover, the decision of where, when, and how to allocate resources for the public good is the essential function and prerogative of the States. This is particularly so in the penal system.\(^46\)

Inmate healthcare claims represent the 4\(^{th}\) Strike – the final opportunity for the intermittent and permanent persistent offender to pillage the innocent.\(^47\) The ability to compel through the 8\(^{th}\) Amendment that which the State or its people choose not to confer, is truly a journey through the Looking Glass.\(^48\)

The United States is a system of shared governance dependent upon federalism.\(^49\) Except for those responsibilities exclusively entrusted to the federal government the fifty states remain largely responsible for most governance in America.\(^50\) The States are largely entrusted with the acknowledgement of mores and the enactment of appropriate laws.\(^51\) Millions of Californians go without healthcare, able to access emergency care through community hospital emergency rooms, but no more.\(^52\) Roughly a dozen people die each day waiting for organ transplant procedures in the United States.\(^53\) Would not the evolving standards of decency of a maturing society marshal resources in favor of the law-abiding, but unfortunate, rather than the incarcerated predator? The 4\(^{th}\) Strike crisis currently unfolding in California presents a pronounced question of whether the 8\(^{th}\) Amendment is indeed a suicide pact?\(^54\) It is utterly nonsensical that the Framers of the Constitution, in seeking to ban State-imposed torture, sought


\(^{46}\) Lewis v. Casey, 518 U.S. 343, 385 (1996)(Thomas, J. Concurring), “The District Court's order vividly demonstrates the danger of continuing to afford federal judges the virtually unbridled equitable power that we have for too long sanctioned. We have here yet another example of a federal judge attempting to "direct or manage the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on [his] authority."

\(^{47}\) While the permanently incarcerated can with age be expected to create greater healthcare costs, younger persistent felons may suffer more in-prison injuries from, e.g., fights, drug use.

\(^{48}\) The reference is to the sequel to “Alice in Wonderland,” a world in which everything is backwards. See, Lewis Carroll, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE (1871).


\(^{50}\) U.S. CONST. 10\(^{th}\) Amend. [rights reserved to the States].

\(^{51}\) Cf. Roth v. United States, 354 U.S. 476 , 504 (1957) [the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States.].

\(^{52}\) 6 million Californians are uninsured. http://cbs13.com/politics/Governor.Schwarzenegger.uninsured.2.474119.html, See also, Cal. Health and Safety Code §1317[ emergency room providers shall render care without respect to the patient’s ability to pay].


\(^{54}\) The phrase likely dates back to Lincoln’s suspension of habeas corpus during the Civil War. Lincoln responded in a Special Session to Congress on July 4, 1861 that an insurrection "in nearly one-third of the States had subverted the whole of the laws . . . Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"
to impair the ability of sovereign states to allocate scarce resources for the most public beneficence.

Further, the Supreme Court’s evolving standards of decency test, applied in reverse counsels strongly against the result desired by the California receiver and mandated by the District Court at the point of a gun: evolving standards of decency of a maturing society would not permit the direction of resources away from the law-abiding and in favor of the criminal. This is true on an individual level, no rational individual would give the last dose of antibiotics to an infected murderer to the detriment of a sick child. The same must hold true at the macro level. No decent, mature society allocates billions in resources at an amorphous Eighth Amendment violation while ignoring its own blameless citizens.

The issue shows no sign of subsiding. In 2008 the 9th Circuit Court of Appeals recognized the right of federal immigration detainees to challenge the medical care they receive while in detention. While this raises substantial legal issues, a detained alien has often not been convicted of anything, it puts the debate over the allocation of medical care resources squarely in the front burner. Those questions must yield to their respective political sovereigns.

There is some basis for hope that the federal courts will exercise restraint. The Supreme Court under the late Chief Justice Rhenquist began the long march to restoring the Constitution to its roots and restraining federal overreaching. The Bill of Rights, including the Eighth Amendment, together with the Fourteenth Amendment act as a bulwark to State action. But those rights are a barricade to State action, a “no further” limit, not an antecedent. The United States Constitution did not intend the judiciary to usurp the ordinary political process. As Alexander Hamilton wrote in Federalist No. 78:

55 The Author recognizes not every incarcerated felon is a violent criminal, however, every felon is a criminal. Moreover in an albeit rough moral sense, the incarcerated criminal is by definition less innocent than the law-abiding. Further, differentiating health care based on the inmate’s offense would be practically unfeasible and would raise serious Double Jeopardy issues.

56 Compare, “The degree of civilization in a society can be judged by entering its prisons.” Feodor Mikhailovich Dostoyevsky (1821–81), Respectfully Quoted: A Dictionary of Quotations, No. 1527 (1989), available at http://www.bartleby.com/73/1527.html, with “It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life—the sick, the needy and the handicapped.” Hubert Horatio Humphrey (1911–78), Respectfully Quoted: A Dictionary of Quotations, No. 724 (1989), available at http://www.bartleby.com/73/724.html

57 Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008). The Ninth Circuit’s ruling was predicated on the 5th Amendment and not the Eight, although the Court utilized the same deliberate indifference standard. Id. at 689 fn. 6.

58 For state inmate medical care the sovereign is the individual State, for immigration detainees, the appropriate sovereign is the United States Government.


60 Alexander Hamilton, THE FEDERALIST PAPERS No. 81. “Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or
The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. [emphasis supplied]

At least one justice of the Supreme Court has recognized these truths.

Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts. When these principles are accorded their proper respect, Article III cannot be understood to authorize the federal judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make.\textsuperscript{62}

But, one might posit, if the judiciary has neither force nor will, is the 4\textsuperscript{th} Strike committed by the incarcerated felon, or the judiciary itself?

\textsuperscript{61} Alexander Hamilton, \textit{THE FEDERALIST PAPERS} No. 78.

\textsuperscript{62} \textit{Lewis v. Casey}, supra, 518 U.S. at 385.