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Article

EXPOSURE TO TOBACCO SMOKE IS MORE THAN OFFENSIVE, IT IS CRUEL AND UNUSUAL PUNISHMENT

JEFFREY S. KINSLER*

I. INTRODUCTION

When the framers of the Constitution prohibited "cruel and unusual punishment,"¹ they undoubtedly envisioned punishments such as flogging and branding, as well as dismemberment and use of the rack.² Such forms of physical punishment are unquestionably cruel and unusual. What if, however, the government, rather than inflicting physical punishment upon a person, merely compels that person to live in an environment that endangers his or her health; for instance, in a prison cell filled with environmental tobacco smoke (ETS)?³ To most nonsmokers, prolonged exposure to ETS⁴ is offensive, annoying, obnoxious, and irritating, but does it constitute cruel and unusual punishment?

In *McKinney v. Anderson*,⁵ the Ninth Circuit Court of Appeals recently found that compelled exposure to ETS may constitute cruel and unusual

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1. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted". U.S. CONST. amend. VIII.

2. THE FOUNDERS' CONSTITUTION 368-87 (Philip B. Kurland & Ralph Lerner eds., 1987).

3. Environmental tobacco smoke (ETS) is also known as passive smoke, secondhand smoke, secondary smoke and involuntary smoke. ETS consists of two types of tobacco smoke: "Sidestream smoke" from the lit end of the cigarette and "mainstream smoke" exhaled by the smoker. Stanton A. Glantz & Richard A. Daynard, *Safeguarding the Workplace: Health Hazards of Secondhand Smoke*, TRIAL, June 1991, at 37.

4. Although cigarettes represent the main concern, cigars and pipes also emit ETS. *The Smoking Lamp Is Out: Smoking Soon to Be Banned on All Air Flights*, AIR TRANSPORT WORLD, June 1990, at 7.

5. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

punishment.⁶ The Fifth, Seventh, and Tenth Circuits, however, have reached the opposite conclusion.⁷ To resolve this split, the Supreme Court recently granted certiorari in *McKinney*.⁸

Horace Greeley's definition of a cigar as "a fire at one end and a fool at the other" finds support in recent studies that discuss the deleterious effects of "second-hand" smoke.⁹ In the past ten years, studies have unequivocally linked ETS to lung cancer, heart disease, and other fatal ailments in nonsmokers.¹⁰ The Environmental Protection Agency (EPA) recently confirmed these health risks in a report released on January 7, 1993, eight months after the Ninth Circuit rendered its decision in *McKinney*.¹¹

The Supreme Court should affirm the Ninth Circuit's ruling in *McKinney* for two reasons. First, the medical evidence introduced since the Ninth Circuit decided *McKinney* confirms that court's belief "that the attitude of our society has evolved at least to a point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health."¹² Thus, any debate concerning ETS's dangers ended with the issuance of the 1993 EPA Report.

6. The Ninth Circuit concluded that "the attitude of our society has evolved at least to the point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health." *McKinney*, 924 F.2d at 1508. The Sixth Circuit is in accord. *Smith v. Brown*, No. 91-1276, 1991 U.S. App. LEXIS 19011, at *3 (6th Cir. Aug. 9, 1991).

7. See *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), *cert. denied*, 493 U.S. 969 (1989); *Steady v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc). See also *infra* notes 119-21, 133-38 and accompanying text.

8. *Helling v. McKinney*, 112 S. Ct. 3024 (1992).

9. *McCrocklin v. Employment Dev. Dep't*, 205 Cal. Rptr. 156, 158 (Cal. App. 2d. 1984) (citing the Surgeon General's Reports for 1972, 1975, and 1979) (denying plaintiff's claim for unemployment benefits based on exposure to ETS for lack of medical evidence, but noting that such studies nevertheless may provide "a reasonable belief" that smoke is a health hazard).

10. The medical community began to acknowledge the dangers that ETS posed to nonsmokers in the late 1970s. See *infra* notes 23-25 and accompanying text. The legal community first recognized the health risks associated with ETS in the mid-1970s. See, e.g., *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. 1976) (granting nonsmokers' request for an injunction requiring the employer to restrict smoking to nonwork areas); see also, Bradley M. Soos, Note, *Adding Smoke to the Cloud of Tobacco Litigation—A New Plaintiff: The Involuntary Smoker*, 23 VAL. U. L. REV. 111 (1988).

11. U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1993) [hereinafter 1993 EPA REPORT]; Hugh Davies, *U.S. Braced for Rash of Legal Claims*, THE DAILY TELEGRAPH, Jan. 28, 1993, at 2.

12. *McKinney v. Anderson*, 924 F.2d 1500, 1508 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

Second, the Ninth Circuit's decision in *McKinney* should be upheld because it is consistent with Eighth Amendment precedent. The relationship of inmates to prison officials is one of entrustment.¹³ As such, prison officials are bound not only to protect inmates from physical harm, but also to provide them with safe living conditions.¹⁴ Furthermore, compelling prisoners to live in hazardous environments, such as smoke-filled cells, is as dangerous, if not as cruel and unusual, as many of the punishments that the framers of the Constitution envisioned.¹⁵ In the past twenty years, federal courts have repeatedly held that exposing inmates to substances or conditions less dangerous than ETS constitutes cruel and unusual punishment.¹⁶ Therefore, since no legal or medical reason exists to draw the line at ETS, courts must now insist that prisons ban smoking or, at the very least, restrict it to certain cell-blocks within the prison.¹⁷

Section II of this Article explores the medical evidence linking ETS to lung cancer, heart disease, and certain other health risks in nonsmokers. Section III examines the history of the Eighth Amendment's ban on cruel and unusual punishment, particularly as it relates to dangerous or unhealthy prison conditions. Section IV analyzes the Ninth Circuit's decision in *McKinney v. Anderson*.¹⁸ Section V questions whether a judicial ban on smoking would itself constitute cruel and unusual punishment to smokers. Finally, Section VI sets forth two reasons, in addition to those enunciated by the Ninth Circuit, for the Supreme Court to affirm *McKinney*.

II. EXPOSURE TO ETS CAUSES DEBILITATING AND TERMINAL DISEASES

The health risks associated with the direct ingestion of tobacco smoke were

13. "When the state takes a person into its custody, who by reason of the deprivation of his liberty cannot care for himself, the Constitution imposes upon the state a corresponding duty to assume responsibility for the prisoner's safety and well-being." *Id.* at 1504 (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976)).

14. *McKinney v. Anderson*, 924 F.2d 1500, 1508 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

15. See THE FOUNDERS' CONSTITUTION, *supra* note 2.

16. See *infra* notes 71-86 and accompanying text for a discussion of substances and conditions that are similar to, or less dangerous than, ETS, but which are nonetheless considered cruel and unusual.

17. See, e.g., *Doughty v. Board of County Comm'rs*, 731 F. Supp. 423 (D. Colo. 1989) (upholding a prison's ban on smoking).

18. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

initially acknowledged in the Surgeon General's Report of 1964.¹⁹ That Report suggested a possible link between smoking cigarettes and lung cancer.²⁰ As a result of the 1964 Report, Congress enacted the Cigarette Advertising and Labeling Act,²¹ which mandated that the following warning be placed on all cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health."²² Since 1965, Congress has twice amended the Cigarette Advertising and Labeling Act to strengthen the warnings concerning cigarette smoking.²³

The first indication that tobacco smoke was potentially harmful to nonsmokers came in the Surgeon General's Report of 1979, which declared that tobacco smoke is a significant source of indoor air pollution.²⁴ Three years later, the Surgeon General reported that "[a]lthough the currently available evidence is not sufficient to conclude that passive or involuntary smoking causes lung cancer in nonsmokers, the evidence does raise a concern about a possible serious public health problem."²⁵

19. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING, REPORT OF THE SURGEON GENERAL (1964).

20. *Id.*

21. 15 U.S.C. § 1333 (1965 & Supp. 1993).

22. *Id.*

23. Effective April 1, 1970, 15 U.S.C. § 1333 required all cigarette packages to bear the statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."

Effective October 12, 1984, 15 U.S.C. § 1333 mandates that all cigarette advertisements and packages contain one of the following rotating labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

24. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH, A REPORT OF THE SURGEON GENERAL 32 (1979).

25. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CANCER, A REPORT OF THE SURGEON GENERAL 9 (1982). During this same period, private studies also began to document the health risks that ETS posed to nonsmokers. See, e.g., Takeshi Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan*, 282 BRIT. MED. J. 183 (1981); James R. White & Herman F. Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980); Ira B. Tager, et al., *Effect of Parental Cigarette Smoking on the Pulmonary Function of Children*, 110 AM. J. EPID. 15 (1979).

The breakthrough came in 1986 when the Surgeon General released a report entitled "The Health Consequences of Involuntary Smoking."²⁶ In the preface to the 1986 Report, the Surgeon General declared that "[i]t is now clear that disease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale the smoke emitted into the air."²⁷ The 1986 Report reached three major conclusions:

(1) Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.

(2) The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures.

(3) The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.²⁸

Moreover, the Surgeon General noted that ETS may, in fact, be more carcinogenic than the tobacco smoke directly inhaled by smokers.²⁹

The 1986 Report, however, is not without its criticisms.³⁰ The tobacco industry, for example, flatly denies that ETS is harmful.³¹ In response to these criticisms, the Surgeon General warned:

Critics often express that more research is required, that certain studies are flawed, or that we should delay action until more conclusive proof is produced. As both a physician and a public health official, it is my judgment that the time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must

26. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL (1986) [hereinafter 1986 SURGEON GENERAL REPORT].

27. *Id.*

28. *Id.* at 7.

29. *Id.* at 8. Smokers are primarily subjected to mainstream smoke, which is less carcinogenic than the sidestream smoke that fills the air. *Id.*

30. See, e.g., Crawford, *On the Health Effects of Environmental Tobacco Smoke*, ARCHIVES OF ENVTL. HEALTH 34 (1987).

31. Antonia C. Novello, *Health Hazards of Cigarette Use*, TRIAL, Mar. 1992, at 46. In fact, the tobacco industry continues to deny that the direct ingestion of tobacco smoke poses health risks.

be to protect the nonsmoker from environmental tobacco smoke.³²

As studies conducted since 1986 have shown, ETS kills more than 53,000 Americans each year.³³ Approximately 3700 of these deaths are the result of lung cancer, while heart disease causes most other deaths.³⁴ Studies also show that a burning cigarette fills the air with more than 4000 chemicals, at least forty-three of which are known carcinogens.³⁵

On January 7, 1993, the EPA released the latest study documenting the health hazards of ETS.³⁶ The 1993 Report classifies ETS as a "Group A" carcinogen, the same group in which benzene and asbestos are classified.³⁷ Furthermore, the EPA estimates that ETS causes more than 3000 lung cancer deaths per year in nonsmokers.³⁸ Thus, one-fifth of all lung cancer deaths caused by factors other than direct ingestion of tobacco smoke are due to ETS.³⁹ The risk of death equals one in one thousand—higher than that of almost any chemical that the EPA regulates.⁴⁰ The spouses of people who smoke face an even higher lung cancer risk: two in one thousand.⁴¹ Furthermore, the EPA reports that exposure to concentrated ETS, such as that found in cars or small offices, is especially dangerous.⁴²

32. 1986 SURGEON GENERAL REPORT, *supra* note 26, at xi-xii.

33. See Glantz, *supra* note 3 and authorities cited therein.

34. Novello, *supra* note 31.

35. Glantz, *supra* note 3.

36. 1993 EPA REPORT, *supra* note 11.

37. *Id.* at 1-3. The EPA concluded:

The weight-of-evidence analysis for the lung cancer hazard identification is developed in accordance with the U.S. EPA's *Guidelines for Carcinogen Risk Assessment* (U.S. EPA 1986) and established principles for evaluating epidemiologic studies. The analysis considers animal bioassays and genotoxicity studies, as well as biological measurements of human uptake of tobacco smoke components and epidemiologic data on active and passive smoking. The availability of abundant and consistent human data, especially human data at actual environmental levels of exposure to the specific agent (mixture) of concern, allows a hazard identification to be made with a high degree of certainty. The conclusive evidence of the dose-related lung carcinogenicity of MS [mainstream smoke] in active smokers, coupled with information on the chemical similarities of MS and ETS and evidence of ETS uptake in nonsmokers, is sufficient by itself to establish ETS as a known human carcinogen, or "Group A" carcinogen under the U.S. EPA's classification system. In addition, this document concludes that the overall results of 30 epidemiologic studies on lung cancer and passive smoking, using spousal smoking as a surrogate of ETS for female never-smokers, similarly justify a Group A classification.

Id. at 1-2 to 1-3 (citations omitted).

38. *Id.* at 1-4 to 1-5. According to the Report, the assumptions used by the EPA to calculate lung cancer deaths tend to underestimate the actual population risk.

39. *Id.* at 1-11.

40. 1993 EPA REPORT, *supra* note 11, at 1-11.

41. *Id.*

42. *Id.* at 1-6 to 1-16.

The 1993 EPA Report also confirms the deleterious effects that ETS has on the children of smokers. The Agency blames ETS for 300,000 cases of bronchitis, pneumonia, and other lower respiratory infections in children under eighteen months old.⁴³ Additionally, up to one million children afflicted with asthma suffer significantly worse symptoms as a result of other people's smoking.⁴⁴ The 1993 Report also links ETS to ear infections in infants.⁴⁵

The 1993 EPA Report has renewed calls for bans on smoking in public buildings,⁴⁶ thereby causing renewed criticism from the tobacco industry.⁴⁷ The tobacco industry contends that the results provided in the Study are premature, that more testing should be done, and that industry tests have not shown any adverse effects of ETS on nonsmokers.⁴⁸ These are the same criticisms that the Surgeon General rejected in 1986.⁴⁹

The 1993 EPA Report was released eight months after the Ninth Circuit ruled that compelled exposure to ETS may constitute cruel and unusual punishment.⁵⁰ Thus, any doubts that existed as to whether compelled exposure to ETS transgresses society's standards of decency have now been erased. Furthermore, the 1993 EPA Report was recently added to the official record in *McKinney*.⁵¹ With the addition of this Report, the Supreme Court now has every reason to affirm the Ninth Circuit's decision.

III. EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT

"[T]he Eighth Amendment proscribes punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain.'"⁵² Among unnecessary and wanton inflictions of pain are those

43. 1993 EPA REPORT, *supra* note 11, at 1-1.

44. *Id.*

45. *Id.* The Report also found that there is strong evidence that infants whose mothers smoke are at an increased risk of dying from Sudden Infant Death Syndrome (SIDS). *Id.* at 1-6.

46. John F. Harris, *New Health Concerns Put Smoking Back on Virginia Agenda*, THE WASHINGTON POST, Jan. 31, 1993, at B1; *Environmental Watch: Healthier Malls*, L.A. TIMES, Jan. 30, 1993, at B7.

47. Jonathan Confino, *Active Line on Passive Smoking*, THE DAILY TELEGRAPH, Jan. 8, 1993, at 21; Anita Manning, *Smoke Reports May Change Public Habits*, USA TODAY, Jan. 7, 1993, at 1A.

48. *See supra* note 47.

49. *See* 1986 SURGEON GENERAL REPORT, *supra* notes 26 and 32 and accompanying text.

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

51. *Helling v. McKinney*, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1993).

52. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The *Rhodes* Court held that the permanent double-celling of inmates is not cruel and unusual punishment in violation of the Eighth Amendment. The Court explained that "to the extent such conditions are harsh, they are part of the penalty that criminals pay for their offenses against

punishments totally without penological justification.⁵³ Although constitutional protections were not afforded to prisoners in the past,⁵⁴ it is beyond question today that individuals convicted of crimes retain certain constitutional rights.⁵⁵ One such right that is no longer “checked” at the prison door is the right to be free from cruel and unusual punishment.⁵⁶

A. Cruel and Unusual Punishment Is Determined By Society's Evolving Standards of Decency

A prisoner's conditions of confinement may constitute cruel and unusual punishment if such conditions are not part of the penalty that criminal offenders must pay for their offenses against society.⁵⁷ An Eighth Amendment analysis of whether prison conditions constitute cruel and unusual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵⁸ Whether a practice violates the “evolving standards of decency,” however, is not determined by each judge's subjective views of society's current standards. Rather, standards of decency are determined by

society.” *Id.* at 347.

53. *Id.* “Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as ‘deplorable and sordid’.” *Id.* at 352 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

54. *Sostre v. Preiser*, 519 F.2d 763, 764 (2d Cir. 1975) (citing *Ruffin v. Commonwealth*, 62 Va. (22 Gratt.) 790, 796 (1871)) (noting that a prison inmate was once characterized as “a slave of the state”).

55. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (citing *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)) (noting that while a sentenced inmate may be punished, such punishment “may not be cruel and unusual under the Eighth Amendment”).

56. *Hutto v. Finney*, 437 U.S. 678 (1978). In *Hutto*, a group of inmates filed a civil rights action against Arkansas prison officials, claiming that the conditions in punitive isolation were cruel and unusual. In punitive isolation, an average of four, and sometimes as many as eleven, inmates were crowded into windowless eight-by-ten cells containing no furniture. *Id.* at 682. At night the prisoners were given mattresses to spread on the floor. *Id.* Although some inmates suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and mingled each morning, then randomly returned to the cells each night. *Id.* at 682-83. Prisoners in punitive isolation received less than 1000 calories a day; their meals consisted primarily of four-inch squares of “grue,” a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. *Id.* at 683. Affirming both lower courts, the Supreme Court concluded that these conditions were cruel and unusual. *Id.* at 688-89.

57. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). It is also recognized that such “conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

58. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

objective factors to the maximum extent possible.⁵⁹ These objective factors include current and enlightened scientific evidence as to the conditions necessary to ensure good physical and mental health of prisoners.⁶⁰ Society's evolving standards of decency are also ascertained by examining statutes and regulations enacted by governmental bodies.⁶¹

In cases involving prison conditions, an Eighth Amendment claim has two parts: An objective component and a subjective component.⁶² The objective component is established if the deprivation was sufficiently serious.⁶³ The subjective component is met if the defendants acted with deliberate indifference to the deprivation.⁶⁴ Thus, to satisfy this two-prong test in an ETS case, an inmate must show that prolonged exposure to ETS posed an unreasonable risk of harm to his or her health and that the prison officials were deliberately indifferent to the problem.⁶⁵

B. Prison Conditions That Are Cruel and Unusual

"Courts have a duty to protect inmates from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by a court."⁶⁶ It has long been recognized that conditions of confinement that threaten an inmate's health and safety are unconstitutional.⁶⁷ Recently, courts have applied the Eighth Amendment to a variety of situations

59. *McKinney*, 924 F.2d at 1504. "[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability' of a given punishment. But such 'judgment[s] should be informed by objective factors to the maximum possible extent.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

60. *Spain v. Proconier*, 600 F.2d 189, 200 (9th Cir. 1979).

61. *Avery v. Powell*, 695 F. Supp. 632, 639-40 (D.N.H. 1988) (holding that an inmate exposed to ETS was able to state a claim for relief under the Eighth Amendment by "extrapolating from legislative enactments").

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

63. *Rhodes v. Chapman*, 452 U.S. 337, 346-477 (1981).

64. *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991). At least one court has held that prison officials are entitled to qualified immunity in ETS cases on the ground that the contours of the right to be free from ETS are not sufficiently clear, such that a reasonable official would understand that the right was being violated. *Murphy v. Dowd*, 975 F.2d 435, 436 (8th Cir. 1992), *cert. denied*, 1993 U.S. App. LEXIS 1415 (U.S. 1993). For an insightful analysis of qualified immunity, see I VAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOV'T CIV. RIGHTS LAW § 1.36 (1991).

65. *McKinney*, 959 F.2d 853, 854 (9th Cir. 1992).

66. JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 240 (3d ed. 1984).

67. *See, e.g., Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (holding that housing inmates in units with inadequate ventilation is unconstitutional).

relating to the maintenance of a prison inmate's physical well-being.⁶⁸ These decisions reflect a well-reasoned principle: While the Constitution does not mandate that prisons be comfortable,⁶⁹ the state must provide inmates with a "healthy, habilitative environment."⁷⁰

Exposing a prisoner to an unreasonable risk of a debilitating or terminal disease offends the evolving standards of decency.⁷¹ Moreover, in at least three areas, courts have found that exposure to substances or conditions similar to or less dangerous than ETS constitutes cruel and unusual punishment.

1. Inadequate Ventilation, Light, or Heat

The lack of adequate ventilation and air-flow undermines the health of inmates and the sanitation of the prison.⁷² Inadequate ventilation, especially in small prison cells, "results in excessive odor, heat and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth, thereby facilitating personal discomfort along with health and sanitation problems."⁷³ As a result, numerous courts have found that inadequate ventilation, though not fatal, constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁷⁴ Confining a person to an unlighted,

68. See, e.g., *Hoptowit*, 753 F.2d at 783-84 (holding that lack of ventilation, inadequate lighting, vermin infestation, substandard fire prevention, and safety hazards in prison violate minimum requirements of Eighth Amendment); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (en banc) (holding that overcrowding, extreme heat, unsanitary conditions, poor diet, and exposure to contagious illnesses constitute cruel and unusual punishment), *rev'd in part on other grounds*, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174, 1175 (5th Cir. 1986) (en banc), *aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

69. See *Caldwell v. Miller*, 790 F.2d 589, 601 (7th Cir. 1986).

70. *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (quoting *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977)).

71. *McKinney v. Anderson*, 924 F.2d 1500, 1505 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992) (citing *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990)).

72. *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985).

73. *Ramos v. Lamm*, 639 F.2d 559, 569 (10th Cir. 1980) (holding that violation of inmate's Eighth Amendment rights occurred with regard to inadequate shelter and sanitation).

74. *Whisenant v. Hutchinson*, No. 90-6372, 1991 U.S. App. LEXIS 622 (4th Cir. Jan. 17, 1991) (stating that inadequate ventilation may reach the level of cruel and unusual punishment); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (stating that lack of ventilation and air flow violates the Eighth Amendment); *Ramos v. Lamm*, 639 F.2d 559, 569 (10th Cir. 1980) (holding that inadequate ventilation, as part of the overall dangerous condition of the prison, was cruel and unusual); *Martinez v. Chavez*, 574 F.2d 1043, 1046 (10th Cir. 1978) (finding that suffocating jail conditions offend "evolving standards of decency that mark the progress of a maturing society"); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) (holding that an inmate's complaint of inadequate heating and ventilation stated a cause of action for cruel and unusual punishment).

windowless cell for an extended period of time is also cruel and unusual.⁷⁵ Likewise, confinement in an inadequately heated cell may violate the Eighth Amendment.⁷⁶

2. Exposure to Asbestos

Exposing an inmate to asbestos may also constitute cruel and unusual punishment, if done knowingly or with reckless disregard.⁷⁷ Accordingly, because the EPA classifies both asbestos and ETS as "Group A" carcinogens,⁷⁸ a court has no sound basis for distinguishing between exposure to ETS and exposure to asbestos.

3. Exposure to Other Toxic Substances

Courts have found that exposure to substances less toxic than either ETS or asbestos may constitute cruel and unusual punishment. For instance, to intentionally or with deliberate indifference expose inmates to substances such as smoke from fires,⁷⁹ contaminated food,⁸⁰ polluted water,⁸¹ or even loud

75. See, e.g., *McCord v. Maggio*, 927 F.2d 844, 846-47 (5th Cir. 1991) (holding that the Eighth Amendment is violated when an inmate is confined to an unlighted, windowless cell filled with sewage and foul water for twenty-three hours a day); *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (finding that confining an inmate to a cell with inadequate ventilation and lighting may constitute cruel and unusual punishment).

76. See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (holding that confinement in a "dark hole" without bedding, adequate heat, or food transgresses the Eighth Amendment); *Leon v. Harris*, 489 F. Supp. 221, 224 (S.D.N.Y. 1980) (stating that an inmate's claim that he was confined to a cell without heat stated a viable cause of action); accord *Parker v. Cook*, 464 F. Supp. 350, 355-56 (S.D. Fla. 1979), *aff'd in part*, 642 F.2d 865 (5th Cir. 1981).

77. See, e.g., *Powell v. Lennon*, 914 F.2d 1459, 1463-64 (11th Cir. 1990) (holding that an inmate's claim that he was exposed to asbestos stated a cause of action under the Eighth Amendment); *Arnold v. Lane*, No. 91 C 5464, 1992 U.S. Dist. LEXIS 9513 (N.D. Ill. Jun. 30, 1992). But see, e.g., *Seymour-Jones v. Bricker*, No. 90-7757, 1990 U.S. Dist. LEXIS 17405 (E.D. Pa. Dec. 17, 1990) (dismissing a litigious inmate's claim that exposure to asbestos constituted cruel and unusual punishment); *Rabb Ra Chaka v. Lane*, No. 88 C 4204, 1989 U.S. Dist. LEXIS 2015 (N.D. Ill. Mar. 1, 1989) (finding that an inmate failed to state a claim of cruel and unusual punishment).

78. See 1993 EPA REPORT, *supra* note 11.

79. See, e.g., *Burrell v. Fairman*, No. 88 C 7745, 1992 U.S. Dist. LEXIS 13013, at *44 (N.D. Ill. Aug. 26, 1992) (holding that knowingly exposing inmate to fire smoke may constitute cruel and unusual punishment); *Husband v. Foulkes*, No. 83 C 0302, 1991 U.S. Dist. LEXIS 5662, at *9 (N.D. Ill. Apr. 26, 1991); *Murphy v. Wheaton*, 381 F. Supp. 1252, 1261 (N.D. Ill. 1974) (finding that deliberately exposing inmates to noxious smoke fumes created when other inmates burned blankets constitutes cruel and unusual punishment).

80. *Murphy v. Wheaton*, 381 F. Supp. 1252, 1261 (N.D. Ill. 1974) (serving of contaminated food violates the Eighth Amendment); *Black v. Brown*, 513 F.2d 652, 655 (7th Cir. 1975) (finding that rust in food caused by meals being pushed through rusty bars is cruel and unusual punishment).

noise⁸² violates the Eighth Amendment. Similarly, the use of mace⁸³ or tear gas⁸⁴ on inmates who are incapable of harming others constitutes cruel and unusual punishment. In addition, repeated exposure to contagious disease may violate the Eighth Amendment if the prison officials act with deliberate indifference to the inmate's serious medical needs.⁸⁵

For years, courts have held that exposing inmates to dangerous substances violates the Eighth Amendment.⁸⁶ In many of these cases, the substances were less toxic than ETS. This analogous authority provides ample support for the Supreme Court to affirm the Ninth Circuit's decision in *McKinney*.

C. Exposing Prisoners with Pre-Existing Medical Conditions to ETS

The first successful civil rights actions based on exposure to ETS were brought by prisoners suffering from pre-existing medical conditions that were aggravated by exposure to tobacco smoke. In *Franklin v. State of Oregon*,⁸⁷ for example, an inmate with a pre-existing throat tumor brought a civil rights action against Oregon prison officials complaining, *inter alia*, that his placement in a cell with a heavy smoker aggravated his throat tumor. The district court dismissed the inmate's claim for failure to allege a deprivation of a constitutional

81. See *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) (holding that unsanitary food handling and polluted water can violate the Eighth Amendment). *But see Jones v. Owens*, No. 89-9178, 1990 U.S. Dist. LEXIS 77, at *3 (E.D. Pa. Jan. 4, 1990).

82. See *Nilsson v. Coughlin*, 670 F. Supp. 1186, 1190 (S.D.N.Y. 1987) (holding that a complaint of constant noise at physically harmful levels states a claim under the Eighth Amendment).

83. See, e.g., *Soto v. Cady*, 566 F. Supp. 773, 778-79 (E.D. Wis. 1983) (using mace on inmates incapable of causing harm to others is cruel and unusual punishment); *Battle v. Anderson*, 376 F. Supp. 402, 423 (E.D. Okla. 1974) (using mace as a punitive measure rather than a control device is cruel and unusual punishment).

84. See, e.g., *Spain v. Proconier*, 600 F.2d 189, 196 (9th Cir. 1979) (holding that use of tear gas on inmates may constitute cruel and unusual punishment). *But see Bethea v. Crouse*, 417 F.2d 504, 509 (10th Cir. 1969) (stating that "no reasonable man would say that [the use of tear gas] amounted to cruel and unusual punishment").

85. *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) (en banc) ("The constant and habitual exposure of convicted prisoners to persons who are contagiously ill is also reprobated as cruel and unusual punishment."), *rev'd in part on other grounds*, *International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174, 1175 (5th Cir. 1986) (en banc), *aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). However, isolated instances of exposure do not constitute cruel and unusual punishment. *Hatton v. Matty*, No. 88-4746, 1988 U.S. Dist. LEXIS 12070, at *2 (E.D. Pa. Oct. 28, 1988).

86. *But cf.*, *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981) (affirming a district court's dismissal of an inmate's claim that serving drinks containing saccharin violates the Eighth Amendment).

87. 662 F.2d 1337 (9th Cir. 1981).

right.⁸⁸ Reversing in part the district court's judgment, the Ninth Circuit concluded that "[i]f these conditions . . . [are] as threatening to Franklin's health as he alleges and if they were the result of deliberate indifference on the part of the prison officials, then Franklin arguably has alleged cruel and unusual punishment under the Eighth Amendment."⁸⁹

Six years later, in *Beeson v. Johnson*,⁹⁰ an inmate's civil rights action based on compelled exposure to ETS withstood a motion to dismiss, where the inmate suffered from asthma, chronic rhinitis, and sinus trouble.⁹¹ Likewise, the Sixth Circuit recently permitted an elderly inmate suffering from a seizure disorder and pulmonary disease to proceed to trial on his claim that compelled exposure to ETS aggravated his pre-existing medical conditions.⁹² After a decade of litigation, the law appears well-settled that prisoners with pre-existing medical conditions that are aggravated by ETS may assert civil rights actions against prison officials for injunctive relief.⁹³ The law is not as settled, however, for those inmates who do not suffer from pre-existing medical conditions.

D. ETS Exposure Cases Prior to *McKinney v. Anderson*

The first constitutional challenge to compelled exposure to ETS by an inmate not suffering from a pre-existing medical condition appeared in 1985.⁹⁴

88. *Id.* at 1346-47 (holding that, as an alternative ground for dismissal, the claim was frivolous).

89. *Id.* (remanding the case to the district court, the 9th Circuit stated, "It is simply too early in the judicial process to dismiss complaints such as these that arguably raise claims that are not wholly insubstantial.")

90. 668 F. Supp. 498 (E.D.N.C. 1987), *rev'd without op.*, 894 F.2d 401 (4th Cir. 1990).

91. *Id.*

92. *Hunt v. Reynolds*, 974 F.2d 734, 735-36 (6th Cir. 1992) (also remanding claim of plaintiff, who suffered from heart disease, to the district court).

93. *See, e.g.*, *Steady v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992) (holding that "[p]risoners [who are] allergic to the components of tobacco smoke, or who can attribute their serious medical conditions to smoke, are entitled to appropriate medical treatment, which may include removal from places where smoke hovers"); *West v. Wright*, 747 F. Supp. 329, 330 (E.D. Va. 1990) (recognizing that inmates with pre-existing medical conditions may assert civil rights claims based on exposure to ETS), *remanded without op.*, 932 F.2d 964 (4th Cir. 1991). *But see* *Southers v. Townley*, No. 89-6383, 1990 U.S. App. LEXIS 14255, at *2 (6th Cir. Aug. 15, 1990) (dismissing the ETS exposure claim of an inmate suffering from a cardiovascular condition).

94. *Rayl v. Maschner*, No. 84-3286 (D. Kan. Jul. 25, 1985) (placing a nonsmoking inmate in a cell with smokers does not constitute cruel and unusual punishment); *see also*, *Lee v. Carlson*, 645 F. Supp. 1430, 1438 (S.D.N.Y. 1986) (where an inmate alleged, *inter alia*, that the prison officials' failure to provide tobacco-free environment violated Constitution), *aff'd*, 812 F.2d 712 (2d Cir. 1987).

This initial attack was unsuccessful.⁹⁵ Not long thereafter, however, ETS cases began to appear across the nation. The leading cases are analyzed below.

1. *Avery v. Powell*

Prior to *McKinney*,⁹⁶ the seminal case involving compelled exposure to ETS was *Avery v. Powell*.⁹⁷ In that case, Clifford Avery, an inmate incarcerated in the New Hampshire State Prison (NHSP), brought a pro se civil rights action against officials of the NHSP.⁹⁸ Avery claimed that his continuous exposure to ETS, as a condition of confinement, violated the Eighth Amendment's ban on cruel and unusual punishment.⁹⁹ Avery sought an injunction requiring the separation of smokers and nonsmokers in the prison, as well as monetary damages.¹⁰⁰

The first issue that the *Avery* court addressed was whether exposure to ETS constitutes a "punishment." The NHSP officials argued that "no violation of the prohibition against cruel and unusual punishment can be found, absent the infliction of actual physical pain."¹⁰¹ However, the court rejected this argument, observing that the Eighth Amendment proscribes more than physically barbarous punishments; it prohibits penalties that "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity and decency.'"¹⁰²

The NHSP officials also contended that "exposure to ETS is, at most, a discomfort and that mere discomfort is not violative of the Eighth Amendment."¹⁰³ However, Avery argued that:

[C]onstant exposure to ETS imperils his physical health because tobacco smoke contains components such as carbon monoxide, nicotine, hydrocyanic acid, ammonia, and formaldehyde, as well as substances which are pharmacologically active, toxic, cancer causing, or cancer promoting in healthy nonsmokers, and for which there is no

95. *Rayl v. Maschner*, No. 84-3286 (D. Kan. Jul. 25, 1985).

96. 924 F.2d 1500 (9th Cir. 1991).

97. 695 F. Supp. 632 (D.N.H. 1988).

98. *Id.* at 633; see also Robin Terry, Note, *Recognition that Involuntary Exposure to Environmental Tobacco Smoke May Constitute Cruel and Unusual Punishment—Avery v. Powell*, 11 CAMPBELL L. REV. 363 (1989).

99. *Avery*, 695 F. Supp. at 633. Avery also claimed that the exposure to ETS violated his due process rights under the Fourteenth Amendment.

100. *Avery*, 695 F. Supp. at 633-34.

101. *Id.* at 636.

102. *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978)).

103. *Avery*, 695 F. Supp. 632, 633-34 (D.N.H. 1988).

known safe level of exposure.¹⁰⁴

As support for this argument, Avery cited the 1986 Surgeon General's Report, which linked ETS to lung cancer and other fatal ailments in nonsmokers.¹⁰⁵ The court agreed with Avery, holding that exposure to ETS is more than discomforting and, under the right circumstances, "may constitute punishment cognizable under the Eighth Amendment."¹⁰⁶

Deciding that exposure to ETS may constitute a punishment did not, however, end the *Avery* court's inquiry. The court still had to determine whether such punishment violated society's evolving standards of decency. To ascertain society's standards of decency regarding exposure to ETS, the *Avery* court looked to regulations and statutes enacted by state legislatures.¹⁰⁷ In so doing, the court found that forty-five states and the District of Columbia had enacted legislation regulating tobacco use.¹⁰⁸ On the basis of these legislative enactments and the scientific authority linking ETS to fatal ailments in nonsmokers, the court concluded that exposure to ETS poses a significant danger to the health of nonsmokers.¹⁰⁹ Accordingly, the court found that Avery had successfully stated a claim for cruel and unusual punishment under the Eighth

104. *Id.*

105. See 1986 SURGEON GENERAL REPORT, *supra* note 26.

106. *Avery v. Powell*, 695 F. Supp. 632, 639 (D.N.H. 1988).

107. *Id.* at 640. The court's ruling was supported by *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which the Supreme Court determined society's evolving standards of decency concerning the death penalty by reviewing the work product of state legislatures and sentencing judges.

108. *Avery*, 695 F. Supp. at 640. For a listing of states that have restricted public smoking, see Rick Kershenblatt, Note, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. BRIDGEPORT L. REV. 133 (1987). An example of legislation aimed at protecting the public from ETS is Rhode Island's anti-smoking law:

The use of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking, but also to the non-smoking person who is required to breathe such contaminated air. The most persuasive intrusion of the non-smoker's right to unpolluted air space is the uncontrolled smoking in public places. The legislature intends, by the enactment of this chapter, to protect the health and atmospheric environment of the non-smoker by regulating smoking in certain public areas.

R.I. GEN. LAWS § 23-20.6-1 (1985).

Federal Regulations have likewise been enacted to combat public exposure to ETS. For instance, the preface to the General Services Administration's smoking regulations proclaims: Numerous studies have concluded that smoking adversely affects the health of those persons "passively" exposed to tobacco smoke. In view of these findings and in the interest of protecting Federal employee health and well being, GSA proposes regulations to protect the non-smoking worker's and public building visitor's right not to be exposed involuntarily to secondhand tobacco smoke at the Federal work site.

41 FED. REG. 44,258 (1986).

109. *Avery*, 695 F. Supp. at 640.

Amendment.¹¹⁰

2. *Gorman v. Moody*

While incarcerated at Westville Correctional Center (Indiana) (WCC), James Gorman, a lifelong nonsmoker, had nine cellmates, eight of whom smoked.¹¹¹ Gorman brought a civil rights action against WCC officials, alleging that their "failure to provide smoking and nonsmoking dormitories caused him to suffer physical, emotional, and mental injury."¹¹² Gorman sought injunctive relief as well as compensatory and punitive damages.¹¹³

In an attempt to ascertain society's evolving standards of decency, the *Gorman* court observed that "[t]imes change, and what may not have been considered cruel and unusual punishment one hundred years ago or even twenty years ago may be so considered today."¹¹⁴ The court nevertheless found that society had not yet set a standard of decency with respect to ETS exposure, but was still grappling with the issue.¹¹⁵ As a result, the court dismissed Gorman's Eighth Amendment claim.¹¹⁶

110. *Id.* The court upheld Avery's claim for injunctive relief, but dismissed his claim for monetary damages on the ground that the NHSP officials were entitled to qualified immunity. *Id.*

111. *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989).

112. *Gorman*, 710 F. Supp. at 1259. According to the *Gorman* court, its research had revealed only one reported case (*Avery v. Powell*) where a prisoner who did not have a pre-existing medical condition sued prison officials for compelled exposure to ETS. The *Gorman* court refused to follow *Avery*. *Accord* *Steding v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992) (dismissing an inmate's lawsuit on the ground that exposure to ETS does not constitute "punishment" for purposes of the Eighth Amendment); *Steele v. Trigg*, No. 91-1941, 1992 U.S. App. LEXIS 28955, at *5 (7th Cir. Oct. 14, 1992).

113. *Gorman*, 710 F. Supp. at 1259. The court summarily dismissed Gorman's request for injunctive relief on the ground that it did not present "an actual case or controversy." At the time of the decision, Gorman had been released from prison and did not, according to the court, have "a personal stake in the outcome" to obtain injunctive relief. *Id.*

114. *Id.* The court noted, however, that lawful incarceration brings about the necessary withdrawal of privileges enjoyed by society at large. Although prisoners must be provided with the basic human needs and penal conditions may not deprive inmates of the minimal civilized measure of life's necessities, inmates cannot expect the amenities, conveniences, and services of a good hotel. *Id.* (citing *Rhodes v. Chapman*, 452 U.S. 337 (1981) and *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988)).

115. *Gorman*, 710 F. Supp. at 1262 (noting that, in determining the evolving standards of decency, "it is particularly relevant that this society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment").

116. *Id.* As a separate count, Gorman claimed that the exposure to ETS violated the Due Process Clause of the Fourteenth Amendment. Gorman claimed that Indiana created a liberty interest protected by the Due Process Clause when it enacted the "Clean Indoor Air Act." IND. CODE § 13-1-13-5(a). The court disagreed, concluding that the Clean Indoor Air Act did not contain the mandatory language necessary to create a liberty interest. *Id.* at 1263.

The *Gorman* court, however, left the door slightly ajar for future litigants by noting:

As our society moves toward a so-called smoke-free environment and new laws are enacted, there may come a time when the "evolving standards of decency that mark the progress of society" demand a smoke-free environment in a prison setting [For now,] whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials¹¹⁷

Thus, although it may be true that society's standards of decency were not fixed in 1989, any doubts society may have had regarding exposure to ETS have since been eradicated by the 1993 EPA Report.¹¹⁸

3. *Wilson v. Lynaugh*

In *Wilson v. Lynaugh*,¹¹⁹ an inmate claimed that he suffered impaired breathing and loss of eyesight due to constant exposure to ETS. However, the district court dismissed the inmate's civil rights action.¹²⁰ The Fifth Circuit affirmed, concluding that "the Eighth Amendment may afford protection against conditions of confinement which constitute health threats, but not against those which cause mere discomfort or inconvenience," like exposure to ETS.¹²¹

4. *Caldwell v. Quinlan*

In *Caldwell v. Quinlan*,¹²² Daniel Caldwell, a former inmate incarcerated in the United States Penitentiary in Marion, Illinois, asserted a civil rights action against the Director of the Federal Bureau of Prisons, seeking an injunction requiring the Director to create a "totally smoke-free environment" for nonsmoking inmates.¹²³ Unlike many of its state counterparts, however, the Federal Bureau of Prisons had not been indifferent to nonsmoking inmates. Federal regulations were already in place authorizing (but not requiring) wardens

117. *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989).

118. 1993 EPA REPORT, *supra* note 11.

119. 878 F.2d 846 (5th Cir. 1989), *cert. denied*, 493 U.S. 969 (1989).

120. *Id.* at 847-48. This was the second civil rights suit brought by Wilson in which he complained of exposure to ETS. The district court dismissed the first suit in 1983.

121. *Id.* at 849. The district court dismissed Wilson's claims on two technical grounds, duplicative litigation and *res judicata*. The Fifth Circuit affirmed the district court on both grounds. *Id.*

122. *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C. 1990), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991).

123. *Id.* at 5-6.

to establish no-smoking areas,¹²⁴ and, in fact, the warden at Marion had established a number of no-smoking areas throughout the prison.¹²⁵

In light of the accommodation of nonsmokers made by the Federal Bureau of Prisons, the court dismissed Caldwell's Eighth Amendment claim.¹²⁶ As an alternative ground for dismissal, the court mentioned that "contemporary society has yet to view exposure to [ETS] as transgressing its broad and idealistic concepts of dignity, civilized standards, humanity or decency."¹²⁷

5. *Smith v. Brown*

In *Smith v. Brown*,¹²⁸ three inmates at the Cotton Correctional Facility

124. The Federal Regulations provide:

To advance towards becoming a clean air environment and to protect the health and safety of staff and inmates the Bureau of Prisons will restrict areas and circumstances in which smoking is permitted within its institutions and offices.

(a) All areas of Bureau of Prisons facilities and vehicles are no smoking areas unless specifically designated as smoking areas by the Chief Executive Officer consistent with the guidelines set forth in this rule.

(b) Chief Executive Officers shall limit smoking areas to the minimum possible consistent with effective operations. Under no circumstances, shall smoking be permitted in the following areas, except [those specifically designated as "smoking" areas by the Chief Executive Officer]:

- (1) Elevators,
- (2) Storage Rooms and Warehouses,
- (3) Libraries,
- (4) Corridors and Halls,
- (5) Dining Facilities,
- (6) Kitchen and Food Preparation Areas,
- (7) Medical/Dental Care Delivery Areas,
- (8) Institution/Government Vehicles,
- (9) Administrative Areas and Offices,
- (10) Auditoriums,
- (11) Class and Conference Rooms,
- (12) Gymnasiums and Exercise Rooms, and
- (13) Restrooms.

28 C.F.R. § 551.160 (1980).

125. *Caldwell v. Quinlan*, 729 F. Supp. 4, 5-6 (D.D.C. 1990) (explaining that the conference rooms, classrooms, elevators, and the library were designated as nonsmoking areas and half of the dining room was designated as nonsmoking).

126. *Id.* at 6-7. The court warned that "to hold that the Constitution empowered it to regulate [ETS] in a correctional facility would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights." *Id.* at 7 (quoting *Kensell v. State of Okla.*, 716 F.2d 1350, 1351 (10th Cir. 1983)).

127. *Caldwell*, 729 F. Supp. at 6 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

128. *Smith v. Brown*, No. 91-1276, 1991 U.S. App. LEXIS 19011, at *2 (6th Cir. Aug. 9, 1991).

(Michigan) filed a class action on behalf of all nonsmoking prisoners, alleging that officials of the Michigan Department of Corrections deliberately exposed prisoners to the health risks associated with ETS.¹²⁹ The district court dismissed the plaintiffs' civil rights complaint.¹³⁰ However, the Sixth Circuit, following *McKinney*, reversed the district court and remanded the case for further proceedings.¹³¹ The Sixth Circuit concluded "that under the liberal standard of review for dismissals under Fed. R. Civ. P. 12(b)(6), it cannot be said that the appellants can prove no set of facts in support of their claim which would entitle them to relief."¹³²

6. *Clemmons v. Bohannon*

In *Clemmons v. Bohannon*,¹³³ the Tenth Circuit, en banc, held that an inmate's complaint that he was sometimes forced to share a cell with a smoker did not implicate the protections afforded by the Eighth Amendment.¹³⁴ To establish an Eighth Amendment claim, according to the Tenth Circuit, a plaintiff must show that he or she has a "serious medical need" to which the defendants were deliberately indifferent.¹³⁵ With respect to the objective component, a serious medical need, the appellate court concluded that the Eighth Amendment does not protect against "possible latent harms," such as those posed by ETS.¹³⁶ As to the subjective component, the Tenth Circuit held that the plaintiff had failed to allege, much less prove, that the defendants forced him to live with others who smoked and that they did so intentionally, knowing the smoke would have serious medical consequences for him.¹³⁷ Remarking that the "role of this Court is not to spearhead and define society's evolving

129. *Id.* at *2.

130. *Id.* at *5.

131. *Id.*

132. *Id.* The court seemed ready to adopt the reasoning embraced in *McKinney* that society's standards of decency had evolved to a point where exposure to ETS is considered cruel and unusual. *Id.* (quoting *McKinney v. Anderson*, 924 F.2d 1500, 1508-09 (9th Cir. 1991)).

133. *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc).

134. *Id.* at 1527.

135. *Id.*

136. *Id.* Judge Seymour, dissenting, found that exposure to ETS does indeed pose a serious health risk. As for the majority's position, Judge Seymour wrote, "Such cavalier treatment is disturbing when we are deciding under what circumstances a prisoner who has not been sentenced to death can be exposed to a substance which an agency [EPA] of our own government has proposed to classify as a known human carcinogen." *Id.* at 1530 (Seymour, J., dissenting).

137. *Id.* at 1528. Judge Seymour also criticized the majority's view regarding deliberate indifference. According to Judge Seymour, deliberate indifference does not require a showing that defendants acted "for the very purpose of causing harm" as the majority suggests. *Id.* (quoting *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991)). Rather, the subjective component is met if defendants "arbitrarily refus[ed] to protect an inmate from a known risk of serious harm . . . notwithstanding the absence of proof of an intent to cause the harm." *Clemmons v. Bohannon*, 956 F.2d 1523, 1533 (10th Cir. 1992) (Seymour, J., dissenting).

standards of decency" but only to interpret and apply the Constitution, the Tenth Circuit affirmed the district court's dismissal of the plaintiff's complaint.¹³⁸

The Sixth and Ninth Circuits have concluded that society's standards of decency have evolved to a point that exposure to ETS may constitute cruel and unusual punishment. The Fifth, Seventh, and Tenth Circuits disagree, but each has noted that society no longer views public exposure to ETS the same way it did twenty years ago.¹³⁹ Consequently, the issue is one of timing: Have society's standards of decency evolved to a point that exposure to ETS constitutes cruel and unusual punishment? In light of the 1993 EPA Report classifying ETS as a known human carcinogen,¹⁴⁰ the answer to this question is an unequivocal "Yes."

IV. ANALYSIS OF *McKinney v. Anderson*

In *McKinney*, a pro se inmate (McKinney) brought a civil rights action against officials of the Nevada Department of Prisons (NDP).¹⁴¹ McKinney was confined in a poorly ventilated, six-foot by eight-foot cell with a roommate who smoked five packs of cigarettes per day.¹⁴² McKinney also faced ETS outside his cell; nearly two-thirds of the inmates in the institution smoked, and the prison had very few smoke-free areas.¹⁴³ As a result of these conditions, McKinney was constantly exposed to ETS.¹⁴⁴

McKinney sought damages and injunctive relief, claiming that compelled exposure to ETS constitutes cruel and unusual punishment.¹⁴⁵ McKinney allegedly suffered nosebleeds, headaches, chest pains, and loss of energy as a result of such exposure.¹⁴⁶ At the district court, the magistrate judge found

138. *Id.* at 1529. In dissent, Judge Seymour accused the majority of turning a blind eye to the medical evidence documenting the health risks posed by ETS. *Id.* at 1532 (Seymour, J., dissenting).

139. See *Wilson v. Lynaugh*, 878 F.2d 846, 851 (5th Cir. 1989), *cert. denied*, 493 U.S. 969 (1989); *Steady v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989); *Clemmons v. Bohannon*, 956 F.2d at 1523, 1532 (10th Cir. 1992) (en banc) (Seymour, J., dissenting).

140. See 1993 EPA REPORT, *supra* note 11.

141. *McKinney v. Anderson*, 924 F.2d 1500, 1502 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

142. *Id.* at 1507.

143. *Id.* (noting that the prison only prohibited smoking in the infirmary and the culinary).

144. *Id.* at 1507. This is especially true considering that, as a prisoner, McKinney was not free to move around the prison.

145. As a separate civil rights claim, McKinney alleged that the prison officials were deliberately indifferent to his serious existing medical symptoms, which he claims were caused by exposure to ETS. *Id.* at 1502.

146. *Id.* at 1502.

that compelled exposure to ETS does not, as a matter of law, constitute cruel and unusual punishment.¹⁴⁷ The district court also found that McKinney had failed to prove deliberate indifference on the part of the prison officials and had failed to establish a nexus between his various ailments and his exposure to ETS.¹⁴⁸

The Ninth Circuit, reversing the district court's ruling in part, observed that "it is established that exposure to ETS by people who are sensitive to ETS because of pre-existing conditions may constitute cruel and unusual punishment."¹⁴⁹ The court noted, however, that McKinney did not suffer any pre-existing conditions that were aggravated by ETS.¹⁵⁰ The court was therefore confronted with an issue of first impression in the Ninth Circuit: Whether an inmate not suffering from a pre-existing condition may state a valid cause of action under the Eighth Amendment by alleging that continual involuntary exposure to ETS poses an unreasonable risk of harm to his health.¹⁵¹

The Ninth Circuit, choosing to confront the issue directly, held that compelled exposure to ETS may constitute cruel and unusual punishment.¹⁵² The court declared that "the attitude of our society has evolved at least to the point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health."¹⁵³ The court based this conclusion on the growing body of medical literature documenting the various adverse health effects that are caused by ETS¹⁵⁴ and on the fact that forty-five states and the District of Columbia had banned public smoking in one form or another.¹⁵⁵

The Ninth Circuit, therefore, concluded that under the right circumstances,

147. *Id.* at 1503.

148. *Id.*

149. *Id.* at 1504 (quoting *Franklin v. State of Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981) (holding that housing an inmate suffering from throat cancer with a smoker may constitute cruel and unusual punishment)).

150. *McKinney v. Anderson*, 924 F.2d 1500, 1504 (9th Cir. 1991), *vacated sub nom. Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated, remanded*, 959 F.2d 853 (9th Cir. 1992), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992).

151. At the time *McKinney* was decided, the two courts that had previously addressed this issue both found that compelled exposure to ETS may constitute cruel and unusual punishment, even though the plaintiff did not suffer from pre-existing conditions. *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990), *rev'd*, 956 F.2d 1523 (10th Cir. 1992) (en banc); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988).

152. *McKinney*, 924 F.2d at 1508.

153. *Id.*

154. *Id.* at 1505-07.

155. *Id.* at 1508.

prolonged involuntary exposure to ETS may satisfy the objective component of an Eighth Amendment claim.¹⁵⁶ Specifically, the court found that McKinney stated a valid claim for injunctive relief by alleging that his exposure to ETS in prison is harmful to his health.¹⁵⁷ Accordingly, the court remanded the case to the district court to allow McKinney to present evidence regarding the level and degree of his exposure to ETS and to determine: (1) whether McKinney's degree of exposure was sufficient to create an unreasonable risk of harm to his health and (2) whether the prison officials were deliberately indifferent to McKinney's exposure to ETS.¹⁵⁸

On October 15, 1991, the Supreme Court granted the defendants' petition for writ of certiorari, vacated the judgment, and remanded the case to the Ninth Circuit for further consideration.¹⁵⁹ On remand, the Ninth Circuit reinstated its earlier judgment.¹⁶⁰ On June 29, 1992, the Supreme Court again granted the defendants' petition for writ of certiorari.¹⁶¹

On January 13, 1993, the United States Supreme Court heard oral arguments in *McKinney*, at which three extra-record developments were brought to the Court's attention.¹⁶² First, the Court took note of the EPA's 1993 Report on the health effects of ETS.¹⁶³ Second, counsel for the NDP informed the court that McKinney had since been transferred to a single cell away from smokers.¹⁶⁴ Upon learning of the transfer, Justice O'Connor inquired whether the case was now moot, but counsel for NDP responded negatively based on the fact that McKinney could be reassigned to a smoking cell in the future.¹⁶⁵ Finally, the Court learned that the NDP had recently adopted regulations mandating no-smoking areas within the prison and pledged

156. *Id.* at 1509.

157. *Id.*

158. *Id.*; *McKinney*, 959 F.2d at 854.

159. *Helling v. McKinney*, 112 S. Ct. 291 (1991). The Supreme Court remanded the case for further consideration in light of *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), a case in which the Supreme Court expanded the requirements for an Eighth Amendment claim by adding a subjective component. *Helling*, 112 S. Ct. at 291.

160. *McKinney*, 959 F.2d 853, 854 (9th Cir. 1992) (noting that its earlier opinion was consistent with *Seiter*).

161. *Helling v. McKinney*, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1993).

162. *Id.*

163. *Id.* See also, 1993 EPA REPORT, *supra* note 11.

164. *McKinney*, 61 U.S.L.W. at 3518.

165. *Id.* The transfer arguably renders McKinney's action moot. See *Johnson v. Moore*, 948 F.2d 517, 522 (9th Cir. 1991) (holding that an inmate's ETS exposure claim was rendered moot when the inmate was transferred to a different facility); *Strader v. Blalock*, 405 F. Supp. 1155, 1159 (W.D. Va. 1975) (holding that, where an inmate who complained of prison conditions had been transferred to a different institution, his complaints were moot).

“reasonable efforts” to accommodate nonsmokers.¹⁶⁶

As to the merits of the appeal, counsel for the NDP argued that because the debate concerning the hazards of ETS is still ongoing, the Ninth Circuit’s actions were premature.¹⁶⁷ Counsel for the NDP also argued that the Ninth Circuit applied the wrong standard to ascertain cruel and unusual punishment; the test, she argued, is whether the inmate has been subjected to “inhumane conditions,” not whether the inmate has been subjected to an “unreasonable risk of serious harm.”¹⁶⁸

Counsel for McKinney, on the other hand, sought to appeal to the Court’s sense of equity and repeatedly referred to the health risks associated with ETS, particularly those identified in the EPA’s 1993 Report.¹⁶⁹ At one point during oral arguments, Justice Scalia declared that, in his view, society accepts exposure to ETS.¹⁷⁰ In response, McKinney’s counsel asserted that the question presented is not whether society accepts exposure to ETS, but rather, at what level should such exposure be tolerated by the courts.¹⁷¹

V. WOULD A BAN ON SMOKING IN PRISON CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

If *McKinney* is remanded and the district court orders the NDP to ban smoking in the prison, would this ban on smoking itself constitute cruel and unusual punishment to smokers? All of the cases that have confronted this issue have held that a ban on smoking in prison is not cruel and unusual punishment to smokers.¹⁷² In the most recent case, a group of smokers argued that a ban on smoking was cruel and unusual punishment because it caused them to suffer

166. *Helling v. McKinney*, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1993). (Accordingly, Justice White “[w]ondered if the case ought to be remanded to the Ninth Circuit under *Wilson* in light of the changed regulations.”)

167. *Id.*

168. *Id.* at 3519. (In an amicus, counsel for the federal government also argued that the Ninth Circuit had applied an incorrect deliberate indifference standard.)

169. *Id.* at 3520.

170. *Id.*

171. *Id.*

172. *Addison v. Pash*, 961 F.2d 731, 732 (8th Cir. 1992) (holding that the denial of cigarettes to an inmate did not constitute cruel and unusual punishment); *Grass v. Sargent*, 903 F.2d 1206 (8th Cir. 1990) (noting that “[t]here is no constitutional right to smoke in prison”); *Washington v. Tinsley*, Nos. H-92-2039, H-92-2045, 1992 U.S. Dist. LEXIS 19776, at *5 (S.D. Tex. Dec. 16, 1992) (holding that a ban on smoking in prison is constitutional); *Mayes v. Hennessy*, No. C-92-1459-JPV, 1992 U.S. Dist. LEXIS 8560, at *3 (N.D. Cal. May 29, 1992) (holding that a ban on smoking does not offend the Eighth Amendment); *Tinsley v. Vaughn*, No. 90-0113, 1991 U.S. Dist. LEXIS 7364, at *10 (E.D. Pa. May 29, 1991) (holding that no cognizable harm was caused by the prison’s ban on smoking).

nicotine withdrawal, restlessness, irritability, depression, and an increase or decrease in appetite.¹⁷³ However, the district court held that a ban on smoking is at most a discomfort and dismissed the smokers' Eighth Amendment claim.¹⁷⁴ Interestingly, in response to the smokers' argument that the ban on smoking transgressed society's standards of decency, the court questioned whether "a deliberate, reasonable society [would] conclude that smoking ought to be allowed in public buildings in those cases where the non-employee occupants were there involuntarily."¹⁷⁵

VI. *McKinney v. Anderson* SHOULD BE AFFIRMED

The Ninth Circuit's decision in *McKinney v. Anderson*¹⁷⁶ is well-grounded in law and fact and thus should be affirmed on its own record. A number of courts, however, have refused to follow *McKinney*.¹⁷⁷ These courts have offered two reasons for rejecting *McKinney*: first, that society's standards of decency have not yet evolved to a point where exposure to ETS is considered cruel and unusual punishment; and second, that *McKinney* is out of line with Eighth Amendment authority.¹⁷⁸ Neither of these arguments is persuasive today.

First, two federal agencies have concluded that exposure to ETS, especially in concentrated forms, kills more Americans than just about any other hazardous substance.¹⁷⁹ The EPA equates ETS with arsenic, asbestos, and benzene—three known killers¹⁸⁰—yet many courts have dismissed ETS exposure cases as frivolous.¹⁸¹ With the addition of the 1993 EPA Report, overwhelming evidence exists that ETS kills and maims thousands of nonsmokers a year.¹⁸² Thus, the debate is over.

Second, for years, courts have routinely held that exposure to asbestos,¹⁸³ loud noise, contaminated food, or even polluted water may constitute cruel and

173. *Washington v. Tinsley*, Nos. H-92-2039, H-92-2045, 1992 U.S. Dist. Lexis 19776, at *6 (S.D. Tex. Dec. 16, 1992).

174. *Id.* at *7.

175. *Id.* at *6.

176. *McKinney v. Anderson*, 924 F.2d 1500 (4th Cir. 1991).

177. *See, e.g., Steading v. Thompson*, 941 F.2d 498, 499 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Murphy v. Dowd*, 975 F.2d 435, 437 (8th Cir. 1992).

178. *See, e.g., Clemmons v. Bohannon*, 956 F.2d 1523, 1528-30 (10th Cir. 1992) (en banc).

179. *See* 1993 EPA REPORT, *supra* note 11 and 1986 SURGEON GENERAL REPORT, *supra* note 26.

180. *See* 1993 EPA REPORT, *supra* note 11.

181. *See, e.g., Steele v. Trigg*, No. 91-1941, 1992 U.S. App. LEXIS 28955, at *7 (7th Cir. Oct. 14, 1992); *Martin v. Mason*, 1990 U.S. App. LEXIS 2172, at *2 (6th Cir. 1990).

182. *See* 1993 EPA REPORT, *supra* note 11.

183. *See supra* notes 77-78.

unusual punishment.¹⁸⁴ According to numerous studies, ETS is at least as dangerous as these substances.¹⁸⁵ Therefore, to hold that exposure to asbestos constitutes cruel and unusual punishment but that exposure to ETS does not is illogical. No sound reason remains to draw the line at ETS exposure. Accordingly, the Supreme Court should affirm *McKinney*.

VII. CONCLUSION

Approximately 53,000 nonsmokers are dying from ETS exposure each year in this country.¹⁸⁶ Millions more suffer from serious ailments due to ETS.¹⁸⁷ The persons most likely to be affected are those exposed to ETS in small offices, cars, or poorly ventilated prison cells.¹⁸⁸ Furthermore, in 1986, the Surgeon General warned that measures to protect the public from ETS are now required.¹⁸⁹ The EPA has recently renewed this warning.¹⁹⁰ Consequently, the Court must now step in and protect the public from exposure to ETS. This protection should start with the group of individuals that is arguably the most vulnerable: Inmates, such as William McKinney, who are involuntarily exposed to dangerous levels of ETS.

184. *See supra* notes 79-82.

185. *See* 1993 EPA REPORT, *supra* note 11.

186. *See* Glantz, *supra* note 3.

187. *See* 1993 EPA REPORT, *supra* note 11.

188. *Id.*

189. 1986 SURGEON GENERAL REPORT, *supra* note 26, at xi-xii.

190. *See* 1993 EPA REPORT, *supra* note 11.

