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Sensible Application of Stare Decisis or a Rewriting of the Constitution: An Examination of Helling V. Mckinney

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SENSIBLE APPLICATION OF STARE DECISIS OR A REWRITING OF THE CONSTITUTION: AN EXAMINATION OF *HELLING V. MCKINNEY*

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I. INTRODUCTION

In *Helling v. McKinney*,[1] the Supreme Court held that compelled exposure to environmental tobacco smoke ("ETS") may constitute cruel and unusual punishment in violation of the Eight Amendment.[2] In that case, the Court upheld an inmate's action in which he alleged that prison officials had, with deliberate indifference, "exposed him to levels of ETS that pose[d] an unreasonable risk of serious damage to his future health."[3] Critics of the decision, including the Court's own dissenters, have charged the Court with expanding the Eighth Amendment "beyond all bounds of history and precedent."[4] Justice Thomas, who a year earlier had dissented to the extension of Eighth Amendment protection to cases in which prisoners

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1. 113 S. Ct. 2475 (1993). *Helling,* the Court's first ETS decision, may be the catalyst to a profusion of "passive smoking" litigation. *See, e.g., Georgia Court Says Secondhand Smoke Can Be Battery,* 31 LIABILITY WEEK 8 (1993) (reporting that Georgia Court of Appeals upheld employee's right to sue fellow employee for battery caused by ETS).

2. Environmental tobacco smoke 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 Workingplace: Health Hazards of Secondhand Smoke,* 27 TRIAL 37 (June 1991).

3. 113 S. Ct. at 2481.

4. 113 S. Ct. at 2482 (Thomas, J., dissenting) (quoting Hudson v. McMillian, 503 U.S. 1 (1992)).

suffered only minor injuries,[5] claimed that in *Helling* the Court had stretched the Eighth Amendment to its "outer limits" by extending it to cover cases in which the plaintiffs suffered no injury at all.[6] Justice Thomas, with whom Justice Scalia joined, argued that the Eighth Amendment should be limited to cases involving "actual, serious injuries."[7]

Contrary to the claims made by the dissenters in *Helling*, the Court's extension of Eighth Amendment protection to ETS exposure is entirely consistent with the history and precedent of the Eighth Amendment, especially when considered in light of new medical evidence linking ETS to several fatal diseases.[8] It is well-settled law that the relationship of inmates to prison officials is one of entrustment.[9] Prison officials are bound to protect inmates not only from physical harm, but also to provide them with safe living conditions.[10] Compelling prisoners to live in hazardous environments, such as smoke-filled cells, is as dangerous, if not cruel and unusual, as many of the punishments envisioned by the framers of the Constitution. In the last twenty years, federal courts have repeatedly held that exposing inmates to substances or conditions less dangerous than ETS constitutes cruel and unusual punishment. There is no legal or medical reason to draw the line at ETS.

This is especially true in light of recent medical evidence which tends to prove that Horace Greeley was prophetic when he defined a cigar as "a fire at one end and a fool at the other."[11] In the last ten years, studies have unequivocally linked ETS to lung cancer, heart disease and other fatal ailments in nonsmokers.[12] These health

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

6. 113 S. Ct. at 2485.

7. *Id.*

8. U.S. CONST. amend. VIII. The Eighth Amendment is applicable to the states by virtue of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 660 (1962).

9. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) ("When the state takes a person into 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 104 (*quoting* Spicer v. Williamson, 132 S.E.2d 291 (1926)).

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

11. McCrocklin v. Employment Dev. Dep't, 205 Cal. Rptr. 156, 158 (1984). McCrocklin was given unemployment benefits.

12. The medical community began to acknowledge the dangers ETS posed to nonsmokers in the late 1970s. *See infra* note 19 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 (1976) (nonsmoker granted injunction requiring employer to restrict smoking to nonwork areas); *see also* Bradley M. Soos, Note, *Adding Smoke to the Cloud of Tobacco*

risks were recently confirmed by the Environmental Protection Agency ("EPA").[13] This report eliminates any doubt that ETS is a substance at least as dangerous as many which have already been found to constitute cruel and unusual punishment.

Section I of this article explores the medical evidence linking ETS to lung cancer, heart disease and certain other health risks in nonsmokers. Section II 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 III analyzes the decision in *Helling v. McKinney*. Section IV questions whether a judicial ban on smoking would itself constitute cruel and unusual punishment to smokers. Finally, Section V illustrates that the Supreme Court's decision in *Helling* is consistent with Eighth Amendment history and precedent.

II. EXPOSURE TO ETS CAUSES DEBILITATING AND TERMINAL DISEASES

The health risks associated with the direct ingestion of tobacco smoke were initially acknowledged in the Surgeon General's Report of 1964.[14] That report suggested a possible link between smoking cigarettes and lung cancer. As a result of the 1964 Report, Congress enacted the Cigarette Labeling and Advertising Act which mandated that the following warning be placed on all cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[15] Since 1965, Congress has twice amended the Cigarette Labeling and Advertising Act to strengthen the warnings concerning cigarette smoking.[16]

Litigation — A New Plaintiff: The Involuntary Smoker, 23 VAL. U. L. REV. 111 (1988).

13. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) (*hereinafter* EPA REPORT). *See also* Hugh Davies, *U.S. Braced for a Rash of Legal Claims*, THE DAILY TELEGRAPH, Jan. 28, 1993, at 2.

14. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING, REPORT OF THE SURGEON GENERAL 30-37 (1964).

15. 15 U.S.C. § 1333 (Supp. 1993).

16. 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.

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.[17] 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."[18]

The breakthrough came in 1986 when the Surgeon General released a report entitled "The Health Consequences of Involuntary Smoking."[19] 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."[20] 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.[21]

The Surgeon General, indeed, noted that some studies indicate that ETS may be more carcinogenic than the tobacco smoke directly

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

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

18. 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 began to document the health risks ETS posed to nonsmokers. *See, e.g.*, Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan,* 282 BRIT. MED. J. 183 (1981); Herman F. Froeb & James R. White, *Small Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke,* 302 NEW ENG. J. MED. 720 (1980); Ira B. Tager, Scott T. Weiss, Bernard Rosner & Frank E. Speizer, *Effect of Parental Cigarette Smoking on the Pulmonary Function of Children,* 110 AM. J. EPID. 15 (1979).

19. 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* SURGEON GENERAL REPORT).

20. *Id.*

21. *Id.* at 7.

inhaled by smokers.[22]

The 1986 Surgeon General Report is not without its critics.[23] The tobacco industry flatly denies that ETS is harmful.[24] Concerning these critics, 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 be to protect the nonsmoker from environmental tobacco smoke.[25]

Studies issued since 1986 have shown that ETS kills more than 53,000 Americans each year.[26] About 3,700 of these deaths are the result of lung cancer; most of the rest are caused by heart disease.[27] The studies also show that a burning cigarette fills the air with more than 4,000 chemicals, 43 of which are known carcinogens.[28]

On January 7, 1993, the EPA released the latest study documenting the health hazards of ETS.[29] The Report classifies ETS as a "Group A" carcinogen, rating it along side of benzene and asbestos.[30] The EPA estimates that ETS causes more than 3,000 lung

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

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

24. Antonia C. Novello, *Health Hazards of Cigarette Use,* 28 TRIAL 46 (Mar. 1992). In fact, the tobacco industry continues to deny that the direct ingestion of tobacco smoke poses health risks. Anna Quindlen, *Public & Private; The Smoke Bomb,* NEW YORK TIMES, Jan. 15, 1994, at 21.

25. SURGEON GENERAL REPORT, *supra* note 19, at xi-xii.

26. *See* Glantz & Daynard, *supra* note 2 and authorities cited therein.

27. Novello, *supra* note 24, at 46.

28. Glantz & Daynard, *supra* note 2 at 37.

29. EPA REPORT, *supra* note 13.

30. *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 1986a) 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

cancer deaths per year in nonsmokers.[31] That means that one-fifth of all lung cancer deaths caused by factors other than direct ingestion of tobacco smoke are due to ETS.[32] This is a risk of one in 1,000 — higher than that of almost any chemical the EPA regulates.[33] The spouses of people who smoke face an even higher lung cancer risk: two in 1,000. The EPA also reported that exposure to concentrated ETS, such as in cars or small offices, is especially dangerous.[34]

The 1993 EPA Report confirms the deleterious effects ETS has on the children of smokers. The agency blamed ETS for 300,000 cases of bronchitis and pneumonia and other lower respiratory infections in children under eighteen months of age.[35] Up to one million children with asthma suffered worse symptoms as a result of other people's smoking.[36] The Report also linked ETS to ear infections in infants.[37]

The 1993 EPA Report has renewed calls for bans on smoking in public buildings.[38] It has also renewed criticism from the tobacco industry.[39] The tobacco industry contends that the results are premature, that more testing should be done and that its tests have not shown any adverse effects of ETS on nonsmokers.[40] These are the same criticisms the Surgeon General rejected in 1986.[41]

The medical evidence linking ETS to lung cancer, heart disease and other fatal ailments is now overwhelming. It is clear that expo-

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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, 1-3 (citations omitted).

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

32. *Id.* at 1-11.

33. *Id.*

34. *Id.* at 1-6 - 1-16.

35. *Id.* at 1-1.

36. *Id.*

37. *Id.* at 1-5. 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.

38. John F. Harris, *New Health Concerns Put Smoking Back on Va. Agenda,* THE WASHINGTON POST, Jan. 31, 1993, at B1; *Environment Watch: Healthier Malls,* LOS ANGELES TIMES, Jan. 30, 1993, at B7.

39. 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.

40. *Id.*

41. SURGEON GENERAL REPORT, *supra* note 19.

sure to ETS is as dangerous as exposure to many of the substances that courts have held is cruel and unusual, such as asbestos and fire smoke.

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

The Eighth Amendment proscribes "punishments which, although not physically barbarous, involve the unnecessary and wanton infliction of pain."[42] "Among 'unnecessary and wanton' inflictions of pain are those that are totally without penological justification."[43] Although there was a time when constitutional protections were not afforded to prisoners,[44] it is beyond question today that individuals convicted of crimes retain certain constitutional rights.[45] One of the rights not "checked" at the prison door is the right to be free from cruel and unusual punishment.[46]

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

A prisoner's conditions of confinement may be cruel and unusual punishment if these conditions are not part of the penalty that "criminal offenders pay for their offenses against society."[47] An Eighth

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42. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (permanent double-celling of inmates is not cruel and unusual punishment in violation of Eighth Amendment; to the extent such conditions are harsh, they are part of the penalty that criminals pay for their offenses against society).

43. *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.

44. Sostre v. Preiser, 519 F.2d 763, 764 (2d Cir. 1975) "prison inmate characterized as 'a slave of the states.'"

45. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

46. 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 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.* Even though some inmates had infectious diseases like hepatitis and venereal disease, "mattresses were removed and jumbled together each morning, then returned to the cells at random each night." *Id.* at 682-83. Prisoners in isolation were given less than 1,000 calories per day; their meals were mainly made up of four-inch squares of "grue," a substance consisted of "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.

47. Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Rhodes v.

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 mature society."[48] Whether a practice violates the "evolving standards of decency" is not determined by each judge's subjective views of society's current standards. Rather, standards of decency are determined by objective factors to the maximum possible extent.[49] These objective factors include "current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners."[50] Society's evolving standards of decency are also ascertained by examining statutes and regulations enacted by governmental bodies.[51]

In cases involving prison conditions, an Eighth Amendment claim has two parts: an objective component and a subjective component.[52] The objective component is established if the deprivation is sufficiently serious. The subjective component is met if the defendants acted with deliberate indifference to the deprivation.[53] 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 health and that the prison officials were deliberately indifferent to the problem.[54]

B. Prison Conditions Which 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."[55] It has long been recognized that conditions of confinement that threaten an inmates health and safety are unconstitutional.[56] In the last few years, the Eighth

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Chapman, 452 U.S. at 347).

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

49. McKinney v. Anderson, 924 F.2d at 1500, 1504 (9th Cir. 1990).

50. Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979).

51. Avery v. Powell, 695 F. Supp. 632, 639 (D.N.H. 1988) (inmate exposed to ETS stated a claim for relief under the Eighth Amendment).

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

53. *Id.* 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 that a reasonable official would understand that what he is doing was violating that right." Murphy v. Dowd, 975 F.2d 435, 436 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1310 (1993). For an insightful analysis of qualified immunity, *see* 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOV'T CIV. RIGHTS LAW § 1.36 (1991).

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

55. PALMER, *supra* note 10, at 240.

56. *See, e.g.,* Hoptowit v. Spellman, 753 F.2d 779, 783-84 (9th Cir. 1985)

Amendment has been applied to a variety of situations relating to the maintenance of a prison inmate's physical well-being.[57] The decisions in this area reflect a well-reasoned principle: While "the Constitution does not mandate that prisons be comfortable,"[58] the state must provide inmates with a "healthy habilitative environment."[59]

"Exposing a prisoner to an unreasonable risk of a debilitating or terminal disease does indeed offend the evolving standards of decency."[60] 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 penitentiary."[61] Inadequate ventilation, especially in small prison cells, "results in excessive odors, 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."[62] As a result, numerous courts have found that inadequate ventilation, though not fatal, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.[63] It is also cruel

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(housing inmates in units with inadequate ventilation is unconstitutional).

57. *See, e.g., Hoptowit,* 753 F.2d at 783-84 (lack of ventilation, inadequate lighting, vermin infestation, substandard fire prevention and safety hazards in prison violated minimum requirements of Eighth Amendment); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc) (overcrowding, extreme heat, unsanitary conditions, poor diet and exposure to persons contagiously ill constitutes cruel and unusual punishment), *overruled in part on other grounds by,* International Woodworkers of Am. 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).

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

59. 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)).

60. *McKinney,* 924 F.2d at 1505.

61. *Hoptowit,* 753 F.2d at 784.

62. *Ramos,* 639 F.2d at 569 (violation of inmate's Eighth Amendment rights occurred with regard to inadequate shelter and sanitation).

63. Whisenant v. Hutchinson, No. 90-6372, 1991 U.S. App. LEXIS 622 (4th Cir. Jan. 17, 1991) (inadequate ventilation may constitute cruel and unusual punishment); *Hoptowit,* 753 F.2d at 784 (lack of ventilation and air flow violates Eighth Amendment); *Ramos,* 639 F.2d at 569 (inadequate ventilation, as part of overall dangerous condition of prison, was cruel and unusual); *Spain,* 600 F.2d at 199 (denial of fresh air constitutes cruel and unusual punishment); Martinez v. Chavez, 574 F.2d 1043, 1046 (10th Cir. 1978) (suffocating jail conditions offend "evolving standards of decency that mark the progress of a maturing society");

and unusual punishment to confine a person to an unlighted, windowless cell for an extended period of time.[64] Likewise, confinement in an inadequately heated cell may violate the Eighth Amendment.[65]

2. Exposure to Asbestos

Exposing an inmate to asbestos may also constitute cruel and unusual punishment, if done knowingly or with reckless disregard.[66] The EPA classifies both asbestos and ETS as "Group A" carcinogens.[67] Accordingly, there is 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, it violates the Eighth Amendment to intentionally or with deliberate indifference expose inmates to substances such as smoke from fires,[68] contaminated food,[69] polluted water,[70] or even

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Kirby v. Blackledge, 530 F.2d 583, 587 (4th Cir. 1976) (inmate's complaint of inadequate heating and ventilation, inter alia, stated cause of action for cruel and unusual punishment).

64. *See, e.g.*, McCord v. Maggio, 927 F.2d 844, 846-47 (5th Cir. 1991) (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) (confining inmate to cell with inadequate ventilation and lighting may constitute cruel and unusual punishment).

65. *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1305 (5th Cir. 1974) (confinement in the "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) (inmate's claim that he was confined to cell without heat stated 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).

66. *See, e.g.*, Powell v. Lennon, 914 F.2d 1459, 1463-64 (11th Cir. 1990) (inmate's claim that he was exposed to asbestos stated cause of action under the Eighth Amendment); Arnold v. Lane, No. 91-C-5464, 1992 U.S. Dist. LEXIS 9513 (N.D. Ill. June 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) (litigious inmate's claim that exposure to asbestos constituted cruel and unusual punishment was dismissed); Rabb Ra Chaka v. Lane, No. 88-C-4204, 1989 U.S. Dist. LEXIS 2015 (N.D. Ill. Feb. 28, 1989) (inmate failed to state a claim of cruel and unusual punishment).

67. *See* EPA REPORT, *supra* note 13, at 1-4.

68. *See, e.g.*, Burrell v. Fairman, No. 88-C-7745, 1992 U.S. Dist. LEXIS 13013, at *44 (N.D. Ill. Aug. 26, 1992) (knowingly exposing inmate to fire smoke may constitute cruel and unusual punishment); Husband v. Foulkes, No.

loud noise.[71] Similarly, the use of mace[72] or tear gas[73] on inmates who are incapable of harming others constitutes cruel and unusual punishment. In addition, repeated exposure to contagious diseases may violate the Eighth Amendment if the prison officials acted with deliberate indifference to the inmate's serious medical needs.[74]

For years courts have held that exposing inmates to dangerous substances violates the Eighth Amendment.[75] In many of these cases, the substances were less toxic than ETS. This precedent is entirely consistent with the Court's decision in *Helling*.

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 tobacco smoke. In *Franklin v. Oregon State Welfare Division*, 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.[76] The district court dismissed

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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) (deliberately exposing inmates to noxious smoke fumes created when other inmates burned blankets constitutes cruel and unusual punishment).

69. *Murphy*, 381 F. Supp. at 1261 (serving of contaminated food violates the Eighth Amendment); Black v. Brown, 513 F.2d 652, 655-56 (7th Cir. 1975) (rust in food caused by meals being pushed through rusty bars is cruel and unusual punishment).

70. Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989); *but see*, Jones v. Owens, No. 89-9178, 1990 U.S. Dist. LEXIS 77, at *3 (E.D. Pa. Jan. 4, 1990).

71. *See* Nilsson v. Coughlin, 670 F. Supp. 1186, 1190 (S.D.N.Y. 1987) (complaint of constant noise at physically harmful level states claim under Eighth Amendment).

72. *See, e.g.*, Soto v. Cady, 566 F. Supp. 773, 778-79 (E.D. Wis. 1983) (it is cruel and unusual punishment to use mace on inmates incapable of causing harm to others); Battle v. Anderson, 376 F. Supp. 402, 423 (E.D. Okla. 1974).

73. *See, e.g., Spain*, 600 F.2d at 196 (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) ("no reasonable man would say that [the use of tear gas] amounted to cruel and unusual punishment").

74. *Jones*, 636 F.2d at 1374 ("The constant and habitual exposure of convicted prisoners to persons who are contagiously ill is also reprobated as cruel and unusual punishment."). 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).

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

76. 662 F.2d 1337 (9th Cir. 1981).

the inmate's claim for failure to allege a deprivation of a constitutional right.[77] 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."[78]

Six years later in *Beeson v. Johnson*, 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.[79] 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.[80]

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.[81] Before *Helling*, however, the law was not so settled for those inmates who do not suffer from pre-existing medical conditions.

D. ETS Exposure Cases Prior to McKinney

The first constitutional challenge by an inmate (not suffering from a pre-existing medical condition) to compelled exposure to ETS appeared in 1985.[82] This initial attack was unsuccessful.[83] Not long

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77. *Id.* at 1347 (as an alternative ground for dismissal the court held that the claim was frivolous).

78. *Id.* The Ninth Circuit remanded the case to the district court, stating "[i]t is simply too early in the judicial process to dismiss complaints such as these that arguably raise claims that are not wholly insubstantial." *Id.*

79. 668 F. Supp. 498 (E.D.N.C. 1987), *rev'd without op.*, 894 F.2d 401 (4th Cir. 1990).

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

81. *See, e.g.*, Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991), ("Prisoners 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) (court dismissed ETS exposure claim of inmate suffering from cardiovascular condition).

82. Rayl v. Maschner, No. 84-3286, slip. op. (D. Kan. July 22, 1985) (celling nonsmoking inmate with smokers does not constitute cruel and unusual

thereafter, however, cases started to spring up across the nation. The leading cases are analyzed below.

1. *Avery v. Powell*

Prior to *McKinney*, the seminal case involving compelled exposure to ETS was *Avery v. Powell*.[84] 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.[85] Avery claimed that his continuous exposure to ETS as a condition of confinement violated the Eighth Amendment's ban on cruel and unusual punishment.[86] Avery sought an injunction requiring the separation of smokers and nonsmokers in the prison as well as monetary damages.[87]

The first issue addressed by the *Avery* court 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."[88] The court quickly rejected this argument, observing that the Eighth Amendment prohibits more than "physically barbarous punishments," it prevents penalties that "transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[89]

The NHSP officials then argued that "exposure to ETS is at most a discomfort and that mere discomfort is not violative of the Eighth Amendment."[90] Avery responded with the argument 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 known

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punishment); *see also,* Lee v. Carlson, 645 F. Supp. 1430, 1438 (S.D.N.Y. 1986) (inmate alleged, *inter alia,* that prison officials' failure to provide tobacco-free environment violated Constitution), *aff'd,* 812 F.2d 712 (2d Cir. 1987).

83. *Rayl, supra* note 82.

84. 695 F. Supp. 632 (D.N.H. 1988).

85. *Id.* at 633. *See also* Robin Terry, Note, *Constitutional Law — Prisoners' Rights — Recognition that Involuntary Exposure to Environmental Tobacco Smoke May Constitute Cruel and Unusual Punishment* 11 CAMPBELL L. REV. 363 (1989).

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

87. *Id.* at 633-34.

88. *Id.* at 636.

89. *Id.* (quoting *Hutto,* 437 U.S. at 685).

90. *Avery,* 695 F. Supp. at 636.

safe level of exposure.[91]

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.[92] The court agreed with Avery, holding that exposure to ETS is more than discomforting and, under the right circumstances, may be punishment under the Eighth Amendment.[93]

Deciding that exposure to ETS may constitute a punishment did not end the 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.[94] In so doing, the court found that "forty-five states and the District of Columbia had enacted legislation regulating tobacco use."[95] The court, on the basis of these legislative enactments and the scientific authority linking ETS to fatal ailments in nonsmokers, concluded that exposure to ETS poses a significant danger to the health of nonsmokers. Accordingly, the court upheld Avery's claim for cruel and unusual punishment under the Eighth Amendment.[96]

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91. *Id.*

92. *See* SURGEON GENERAL REPORT, *supra* note 19, at 8-16.

93. *Avery*, 695 F. Supp. at 639.

94. *Id.* 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.

95. *Avery*, 695 F. Supp. at 640. For a listing of states which 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. 51 Fed. Reg. 44,258 (1986).

96. *Avery*, 695 F. Supp. at 640. The court upheld Avery's claim for injunctive relief, but dismissed his claim for monetary damages on the ground that the

2. *Gorman v. Moody*

While incarcerated at Westville (Indiana) Correctional Center ("WCC"), James Gorman, a lifelong nonsmoker, had nine cellmates, eight of whom smoked.[97] 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."[98] Gorman sought injunctive relief, compensatory and punitive damages.[99]

In an attempt to ascertain society's evolving standards of decency, the 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."[100] 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.[101] As a result, the court dismissed Gorman's Eighth Amendment claim.[102]

NHSP officials were entitled to qualified immunity. *Id.* at 642.

97. Gorman v. Moody, 710 F. Supp. 1256, 1258 (N.D. Ind. 1989). *Accord Steading,* 941 F.2d at 500 (Seventh Circuit dismissed inmate's lawsuit on the ground that exposure to ETS does not constitute "punishment" for purposes of Eighth Amendment); Steele v. Trigg, No. 91-1941, 1992 U.S. App. LEXIS 28955, at *5 (7th Cir. Oct. 14, 1992).

98. *Gorman,* 710 F. Supp. at 1258. According to the *Gorman* court, its research had revealed only one reported case (*Avery*) where a prisoner who did not have a pre-existing medical condition sued prison officials for compelled exposure to ETS. *Id.* The *Gorman* court refused to follow *Avery. Id.* at 1259.

99. *Id.* at 1258. The court summarily dismissed Gorman's request for injunctive relief on the ground that it did not present "an actual case or controversy." *Id.* At the time of decision, Gorman had been released from prison and did not, according to the court, have "a personal stake in the outcome" of injunctive relief. *Id.*

100. *Id.* at 1259. The court noted, however, that "lawful incarceration brings about the necessary withdrawal of privileges enjoyed by society at large. Although there is no doubt that prisoners must be provided with the basic human needs and [that] 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.* (quoting *Rhodes,* 452 U.S. at 337 and Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988)).

101. *Gorman,* 710 F. Supp. at 1262 (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").

102. *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)(19). *Id.* The court disagreed, concluding that the "Clean Indoor Air Act" did not contain the mandatory language necessary to create a liberty interest. *Gorman,* 710 F. Supp.

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 officials . . . .[103]

It may be true that society's standards of decency were not fixed in 1989, but that is not the case today. The 1993 EPA Report eradicates any doubts society may have had regarding exposure to ETS.[104]

3. *Wilson v. Lynaugh*

In *Wilson v. Lynaugh*, an inmate claimed that he suffered impaired breathing and loss of eyesight due to constant exposure to ETS.[105] The district court dismissed the inmate's civil rights action.[106] 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.[107]

4. *Caldwell v. Quinlan*

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.[108] Unlike many of its state counterparts, the Federal Bureau of Prisons had not been indifferent to nonsmoking inmates. Federal regulations were in place authorizing (but not requiring) wardens to establish no-smoking areas,[109] and, in

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at 1263.

103. *Gorman,* 710 F. Supp. at 1262.

104. EPA REPORT, *supra* note 13.

105. 878 F.2d 846, 849 (5th Cir. 1989), *cert. denied,* 493 U.S. 969 (1989).

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

107. *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.* at 847.

108. Caldwell v. Quinlan, 729 F. Supp. 4, 5-6 (D.D.C. 1990), *aff'd,* 923 F.2d 200 (D.C. Cir. 1990), *cert. denied,* 112 S. Ct. 295 (1991).

109. *See* 28 C.F.R. § 551.160 (1980), which provides:

fact, the Warden at Marion had established a number of no-smoking areas throughout the prison.[110]

In light of the accommodation of nonsmokers made by the Federal Bureau of Prisons, the court dismissed Caldwell's Eighth Amendment claim.[111] 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 and decency.'"[112]

5. *Smith v. Brown*

Three inmates at the Cotton Correctional Facility (Michigan) filed a class action on behalf of all nonsmoking Michigan prisoners alleging that officials of the Michigan Department of Corrections deliberately exposed prisoners to the health risks associated with the

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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.

110. *Caldwell,* 729 F. Supp. at 5-6 (the conference rooms, classrooms, elevators and the library were designated as nonsmoking areas and the dining room had designated nonsmoking areas).

111. *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. Oklahoma, 716 F.2d 1350, 1351 (10th Cir. 1983)).

112. *Caldwell,* 729 F. Supp. at 6 (quoting *Estelle,* 429 U.S. at 102).

inhalation of ETS.[113] The district court dismissed plaintiffs' civil rights complaint.[114] The Sixth Circuit, following *McKinney*, reversed the district court and remanded the case for further proceedings.[115] The Sixth Circuit concluded that "under the liberal standard of review for dismissals under Federal Rule of Civil Procedure 12(b)(6), it cannot be said that the appellants undoubtedly can prove no set of facts in support of their claim which would entitle them to relief."[116]

6. *Clemmons v. Bohannon*

In *Clemmons v. Bohannon*, 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.[117] To establish an Eighth Amendment claim, according to the Tenth Circuit, a plaintiff must show that he has a "serious medical need" to which the defendants were deliberately indifferent.[118] With respect to the objective component — a serious medical need — the appeals court concluded that the Eighth Amendment does not protect against "possible latent harms," like those posed by ETS.[119] 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."[120] Remarking that the "role of this Court is

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

114. *Id.* at 3-4.

115. *Id.* at 6-7.

116. *Id.* at 3. 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*, 924 F.2d at 1508-09.)

117. Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc).

118. *Id.*

119. *Id.* at 1527. 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).

120. *Id.* at 1528. Judge Seymour also criticized the majority's view regarding deliberate indifference. Deliberate indifference, according to Judge Seymour, does not require a showing that defendants acted "for the very purpose of causing

not to spearhead and define society's evolving 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.[121]

Before *Helling*, the Sixth and Ninth Circuits had concluded that society's standards of decency had evolved to a point that exposure to ETS may constitute cruel and unusual punishment.[122] The Fifth, Seventh and Tenth Circuits disagreed, but each noted that society no longer viewed public exposure to ETS the way it did twenty years ago. Consequently, the issue is one of timing: Has society's standards of decency evolved to a point that exposure to ETS constitutes cruel and unusual punishment? The Supreme Court answered this question affirmatively in *Helling*.

IV. HELLING V. MCKINNEY

In *Helling*, a pro se inmate ("McKinney") brought a civil rights action against officials of the Nevada Department of Prisons.[123] McKinney was confined in a poorly-ventilated, six-foot by eight-foot cell with a roommate that smoked five packs of cigarettes per day.[124] 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.[125] As a result of these conditions, McKinney was constantly exposed to ETS.[126]

In his suit, McKinney claimed that compelled exposure to ETS constitutes cruel and unusual punishment.[127]

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harm," as the majority suggests. *Id.* at 1533 (quoting *Wilson,* 111 S. Ct. at 2326). 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,* 956 F.2d at 1533 (Seymour, J., dissenting).

121. *Id.* at 1529. Judge Seymour, dissenting, 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).

122. Several ETS opinion have been issued since the Court decided Helling v. McKinney. *See, e.g.,* Wilson v. Hambrick, No. 92-6129, 1993 U.S. App. LEXIS 25454 (6th Cir. Sept. 30, 1993) (reversing dismissal of inmate's action); Gaster v. Campbell, No. 93-6605, 1993 U.S. App. LEXIS 22433 (4th Cir. Sep. 2, 1993) (vacating district court's dismissal of inmate's suit); Smith v. Scott, No. 93-1333, 1993 U.S. App. LEXIS 20796 (6th Cir. Aug. 16, 1993) (reversing dismissal of inmates' Eighth Amendment action).

123. *McKinney,* 924 F.2d at 1502.

124. *Id.* at 1507.

125. *Id.* (the prison only prohibited smoking in the infirmary and the culinary).

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

127. *Id.* at 1500. As a separate civil rights claim, McKinney alleged that the

At the district court, the magistrate judge found that compelled exposure to ETS does not, as a matter of law, constitute cruel and unusual punishment.[128] 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 exposure to ETS.[129]

The Ninth Circuit, reversing in part the district court's ruling, 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."[130] The court noted, however, that McKinney did not suffer any pre-existing conditions that were aggravated by ETS. The court was therefore confronted with an issue of first impression in the Ninth Circuit: whether an inmate who is 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.[131]

The Ninth Circuit, choosing to confront the issue directly, held that compelled exposure to ETS may constitute cruel and unusual punishment.[132] The court declared 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."[133] The court based this conclusion on a growing body of medical literature documenting the adverse health effects caused by ETS and on the fact that 45 states had banned public smoking in one form or another.[134]

"prison officials were deliberately indifferent to his serious existing medical symptoms, which he asserts were caused by exposure to ETS." *McKinney,* 924 F.2d at 1502.

McKinney allegedly suffered "nosebleeds, headaches, chest pains and loss of energy" as a result of such exposure. McKinney sought damages and injunctive relief to remedy the alleged cruel and unusual punishment. *Id.*

128. *Id.* at 1503.

129. *Id.*

130. *Id.* at 1504 (quoting *Franklin,* 662 F.2d at 1346-47 (housing inmate suffering from throat cancer with a smoker may constitute cruel and unusual punishment)).

131. *Id.* at 1503. 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 does not suffer from pre-existing conditions. Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990), *op. vacated,* 956 F.2d 1523 (10th Cir. 1992) (en banc); Avery v. Powell, 695 F. Supp. 632 (D.N.H. 1988).

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

133. *Id.*

134. *Id.* at 1508-09.

The appeals court, therefore, concluded that under the right circumstances, prolonged involuntary exposure to ETS may satisfy the objective component of an Eighth Amendment claim.[135] As to the subjective component, the Ninth Circuit found that McKinney had been precluded from presenting evidence of the prison officials' deliberate indifference to his ETS exposure. Accordingly, the appeals court remanded the case to the district court to allow McKinney to present evidence regarding the level and degree of his exposure to ETS, whether that degree of exposure was sufficient to create an unreasonable risk of harm to his health and whether the prison officials were deliberately indifferent to McKinney's exposure to ETS.[136]

On October 15, 1991, the Supreme Court granted defendants' petition for writ of certiorari, vacated the judgment and remanded the case to the Ninth Circuit for further consideration.[137] On remand, the Ninth Circuit reinstated its earlier judgment.[138] On June 29, 1992, the Supreme Court again granted defendants' petition for writ of certiorari.[139]

On June 18, 1993, the Supreme Court affirmed the Ninth Circuit's decision in *Helling*.[140] The Court found that McKinney had stated a cause of action under the Eighth Amendment by alleging that prison officials had, with deliberate indifference, exposed him to levels of ETS that posed an unreasonable risk of serious damage to his future health.[141] Accordingly, the Court remanded the case to allow McKinney to prove his allegations, which will require

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135. *Id.*

136. *Id.* at 1509.

137. 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 v. McKinney, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1983).

138. *McKinney,* 959 F.2d at 854 (court noted that its earlier opinion was consistent with *Seiter*).

139. Helling v. McKinney, 61 U.S.L.W. 3518 (U.S. Feb. 2, 1983). On January 13, 1993, the United States Supreme Court heard oral arguments in *Helling,* at which three extra-record developments were brought to the Court's attention. First, the Court took note of the EPA's 1993 Report on the health effects of ETS. Second, counsel for the NHSP informed the court that McKinney had been transferred to a single cell away from smokers. Upon learning of the transfer, Justice O'Conner inquired whether the case was now moot. NHSP's counsel responded negatively on the basis that McKinney could be reassigned to a smoking cell. Finally, the Court learned that the NHSP had recently adopted regulations mandating no-smoking areas within the prison and pledging "reasonable efforts" on the part of NHSP officials to accommodate nonsmokers.

140. *Helling,* 113 S. Ct. at 2482.

141. *Id.* at 2481.

him to prove both the subjective and objective components of an Eighth Amendment claim.[142] With respect to the objective component, McKinney must demonstrate that he is being exposed to unreasonably high levels of ETS.[143] As for the subjective factor, McKinney must prove that prison officials deliberately ignored the possible dangers posed by his exposure to ETS.[144]

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

If officials interpret *Helling* as requiring a ban on smoking in prison, would this ban itself constitute cruel and unusual punishment to smokers? All of the cases that have confronted the issue have held that a ban on smoking in prison is not cruel and unusual punishment to smokers.[145] In one of the most recent cases, a group of smokers argued that a ban on smoking was cruel and unusual punishment because it caused them to suffer nicotine withdrawal, restlessness, irritability, depression and an increase or decrease in appetite.[146] Holding that a ban on smoking is at most a discomfort, the court dismissed the smokers' Eighth Amendment claim.[147] 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 building[s] in those cases where the non-employee occupants were there involuntarily."[148]

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142. *Id.*

143. *Id.* at 2482. The Court observed that it may be difficult for McKinney to make this showing because he had recently been transferred to a non-smoking cell. *Id.*

144. *Id.* at 2481.

145. Rodriguez v. Pearce, No. 93-35092, 1993 U.S. App. LEXIS 23385 (9th Cir. Sep. 1, 1993) (there is no constitutional right to smoke in prison); Addison v. Pash, 961 F.2d 731, 732 (8th Cir. 1992) (denial of cigarettes to inmate did not constitute cruel and unusual punishment); Grass v. Sargent, 903 F.2d 1206 (8th Cir. 1990) ("There is no constitutional right to smoke in prison"); Washington v. Tinsley, 809 F. Supp. 504, 507 (S.D. Tex. 1992) (ban on smoking in prison constitutional); Mayes v. Hennessy, No. C-92-1459-JPV, 1992 U.S. Dist. LEXIS 8560, at *3 (N.D. Cal. May 29, 1992) (ban on smoking does not offend Eighth Amendment); Tinsley v. Vaughn, No. 90-0113, 1991 U.S. Dist. LEXIS 7364, at *10 (E.D. Pa. May 29, 1991) (no cognizable harm caused by prison's ban on smoking).

146. *Washington*, 809 F. Supp. at 507.

147. *Id.*

148. *Id.*

VI. HELLING V. MCKINNEY IS CONSISTENT WITH EIGHTH AMENDMENT PRECEDENT AND HISTORY

The Supreme Court's decision in *Helling v. McKinney* is entirely consistent with years of Eighth Amendment precedent. Critics have argued that *Helling* expanded the Eighth Amendment beyond its outer limits. The two elements for this criticism are: 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 *Helling* is out of line with Eighth Amendment authority.[149] Neither of these arguments is sound.

First, two agencies of our government have concluded that exposure to ETS, especially in concentrated forms, kills more Americans than just about any other hazardous substance.[150] The EPA equates ETS with arsenic, asbestos and benzine — three known killers.[151] With the addition of the 1993 EPA Report, there is more than enough evidence to conclude that ETS kills and maims thousands of nonsmokers a year. The debate, therefore, is over.

Secondly, for years courts have routinely held that exposure to asbestos, loud noise, contaminated food or even polluted water may constitute cruel and unusual punishment. According to numerous studies, ETS is at least as dangerous as these substances.[152] To hold that exposure to asbestos constitutes cruel and unusual punishment but that exposure to ETS does not is illogical at best. There is no sound reason to draw the line at ETS exposure. Accordingly, the Supreme Court's decision in *Helling* is in line with years of Eighth Amendment authority.

VII. CONCLUSION

Approximately 50,000 nonsmokers are dying from ETS exposure each year in this country.[153] Millions more are suffering serious ailments due to ETS.[154] The persons most likely to be effected are those exposed to ETS in small offices, cars or poorly-ventilated prison cells.[155] In 1986, the Surgeon General warned that measures to

149. *See e.g., Clemmons,* 956 F.2d 1528-30.
150. *See* EPA REPORT, *supra* note 13 and SURGEON GENERAL REPORT, *supra* note 19.
151. *See* EPA REPORT, *supra* note 13 at 1-4.
152. *See* EPA REPORT, *supra* note 13.
153. *See* Glantz & Daynard, *supra* note 2.
154. *See* EPA REPORT, *supra* note 13 at 1-1, 1-4 - 1-6.
155. *Id.* at 3-22 - 3-25, 3-52.

protect the public from ETS are now required.[156] The EPA renewed this warning earlier this year.[157]

The Supreme Court has struck the first blow in the ETS battle. Protection from ETS exposure started with the group that is arguably the most vulnerable — prison inmates. With time, ETS exposure will play a vital role in cases sounding in product liability, battery, domestic relations, worker's compensation and wrongful discharge. *Helling* merely confirmed what most people already knew: tobacco smoke is dangerous to smokers and nonsmokers alike.

156. SURGEON GENERAL REPORT, *supra* note 19 at xi-xii.
157. *See* EPA REPORT, *supra* note 13.