

## NOTES

# *HELLING v. McKINNEY* AND SMOKING IN THE CELL BLOCK: CRUEL AND UNUSUAL PUNISHMENT?

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### INTRODUCTION

A continually burgeoning prison population<sup>1</sup> and horrid, dangerous conditions of confinement<sup>2</sup> have created a precarious situation in America's prisons. Adding further fire to this volatile setting are prison inmates who slowly have cast off the shackles of a tradition of political powerlessness<sup>3</sup> and demanded recognition of the fact that the incarcerated are still individuals with legal rights.<sup>4</sup>

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1. See DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1992 1 (1993) (reporting that number of prisoners under jurisdiction of federal or state correctional authorities reached record high of 883,593 in 1992 and that most facilities are operating above capacity).

2. See *Rhodes v. Chapman*, 452 U.S. 337, 355-56 (1981) (Brennan, J., concurring) (describing living conditions in two state prisons as unsanitary and dangerous); see also *id.* at 353-54 n.1 (listing states in which courts have found prison systems to have created unconstitutional conditions of confinement). In *Rhodes*, the Court observed that "no static 'test'" can determine whether prison conditions are unconstitutional. *Id.* at 346. Instead, courts must interpret the Eighth Amendment according to "the evolving standards of decency that mark the progress of a maturing society." *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

3. See *Rhodes*, 452 U.S. at 358 (Brennan, J., concurring) (stating that prisoners are "voteless, politically unpopular, and socially threatening"). *But cf.* *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting) (noting that incarceration does not completely separate prisoners from society).

4. See *Turner v. Safley*, 482 U.S. 78, 84-89 (1987) (reviewing prisoners' rights cases and stating that prison gates do not separate prisoners from protection of Constitution); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854, 859 (4th Cir. 1975) (footnote omitted) ("Subject to legitimate requirements of prison discipline and security, he [a prisoner] retains his constitutional rights to due process, to equal protection, and to protection against 'cruel and unusual punishment,' as guaranteed by the

Over the last thirty years, the Cruel and Unusual Punishments Clause of the Eighth Amendment<sup>5</sup> has become an important weapon in the prisoner's fight for constitutional protection from unhealthy and dangerous prison conditions.<sup>6</sup> The debate in prisoners' rights cases primarily has centered around the inherent tension between the demands of the United States Constitution, which does not require comfortable prisons,<sup>7</sup> and the demands of humanity, which suggest that correctional facilities maintain some standard of decent living conditions.<sup>8</sup> Despite years of controversy and litigation, the precise scope of protection that the Eighth Amendment affords to prison inmates still remains unclear.<sup>9</sup> The U.S. Supreme Court recently confronted this debate in *Helling v. McKinney*,<sup>10</sup> in which the Court attempted to clarify what constitutes cruel and unusual punishment.<sup>11</sup>

In June 1993, the Supreme Court in *Helling* held that a prisoner stated an actionable claim under the Eighth Amendment when he alleged that administrators of a prison system had, with "deliberate indifference,"<sup>12</sup> exposed him to levels of environmental tobacco

Eighth Amendment. . ."). *But see* *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (noting that constitutional rights prison inmates retain are subject to restrictions and limitations if reasonably related to legitimate penal goals); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (stating that requirements of penal institution may justify limitations on inmates' constitutional rights); *Wolff*, 418 U.S. at 555 (recognizing that lawful confinement deprives inmates of many rights and privileges of ordinary citizens). For a general discussion of the constitutional rights that prisoners retain during their period of incarceration, see Rodney L. LaGrone et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 GEO. L.J. 699, 1430-60 (1990).

5. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

6. *See infra* note 31 (noting first cases that allowed prisoners to use Cruel and Unusual Punishments Clause to challenge constitutional violations during incarceration); *see also infra* note 48 (citing increases in numbers of prisoners' rights cases). *See generally* Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 4 B.Y.U. L. REV. 857, 881 (1992) (noting that constitutional guarantees sometimes taken for granted by public have greater importance for prisoners).

7. *Rhodes*, 452 U.S. at 349; *see infra* note 42 (citing cases that support proposition that Eighth Amendment does not protect prisoners from mere discomfort or slight inconvenience).

8. *See Harris v. Fleming*, 839 F.2d 1232, 1235-36 (7th Cir. 1988) (noting that while prisoners cannot expect services and amenities of hotel, society has duty to provide inmates with constitutionally adequate living conditions); *see also Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) (noting that state has duty to provide prisoners with "healthy habitative environment") (quoting *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977), *cert. denied*, 450 U.S. 1041 (1981)).

9. *See infra* note 24 and accompanying text (describing several interpretations of Eighth Amendment).

10. 113 S. Ct. 2475 (1993).

11. *Helling v. McKinney*, 113 S. Ct. 2475, 2480-82 (1993).

12. *Id.* at 2481. The Supreme Court has interpreted the word "punishments" in the Cruel and Unusual Punishments Clause as containing an implicit intent, or state of mind, requirement. *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991). In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court, for the first time, explicitly rejected notions that mere inadvertence or

smoke (ETS)<sup>13</sup> that posed an unreasonable risk of serious damage to his future health.<sup>14</sup> This decision is a landmark in Eighth Amendment jurisprudence for several reasons. For the first time, the Court recognized that the health effects of ETS in the prison setting may constitute cruel and unusual punishment.<sup>15</sup> Furthermore, the Court ruled that the Cruel and Unusual Punishments Clause protects prisoners from both current and future harm to their health.<sup>16</sup> In doing so, the Court recognized that inmates need not wait for a tragic event to occur in order to remedy dangerous confinement conditions. Thus, *Helling* marks a significant step toward vesting prisoners with constitutional rights to safe living conditions during their incarceration.

The Court limited its potentially broad ruling, however, by requiring that prisoners establish three criteria before obtaining relief from hazardous prison conditions under the Cruel and Unusual Punishments Clause. First, a prisoner must offer proof that prison officials deliberately intended to cause the prisoner harm.<sup>17</sup> Second, the claimant must provide objective statistical and scientific data supporting the alleged risk of harm.<sup>18</sup> Finally, the prisoner must show that no individual in contemporary American society would choose to tolerate the disputed risk.<sup>19</sup>

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negligence could establish the requisite mental culpability under the Eighth Amendment. *Id.* at 105-06. Instead, the Court held that only acts or omissions sufficiently harmful to evidence a prison official's "deliberate indifference" to an inmate's serious medical needs will offend "evolving standards of decency" and therefore constitute an actionable claim under the Eighth Amendment. *Id.* at 106.

*Estelle* addressed whether the failure of prison officials to provide an inmate with adequate medical care constitutes cruel and unusual punishment. *Id.* at 104. This case was the Supreme Court's first application of the Cruel and Unusual Punishments Clause to a deprivation that was not part of the inmate's imposed sentence. *Wilson*, 111 S. Ct. at 2323. In *Wilson*, the Court held that the "deliberate indifference" standard applies to all inadequate conditions of confinement, including failure to respond to a prisoner's serious medical needs. *Id.* at 2326-27.

13. ETS is the smoke emitted from the lit end of an idling cigarette combined with the mainstream smoke exhaled from the smoker. Robin Terry, Note, 11 CAMPBELL L. REV. 363, 363 (1989). For a discussion of the chemical composition of ETS, see Lynn M. Galbraith-Wilson, *The Call for State Legislation on Environmental Tobacco Smoke in State Prisons*, 13 HAMLIN J. PUB. L. & POL'Y 335, 337-39 (1990).

14. *Helling*, 113 S. Ct. at 2481.

15. Compare *id.* (holding that prisoner states cause of action by alleging that prison officials have deliberately exposed him to unreasonably high levels of ETS) with *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc) (recognizing in pre-*Helling* decision that Supreme Court has never held that potential harm to prisoner's health from ETS exposure is serious medical need implicating Eighth Amendment).

16. *Helling*, 113 S. Ct. at 2480-81 (stating that Eighth Amendment protects prisoners from sufficiently imminent dangers).

17. *Id.* at 2482.

18. *Id.*

19. *Id.*

The *Helling* decision provides prisoners with a standard that allows them to expand the range of basic human needs to which they are constitutionally entitled. The Supreme Court has already recognized that the Eighth Amendment requires prison officials to provide inmates with basics such as food, shelter, warmth and exercise under the Eighth Amendment.<sup>20</sup> On remand, William McKinney, the respondent in *Helling*, will test the Court's new standard for condition-of-confinement cases in his attempt to persuade the district court that clean air, free of second-hand smoke, is a basic human need.<sup>21</sup> In reality, because the *Helling* standard poses several formidable obstacles that an inmate must surmount before obtaining relief from hazardous prison conditions, the standard will prove to be an impractical and inaccessible means for prisoners to broaden the scope of their protection under the Cruel and Unusual Punishments Clause.

Part I of this Note discusses the history of the standards applied to the Cruel and Unusual Punishments Clause. Part II analyzes the Supreme Court's holding and reasoning in *Helling v. McKinney*. Part III addresses the feasibility of the *Helling* standard and, in particular, suggests how prisoners may satisfy the objective component of an Eighth Amendment claim. Finally, Part IV describes the ramifications of, and offers several reactions to, the *Helling* decision.

## I. BACKGROUND

### A. *History of the Eighth Amendment*

The Eighth Amendment to the U.S. Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>22</sup> While it is generally accepted that the prohibition against cruel and unusual punishments predated the Eighth Amendment,<sup>23</sup> judges and scholars have been unable to agree

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20. *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991). See *infra* text accompanying note 70 (explaining that list of "basic human needs" set forth in *Wilson* is open for expansion or limitation).

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

22. U.S. CONST. amend. VIII. The Eighth Amendment applies to the states under the Fourteenth Amendment's Due Process Clause. *Thompson v. Oklahoma*, 487 U.S. 815, 819 n.1 (1988); see also *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (invalidating state statute deemed to violate Cruel and Unusual Punishments Clause).

23. See *Ingraham v. Wright*, 430 U.S. 651, 664-66 (1977) (discussing incorporation of Eighth Amendment into U.S. Constitution from English Bill of Rights of 1689); *Furman v. Georgia*, 408 U.S. 238, 316-40 (1972) (Marshall, J., concurring) (tracing legislative history of Eighth Amendment's ban on cruel and unusual punishments and prohibition's derivation from English law). For a discussion of the history of the Cruel and Unusual Punishments Clause, see Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

on the precise meaning of the phrase "cruel and unusual."<sup>24</sup> Consequently, judicial treatment of the Eighth Amendment's Cruel and Unusual Punishments Clause lacks uniformity and consistency,<sup>25</sup> and the definition of this clause continues to evolve.<sup>26</sup>

Nonetheless, several principles have been firmly established in Eighth Amendment law. For example, the Supreme Court has concluded that the Cruel and Unusual Punishments Clause proscribes punishments "which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime."<sup>27</sup> The Court has also held that

24. See *Stanford v. Kentucky*, 492 U.S. 361, 368-69 (1989) (determining that punishment is cruel and unusual either as kind of punishment considered cruel at time Bill of Rights was adopted or kind of punishment now considered cruel based on "evolving standards of decency"); *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986) (stating that "Eighth Amendment's ban . . . embraces at a minimum, those modes or acts of punishment considered cruel at the time the Bill of Rights was adopted"); *Solem v. Helm*, 463 U.S. 277, 290-92 (1983) (delineating three factors to determine whether punishment is cruel and unusual: gravity of offense compared to severity of sentence, sentences of similar criminals in same jurisdiction, and sentences of similar crimes in other jurisdictions). Compare *Ingraham*, 430 U.S. at 667 (stating that Cruel and Unusual Punishments Clause circumscribes criminal process and that Clause is primarily directed at method or kind of punishment) with *Inmates of Occoquan v. Barry*, 844 F.2d 828, 837 (D.C. Cir. 1988) (stating that Eighth Amendment concerns cruel, not deficient, conditions). See generally Anthony A. Avey, Note, 24 ST. MARY'S L.J. 539, 552 & n.57 (1993) (noting that divergent interpretations of Supreme Court's decisions from 1909 to 1992 have "rendered Eighth Amendment jurisprudence far from clear").

25. See *Avey*, *supra* note 24, at 552 & n.57 (comparing *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1993) with *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) to illustrate differences in standard for wantonness in prison condition cases). Compare *Wilson*, 111 S. Ct. at 2327 (stating that deprivation of "single, identifiable human need" might constitute cruel and unusual punishment) with *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (concluding that prison conditions that deprive inmates of "minimal civilized measure of life's necessities" are unconstitutional).

26. *Avey*, *supra* note 24, at 540-52. The Supreme Court has consistently adhered to the view that the Cruel and Unusual Punishments Clause is not fastened to obsolete meanings, but must progress and evolve with society's changing standards of decency and humane justice. See *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (observing that Court has interpreted Eighth Amendment in "flexible and dynamic manner"); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion) (recognizing that words of Eighth Amendment are not precise and scope of Amendment is not static); *Weems v. United States*, 217 U.S. 349, 373 (1910) (stating that constitutional principles are vital only if they can be applied to problems beyond those for which they were created). See generally Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 301-10 (1989) (analyzing evolution of Eighth Amendment jurisprudence).

27. *Rhodes*, 452 U.S. at 346 (citations omitted); see also *Hudson v. McMillian*, 112 S. Ct. 995, 998-99 (1992) (creating two standards to determine what is subjectively necessary to establish "unnecessary and wanton infliction of pain": (1) deliberate indifference in prison condition cases and (2) malicious and sadistic intent in excessive force context). But see *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (defining punishment as "excessive" and unconstitutional, "if it 'makes no measurable contribution to the goals of punishment' and thus merely amounts to purposeless and needless infliction of pain and suffering). The Court has not limited the Eighth Amendment's application to "barbarous" methods generally outlawed at the time the Bill of Rights was adopted. *Gregg*, 428 U.S. at 171; see also *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976) (listing recent holdings that prohibit more than merely "physically barbarous punishments").

an analysis of whether prison conditions violate the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"<sup>28</sup> revealing the Court's consistent view that the scope of the Eighth Amendment is not static.<sup>29</sup> The "evolving standards of decency" rule also recognizes that while the State must punish inmates for violations of the law, the state must exercise this power "within the limits of civilized standards."<sup>30</sup> The foregoing principles now guide any court's inquiry into whether confinement conditions constitute cruel and unusual punishment.

Prison inmates have only recently begun to challenge their confinement conditions in court.<sup>31</sup> Initially, courts applying the Eighth Amendment to such claims did not order improvements to prison conditions because they considered convicts "slave[s] of the state" without enforceable rights.<sup>32</sup> Even as courts discarded this view of prisoners,<sup>33</sup> judges continued to take a "hands-off" ap-

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28. *Trop*, 356 U.S. at 101 (recognizing that fundamental policy underlying Cruel and Unusual Punishments Clause is "the dignity of man"); see also, *Rhodes*, 452 U.S. at 346 (applying "evolving standards of decency" approach established in *Trop*); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (noting that Eighth Amendment prohibits penalties that "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'") (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (arguing that power of state must be exercised within limits of civilized standards).

To the greatest extent possible, courts should use objective factors to determine whether a condition of confinement or the conduct of prison officials violates society's standards of decency. See *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (warning that judges should not look to their own subjective conceptions of decency in determining how society's standards have evolved); *Gregg*, 428 U.S. at 173 (stating that courts must use objective criteria to evaluate contemporary values). Examples of such objective factors include public and legislative attitudes, as well as jury responses as measured by sentencing decisions. *Coker*, 433 U.S. at 592.

29. *Trop*, 356 U.S. at 101; see *Weems v. United States*, 217 U.S. 349, 373 (1910) ("[A] principle to be vital must be capable of wider application than the mischief which gave it birth.").

30. *Trop*, 356 U.S. at 100; see *id.* (observing that any punishment outside bounds of traditional penalties, such as fines, imprisonment, and even execution, is constitutionally suspect).

31. Prisoners' constitutional challenges to prison conditions began in earnest in the mid-1960s when prisoners gained substantial access to federal courts through the Supreme Court's decisions in *Monroe v. Pape*, 365 U.S. 167 (1961), and *Robinson v. California*, 370 U.S. 660 (1962). In *Monroe*, the Court expanded the prohibition of 42 U.S.C. § 1983 to include officials who violate the constitutional rights of individuals while acting under the color of state law. *Monroe*, 365 U.S. at 183-84. For a discussion of 42 U.S.C. § 1983 (1988), which codifies § 1 of the Civil Rights Act of 1871, see Doretha M. Van Slyke, Note, *Hudson v. McMillian and Prisoner's Rights: The Court Giveth and the Court Taketh Away*, 42 AM. U. L. REV. 1727, 1738 n.66 (1993). In *Robinson*, the Court held that the Eighth Amendment applied to a state statute. *Robinson*, 370 U.S. at 666-67.

32. *Cootz v. State*, 785 P.2d 163, 170 (Idaho 1989) ("At one time the prevailing view was that deprivation was essentially total. The penitentiary inmate was considered 'the slave of the State.'") (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)).

33. Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 211 (1980).

proach<sup>34</sup> to prison issues because of their reluctance to interfere with internal prison affairs.<sup>35</sup> Justifications for this policy of judicial restraint ranged from the view that courts lacked the expertise to deal with problems of prison administration and reform<sup>36</sup> to a fear that the judiciary would otherwise overstep the boundaries of its power.<sup>37</sup> Recognizing that the main function of prison administrators is to maintain internal security and order, courts have granted prison officials a great deal of discretion with which to implement prison policies and procedures.<sup>38</sup> During the late 1960s and throughout the 1970s, however, some courts began to reject this tradition of complete judicial deference and ordered prison officials to improve

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34. See Robbins, *supra* note 33, at 211-19 (providing excellent discussion of "hands-off" doctrine); see generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (reviewing history and bases of "hands-off" doctrine).

35. See, e.g., O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (stating that courts should defer to judgment of prison officials and not place burden on them to disprove availability of alternative accommodations); Block v. Rutherford, 468 U.S. 576, 584-85 (1984) (reaffirming limited role courts should play in prison administration); Bell v. Wolfish, 441 U.S. 520, 540-41 n.23 (1979) (noting that order, discipline, and security are furthered when courts defer to prison administrators' policies) (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (stating that problems in America's prisons are complex and cannot be resolved by judicial decree), *overruled on other grounds* by Thornburgh v. Abbott, 490 U.S. 401 (1989); see also Turner v. Safley, 482 U.S. 78, 85 (1987) (insisting that prison administration is best committed to legislative and executive branches, and that respect for separation of powers and state sovereignty requires judicial restraint). *But see* Johnson v. Avery, 393 U.S. 483, 486 (1969) (allowing courts to intervene in prison administration if state violates federal constitutional rights). See generally Robbins, *supra* note 33, at 212-13 (discussing variety of rationales offered by courts to justify reluctance to become immersed in prison operations).

36. See Turner, 482 U.S. at 84-85 (reiterating principle that prison administration problems are too complex to be solved by judicial decree); Procunier, 416 U.S. at 404-05 (stating that judicial deference stems from notion that needs of prison administration, such as expertise, planning, and resources, are normally managed by legislative and executive branches). *But see* Gutterman, *supra* note 6, at 900 (concluding that notion of administrative expertise in area of prison reform is erroneous and that care and custody of prisoners is usually delegated to guards and correctional agencies that are chronically under-staffed and ill-trained).

37. See Turner, 482 U.S. at 85 (expressing concern that judicial involvement in prison administration could violate separation of powers); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (stating that Eighth Amendment is rooted in effort to limit excesses of English judiciary); Gregg v. Georgia, 428 U.S. 153, 176 (1976) ("Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of standards of criminal responsibility . . .'" (quoting Powell v. Texas, 392 U.S. 514, 533 (1968))). See generally Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 840, 842-44 (1971) (listing reasons for judicial restraint).

Judges seem especially reluctant to outlaw smoking because such a decision would, in effect, make the courts a superlegislature promulgating social change under the guise of securing constitutional rights. See Polly B. Elliott, *Cruel and Unusual Case Before High Court*, State News Serv., Jan. 11, 1993, available in LEXIS, News Library, Wires File (reporting Tenth Circuit's rejection of state workers' claim to smoke-free workplace); see also Wolfish, 441 U.S. at 562 (concluding that authority to make policy choices about prisons is generally not judicial role).

38. See Luise, *supra* note 26, at 303-05 (discussing limited degree of judicial intervention in prison management); see also *supra* notes 35-36 (discussing cases in which courts have remained deferential to prison administrators).

confinement conditions.<sup>39</sup> It was during this period that the "dark and evil world" of prisons<sup>40</sup> was first clearly exposed to the American public.<sup>41</sup>

The Constitution does not require comfortable conditions during incarceration.<sup>42</sup> Nonetheless, the Supreme Court has insisted that courts intervene in prison matters to remedy constitutional violations.<sup>43</sup> Although imprisonment involves the loss of many rights and privileges,<sup>44</sup> courts must act to ensure that the Eighth Amendment protects prisoners against cruel and unusual conditions of confinement<sup>45</sup> and living conditions that undermine basic human dignity.<sup>46</sup> The Cruel and Unusual Punishments Clause has slowly evolved into

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39. See *Ramos v. Lamm*, 639 F.2d 559, 563-64 (10th Cir. 1980) (rejecting State's argument that district court should abstain from case involving serious allegations that administrators violated prisoners' constitutional rights), *cert. denied*, 450 U.S. 1041 (1981); *Williams v. Edwards*, 547 F.2d 1206, 1212 (5th Cir. 1977) (upholding district court's order requiring prison officials to improve medical care and safety); *Gates v. Collier*, 501 F.2d 1291, 1322 (5th Cir. 1974) (approving district court order to improve prison); see also *Rhodes v. Chapman*, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring) (listing states with individual prisons or prison systems that, by 1980, had been declared unconstitutional under Eighth and Fourteenth Amendments). See generally *Robbins*, *supra* note 33, at 213-15 (discussing erosion of "hands-off" doctrine in lower federal courts).

Wolff v. McDonnell marked the Supreme Court's first involvement in modern-day prison reform and its official renunciation of the "hands-off" doctrine. *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, the Court recognized that there must be a "mutual accommodation" between the needs and objectives of the prison system and the constitutional rights of the prisoners. *Id.* at 556.

40. *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (describing conditions "ordinary convict" would feel in Arkansas prison), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

41. See *Gutterman*, *supra* note 6, at 871-72 (observing that *Holt* destroyed myth that prisoners were treated humanely).

42. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); see also *Atiyeh v. Capps*, 449 U.S. 1312, 1315-16 (1981) ("[N]obody promised [prisoners] a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them . . ."); *Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir.) (finding that Eighth Amendment does not protect prisoners from conditions of confinement that cause discomfort or mere inconvenience), *cert. denied*, 493 U.S. 969 (1989); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (stating that Eighth Amendment does not require that prisoners be provided with every amenity they find desirable).

43. See *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (observing that courts must review inmates' valid constitutional claims), *overruled on other grounds* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (*per curiam*) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners."); see also *Rhodes*, 452 U.S. at 352 (Brennan, J., concurring) (maintaining that role of courts is limited to determining whether challenged confinement conditions are constitutionally valid, not to imposing their view of how to run prison).

44. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

45. See *Procunier*, 416 U.S. at 405-06 (holding that when conditions of confinement amount to cruel and unusual punishment, courts have Eighth Amendment duty to intervene and protect prisoners' rights).

46. *Cf. Trop v. Dulles*, 356 U.S. 86, 100-04 (1958) (plurality opinion) (finding that court had duty to invalidate federal law that dehumanized deserters by stripping them of citizenship). *But see Note*, *supra* note 34, at 857 (stating that courts will not usually intervene in prison administration absent shocking conditions).



the primary source of substantive protection for prisoners.<sup>47</sup> As such, prisoners have increasingly turned to this clause<sup>48</sup> as a means of remedying the "soul-chilling" living conditions present in some of America's prisons.<sup>49</sup>

### B. Establishment of a Standard

In 1978, the Supreme Court in *Hutto v. Finney*<sup>50</sup> for the first time clearly stated that prison conditions are a form of punishment reviewable under the Eighth Amendment.<sup>51</sup> The prison officials in *Hutto*, however, did not contest the lower court's finding that the challenged prison conditions constituted cruel and unusual punishment.<sup>52</sup> The Court in *Hutto*, therefore, did not address issues such as when, or what types of, confinement conditions are unconstitutional.

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47. See *Graham v. Conner*, 490 U.S. 386, 395 n.10 (1989) (recognizing that Cruel and Unusual Punishments Clause is chief source of substantive protection for inmates challenging prison officials' use of excessive force); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (stating that Eighth Amendment is prisoners' primary source of protection from unnecessary and wanton infliction of pain); *Ingraham v. Wright*, 430 U.S. 651, 665-66 (1977) (stating that Framers of Constitution adopted "cruel and unusual punishments" language to protect prisoners from both judges and legislatures acting beyond their authority); *Huguet v. Barnett*, 900 F.2d 838, 840 (5th Cir. 1990) (noting that prisoners may use Cruel and Unusual Punishments Clause to challenge constitutional infringements of their rights during incarceration). See generally Note, *supra* note 34, at 848 (noting that courts have used Cruel and Unusual Punishments Clause as primary mechanism to secure decent and humane conditions for prisoners).

48. See *Rhodes v. Chapman*, 452 U.S. 337, 354 n.2 (1981) (Brennan, J., concurring) (stating that, in 1980, there were 8,000 pending challenges to prison conditions) (citing 3 NATIONAL INST. OF JUSTICE, AMERICAN PRISONS AND JAILS 34 (1980)); Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON U. L. REV. 1, 6 (1988) (noting that, in 1966, prisoners filed 218 cases alleging constitutional violations, but over 16,000 cases filed in 1982).

49. *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 684 (D. Mass. 1973) ("[T]he soul-chilling inhumanity and conditions in American prisons has been thrust upon the judicial conscience."), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).

50. 437 U.S. 678 (1978).

51. *Hutto v. Finney*, 437 U.S. 678, 685 (1978); see also *supra* note 12 and accompanying text (explaining that *Estelle v. Gamble*, 429 U.S. 97 (1976), was Supreme Court's first application of Cruel and Unusual Punishments Clause to alleged deprivation not formally part of prisoner's sentence). Not all Supreme Court Justices agree on this point. See *Helling v. McKinney*, 113 S. Ct. 2475, 2483 (1993) (Thomas, J., dissenting) (doubting Court's premise that deprivations suffered by prisoners constitute "punishment" for Eighth Amendment purposes); *Hudson v. McMillian*, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting) (advocating rule applied at time when "judges and commentators regarded the Eighth Amendment as applying only to tortuous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration"). For a general discussion on whether prison conditions of confinement constitute punishment under the Eighth Amendment, see Amy Newman, Note, *Eighth Amendment—Cruel and Unusual Punishment and Condition Cases*, 82 J. CRIM. L. & CRIMINOLOGY 979, 990-99 (1992) (analyzing majority and concurring opinions in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), on question of whether prison conditions are part of prison sentence).

52. *Hutto*, 437 U.S. at 685.

It was not until 1981, in *Rhodes v. Chapman*,<sup>53</sup> that the Court announced a standard for determining when conditions in correctional facilities constitute cruel and unusual punishment.<sup>54</sup> In broad, sweeping terms, *Rhodes* extended the scope of Eighth Amendment protection to all prison conditions, "alone or in combination," that deprive inmates of the "minimal civilized measure of life's necessities."<sup>55</sup> The Court concluded that prison conditions that are not cruel and unusual under contemporary standards of decency are constitutional.<sup>56</sup> Applying this standard, the Court concluded that the practice of assigning two inmates to one cell was constitutional.<sup>57</sup>

Although representing a significant breakthrough in conditions-of-confinement jurisprudence, *Rhodes* has been criticized for several reasons. The decision offered little guidance as to whether the Supreme Court was signaling a return to, or departure from, its "hands-off" approach to prison matters.<sup>58</sup> The Court also failed to clearly define "minimal civilized measures of life's necessities."<sup>59</sup> Even after *Rhodes*, the Court still needed to clarify the criteria a prisoner had to meet to establish a claim that incarceration conditions constitute cruel and unusual punishment.<sup>60</sup> These issues were later addressed in *Wilson v. Seiter*.<sup>61</sup>

### C. Refinement of the Standard: A Two-Step Approach

*Wilson v. Seiter* involved an incarcerated felon's claim that the living conditions in his prison constituted cruel and unusual punishment and therefore violated the Eighth Amendment.<sup>62</sup> The Supreme

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53. 452 U.S. 337 (1981).

54. See *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981); see *Inmates of Occoquan v. Barry*, 844 F.2d 828, 835 (D.C. Cir. 1988) (stating that *Rhodes* was "ground-breaking decision" for determining principles applicable to prison condition litigation).

55. *Rhodes*, 452 U.S. at 347.

56. *Id.*

57. *Id.*

58. Compare *id.*, at 346-47 (broadening scope of Eighth Amendment to include protection from prison conditions depriving inmates of basic human needs) with *id.* (suggesting that harsh, restrictive prison conditions may be price criminals pay for their offenses against society). One author has suggested that over the last two decades, "the Court has restricted the constitutional protection afforded to prisoners." Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1346 nn.33-34 (1992) (citing various commentators who pondered whether restrictions signalled return to "hands-off" doctrine).

59. *Rhodes*, 452 U.S. at 347.

60. See *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993) (refining objective component of *Wilson* test in prison condition context); *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991) (creating subjective and objective components of confinement conditions claim).

61. 111 S. Ct. 2321 (1991).

62. *Wilson v. Seiter*, 111 S. Ct. 2321, 2322-23 (1991). *Wilson's* complaint alleged that "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling,

Court took this opportunity to set forth a two-part test for Eighth Amendment claims based on conditions of confinement.<sup>63</sup> The first part, the subjective element of the test, requires that the prisoner inquire into the defendant prison official's state of mind<sup>64</sup> to prove the prison administrator was "deliberately indifferent" to the needs of this prisoner.<sup>65</sup> Under the second part, the objective component, the prisoner must prove that the disputed prison condition deprives the inmate of a "single, identifiable human need" such as food, warmth, or exercise.<sup>66</sup>

The Court in *Wilson* left unanswered several important questions regarding the objective component of confinement conditions claims.<sup>67</sup> For example, *Wilson* left unclear the scope of a prison official's constitutional duty to provide inmates with a habitable, healthy environment.<sup>68</sup> One problem with interpreting *Wilson* as imposing a duty on prison officials to protect prisoners from unsafe living conditions is that the Court did not clearly indicate how courts

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improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with physically and mentally ill inmates" violated his Eighth Amendment rights. *Id.* at 2323.

63. *Id.* at 2324. The Court in *Wilson* succinctly stated that the objective component of an Eighth Amendment prison claim involves the determination of whether the alleged deprivation is "sufficiently serious," while the subjective element considers whether the officials involved are acting "with a sufficiently culpable state of mind." *Id.*

64. *Id.* *But see id.* at 2330 (White, J., concurring) (rejecting majority's state-of-mind requirement as departure from precedent and impractical to apply). At least one legal commentator has noted that, as Justice White predicted, *Wilson*'s state-of-mind requirement has proven to be difficult to apply. Gutterman, *supra* note 6, at 889.

65. *Wilson*, 111 S. Ct. at 2327 (applying standard set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976)). By requiring prisoners to prove administrators' "deliberate indifference" to serious medical needs, the Court in *Estelle* established a subjective element for Eighth Amendment claims. *Estelle*, 429 U.S. at 106; *see Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981) (focusing on objective factors, such as history of jurisprudence, state statutes, and jury sentences); *see also Wilson*, 111 S. Ct. at 2324 (stating that *Rhodes* had no occasion to address subjective element).

66. *Wilson*, 111 S. Ct. at 2327 (requiring inmate to identify deprived human need with specificity, not merely "overall conditions").

67. For one, the Court in *Wilson* never clearly stated whether its two-component analysis applied to excessive force cases under the Eighth Amendment. The Court later applied the *Wilson* test to excessive force claims in *Hudson v. McMillian*. *Hudson v. McMillian*, 112 S. Ct. 995, 1000-01 (1992). The Court in *Hudson*, however, stated that, in the excessive force context, the subjective component requires prisoners to prove that prison officials maliciously and sadistically used force to cause harm. *Id.* at 1000.

68. *Cf. DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (finding that states have constitutional duty to be responsible for "safety and general well-being" of those in its custody while not addressing precise scope of State's duty to provide for prisoners' health and basic needs); *Youngberg v. Romeo*, 457 U.S. 305, 315 (1982) (noting that right to personal security is not extinguished by lawful confinement). *DeShaney*, however, did not involve prisoners' rights. The case concerned a complaint that a social services department's failure to protect a child from the abuse and beatings of his father violated the Fourteenth Amendment. *Id.* at 191. *DeShaney* is relevant to this Note, however, because the Court discussed the State's Eighth Amendment duty to provide prisoners and others in custody with adequate protection and medical care, though it refused to extend this duty beyond the prison setting. *Id.* at 198-201.

should determine what constitutes a "single, identifiable human need."<sup>69</sup> Both the scope of prison authorities' custodial duty under the Eighth Amendment and the possible range of a prisoner's basic needs were left open for expansion or limitation.<sup>70</sup> Another problem with the *Wilson* opinion is that the Court failed to articulate how harmful the disputed deprivation must be to constitute cruel and unusual punishment.<sup>71</sup> Although the Court pointed to the deprivation of a basic human need as the proper basis for an Eighth Amendment claim, *Wilson* also did not delineate the types of evidence a prisoner could use to prove that an alleged deprivation constituted cruel and unusual punishment.<sup>72</sup> Moreover, the Court did not address whether an injury must be actual and current, rather than prospective, to be actionable in the confinement conditions context.<sup>73</sup> These unresolved issues became the focus of the Court's inquiry in *Helling v. McKinney*.<sup>74</sup>

## II. *HELLING V. MCKINNEY*

### A. *The History of the Case*

#### 1. *Facts of the case*

William McKinney is a prisoner in the Nevada state prison system.<sup>75</sup> In December 1986, he filed a pro se complaint under 42

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69. *Wilson*, 111 S. Ct. at 2327; see also *id.* (citing food, warmth, and exercise as examples of basic human needs); Gray, *supra* note 58, at 1385-86 (discussing ramifications of Court's failure in *Wilson* to define basic human needs with specificity).

70. See *supra* note 26 and accompanying text (discussing need to interpret imprecise text of Eighth Amendment in flexible manner consistent with current societal standards).

71. *Wilson*, 111 S. Ct. at 2327 (expressing no opinion on whether various allegations met "threshold test of serious deprivation"). The Court did note, however, that courts need not consider together every single condition of confinement when evaluating whether a "serious deprivation" has occurred. *Id.*

72. Cf. *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) (stating that what is necessary to show "sufficient harm" in Eighth Amendment analysis depends on claim at issue).

73. Cf. *id.* at 999-1000 (stating that there is no significant injury requirement under Eighth Amendment, and that "absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it"). For further analysis of the level of harm needed to raise a claim of cruel and unusual punishment, see *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (stating that Eighth Amendment violation is established by "serious deprivations of basic human needs" or of "minimal civilized measure of life's necessities") (emphasis added); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'" (emphasis added); Gray, *supra* note 58, at 1346-47 (stating that Court's application of "sufficient seriousness" standard is means used to restrict prisoners' rights).

74. 113 S. Ct. 2475 (1993).

75. *Helling v. McKinney*, 113 S. Ct. 2475, 2478 (1993); see *infra* note 104 (discussing McKinney's transfer to different facility).

U.S.C. § 1983<sup>76</sup> against a number of officials of the prison at Carson City, where he was incarcerated when he initiated the suit.<sup>77</sup> In his complaint, McKinney alleged that his involuntary, sustained exposure to ETS constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>78</sup> McKinney, a nonsmoker, claimed that he was almost constantly exposed to secondary cigarette smoke because he was confined in a poorly ventilated, six-by-eight-foot cell with a roommate who smoked five packs of cigarettes a day.<sup>79</sup> Prison officials also allowed smoking in classrooms and the law library.<sup>80</sup> McKinney contended that his exposure to ETS was completely involuntary, and that prison officials had continually denied his numerous requests to be housed with a nonsmoker or to be transferred to a single cell.<sup>81</sup> McKinney complained that this exposure to

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76. 42 U.S.C. § 1983 (1988). The relevant portion of § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

*Id.* For an overview of § 1983 suits, see Thomas E.L. Dewey, *Prisoners' Rights: Procedural Means of Enforcement under 42 U.S.C. § 1983*, 79 GEO. L.J. 1253, 1281-94 (1991).

77. *McKinney v. Anderson*, 924 F.2d 1500, 1502 (9th Cir. 1991), *aff'd sub nom. Helling v. McKinney*, 113 S. Ct. 2475 (1993). McKinney named several prison officials as defendants: "the director, the warden, the associate warden, a unit counselor, and the prison store's manager." *Id.*

78. *Helling v. McKinney*, 113 S. Ct. 2475, 2478 (1993). McKinney requested both damages and injunctive relief. *Id.* McKinney asserted two Eighth Amendment claims: (1) that prison officials were "deliberately indifferent" to his serious existing medical needs, and (2) that exposure to secondary smoke constitutes cruel and unusual punishment. *McKinney v. Anderson*, 924 F.2d at 1502. McKinney also asserted a due process claim, *id.*, which this Note does not address.

79. *See Helling v. McKinney*, 113 S. Ct. at 2478 (describing McKinney's allegations); *McKinney v. Anderson*, 924 F.2d at 1507 (noting size of McKinney's cell).

80. At the time the action arose, prison officials prohibited smoking only in the infirmary and the kitchen. *McKinney v. Anderson*, 924 F.2d at 1507. McKinney also complained that the prison store sold cigarettes to inmates without properly informing them about the health hazards that smoking in a cell posed to nonsmoking cellmates. *Helling v. McKinney*, 113 S. Ct. at 2478.

81. *McKinney v. Anderson*, 924 F.2d at 1502. *But see* Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter *Amicus Brief*] (discussing affidavit that describes classification of prisoners for housing and states that prison officials have made efforts to separate smokers from non-smokers "to the greatest extent possible"). The evidence at trial showed that McKinney refused several bed moves because he found these options unacceptable. Petitioners' Brief on the Merits at 33-34, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter *Petitioners' Brief*]. Furthermore, "one exhibit, an Inmate Personal Property Claim Form for Loss or Damage of Personal Property completed by McKinney in July, 1989, lists as lost items belonging to him '2 cartons of cigarettes.'" *Id.*

ETS caused him to suffer "nosebleeds, headaches, loss of energy to exercise, shortness of breath, and chest pains."<sup>82</sup>

## 2. *Procedural history*

In the district court, a federal magistrate<sup>83</sup> granted the defendants' motion for a directed verdict after concluding that McKinney had failed to prove that prison authorities had been deliberately indifferent to his medical needs.<sup>84</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed on the deliberate indifference issue.<sup>85</sup> The appeals court reversed in part, however, holding that McKinney had stated a cognizable cause of action under the Eighth Amendment by alleging that exposure to ETS was harmful to his health.<sup>86</sup> The

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82. At trial, however, "McKinney attempted to relate any physical problems he was experiencing to a variety of sources, not just secondary tobacco smoke." Petitioner's Brief, *supra* note 81, at 33-34. For example, McKinney alleged that "being in a bunk downstairs, rather than upstairs," caused him nosebleeds. *Id.* at 34. He also "attributed sore throats, vomiting, scratching, and dizziness to drinking water." *Id.* He further complained about having to eat saccharin with his meals, instead of sugar, because "there is an abundance of scientific authority that suggest that saccharin may cause cancer in humans." *Id.*

83. McKinney filed his complaint against the Nevada state prison system in the United States District Court for the District of Nevada. *McKinney v. Anderson*, 924 F.2d at 1502. The parties then consented to have a United States Magistrate conduct the jury trial and order the entry of a final judgement. *Id.* at 1503 n.2; *see also* 28 U.S.C. § 636(c)(1) (1988) (allowing magistrate to conduct proceedings when parties consent). Under § 636(c)(3), parties may appeal "directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3) (1988). The lower court opinions use the terms "magistrate" and "district court" interchangeably; therefore, this Note will do the same.

84. *McKinney v. Anderson*, 924 F.2d at 1503. At trial, McKinney focused on the issues of his constitutional right to an environment free from second-hand smoke and the defendants deliberate indifference to his medical symptoms. *Id.* The magistrate concluded that inmates have no constitutional right to be free from secondary cigarette smoke. *Id.* While McKinney's case went to trial before a jury on the issue of whether the defendants were deliberately indifferent to his alleged serious medical symptoms, the district court granted the defendants' motion for a directed verdict on this issue. *Id.* at 1511. Because there was no evidence that Nevada State prison officials were deliberately indifferent to McKinney's medical needs and because a prison doctor who examined McKinney found no serious existing illnesses requiring treatment, the Ninth Circuit affirmed the district court's decision on appeal. *Id.* For a detailed account of the case's history, see Brief for Respondent at 1-9, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter Respondent's Brief].

85. *McKinney v. Anderson*, 924 F.2d at 1511.

86. *Id.* at 1509. The Ninth Circuit disagreed with the district court's interpretation of the standard applicable to condition-of-confinement claims. *Id.* at 1503. The magistrate based her decision on the view that either "McKinney had a constitutional right to a completely smoke-free environment or he had only a constitutional right to medical attention for proven serious medical needs." *Id.* The court of appeals agreed with the district court that "there is no constitutional right to be free from secondary cigarette smoke." *Id.* The court of appeals noted, however, that "the right to an utterly smoke-free environment [was] not the real question" in the case. *Id.* at 1505 n.3. Rather, the main question was whether the Constitution mandates an environment that is free of "significant risks of harm" to an inmate's health. *Id.*

The Ninth Circuit also disagreed with the magistrate's ruling that a prisoner can establish that involuntary exposure to ETS constitutes an Eighth Amendment violation only by proving that the state was deliberately indifferent to the inmate's serious medical symptoms. *Id.* The court

Ninth Circuit remanded the case to give McKinney the opportunity to prove that he had been involuntarily exposed to levels of ETS that posed an "unreasonable risk of harm to his future health."<sup>87</sup>

In October 1991, the Supreme Court granted certiorari.<sup>88</sup> Rather than grant the appeal full review, the Court vacated the judgment below and remanded the case to the court of appeals for further consideration in light of *Wilson v. Seiter*.<sup>89</sup> On remand, the Ninth Circuit reinstated its earlier judgment and again remanded to the district court for proceedings consistent with both its previous opinion and *Wilson*.<sup>90</sup> For the second time, Helling et al. sought and received review by the Supreme Court.<sup>91</sup>

### B. *The Holding and Rationale in Helling v. McKinney*

In *Helling v. McKinney*, Justice White, writing for the majority,<sup>92</sup> stated that a prison inmate need not suffer from a serious, current

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of appeals stated that it is cruel and unusual punishment to compel a prisoner to be exposed to levels of ETS that "pose an unreasonable risk of harm to an inmate's health." *Id.* at 1504.

The Ninth Circuit based its holding on two factors. First, scientific evidence supported the respondent's claim that sufficient exposure to ETS could endanger a person's health. *Id.* at 1505-07. Second, society's attitude had evolved to the point that involuntary exposure to ETS may violate contemporary standards of decency. *Id.* at 1508.

87. *Id.* at 1509. Both before and during his trial, McKinney attempted to submit evidence regarding the degree of his exposure to ETS and the actual and potential effects of this passive smoke on his health. *Id.* at 1503. Because the magistrate did not believe that "potential" harm was actionable under the Eighth Amendment, she excluded evidence that did not relate to McKinney's current medical symptoms, including documentation of potential health effects of exposure to passive smoke. *Id.* On remand, McKinney will be allowed to present this evidence and all "evidence regarding the level and degree of his exposure to ETS" because of the Ninth Circuit's decision that McKinney stated a valid Eighth Amendment claim when he alleged that "passive smoke in the prison may pose an unreasonable risk of harm to his existing or future health." *Id.* at 1509.

Even though the court of appeals held that McKinney had stated a cognizable claim, the court also ruled that the defendants were "entitled as a matter of law to prevail on their defense of qualified immunity." *Id.*; see also *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (surveying various state officials who may be allowed qualified immunity and concluding that prison officials are among them). Qualified immunity shields government officials from liability for damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

88. *Helling v. McKinney*, 112 S. Ct. 291 (1991).

89. *Id.*

90. *McKinney v. Anderson*, 959 F.2d 852, 854 (1992). The Ninth Circuit noted that *Wilson v. Seiter* added a subjective component to conditions of confinement cases under the Eighth Amendment, which McKinney had to establish to sustain his claim. *Id.* The Ninth Circuit decided that the subjective component did not undermine its previous finding "that it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health," which was the objective element of McKinney's Eighth Amendment claim. *Id.*

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

92. Justice White's majority opinion was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter. *Helling v. McKinney*, 113 S. Ct. 2475, 2477 (1993).

medical condition to state an Eighth Amendment claim for cruel and unusual punishment.<sup>93</sup> The Court concluded that it is sufficient for a prisoner to allege that prison officials "have, with deliberate indifference, exposed him to . . . an unreasonable risk of serious damage to his future health."<sup>94</sup> The Court remanded the case for trial to give McKinney an opportunity to prove both the subjective and objective elements of his Eighth Amendment claim.<sup>95</sup>

1. *The subjective element: the standard of mental culpability*

In requiring McKinney to establish that prison officials were deliberately indifferent to his situation,<sup>96</sup> the Court reaffirmed its view that the Eighth Amendment has a subjective component,<sup>97</sup> which, in conditions-of-confinement cases, requires proof of "deliberate indifference" on the part of prison officials.<sup>98</sup> In *Helling*, the Court broadened the deliberate indifference standard by applying it to inmates' allegations of future, rather than merely current, harm.<sup>99</sup> The Court also stated that the deliberate indifference inquiry must focus on the current attitudes and conduct of the officials<sup>100</sup> and consider the complexities of prison administration.<sup>101</sup>

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93. See *Helling v. McKinney*, 113 S. Ct. at 2480 ("We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.").

94. *Id.* at 2481.

95. *Id.* at 2481-82. The Court also stated that McKinney must prove he is entitled to an injunction. *Id.* at 2482.

96. *Id.*

97. See *supra* notes 64-65 and accompanying text (explaining subjective component); see also *e.g.*, *Hudson v. McMillian*, 112 S. Ct. 995, 998-99 (1992) (holding that when prison officials are "accused of using excessive physical force," court must ask "whether force was applied in good faith effort to maintain or restore order, or maliciously and sadistically to cause harm"); *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) (illuminating requirement for state-of-mind inquiry for claims of cruel and unusual punishment involving official conduct which is not formally imposed criminal penalty); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (stating that Cruel and Unusual Punishments Clause prohibits only wanton conduct of prison officials); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (finding that "deliberate indifference" to prisoner's serious medical needs is cruel and unusual punishment). For a general discussion of the requisite mental state of prison officials that is needed to sustain a claim under the Cruel and Unusual Punishments Clause, see *Van Slyke*, *supra* note 31, at 1731-37.

98. See *Wilson*, 111 S. Ct. at 2326-27 (extending "deliberate indifference" standard of *Estelle* to all inadequate conditions of confinement); see also *supra* note 12 (explaining "deliberate indifference" standard).

99. See *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993) (finding that valid Eighth Amendment cause of action is stated when prisoner alleges prison officials' deliberate indifference to risk of future harm).

100. *Id.* at 2482.

101. *Id.* This view continues the Court's theme of judicial deference to prison administrators in Eighth Amendment cases. See *supra* notes 35-38 and accompanying text (discussing courts' "hands-off" approach to prison issues).



Applying this standard to McKinney's claims, the Court noted that McKinney might face two significant problems in proving the subjective element of his Eighth Amendment claim.<sup>102</sup> First, McKinney must delve into and definitively prove the state of mind of the prison officials at the time he was being exposed to secondary cigarette smoke.<sup>103</sup> Second, developments regarding smoking policies in the Nevada prison system since McKinney initiated his claim may render his case moot.<sup>104</sup>

## 2. *The objective element*

### a. *The level of harm required to sustain an Eighth Amendment claim*

The most disputed issue between the parties in *Helling v. McKinney* was whether the Eighth Amendment provides protection against prison conditions that merely threaten to cause future health problems.<sup>105</sup> The Court expressly rejected the prison officials' "central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment."<sup>106</sup> In so doing, the Court clearly acknowledged a rule that

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102. *Helling*, 113 S. Ct. at 2482; *see also id.* (noting that if McKinney fails to satisfy subjective element, district court has discretion to enter judgment for defendants without taking evidence on objective element).

103. *Id.*; *see also* *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991) (rejecting prisoner's claim that prison officials deliberately intended to punish prisoner through exposure to ETS). On the issue of prohibiting smoking in prisons, wardens must decide between the effect of smoke on nonsmokers and the effects of a ban on prisoners who smoke. *Id.* In deciding this issue in favor of those inmates who smoke, wardens cannot plausibly be accused of intending to punish nonsmoking prisoners or hoping smoke will injure other prisoners. *Id.* This Note will focus on the feasibility of meeting the objective component of his condition-of-confinement claim, not the subjective element of McKinney's claim.

104. *See Helling*, 113 S. Ct. at 2482 (discussing McKinney's difficult proof problems in light of increased smoking restrictions). The most significant development in this case since McKinney filed his complaint on December 18, 1986 is that on January 10, 1992, the Director of the Nevada Department of Prisons adopted a formal smoking policy which prohibits smoking in classrooms, gymnasiums, chapels, libraries, kitchens, industries, and infirmaries, except in areas specifically designated for that purpose. *See* Respondent's Brief, *supra* note 84, at app. 1a-2a (reprinting text of Administrative Directive #53-92). In addition, "wardens may further designate non-smoking sections in inmate dormitory settings . . . contingent on space availability." *Id.* Furthermore, "reasonable efforts may be made by the institutional classification committees to accommodate non-smokers in double-bunked housing areas." *Id.*

Another relevant change is that McKinney was moved from Carson City to Ely State Prison, where "he is now housed in a single cell." *Id.* at 8. These changes in facts are pertinent to the argument that McKinney's claim may now be moot. *But see id.* at 10 (noting that there is reasonable chance that McKinney may be moved back to Carson City, where he would be exposed to conditions that gave rise to original suit).

105. *See Helling*, 113 S. Ct. at 2479-80 (indicating that petitioners had devoted great part of their brief and argument to issue of whether "relief could be granted by alleging that . . . compelled exposure to ETS poses an unreasonable risk to health").

106. *Id.* at 2480.

it and several lower courts had already recognized—namely that the Eighth Amendment protects inmates from the risk of future harm.<sup>107</sup>

The Court reasoned that the Eighth Amendment requires that prison officials provide inmates with a reasonably safe environment.<sup>108</sup> According to the Court, this standard logically requires consistent protection from “unsafe, life-threatening” living conditions even though no harm has yet come to the prisoner’s health.<sup>109</sup> The Court found this view consistent with earlier Eighth Amendment decisions, which had recognized that “a remedy for unsafe conditions need not await a tragic event.”<sup>110</sup> The Court in *Helling* concluded that, in conditions-of-confinement cases, an inmate states a claim under the Cruel and Unusual Punishments Clause by alleging that prison officials have exposed him to an “unreasonable risk of serious

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107. *Id.* (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition.”); see *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (validating courts’ consideration of overall prison conditions when cruel and unusual punishment inquiry focuses on avoiding potential Eighth Amendment violation); *Powell v. Lennon*, 914 F.2d 1459, 1464 n.10 (11th Cir. 1990) (deciding that prisoner’s allegation of exposure to asbestos in cell, even where requested remedy was preventive, was valid Eighth Amendment claim); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (“Prisoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief . . . .”); *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (holding that compelled exposure to chemical that increased prisoner’s risk of developing bladder cancer after latency period of 14 to 30 years constituted Eighth Amendment violation); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) (stating that prisoner need not wait until he is actually assaulted to obtain relief). *But see, e.g., Rhodes v. Chapman*, 452 U.S. 337, 367 (1981) (Brennan, J., concurring) (stating that Eighth Amendment focuses on “actual effect of challenged conditions upon the well-being of the prisoners”); *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (determining that “Eighth Amendment does not sweep so broadly as to include possible latent harms to health”).

108. *Helling*, 113 S. Ct. at 2480-81.

109. *Id.* at 2481.

110. *Id.*; see also *Hutto*, 437 U.S. at 678, 682, 687 (finding broad remedy appropriate to “insure against the risk of inadequate compliance” with Eighth Amendment where inmates were crowded into “punitive isolation cells” and exposed to hepatitis and venereal diseases); *Rhodes*, 452 U.S. at 337, 352 n.17 (listing federal court rulings that prison conditions constitute cruel and unusual punishment).

The Court in *Helling* noted that in *Rhodes*, it had followed two circuit courts that granted relief based on the risk of harm created by deplorable prison conditions. *Helling*, 113 S. Ct. at 2481. In *Gates v. Collier*, the Fifth Circuit found unconstitutional conditions such as unsafe electrical wiring, lack of firefighting measures, and the exposure of healthy inmates to those with serious contagious diseases. *Gates v. Collier*, 501 F.2d 1291, 1302 (5th Cir. 1974). In *Ramos v. Lamm*, the Tenth Circuit held that a prisoner endangered by “threats of violence and sexual assault” does not have to wait until he is actually assaulted before obtaining relief. *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1981); see also *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) (concluding that allegations of unhealthy physical conditions of prison, inadequate diet, denial of personal hygiene items, and lack of sufficient opportunity to exercise each stated Eighth Amendment claim); *Battle v. Anderson*, 564 F.2d 388, 401 (10th Cir. 1977) (holding that overcrowded prison conditions, which had detrimental effect on health, safety, and security of inmates, amounted to cruel and unusual punishment).

damage to his future health.”<sup>111</sup> The Court in *Helling* also followed precedent in requiring that the alleged harm be serious.<sup>112</sup>

*Helling v. McKinney* thus provides “that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain.”<sup>113</sup> The decision is ambiguous, however, as to how imminent a harm must be before it rises to the level of cruel and unusual punishment. The United States, as amicus curiae, argued that the harm an individual suffers from ETS exposure is not “sufficiently imminent” because it is too speculative to constitute a serious medical need.<sup>114</sup> Although the Court left this issue open,<sup>115</sup> it did note that McKinney would have to prove that “he himself is being exposed to unreasonably high levels of ETS.”<sup>116</sup> The Court did not provide a method for determining the level of ETS necessary to constitute an Eighth Amendment violation. The Court, however, did explain the type of evidence a prisoner must use to prove the objective element of an Eighth Amendment conditions-of-confinement claim.<sup>117</sup>

*b. Limitations on the objective element*

In *Helling v. McKinney*, the Supreme Court limited its potentially broad ruling that the Eighth Amendment encompasses latent harms by setting forth two components of the objective element in a conditions-of-confinement case. First, the inmate must provide the court with statistical and scientific data establishing both the seriousness of the risk and the likelihood that exposure to the harm, in this case secondhand smoke, will actually cause injury.<sup>118</sup> Second, the prisoner must show that the risk at issue is so grave that it would violate “contemporary standards of decency to expose *anyone* unwillingly to such a risk.”<sup>119</sup> In *Helling*, the Court thus refined the objective component of an Eighth Amendment claim by setting forth a framework prisoners can use to prove that certain conditions of

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111. *Helling*, 113 S. Ct. at 2481.

112. See *supra* note 73 (discussing Supreme Court precedents holding that serious harm is needed to state cruel and unusual punishment claim).

113. *Helling*, 113 S. Ct. at 2481.

114. *Id.* The United States did concede, however, that the Eighth Amendment may protect prisoners from future harm. Amicus Brief, *supra* note 81, at 19.

115. *Helling*, 113 S. Ct. at 2481.

116. *Id.* at 2482.

117. See *infra* notes 118-19 and accompanying text (explaining objective element of conditions-of-confinement claims as established in *Helling*).

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

119. *Id.*

confinement are so objectively dangerous that they constitute cruel and unusual punishment.

### C. *The Dissent*

In his dissent, Justice Thomas, joined by Justice Scalia, argued that the Court's expansion of Eighth Amendment protection to the mere risk of injury was misguided and that the *Helling* decision expanded the Cruel and Unusual Punishments Clause "beyond all bounds of history and precedent."<sup>120</sup> The dissent maintained that the Eighth Amendment applies only to actual and serious injuries, and not to risks of future harm.<sup>121</sup> Employing reasoning similar to his dissent in *Hudson v. McMillian*,<sup>122</sup> Justice Thomas criticized the majority's central premise that deprivations and conditions of confinement can be construed as punishment for Eighth Amendment purposes.<sup>123</sup> Justice Thomas argued that the Eighth Amendment applies only to cruel and unusual punishments imposed by statute or sentence and not to those punishments that prison authorities might inflict on the incarcerated.<sup>124</sup> Applying a historical and textual analysis to the Cruel and Unusual Punishments Clause, Justice Thomas maintained that the definition of "punishment," both at the time the Eighth Amendment was ratified and today, refers to a "penalty imposed for the commission of a crime."<sup>125</sup> The dissent also contended that neither historical evidence nor 185 years of precedent prior to *Estelle v. Gamble*<sup>126</sup> suggested that harsh prison conditions may constitute cruel and unusual punishment.<sup>127</sup> Justice Thomas even suggested that he would overrule *Estelle*,<sup>128</sup> criticizing the Court's failure in that case to consider text and history.<sup>129</sup>

The dissent then proceeded with a textual and historical critique of the majority's ruling in *Helling*. Justice Thomas correctly noted that none of the Supreme Court decisions relied on by the majority

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120. *Id.* at 2482.

121. *Id.* at 2485 (Thomas, J., dissenting).

122. See *Hudson v. McMillian*, 112 S. Ct. 995, 1005-08 (1992) (Thomas, J., dissenting) (arguing that Eighth Amendment applies only when actions are part of punishment and result in serious injury).

123. *Helling v. McKinney*, 113 S. Ct. at 2483 (Thomas, J., dissenting).

124. *Id.*

125. *Id.* at 2483-84 (citing dictionary definitions of "punishment" from 1771 to 1990).

126. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (recognizing that serious deprivations can constitute cruel and unusual punishment if inflicted with deliberate indifference).

127. *Helling*, 113 S. Ct. at 2484 (Thomas, J., dissenting).

128. *Id.* at 2485 (maintaining that Eighth Amendment should not have been extended to prison conditions). Justice Thomas ultimately declined to advocate overruling *Estelle* because *Helling* did not involve a "straightforward application of *Estelle*." *Id.*

129. *Id.* at 2484-85.

specifically “held that the mere threat of injury can violate the Eighth Amendment.”<sup>130</sup> On the other hand, the dissent ignored the fact that the Court repeatedly has held that the scope of the Cruel and Unusual Punishments Clause is not static, but rather must evolve with contemporary standards of decency.<sup>131</sup>

### III. PROVING THE OBJECTIVE ELEMENT ON REMAND

The Supreme Court’s decision in *Helling v. McKinney* expands the scope of protection that the Cruel and Unusual Punishments Clause provides to prisoners. The Court set forth a framework that prisoners must use to prove that prison conditions deprive them of basic human needs.<sup>132</sup> Although the elements of this framework seem straightforward, inmates will face difficulties in establishing the two components set forth in *Helling* to meet the objective element of a conditions-of-confinement claim.<sup>133</sup>

#### A. Contemporary Standards of Decency

To establish the objective element of the standard announced in *Helling*, prisoners must first prove that society considers the disputed risk to be “so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”<sup>134</sup> Problems in meeting this component of the objective element begin with the fact that some Americans hold criminals to a different standard than the rest of free society. These people argue that law-abiding citizens should not be exposed to certain health risks, but criminals must bear harsh, unhealthy living conditions as a price to pay for violating the law.<sup>135</sup> Another difficulty prisoners will encounter in establishing this component of their conditions-of-confinement claim is the inherent problem of defining and proving what constitutes “contemporary standards of decency.”

In *Trop v. Dulles*,<sup>136</sup> the Supreme Court stated for the first time that the Eighth Amendment must “draw its meaning from the

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130. *Id.* at 2485 n.3.

131. *See Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (stating that Eighth Amendment should be dynamically interpreted and should preserve human decency).

132. *See supra* text accompanying notes 118-19 (delineating objective element of conditions-of-confinement claims).

133. *See Helling*, 113 S. Ct. at 2482 (explaining problems prisoners may face in establishing both that contemporary standards of decency forbid exposure to alleged health risk and that scientific data proves likelihood of injury from exposure).

134. *Id.*

135. *See infra* note 244 and accompanying text (discussing public attitude toward prison conditions).

136. 356 U.S. 86 (1958).

evolving standards of decency that mark the progress of a maturing society."<sup>137</sup> The Court, in *Trop*, did not provide a precise framework for establishing when a condition of confinement violates society's contemporary standards of decency. Later, the Court in *Gregg v. Georgia*<sup>138</sup> provided some direction on how courts should determine whether a particular punishment violates evolving social standards.<sup>139</sup> Sounding a theme of judicial restraint and nonintervention in prison administration,<sup>140</sup> the Court in *Gregg* warned judges that Eighth Amendment decisions should not be colored by their personal opinions or views.<sup>141</sup> Instead, in assessing which contemporary values affect the Eighth Amendment, a court should consider only how objective factors such as legislative enactments,<sup>142</sup> history and precedent,<sup>143</sup> public attitudes toward a given sanction,<sup>144</sup> and jury sentencing reflect those values.<sup>145</sup>

### 1. *Legislative action*

Courts have recognized that statutes and regulations are the best

137. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Courts must also determine whether the challenged punishment comports with the basic concept of human dignity at the core of the Eighth Amendment. *Id.* at 100.

138. 428 U.S. 153 (1976).

139. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (noting that "Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society").

140. See *supra* notes 34-38 and accompanying text (discussing some courts' "hands-off" policy toward prison administration issues); see also *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) ("[O]ur job is to identify the 'evolving standards of decency'; to determine, not what they should be, but what they are").

141. *Gregg*, 428 U.S. at 173 (finding that Eighth Amendment requires that courts "look to objective indicia that reflect the public attitudes toward a given sanction"); see also *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (agreeing that Eighth Amendment judgments should not rest on subjective judges' opinions). While the practices of other nations may be relevant, American conceptions of decency are dispositive of an Eighth Amendment inquiry. *Stanford*, 495 U.S. at 369 n.1.

142. See *infra* note 146 (discussing legislative enactments as evidence of societal values).

143. See, e.g., *Gregg*, 428 U.S. at 176-78 (discussing influence of history and precedent on determination of whether death penalty violates contemporary values).

144. See *id.* at 173 (looking to "objective indicia that reflect the public attitude toward a given sanction").

145. See *id.* at 181 (noting that jury is "a significant and reliable objective index" of society's contemporary values). No single objective factor will be dispositive in a given case. *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983). This Note will not address responses of sentencing juries because this factor is not relevant under the facts of *Helling v. McKinney*.

This section of the Note focuses on the feasibility of *McKinney* proving, on remand, that it violates contemporary standards of decency to expose someone to the risk of involuntary, sustained exposure to secondary cigarette smoke. Therefore, this part of the Note will apply *Gregg's* objective factors only to the narrow context of exposure to ETS. It should be noted, however, that, after *Helling*, prisoners challenging any condition of confinement must use *Gregg's* objective factors to prove the social standards prong of the objective element of an Eighth Amendment claim.

indication of society's prevailing values.<sup>146</sup> State and local ordinances, therefore, may help prisoners persuade the courts that the Eighth Amendment should protect them from certain harmful prison conditions. It will be helpful to McKinney's claim, then, that states, in recent years, have enacted a significant amount of legislation regulating environmental tobacco smoke and protecting nonsmokers from involuntary exposure to passive smoke.<sup>147</sup> In contrast, one writer noted in 1991 that while ETS was "ripe for legislative and regulatory activity," the scope of federal ETS regulation was limited.<sup>148</sup> This remains true today.<sup>149</sup> Nevertheless, the substantial number of recent state legislative enactments reflects the prevailing social attitude that levels of secondary smoke should be limited in a number of settings.<sup>150</sup>

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146. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (finding that "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"); *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (stating that legislative response is "most marked indication" of society's attitude); see also *McKinney v. Anderson*, 924 F.2d 1500, 1508-09 (1991) (reviewing several statutes and regulations regarding ETS to determine society's prevailing attitude toward ETS exposure). This judicial view is a derivation of the theme that courts should defer to the legislature in prison condition cases. See *supra* note 36 (citing cases in which courts emphasized need for deference). But see *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) (warning that legislative judgments cannot be determinative of Eighth Amendment standards because framers intended Eighth Amendment to protect against legislative abuse).

It has been suggested that legislation is the best method for dealing with nonsmokers' rights. See Donna S. Stroud, *When Two "Rights" Make a Wrong: The Protection of Nonsmokers' Rights in the Workplace*, 11 CAMPBELL L. REV. 339, 348 (1989) (advocating legislative approach and noting that at least 41 states have enacted statutes restricting smoking). But see Galbraith-Wilson, *supra* note 13, at 344 (refusing to emphasize Bureau of Prisons regulation, which fails to provide completely smoke-free environment).

147. See *infra* note 151 (listing state ETS statutes); Stroud, *supra* note 146, at 349 (noting that, although restrictions vary widely from state to state, most states recognize that smoking in public places is nuisance).

148. Alan B. Horowitz, Comment, *Terminating the "Passive" Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U. L. REV. 183, 192, 197-213 (1991) (commenting on lack of nationally coordinated legislative efforts to regulate ETS, judicial reluctance to give broad remedies for ETS, congressional submission to pressure from tobacco lobby, and federal aversion to national regulation). Horowitz also noted that the risks from ETS "significantly exceed[] those environmental risks currently regulated by our federal agencies and [that ETS] kills more people than all airborne pollutants currently regulated by the EPA." *Id.* at 204 (citing ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES 69 (1989)). Goodin supports his claim by citing studies undertaken by the United States National Academy of Sciences and the Department of Health and Human Services. Goodin, *supra*, at 69.

149. But see, e.g., 15 U.S.C. §§ 1331-1341 (1988 & Supp. IV 1992) (establishing "Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"); 49 U.S.C. app. § 1374(d)(1)(A) (1988 & Supp. III 1991) (banning smoking on virtually every domestic airline flight); 49 C.F.R. § 1061.1 (1992) (forbidding smoking on vehicles transporting passengers in interstate commerce); 41 C.F.R. § 101-20.105-3 (1993) (regulating smoking in Government Services Administration-controlled buildings); 28 C.F.R. § 551.160-63 (1993) (regulating smoking in Bureau of Prisons facilities); *infra* note 151 (listing state statutes regulating ETS).

150. See Respondent's Brief, *supra* note 84, at 40 (discussing survey findings that indicate "national consensus" in favor of some limitations on unwanted exposure to secondhand smoke).

State and local governments have significantly increased the regulation of secondary smoke. By 1993, forty-nine states and the District of Columbia had enacted statutes protecting nonsmokers from even voluntary exposure to ETS in some public places.<sup>151</sup> A majority of these statutes were passed by lawmakers motivated by concerns that exposure to ETS constituted a health risk.<sup>152</sup> Similarly, more than eighty cities and counties enacted smoking laws between 1980 and

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151. ALA. CODE § 25-9-86(j) (1992); ALASKA STAT. § 300 (1991); ARIZ. REV. STAT. ANN. §§ 36-601.01 to -.02 (1993); ARK. CODE ANN. § 6-21-609 (Michie 1993), § 20-22-710 (Michie 1991), § 20-27-703 (Michie 1991), § 20-78-217 (Michie 1991); CAL. HEALTH & SAFETY CODE § 1234 (West 1990), § 1286 (West 1990), § 1596.795 (West 1990 & Supp. 1994), §§ 25941, 25943-25944, 25947 (West 1984), §§ 25948-25949 (West Supp. 1994), § 26577.35 (West Supp. 1994); COLO. REV. STAT. § 25-14-103 (1990); CONN. GEN. STAT. ANN. § 1-21(b) (West 1988), § 53198 (West 1988), § 31-40q (West 1988 & Supp. 1993); DEL. CODE ANN. tit. 11, § 1327 (Supp. 1992); D.C. CODE ANN. §§ 6-912 to -913 (1981 & Supp. 1993); FLA. STAT. ANN. chs. 386.203, 204 (Harrison 1993); GA. CODE ANN. § 16-12-2 (1992); HAW. REV. STAT. § 328K (1992 Supp.); IDAHO CODE § 18-5904 (1987), §§ 39-5502, -5503, -5505, -5510 (Supp. 1993); ILL. ANN. STAT. ch. 410 para. 80, ch. 720 para. 560, ch. 225 para. 705/13.02 (Smith-Hurd 1993); IND. CODE ANN. § 16-41-37 (Burns 1993); IOWA CODE ANN. § 142B (West Supp. 1993); KAN. STAT. ANN. §§ 21-4009 to -4010 (1988); KY. REV. STAT. § 352.170(3) (Baldwin 1988), § 438.050 (Baldwin Supp. 1993); LA. REV. STAT. ANN. § 17:240 (West Supp. 1993), § 40:1261 (West 1992), §§ 40:1300:23, :24 (West Supp. 1993); ME. REV. STAT. ANN. tit. 22, §§ 1578, 1579-A, 1580, 1580-A to -B, § 1825 (West 1992); MD. CODE ANN. HEALTH-GEN. §§ 24-205, -501 (1990), MD. CODE ANN. TRANSP. § 7-705(b)(2) (Supp. 1993); MD. ANN. CODE art. 25 § 236B (1990), art. 38A § 23(b) (1990), art. 78 § 35(a) (Supp. 1991); MASS. ANN. LAWS ch. 270, §§ 21-22 (Law. Co-op. 1992); MICH. STAT. ANN. §§ 14.15 (12601-12617) (Callaghan 1988 & Supp. 1993); MINN. STAT. ANN. §§ 144.413-414 (West 1989 & Supp. 1994); MISS. CODE ANN. § 97-35-1(4) (1973); MO. ANN. STAT. §§ 191.765-767 (Vernon Supp. 1993); MONT. CODE ANN. §§ 50-40-103, -107, -201, -204 (1993); NEB. REV. STAT. §§ 71-5701, -5713 (1986); NEV. REV. STAT. §§ 202.249-2492, 473.065(c), 475.050 (1991); N.H. REV. STAT. ANN. §§ 155:65-66 (Supp. 1992), § 207:32 (1989); N.J. STAT. ANN. § 26-3D (West 1987 and Supp. 1993), § 26:3E-7 (West 1987); N.M. STAT. ANN. §§ 24-16-3, -7 (Michie 1991); N.Y. PUB. HEALTH LAW §§ 1399-n, -o (McKinney 1990); N.C. GEN. STAT. §§ 143-596, -598 (1993); N.D. CENT. CODE § 23-12-10 (1991 & Supp. 1993); OHIO REV. CODE ANN. §§ 3313.751, 3741.14(2), 3743.06(c), 3791.031, 4157.65, 4951.57 (Anderson 1992); OKLA. STAT. ANN. tit. 21 § 1247 (West 1983), tit. 63 § 1-1521-25 (West Supp. 1993); OR. REV. STAT. §§ 192.710, 243.350, 433.835-875, 441.815, 479.015, 659.380 (1991); PA. STAT. ANN. tit. 35 §§ 361, 1230.1, 1223.5 (1993), tit. 53 § 46202(22) (1966), tit. 55 § 560.1 (Supp. 1993); R.I. GEN. LAWS §§ 23-20.6-2, -20.7-4 to -5 (1989 & Supp. 1993); S.C. CODE ANN. § 23-35-90 (Law. Co-op. 1989), § 44-95-20 (Law. Co-op. Supp. 1993), § 59-67-150 (Law. Co-op. 1990); S.D. CODIFIED LAWS § 22-36-2 (1988); TEX. PENAL CODE ANN. § 48.01 (West 1989 & Supp. 1994); UTAH CODE ANN. 76-10-101, -106 (1990 & Supp. 1993); VT. STAT. ANN. tit. 18 § 1421, §§ 1741-1745 (Supp. 1993), tit. 20 § 2752 (1987); VA. CODE ANN. § 3.1-379 (Michie 1983), § 15.1-29.19 (Michie 1989), §§ 15.1-291.1, -11 (Michie Supp. 1993), § 45.1-98 (Michie 1989), § 45.1-98.1 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9.91.025 (West 1988), §§ 70.160.010-040 (West 1992); W. VA. CODE § 16-9A-4 (1991), § 21-3-8 (1989), §§ 22A-2-53, -57 (1985), § 30-33-4(b)(4) (Supp. 1993); WIS. STAT. ANN. § 101.123 (West 1988 & Supp. 1992); WYO. STAT. § 30-2-602(b).

152. *Avery v. Powell*, 695 F. Supp. 632, 640 (D.N.H. 1988); see Rivka Widerman, *Tobacco is a Dirty Weed. Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation*, 38 LOY. L. REV. 387, 423 (1992) (commenting that contemporary anti-smoking laws are intended to protect nonsmokers from secondhand smoke and discourage smoking); Morley Swingle, Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 457 (1980) (stating that smoking restrictions are aimed at protecting health of nonsmokers).



1986,<sup>153</sup> and 145 municipal governments have imposed restrictions on smoking since January 1993.<sup>154</sup>

This trend should be evaluated against the fact that a number of these statutes and regulations exempt prison facilities.<sup>155</sup> Despite arguments that these exemptions show that society is not yet willing to extend to prisoners the same protections accorded to the nonsmoking public,<sup>156</sup> some prisons and jails have begun taking major steps toward prohibiting smoking.<sup>157</sup> As of May 1990, county and state corrections departments in thirteen states had enacted, or were considering, complete bans on smoking.<sup>158</sup> In light of McKinney's case, it is significant to note that the Nevada state prison system has adopted a new smoking policy prohibiting smoking except in certain designated areas.<sup>159</sup>

Federal regulatory agencies have also taken action regarding ETS.<sup>160</sup> The Environmental Protection Agency, for example,

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153. *McKinney v. Anderson*, 924 F.2d 1500, 1509 (9th Cir. 1991) (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL 7* (1986)); Horowitz, *supra* note 148, at 209 (stating that "local ordinances are generally more restrictive than their state counterparts"). A recent survey of smoking restrictions adopted by states as well as cities with a population of at least 25,000 reveals that smoking restrictions cover over two-thirds of the approximately 100 million Americans living in cities with a population of 25,000 or more. Nancy A. Rigotti & Chris L. Pashos, *No-Smoking Laws in the United States: An Analysis of State and City Actions to Limit Smoking in Public Places and Workplaces*, 266 JAMA 3162, 3164 (1991).

154. Marcia Coyle et al., *Blowing Smoke*, NAT'L L.J., July 5, 1993, at 11. Another 144 municipal governments are considering bans. *Id.*

155. See Petitioners' Brief, *supra* note 81, at 27 (citing NEV. REV. STAT. § 202.249[1] (1987) as example of smoking statute exempting prisons).

156. See Petitioners' Brief, *supra* note 81, at 28-29 (arguing that "although the trend in society is toward the protection of non-smokers in certain public places, such protections have not necessarily been extended to prisons in deference to the unique problems associated with the management and classification of inmates").

157. See *infra* note 158 and accompanying text (noting state and local examples); 28 C.F.R. § 551.160-63 (1993) (designating smoking and nonsmoking areas in Federal Bureau of Prisons' facilities and vehicles). Federal prison officials must, "[t]o the extent practicable," place nonsmoking inmates in nonsmoking quarters. 28 C.F.R. § 551.162(b) (1993). Also, under this regulation, double-celling of smokers with nonsmokers should be "avoided except where impractical due to circumstances, and then may be done only for limited duration." *Id.*; see also Galbraith-Wilson, *supra* note 13, at 344 (warning that Bureau of Prisons regulation should not be given emphasis because it fails to provide nonsmoking inmate with completely smoke-free environment).

158. See Lisa Belkin, *At More and More Jails, Smoking is Forbidden*, N.Y. TIMES, July 9, 1990, at A10 (noting that American Jailers Association, which represents 6500 jail administrators, passed resolution endorsing ban on smoking in prisons and held training program on management of smoke-free jails).

159. See *supra* note 104 (describing Nevada state prison system's smoking policy).

160. See *Health Effects of Indoor Air Pollution: Hearing Before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 93-94 (1987) [hereinafter *Health Effects Hearing*] (statement of Thomas Godar, M.D., American Lung Assoc.) (describing general federal jurisdiction over indoor air pollution). In response to new studies suggesting that the tobacco industry increased nicotine levels in cigarettes to "maintain their addictive hold on smokers," the Food and Drug Administration (FDA) has recently announced

recently issued a report classifying ETS as a "Group A" carcinogen, the same group in which benzene and asbestos are classified.<sup>161</sup> The EPA report, a comprehensive study of the hazardous effects of ETS on human health, emphasized the need for smoking bans in public places.<sup>162</sup> The Occupational Safety and Health Administration's (OSHA) recent request for more information, comments, and recommendations on occupational exposure to indoor air pollut-

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that it may begin regulating tobacco products. John Schwartz, *In Policy Shift, FDA Is Ready to Consider Regulating Tobacco*, WASH. POST, Feb. 26, 1994, at A4 [hereinafter *FDA Regulation*]. If cigarettes are regulated by the FDA, there may be severe consequences to the tobacco industry because the FDA ensures that products on the market must be both "safe and effective." *See id.* (reporting that David A. Kessler, Commissioner of FDA, stated that FDA regulation "could mean, ultimately, removal from the market of tobacco products' with addictively high levels of nicotine").

The growing trend of federal and private efforts to ban smoking in public signals a victory for nonsmokers' rights. *See infra* note 185 (discussing recent bans or restrictions on smoking in public). These advances in the anti-smoking movement are evidence that society is finally beginning to recognize the harmful effects of passive smoke on human health. *See* Kirstin D. Grimsley, *More Malls, Stores Curb Smoking: Health, Legal Issues Spur Retailers to Act*, WASH. POST, Jan. 26, 1994, at A1, A8 [hereinafter *Malls Curb Smoke*] (stating that retailers and business owners have severely limited smoking in response to recent studies of dangers of secondhand smoke, particularly to children); *see also* John Schwartz, *Report Cites Teenagers' Tobacco Use: Rise in Smoking Noted by Surgeon General*, WASH. POST, Feb. 25, 1994, at A1 [hereinafter *1994 Surgeon General Report*] (indicating that publicity of "anti-smoking message" has convinced some Americans to stop smoking).

The benefits of these actions to curb smoking in American society, however, should not come at the expense of smokers' rights. Critics of the recent bans and restrictions on smoking voice concerns that such actions raise many complex and difficult social issues and ignore smokers' rights. Some have argued that prohibitions on smoking are contrary to the democratic tradition of the United States to encourage Americans to make their own choices and "pursue their preferences." *Malls Curb Smoke, supra*, at A8 (reporting response of Walker Merryman, vice president, Tobacco Institute, to decisions of hundreds of mall owners to ban or limit smoking); *see Elders, Predecessors Back 'Secondhand' Smoke Bill*, WASH. POST, Feb. 8, 1994, at A7 (stating that federal legislation banning smoking in public represents "social engineering on a vast scale . . . [and] recalls the extremism of Prohibition"). Smokers' advocates also argue that smoking restrictions will create inconveniences for those who smoke. *See Malls Curb Smoke, supra* (suggesting that smokers may stop going to malls or may spend less time in stores and other areas that regulate smoking); *see also FDA Regulation, supra*, at A4 (estimating that 80% of smokers may be addicted to smoking and that bans on smoking should recognize that smokers may need "weaning period").

161. OFFICE OF AIR AND RADIATION, U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS 1-4 (1993) [hereinafter 1993 EPA REPORT]. On June 22, 1993, the tobacco industry filed suit against the EPA in the Middle District of North Carolina seeking to have this classification rescinded. Coyle et al., *supra* note 154, at 11. The 1993 EPA report was added to the official record in McKinney's case. *Helling v. McKinney*, 61 U.S.L.W. 3518, 3519 (Feb. 2, 1993).

162. *See* 1993 EPA REPORT, *supra* note 161, at 1-4 (reporting that ETS causes some 3000 annual lung cancer deaths in nonsmoking Americans); *see also* Greg Rushford, *Passive Smoke, Active Lobby: Tobacco Interests Set Sights on EPA Staff Study*, LEGAL TIMES, Aug. 6, 1990, at 2 (discussing Tobacco Institute's efforts to discredit EPA's findings and public relations campaign denying any link between ETS and cancer). For a further discussion of the 1993 EPA report, *see* Jeffrey S. Kinsler, *Exposure to Tobacco Smoke Is More than Offensive, It Is Cruel and Unusual Punishment*, 27 VAL. U. L. REV. 385 (1993); Coyle et al., *supra* note 154, at 11.

ants<sup>163</sup> from any interested parties in the American public indicates that OSHA is also taking the health hazards of ETS seriously. The legislation and regulations regarding the right of nonsmokers to be free from involuntary exposure to ETS will provide McKinney with effective tools on remand to persuade the trial court that contemporary standards of decency recognize that inmates deserve protection from ETS.

## 2. *History and precedent*

Federal courts have been divided on whether a prisoner's involuntary exposure to ETS implicates the Eighth Amendment. In *Avery v. Powell*,<sup>164</sup> the first case to address whether exposure to ETS constitutes punishment under the Eighth Amendment,<sup>165</sup> the district court in New Hampshire found that exposure to ETS is not merely a discomfort, but may also constitute punishment, thereby implicating the Eighth Amendment.<sup>166</sup> This finding led the court to hold that ETS exposure would constitute cruel and unusual punishment where a prisoner could prove that his exposure to a smoke-filled environment was hazardous to his health and offended evolving standards of decency.<sup>167</sup>

The U.S. Court of Appeals for the Tenth Circuit, in *Clemmons v. Bohannon*,<sup>168</sup> refused to follow the lead of the *Avery* decision. The court in *Clemmons*, while acknowledging that ETS exposure is a potential health hazard,<sup>169</sup> concluded that exposure to secondhand smoke does not rise to the level of an Eighth Amendment violation.<sup>170</sup> The court stated that a nonsmoking prisoner who is sometimes forced to share a cell with a smoking cellmate is not deprived of a basic human need.<sup>171</sup> Moreover, the court found that the

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163. 56 Fed. Reg. 47,892-93 (1991). Under the Occupational Safety and Health Act, 29 U.S.C. § 651 (1988), OSHA has the responsibility to maintain a healthful workplace. OSHA, however, has not yet interpreted the Act as "ensuring healthful air quality." *Health Effects Hearing*, *supra* note 160, at 94 (statement of Thomas Godar, M.D., American Lung Assoc.).

164. 695 F. Supp. 632 (D.N.H. 1988).

165. Terry, *supra* note 13, at 364.

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

167. *Id.* at 640. The *Avery* test mirrors and precedes the *Helling* standard. See *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993) (holding that prisoner states Eighth Amendment claim by alleging that he has been exposed to levels of ETS that unreasonably endanger his future health, that exposure is contrary to contemporary standards of decency, and that prison officials are deliberately indifferent to his medical needs).

168. 956 F.2d 1523 (10th Cir. 1992).

169. *Clemmons v. Bohannon*, 956 F.2d 1523, 1525 (10th Cir. 1992).

170. *Id.*

171. *Id.* at 1527. Unlike the plaintiff prisoners in *Clemmons*, McKinney was constantly exposed to ETS. See *Helling*, 113 S. Ct. at 2478 (stating that McKinney's cellmate smoked five packs of cigarettes per day). McKinney sought Supreme Court review on the grounds that the

Eighth Amendment does not protect prisoners from possible latent health harms.<sup>172</sup>

The Fifth, Seventh, and Tenth Circuits have also refused to hold that exposure to ETS in the prison setting violates the Cruel and Unusual Punishments Clause.<sup>173</sup> These courts have relied on a range of reasons, including the good-faith efforts of prison officials to implement significant safeguards for the protection of nonsmoking prisoners<sup>174</sup> and society's inability to agree on the propriety of nonsmoking areas.<sup>175</sup> In contrast, the U.S. Courts of Appeals for the Sixth and Ninth Circuits have concluded that contemporary standards of decency have evolved to the point that involuntary exposure to passive smoke may constitute cruel and unusual punishment.<sup>176</sup>

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Ninth Circuit's decision in his case and the Tenth Circuit's decision in *Clemmons* constituted a split among the circuits. *Id.* at 2479.

172. *Clemmons*, 956 F.2d at 1527.

173. The *Clemmons* decision is still binding within the Tenth Circuit. *See supra* text and accompanying notes 168-72 (discussing *Clemmons*).

In *Wilson v. Lynaugh*, a decision made prior to the Supreme Court's ruling in *Wilson v. Seiter*, the Fifth Circuit refused to consider a previously litigated Eighth Amendment claim that was reinstigated following new studies regarding the effects of ETS. *Wilson v. Lynaugh*, 878 F.2d 846, 850 (5th Cir. 1989). The court considered, *inter alia*, society's inability to decide on the propriety of nonsmoking areas. *Id.* at 851 (citing *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989)).

In *Steading v. Thompson*, the U.S. Court of Appeals for the Seventh Circuit considered an asthmatic prisoner's claim that his exposure to ETS constituted cruel and unusual punishment. *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991). The court conceded that health may be affected by ETS exposure, but concluded that society is still debating the severity of such health effects. *Id.* The court in *Steading* rejected the prisoner's claim because there was no evidence of a culpable state of mind on the part of prison officials, as required by *Wilson v. Seiter*. *Id.* The court did note, however, that prisoners who are allergic to tobacco smoke or who can attribute their serious medical symptoms to ETS are entitled to medical treatment, which may include removal from smoking areas. *Id.*

174. *See West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990) (noting that offers to assign prisoner to nonsmoking cell with fan, vents, and windows showed that prison officials were not deliberately indifferent to serious medical needs of nonsmoking prisoners).

175. *See Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir. 1989) (holding that Eighth Amendment does not protect against discomforts); *Caldwell v. Quinlan*, 729 F. Supp. 4, 6 (D.D.C. 1990) (stating that contemporary society does not yet think exposure to ETS violates "broad and idealistic concepts of dignity, civilized standards, humanity and decency") (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (noting that evolving standards of decency had not yet progressed to point where society demands smoke-free environment in prison setting).

176. *See, e.g., Smith v. Brown*, No. 91-1276 1991 U.S. App. LEXIS 19011, at \* 3 (6th Cir., Aug. 9, 1991) (finding in error district court's ruling that society's standards of decency had not yet evolved to point of requiring smoke-free areas in prisons); *McKinney v. Anderson*, 924 F.2d 1500, 1512 (9th Cir. 1991) (concluding that prisoner's involuntary exposure to levels of ETS that pose unreasonable risks of harm to future health violate society's standards of decency). In *Brown*, three inmates filed a class action suit on behalf of non-smoking prisoners in Michigan, claiming that prison officials had violated their Eighth Amendment rights by failing to provide non-smoking areas within the prison housing units. *Brown*, at \*1-\*2.

The circuits have split on the issue of ETS for a variety of reasons.<sup>177</sup> The conflict among the courts, however, has centered mainly around whether the public recognizes that long-term exposure to ETS in close quarters is dangerous to an individual's health.<sup>178</sup> Another point of discord concerns the issue of how much this recognition should manifest itself in public attitudes before courts may conclude that "evolving standards of decency" mandate freedom from compelled, sustained exposure to passive smoke in correctional facilities.<sup>179</sup>

### 3. *Public attitudes*

Evidence of public attitudes is an effective tool for prisoners to show that contemporary social standards suggest that protection from a particular deprivation is a basic human need protected by the Eighth Amendment.<sup>180</sup> Public attitudes regarding certain health risks, however, are rarely uniform. For example, in the context of McKinney's claim, just as courts differ as to whether compelled exposure to ETS constitutes cruel and unusual punishment,<sup>181</sup> society also seems to be undecided on how to balance the rights of nonsmokers and smokers.<sup>182</sup> Until recently, smokers' right to smoke wherever and whenever they wished had been close to absolute.<sup>183</sup> As society gains more information about the hazards of smoking and

177. See generally David T. Cox, *McKinney v. Anderson: Cruel and Unusual Smoke—Eighth Amendment Limitations on Conditions of Confinement in Prisons*, 18 J. CONTEMP. L. 131, 137-47 (1992) (discussing cases since 1989 dealing with issue of ETS as condition of confinement).

178. See *Clemmons v. Bohannon*, 918 F.2d 858, 864 (10th Cir. 1990) (noting that courts disagree on extent to which public must recognize that exposure to ETS is harmful before such exposure violates evolving standards of decency).

179. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

180. *Cf. Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (noting that standards of decency inquiry turns on society's view of death penalty as criminal sanction).

181. See *supra* notes 164-76 and accompanying text (discussing cases that show varying positions on cruel and unusual punishment issue).

182. *Clemmons*, 918 F.2d at 870 (Tacha, J., dissenting); see *Caldwell v. Quinlan*, 729 F. Supp. 4, 6 (D.D.C. 1990) (stating that society has yet to view smoking as transgressing "broad and idealistic concepts of . . . decency"); *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (indicating that "society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment"). *But see McKinney v. Anderson*, 924 F.2d 1500, 1504 (9th Cir. 1991) (noting district court's ruling that society's attitudes have evolved to point that unwanted exposure to ETS violates social standards of decency).

183. See *Swingle*, *supra* note 152, at 445-46 (discussing early history of conflict regarding right to smoke between smokers and nonsmokers). Between 1927 and 1964, very few laws restricting smoking existed. *Id.* at 445. In the 1960s, anti-smoking statutes began to appear as a result of studies confirming the danger of breathing secondhand smoke. *Id.* at 445-46. Although there is no constitutional right to breathe clean air, at least one commentator has noted that while a smoker may have a right to harm his own health, he does not have a right to threaten the health of nonsmokers. *Stroud*, *supra* note 146, at 340; see also *Galbraith-Wilson*, *supra* note 13, at 344 (determining that smokers' rights to smoke ends where their behavior affects health of those forced to breathe their second-hand smoke).

ETS,<sup>184</sup> however, the American public has become less tolerant of involuntary exposure to second-hand smoke.<sup>185</sup>

Nevertheless, several significant obstacles may prevent prisoners from proving that public attitudes toward ETS have evolved to the point that compelled exposure to passive smoke may be cruel and unusual punishment.<sup>186</sup> Smoking is a 400-year-old habit and a part

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184. See *infra* notes 200-05 and accompanying text (discussing recent medical evidence on health effects of ETS).

185. Horowitz, *supra* note 148, at 208 (noting that surveys indicate "the public is offended by ETS, and increasingly favors total smoking bans in many public places"); Rick Kershenblatt, Comment, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. BRIDGEPORT L. REV. 133, 148-49 n.99 (listing nonsmokers' gains in public support and political power); Stroud, *supra* note 146, at 358-59 (discussing 1987 public opinion polls showing society's endorsement of smoking bans in public places); Widerman, *supra* note 152, at 388 (suggesting that "Americans today seem to have foresworn smoking"). The campaign to minimize the involuntary exposure to passive smoke in American society has taken a great leap forward in 1994. Many retailers and business owners have voluntarily decided to severely restrict or ban smoking in malls and fast-food restaurants across the country. See *Malls Curb Smoke*, *supra* note 160, at A1, A8 (stating that Sears, Roebuck and Co. prohibits smoking in 799 of its stores, San Diego-based Ernest Hahn Co. bans smoking in 48 of their shopping centers across country, Chicago-based Homart Development Corp. plans to ban smoking in 20 of its shopping centers, and that local malls in District of Columbia, Virginia, and Maryland also will soon be virtually smoke-free); see also *McDonald's Restaurants Going Smoke-Free: Fast-Food Trade Group Back Legislation to Ban Public Smoking*, WASH. POST, Feb. 24, 1994, at A1 [hereinafter *Smoke-Free Restaurants*] (reporting that McDonald's Corp., "the world's largest fast-food chain," has decided to ban smoking in all McDonald's restaurants in U.S. and that Arby's Inc. has also announced it will ban smoking in its restaurants). But see *id.* at A12 (stating that National Restaurant Association has refused to openly support legislation banning smoking in public places).

Some have suggested that these decisions to ban or severely limit smoking are a response to recent studies warning of the dangers of secondhand smoke, such as the EPA's report in 1993. *Malls Curb Smoke*, *supra* note 160, at A1. Others have stated that fears of legal liability under "clean air legislation, and under protections offered to disabled patrons and customers with illnesses aggravated by exposure to second-hand smoke" prompted their actions. *Id.* Another reason for the recent curbs on smoking is customer preference. See *Smoke-Free Restaurants*, *supra*, at A12 (finding that nonsmokers comprise greater portion of clientele than smokers). But see *id.* (reporting that research compiled by tobacco industry indicated that "45 percent of smokers visited fast-food restaurants 14 or more times each month, while only 30 percent of nonsmokers ate there regularly").

The Pentagon's announcement to ban smoking in the military workplace also signals another substantial victory for nonsmokers. See John Lancaster, *Military Bans Smoking in Workplace: Decision Will Affect 2.6 Million Personnel*, WASH. POST, Mar. 8, 1994, at A1 (stating that while other businesses and federal agencies have taken actions to ban or restrict smoking, Defense Department is largest employer to do so and is most sweeping ban on smoking yet). In March 1994, Pentagon officials instituted a new smoking policy in the military that completely prohibits smoking inside all offices of the Defense Department and all other areas that fall within the definition of a "workplace, whether it is the inside of a tank, airplane or helicopter." See *id.* at A1 (estimating that this prohibition on smoking will affect 2.6 million American military personnel in areas across world). But see *id.* (noting that under new smoking policy, smoking is still permitted in certain areas of military barracks and family housing, social clubs, restaurants, prison areas, and recreational facilities).

186. In discussing the inherent problems of using contemporary standards of decency as a standard by which to measure whether a challenged punishment is cruel and unusual, Judge Frank stated that "in any context, such a standard—the community's attitude—is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels." *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

of the American heritage and culture.<sup>187</sup> Despite the associated health risks, tobacco continues to be an important part of life for many individuals,<sup>188</sup> including prisoners.<sup>189</sup>

In *Helling v. McKinney*, the Supreme Court refused to create a constitutional right to a smoke-free environment.<sup>190</sup> Yet the facts and issues *Helling* presented drew the Court into the national debate about smoking by pitting the rights of smoking inmates against the rights of nonsmoking inmates. If McKinney can persuade the district court on remand that society will no longer tolerate compelled exposure to ETS in either the public or prison setting, his case will signal a substantial victory for nonsmoking prisoners.<sup>191</sup>

### B. Scientific and Statistical Data Regarding ETS

After *Helling*, if a prisoner can prove that a certain condition of confinement violates contemporary standards of decency, he or she must then provide the court with scientific and statistical data about the seriousness of the potential harm and the likelihood that the alleged harm will injure his or her health.<sup>192</sup> Prior to *Helling*, courts rejected the use of public opinion polls,<sup>193</sup> positions of interest

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187. See Carl D. Mayhew, Comment, *Smoking in Public: This Air Is My Air, This Air Is Your Air*, 4 S. ILL. U. L.J. 665, 665 (1984) (stating that Americans have been addicted to tobacco since colonial period); see also Widerman, *supra* note 152, at 395-97 (discussing long history of tobacco use in United States).

188. See, e.g., Kenton Robinson, *Advocacy Group Hopes to Ignite Smokers into Battling for Rights*, HARTFORD COURANT, Jan. 11, 1994, at A7 (estimating that 46-50 million smokers in United States smoke 476 billion cigarettes per year).

189. See Belkin, *supra* note 159, at A10 (estimating that nationwide proportion of smokers in prisons is 90%); Linda Himelstein, *These Inmates Really Want to Kick Butts; Convicts Press Claims that Smoky Cells Are 'Cruel and Unusual'*, Legal Times, June 24, 1991, at 1 (noting that smoking population in prisons is estimated to be as high as 70%). In his affidavit, Donald L. Helling, Associate Warden at the Nevada State Prison, stated that "[s]moking is very important to many inmates," and that "if smoking were banned . . . it would create a potentially dangerous situation due to the anger of those inmates who do smoke." Amicus Brief, *supra* note 81, at 4.

190. *Helling v. McKinney*, 113 S. Ct. 2475, 2481 (1993).

191. See *Statement by Attorney in Second-Hand Smoke Case Decided by U.S. Supreme Court*, U.S. Newswire, June 18, 1993, available in LEXIS, Nexis Library, USNWR File ("This is an important victory not only for prisoners, but for all Americans who are concerned about second-hand smoke and its ill-effects on their health." (quoting Cornish F. Hichcock, staff attorney, Public Citizen Litigation Group and attorney for William McKinney)).

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

193. See *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (rejecting as insufficient evidence of national consensus several public opinion surveys indicating strong opposition to execution of mentally retarded criminals).

groups and professional societies,<sup>194</sup> and expert testimony<sup>195</sup> as gauges of public attitudes in Eighth Amendment claims. Courts also refused to acknowledge socioscientific, ethnoscientific, and purely scientific evidence as proof of standards of decency.<sup>196</sup> In *Helling*, however, the Court not only allowed scientific and statistical data into evidence, but also mandated that such evidence be presented to the court in condition-of-confinement cases. In requiring such data, the Court placed another barrier in the path of the prisoner seeking relief from unhealthy, unsafe prison settings. For one, this scientific evidence may not always be accessible to prisoners who may lack the financial means to obtain such information. Furthermore, as with the effects of ETS on human health, the available data may conflict or may not even exist.

The second component of the objective element of an Eighth Amendment claim requires McKinney, on remand, to provide scientific and statistical data to support his contention that exposure to ETS constitutes cruel and unusual punishment.<sup>197</sup> Although the dangers of smoking have been studied since 1761,<sup>198</sup> society has only begun to understand the adverse effects of tobacco during the past

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194. See *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (refusing to allow opinions of public, interest groups and professional associations' regarding capital punishment for teenage offenders as too broad and uncertain to establish national consensus); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 837 (1988) (warning against using professional standards as indication of national attitudes, as they take "the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform").

195. See, e.g., *Whitley v. Albers*, 475 U.S. 312, 323 (1986) (rejecting expert's after-the-fact opinion on whether danger was "imminent"); *Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27 (1979) (refusing to consider expert testimony that court had found little application to case at hand); *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (noting that expert opinions on desirable prison conditions may be helpful and relevant to establishing goals for prison officials but do not establish constitutional minima) (citing U.S. DEPT. OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS I (1980)). But see *Hoptowitz v. Ray*, 682 F.2d 1237, 1246 (1982) (noting that courts may consider opinions of experts and pertinent organizations to determine whether challenged condition violates contemporary standards of decency, although "these opinions will not ordinarily establish constitutional minima"). The magistrate denied McKinney's motion to provide expert testimony on the health effects of ETS. *McKinney v. Anderson*, 924 F.2d 1500, 1503 (9th Cir. 1991).

196. *Stanford*, 492 U.S. at 377-78; *Gregg v. Georgia*, 428 U.S. 153, 184-86 (1976) (noting debate in use of statistical data to evaluate whether death penalty deters crime). But see *Stanford*, 492 U.S. at 383 (Brennan, J., dissenting) (stating that inquiry into Eighth Amendment standards must also include scientific evidence); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (maintaining that court's decision whether there are "conditions necessary to insure [inmates'] good physical and mental health" must include analysis of current scientific opinion).

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

198. See Galbraith-Wilson, *supra* note 13, at 335 (reviewing studies of smoking's adverse health effects); Mayhew, *supra* note 187, at 665 ("Even before the English landed in America, smoking had become controversial due to health concerns; this despite the lack of hard medical evidence against it at the time.").



thirty years.<sup>199</sup> A variety of studies<sup>200</sup> have demonstrated that cigarette smoke kills people.<sup>201</sup> The U.S. Surgeon General's 1986 report, *The Health Consequences of Involuntary Smoking*,<sup>202</sup> is still considered the most comprehensive compilation of scientific and statistical data on involuntary smoking.<sup>203</sup> This report concluded

199. Galbraith-Wilson, *supra* note 13, at 335 (citing U.S. Surgeon General's Report on Smoking and Health of 1964 as first systematic cognitive recognition of dangers of tobacco use); *see also* *Changing Climate Seen in Efforts to Tell Public about Smoking*, *Health*, 252 JAMA 2797, 2797-99 (1984) (attributing recent progress in public information about smoking hazards to former President Ronald Reagan's Smoking Prevention and Health Education Act, new labeling laws, and proliferation of state and local regulation restricting smoking in public places); *see also* Sandra Blakslee, *Nicotine: Harder to Kick than Heroin*, N.Y. TIMES, Mar. 29, 1987, at F22 ("Despite overwhelming evidence that tobacco is destroying their health and shortening their lives, 53 million Americans continue to smoke. Increasingly aware that their addiction is also harmful to their children and co-workers, they continue to puff away on 570 billion cigarettes a year.")

200. *See* Galbraith-Wilson, *supra* note 13, at 336 n.10 (listing various U.S. Surgeon General reports on hazards of smoking); Swingle, *supra* note 152, at 447-49 (discussing studies published in 1970s identifying negative effects of passive smoke on human health).

201. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL 11 (1989) [hereinafter 1989 REPORT] (reporting Surgeon General's estimate that smoking is responsible for more than one of every six deaths in United States each year). According to the Surgeon General, "cigarette smoking is the single most important preventable environmental factor contributing to illness, disability and death in the United States.") U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH, A REPORT OF THE SURGEON GENERAL vii (1979); *see also* Stanton A. Glantz & Richard A. Daynard, *Safeguarding the Workplace: Health Hazards of Secondhand Smoke*, TRIAL, June 1991, at 37, 39 (reporting that each year passive smoking kills about 3,700 Americans by inducing lung cancer and 37,000 by inducing heart disease, with an estimated total, when added to other cancers passive smoking causes, of 53,000).

202. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986) [hereinafter 1986 REPORT].

203. *Clemmons v. Bahannon*, 918 F.2d 858, 865 n.6 (10th Cir. 1990). Some critics claim that the Surgeon General's reports are too tenuous to be relied on in an Eighth Amendment inquiry. *See id.* at 871-72 (Tacha, J., dissenting) (mentioning that 1986 Report does not establish constitutional minima but rather public health goal that society should try to attain); *cf.* *Bell v. Wolfish*, 441 U.S. 520, 544 n.27 (1978) (asserting that Department of Justice task force's recommendations regarding conditions of confinement are not determinative of constitutional standards); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 827 (D.C. Cir. 1988) (preferring public's attitude over expert standards as gauge for Eighth Amendment analysis). Furthermore, while the 1986 Surgeon General's report concludes that "[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers," the report also states that the "risk associated with involuntary smoking exposure is uncertain" and "[m]ore accurate estimates for the assessment of exposure in the home, workplace, and other environments are needed." 1986 REPORT, *supra* note 202, at vii, 101-02 (prefacing and summarizing studies on risks of passive smoking).

The tobacco industry has consistently taken the position that ETS exposure is not hazardous to human health. *See, e.g.*, Maxwell W. Layard, *Environmental Tobacco Smoke and Cancer: The Epidemiologic Evidence*, in ENVIRONMENTAL TOBACCO SMOKE: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY, 1989, at 99-112 (Donald J. Ecobichon & Joseph M. Wu eds., 1990) (providing data from scientific symposium funded by tobacco industry showing that link between ETS and lung cancer is weak and inconsistent); *Passive Smokers: Next Tobacco Plaintiffs*, TRIAL, Sept. 1990, at 15, 15 (stating that tobacco industry denies adverse effects of ETS). *But see* Andrew Blum, *Secondhand Smoke Suits May Catch Fire*, NAT'L L.J., Mar. 1, 1993, at 1, 12 (assigning little credibility to tobacco industry's criticism of Surgeon General's conclusions).

In response to such allegations, the Surgeon General has stated:

[T]he time for delay is past; measures to protect the public health are required now.

that exposure to ETS causes diseases, including cancer and acute and chronic respiratory problems, in healthy nonsmokers.<sup>204</sup> In 1991, passive smoke was considered the third leading preventable cause of death in the United States.<sup>205</sup>

McKinney can attempt to refute prison officials' claims that the harms of ETS are too speculative to warrant relief by presenting the recent medical research and statistics on ETS exposure.<sup>206</sup> With such support, McKinney may be able to show that exposure to ETS in prisons presents significant current<sup>207</sup> and future<sup>208</sup> health risks.<sup>209</sup> McKinney must ultimately convince the factfinder that

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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.

1986 REPORT, *supra* note 202, at xi-xii.

204. 1986 REPORT, *supra* note 202, at 10, 13. (finding that substantial number of lung cancer deaths among nonsmokers can be attributed to involuntary smoking); *see also* NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS 10 (1986) (finding that ETS can cause acute and chronic respiratory problems); U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE, A REPORT OF THE SURGEON GENERAL 405 (1984) (finding that studies have indicated weaker measures of pulmonary function among subjects continually exposed to ETS). The Surgeon General also concluded that the children of parents who smoke have an increased frequency of respiratory problems, and that simple segregation of smokers from nonsmokers within the same airspace may reduce, though not eliminate, the risks posed by ETS. 1986 REPORT, *supra* note 202, at vii.

Scientists recent discovered that sidestream smoke, which is the smoke that escapes from the lighted end of a cigarette between puffs, is comprised of chemicals more harmful than mainstream smoke, the smoke that the smoker inhales. This finding supports the conclusion that involuntary smoking exerts a nefarious impact upon one's health. *See* Terry, *supra* note 13, at 369 (stating that sidestream smoke is more dangerous than mainstream smoke because when smoker inhales fire on cigarette becomes hotter, thereby increasing combustion and number of chemicals emitted); *see also* Galbraith-Wilson, *supra* note 13, at 337 (discussing chemical composition of ETS); Lawrence K. Altman, *The Evidence Mounts on Passive Smoking*, N.Y. TIMES, May 29, 1980, at C1 (defining sidestream smoke and mainstream smoke).

205. Glantz & Daynard, *supra* note 201, at 40.

206. *See* Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993) (declining to hold that it would be impossible for McKinney to prove Eighth Amendment violation from ETS exposure).

207. *See* Kershenblatt, *supra* note 185, at 159 n.157 (listing nonfatal, physiological reactions to ETS); Glantz & Daynard, *supra* note 201, at 39 (stating that nonfatal effects of passive smoking, which include burning eyes, sore throat, and headaches, indicate that ETS is dangerous and potentially lethal). McKinney allegedly suffers from some of these current symptoms. McKinney v. Anderson, 924 F.2d 1500, 1502 (9th Cir. 1991) (listing symptoms McKinney exhibited as result of ETS exposure), *cert. granted*, 112 S. Ct. 291 (1991), *aff'd*, 113 S. Ct. 2475 (1993) (noting report's conclusion that ETS places nonsmokers at risk of developing disease).

208. *See* 1986 REPORT, *supra* note 202, at xi; Glantz & Daynard, *supra* note 201, at 37-38 (discussing variety of fatal diseases that ETS exposure may cause); Horowitz, *supra* note 148, at 203 n.98 (listing variety of studies linking ETS to respiratory illness, heart disease, and cancer).

209. *See* 1993 EPA REPORT, *supra* note 161, at 3-6 (stating that exposure to ETS in small areas is especially dangerous); James L. Repace, *Tobacco Smoke and the Nonsmoker*, reprinted in *Indoor Air Quality Research: Hearings Before the Subcomm. on Energy Development and Applications and the Subcomm. on Natural Resources, Agriculture Research, and Environment of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 440, 451 (1983) (contending that studies linking passive smoking with diseases in small airways establish that passive smoke poses significant health

exposure to passive smoke unreasonably endangers his health.<sup>210</sup> There is a good chance that McKinney will meet this burden given that two-thirds of the inmates in the Nevada state prison at Carson City smoke.<sup>211</sup> Similar prison statistics may help other prisoners prove that they have been exposed to unreasonably high levels of second-hand smoke.<sup>212</sup>

In ruling that a prisoner states a cognizable Eighth Amendment claim by alleging that prison officials have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health,<sup>213</sup> the Supreme Court, in essence, also decided that the time for delay on the issue of nonsmoking prisoners' rights has past. Although the Court, in *Helling*, chose not to conclusively address whether ETS exposure in prisons constitutes cruel and unusual punishment,<sup>214</sup> the Court has provided prisoners with the standard they can utilize to add freedom from involuntary exposure to second-hand smoke to the list of basic human needs protected by the Eighth Amendment.

*Helling v. McKinney* marks a step in the Supreme Court's recognition of prisoners' rights to humane living conditions.<sup>215</sup> Just how significant a step the Court took in this direction is not clear. After

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threats).

210. See *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993) (elucidating McKinney's burden regarding objective factor in conditions of confinement cases).

211. *McKinney v. Anderson*, 924 F.2d at 1507. The element of causation, however, may make proof of an ETS claim particularly difficult. See Blum, *supra* note 203, at 12 ("[T]o get a good [secondhand smoke] case you need an incredible combination of facts that a person never smoked . . . and was exposed to an intense amount of secondary smoke.") (quoting Victor Schwartz, defense attorney and torts expert, Crowell & Moring); see also Petitioner's Brief, *supra* note 81, at 18 (noting that precise risk of future harm to any individual from ETS depends on variety of factors including age, health, length and degree of exposure, and personal habits). But see Galbraith-Wilson, *supra* note 13, at 338 (noting that absorption of chemicals from secondary smoke into nonsmoker's body depends on smoke concentration and amount of time spent in smoke-filled environment); Glantz & Daynard, *supra* note 201, at 39 (noting that even low exposures to ETS appear to have disproportionately adverse effect on nonsmokers).

212. See *Helling*, 113 S. Ct. at 2482 (stating burden regarding Eighth Amendment, but never expanding upon exactly what constitutes "unreasonably high" levels of ETS exposure to satisfy condition of confinement claims). The Court, however, did note that the formal smoking policy adopted by the Director of the Nevada State Prisons on January 10, 1992, may minimize the risk to McKinney's health and make it impossible for him to prove that he will be exposed to an unreasonable risk of future harm to his health. *Id.* The new smoking policy limits smoking to specifically designated areas and prohibits smoking in "program, food preparation/serving, recreational and medical areas." *Id.*

213. *Id.* at 2481.

214. See *id.* ("We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.")

215. See *id.* at 2480 (extending Cruel and Unusual Punishments Clause to protect against threat of future harm thereby giving prisoners means to remedy unsafe living conditions without having to first suffer actual harm). *Helling* is also the first case in which the Supreme Court recognized the rights of nonsmokers in the narrow context of prison conditions.

*Wilson v. Seiter*, the Supreme Court still needed to clarify the objective element of conditions-of-confinement claims,<sup>216</sup> which is what it did in *Helling*.<sup>217</sup> Requiring inmates to first prove that the prison condition at issue violates modern standards of decency, and then to provide the court with scientific and statistical data that this living condition poses a serious risk of harm to the prisoner's health, places an extremely heavy burden on prisoners who allege that various prison conditions constitute cruel and unusual punishment. Faced with such formidable criteria, prisoners like William McKinney will find it exceedingly difficult to use the *Helling* framework to expand the list of basic human needs to which the incarcerated are entitled under the Eighth Amendment.

#### IV. RAMIFICATIONS

Although the Supreme Court's holding in *Helling v. McKinney* raises several significant issues in conditions-of-confinement jurisprudence,<sup>218</sup> the Court's decision to expand the protections of the Cruel and Unusual Punishments Clause to include confinement conditions that pose dangers of future harm is logically sound. A prisoner should not have to wait until he is severely and perhaps irreparably injured before obtaining relief from hazardous living conditions. In this sense, the *Helling* decision is a victory for America's prisoners. On the other hand, *Helling* comes at a cost for this nation's judicial system, as courts will inevitably face increases in litigation concerning conditions of confinement. The American public and prison authorities may consequently become increasingly critical of courts for overstepping the bounds of their authority.<sup>219</sup>

##### A. *The Slippery Slope*

The decision in *Helling* that a prisoner should be free from unreasonable health risks may be logical, fair, and humane.

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216. See *supra* notes 67-73 and accompanying text (discussing issues left unanswered by *Wilson v. Seiter*, 111 S. Ct. 2321 (1991) regarding objective element of condition-of-confinement claims).

217. See *supra* notes 118-19 and accompanying text (delineating *Helling* criteria for establishing objective element of Eighth Amendment claim).

218. For example, questions arise as to the implications of allowing prisoners to recover for unreasonable risks of future harm when not currently suffering any medical symptoms.

219. See *Caldwell v. Quinlan*, 729 F. Supp. 4, 7 (D.D.C. 1990) (concluding that holding that Constitution empowers court to regulate secondhand smoke in correctional facility would support society's fear of federal judiciary becoming "a superlegislature promulgating social change under the guise of securing constitutional rights") (quoting *Kensell v. Oklahoma*, 716 F.2d 1350, 1351 (10th Cir. 1983)); see also *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (stating that smoking is societal issue best left to executive and legislative branches).

Nonetheless, one practical implication of such a broad standard will be that prisoners will bring even more conditions-of-confinement claims, thereby adding to already overcrowded court dockets. Such an expansive view of the Cruel and Unusual Punishments Clause may subject a plethora of prison conditions to Eighth Amendment scrutiny, thus opening a Pandora's Box of constitutional challenges to prison conditions.<sup>220</sup>

Advocates of the *Helling* opinion dismiss this "parade of horrors" as alarmist.<sup>221</sup> They maintain that applying the Eighth Amendment to future harm will not result in a deluge of speculative claims because only a substantial risk of a serious harm will sustain an Eighth Amendment claim under *Helling*.<sup>222</sup> Nonetheless, because *Helling* fails to define exactly what constitutes an unreasonable or substantial risk of serious damage to future health, courts may be confronted with an increase in lawsuits from prisoners testing the bounds of the *Helling* framework. Therefore, until the Supreme Court sets forth

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220. In an amicus brief in favor of the defendants, 34 states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, and the Virgin Islands suggested that the range of claims would be vast.

In the South and Hawaii, inmates may well complain that mandated exercise programs expose prisoners to too much ultraviolet radiation, risking melanoma or other skin disorders. In the North, prisoners might complain that shovelling snow on a winter work detail too likely risks back injury, or heart attack. . . . Indeed, the severe depressive effects of prison life itself . . . arguably affect longevity.

Brief Amici Curiae of the States of Hawaii, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, Wyoming, the District of Columbia, the Commonwealth of Puerto Rico, and the Territories of American Samoa, Guam and the Virgin Islands in support of Petitioners at 9, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (No. 91-1950) [hereinafter States' Brief]. See also *id.* (arguing that even if scientific evidence establishes increased risk of heart disease from eating certain foods, it is not cruel and unusual for prison officials to serve macaroni and cheese instead of broiled fish); *No Smoking in the Cellblock*, AM. LAW., Apr. 1993, at 90, 91 (reporting that during oral arguments, Justice Scalia rejected EPA's 1993 study of health risks from ETS and stated that "we don't have to feed people bean sprouts in prisons simply because that would be healthier. . . . It's a risk we all know about, and that this society has accepted").

221. Lynn S. Branham, *Where There's Smoke, There's . . . a Lawsuit*, AMERICAN BAR ASSOCIATION: PREVIEW OF THE UNITED STATES SUPREME COURT CASES, Dec. 31, 1992, at 179 (stating, counter to prison officials' arguments, that deluge of lawsuits will not result if Supreme Court holds that Eighth Amendment claim can exist because of potential long-term health effects of ETS because only conditions creating "unreasonable risk" of "serious harm" will be heard under *Helling* standard).

222. See Amicus Curiae Brief of the American Civil Liberties Union and the American Civil Liberties Union of Nevada in Support of Respondent at 34, *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (No. 91-1958) [hereinafter ACLU Brief] (indicating that likelihood and gravity of injury must also be taken into account). Another argument supporting the Supreme Court's decision to protect prisoners from unreasonable risks of potential harm to their health is that if the Eighth Amendment is inapplicable to future harms, prison officials will have no duty to protect prisoners from possible future harms such as fire, exposure to asbestos, and fellow inmates who are to be dangerous. *Id.* at 25, 28-30.

some specific guidelines, burgeoning court dockets are a likely consequence of *Helling*.<sup>223</sup>

### B. Public Attitudes

The Supreme Court's decision in *Helling* to protect the incarcerated from some future harm will also have significant implications on the American public's attitude toward both the courts and prisoners. In *Helling*, the Court declared that the Eighth Amendment protects inmates from exposure to unreasonably high risks of serious damage to their current and future health,<sup>224</sup> focusing on the specific risks of involuntary exposure to secondary smoke.<sup>225</sup> While society continues to debate the rights of smokers and nonsmokers,<sup>226</sup> some argue that courts have ended the debate and created a right for inmates that free society does not enjoy.<sup>227</sup> While Americans outside the prison gates may be free of deplorable prison conditions, they are not completely free of "cruel and unusual" exposure to ETS in areas such as the workplace, restaurants, or the home.<sup>228</sup>

Arguably, because a smoke-free environment is not required in the free world, it should not be mandated in the prison setting. All nonsmokers in today's society are involuntarily exposed to ETS to some extent. After *Helling*, however, no constitutional provision protects free, law-abiding American citizens from future harm to their health. As a result, nonprisoners may resent what they view as preferential treatment of prisoners.<sup>229</sup> One critical distinction,

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223. See Blum, *supra* note 203, at 12 (discussing recent upsurge in secondhand smoke litigation following 1993 EPA report, citing *Helling* and *Clemmons* cases as examples, and anticipating that more ETS cases will follow); Coyle et al., *supra* note 154, at 11 (noting sentiment of Richard A. Daynard, Professor, Northeastern University School of Law, and Head of Tobacco Products Liability Project that *Helling* decision prompted tobacco industry's recent suit against EPA); Glantz & Daynard, *supra* note 201, at 39 (listing cases in which plaintiffs have successfully brought secondhand smoke claims). See generally 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) (addressing extension of products liability to claims by involuntary smokers against tobacco industry).

224. *Helling v. McKinney*, 113 S. Ct. 2475, 2480 (1993) (rejecting theory that only current harms are actionable under Eighth Amendment).

225. *Id.* at 2482 (requiring McKinney to prove he "is being exposed to unreasonably high levels of ETS" to sustain his Eighth Amendment claim).

226. See *supra* notes 182-83, 185 and accompanying text (discussing public attitudes toward exposure to ETS).

227. See *No Smoking in the Cellblock*, *supra* note 220, at 90 (reporting that this argument was advanced at oral argument in *Helling* by Del Papa, Nevada Attorney General); see also *Clemmons v. Bohannon*, 918 F.2d 858, 873 n.2 (10th Cir. 1990) (Tacha, J., dissenting) (maintaining that Constitution does not give nonsmoking prisoners more protection than rest of society from ETS).

228. See Horowitz, *supra* note 148, at 206 (observing that nonsmokers cannot choose where and when to breathe).

229. Branham, *supra* note 221, at 3.

however, is that unlike the general population, prisoners are not free to avoid or leave places where smoking is allowed or where other dangers to their health exist.<sup>230</sup>

*Helling v. McKinney* should not be regarded as a grant of preferential treatment to prisoners, but rather as an example of the Court's recognition of the special relationship between the state and the incarcerated. When incarcerating criminals, the state restrains them to such an extent that they become unable to care for themselves<sup>231</sup> and are therefore wholly dependent on the state.<sup>232</sup> This affirmative exercise of the state's power gives the State a constitutional duty to protect prisoners from unsafe conditions.<sup>233</sup> Courts, therefore, must intervene to ensure that the state is carrying out this duty.<sup>234</sup> *Helling* is an example of this legal principle. Nonetheless, the Court's attempt to remedy hazardous conditions of confinement will result in criticism from prison authorities who have had wide discretion in administering prison affairs for many years.<sup>235</sup>

### C. Judicial Activism

The *Helling* decision may enable prisoners to expand the list of basic human needs guaranteed by the Cruel and Unusual Punishments Clause. As a result, prison administrators will no longer have such broad discretion over prison affairs and their actions will now be subject to closer judicial scrutiny.<sup>236</sup> *Helling*, therefore, is certain to

230. *McKinney v. Anderson*, 924 F.2d 1500, 1507 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 291 (1991), *aff'd*, 113 S. Ct. 2475 (1993); see ACLU Brief, *supra* note 222, at 35 (arguing that prisoners and general public are not similarly situated). *But see* States' Brief, *supra* note 220, at 22 (arguing that even though incarcerated may have less freedom than nonprisoners to avoid ETS exposure, this is one advantage that flows to law-abiding citizens for not committing crime). The argument that prisoners have less freedom to choose their level of exposure to ETS is flawed because children and other family members may not effectively be able to avoid the passive smoke of other family members, nor may employees be able to avoid colleagues who smoke. States' Brief, *supra* note 220, at 22 n.18.

231. See *DeShaney v. Winnebago County*, 489 U.S. 189, 200 (1989) (discussing affirmative duty of state flowing from limitation imposed on freedom of individual to provide for own well-being).

232. See *id.* (referring specifically to relationship between State and abused child, but including other relationships).

233. See *id.* at 317 (addressing claim by institutionalized individual, who was dependent on state, of right to rehabilitation or infusion of necessary skills to competently function).

234. See *Johnson v. Avery*, 393 U.S. 483, 486 (1968) (stating that courts must intervene in prison administration when prison officials violate inmates' constitutional rights).

235. See *supra* notes 34-38 and accompanying text (discussing courts' reluctance to intervene in prison affairs on grounds that such matters are better left to expertise of prison officials).

236. In reducing some authority of prison administrators, courts must also consider the impact of accommodating the needs and desires of nonsmoking inmates on the rights of other inmates, on prison personnel, and on the allocation of prison resources generally. See *Turner v. Safley*, 482 U.S. 78, 90 (1987) (stating that when accommodation has "ripple effect" on prison and fellow inmates, courts should defer to prison officials' discretion). The Supreme Court held

engender criticism from prison officials.

*Helling v. McKinney* is a perfect example of the tension between the states' powers over public health, safety, and welfare and constitutional guarantees of humane treatment for prisoners. When courts consider the constitutionality of prison conditions, they immerse themselves in an intricate balancing of prison administrators' legitimate interests in maintaining security against the rights of the incarcerated to live in a safe environment.<sup>237</sup> Most prison litigation, therefore, amounts to a choice between the need for prison security and the prisoners' need for human dignity. Although courts generally have decided in favor of prisons,<sup>238</sup> the balance is beginning to shift in the other direction.<sup>239</sup>

*Helling* reveals the Court's willingness to interfere in prison administration when conditions of confinement, such as sustained involuntary exposure to unreasonably high levels of ETS, "shock the human conscience."<sup>240</sup> This holding may outrage prison officials who suggest that judicial scrutiny of every decision they make will seriously undermine effective prison administration and security.<sup>241</sup>

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in *Turner* that when a prison regulation impinges on inmates' constitutional rights, the regulation will be upheld if it is reasonably related to legitimate penal interests. *Id.* at 89.

237. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 540 (1978) (finding that legitimate governmental interests in effective management of detention facility justifies conditions of abrogated autonomy during pretrial detention, and holding that double-bunking of pre-trial detainees is constitutional); *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974) (listing several legitimate penal goals that court must consider in evaluating constitutional challenges to prison regulations); *Procunier v. Martinez*, 416 U.S. 396, 405 (1973) (stating that legitimate penal goals may justify restrictions on prisoners' rights).

238. See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977) (stating that prisoners' rights must give way to penal management considerations); *Pell*, 417 U.S. at 823 (subordinating inmates' First Amendment rights to concerns of internal security); *Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of . . . rights, a retraction justified by the considerations underlying our penal system.").

239. See, e.g., *Helling v. McKinney*, 113 S. Ct. 2475, 2481-82 (1993) (holding that exposure to ETS can be basis for Eighth Amendment claim); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (holding that placing convicted criminals in unsafe conditions violates Eighth Amendment); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (concluding that "deliberate indifference to serious medical needs of prisoners" violates Eighth Amendment).

240. *Trop v. Dulles*, 356 U.S. 87, 100 (1957) (stating that courts must act when prison conditions are so shocking as to offend inmates' basic human dignity).

241. See *supra* note 236 (addressing prison administration problems that may arise from accommodating constitutional needs of certain inmates). *Helling's* critics claim that the Supreme Court has gone too far in ruling that exposure to ETS can constitute cruel and unusual punishment. They suggest that segregation of smoking and nonsmoking prisoners will create a potentially volatile prison environment. See *Branham, supra* note 221, at 3 (noting *Helling* defendants' claim that court orders mandating limitations on ETS exposure could undermine security and order in correctional facilities). Specifically, the defendants in *Helling* argued that if their discretion in making cell assignments was limited by a requirement that nonsmoking prisoners be housed only with other nonsmokers, some inmates might have to be housed with other prisoners who pose a threat of violence to them or are otherwise incompatible. *Id.*; see also States' Brief, *supra* note 220, at 12 (stating that segregation of smoking



After *Helling*, prison administrators' fears that the Cruel and Unusual Punishments Clause pendulum is swinging in favor of the incarcerated and their need for human dignity even during their period of imprisonment theoretically may come to fruition. Realistically, however, *Helling* does not swing the pendulum far enough for prisoners seeking relief from unhealthy living conditions.

### CONCLUSION

Prisons are inherently dangerous and risky places.<sup>242</sup> Requiring prison administrators to remove all potential risks would be a burden that, logically, the Constitution should not mandate.<sup>243</sup> Furthermore, some argue that prisoners should bear the burden of barbaric and unsanitary conditions as a price to pay for their transgressions.<sup>244</sup> Prisons, however, are institutions that control an inmate's daily existence in a way that few nonprisoners can imagine.<sup>245</sup> Prison officials must provide inmates with a healthy environment<sup>246</sup> so that they can be rehabilitated and reformed. In *Helling*, the Supreme Court confronted these competing interests and subtly suggested that prison officials should attempt to minimize the very real and serious risks that certain conditions of confinement, like exposure to tobacco smoke, pose to the health of American prisoners.

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and nonsmoking prisoners will limit flexibility needed to run prison, cause security problems, be unduly expensive, unwisely restrict opportunities for positive interaction between inmates, and provide opportunities for manipulation by prisoners seeking to move). Smoking restrictions may also affect the morale of prisoners who choose to smoke, thus increasing the potential for disruption. *Id.* Finally, segregation may not be a practical solution to protecting nonsmoking prisoners from the hazards of ETS. See 1986 REPORT, *supra* note 202, at 7 (finding that separation of smokers and nonsmokers within same airspace may reduce, but will not eliminate exposure of nonsmokers to ETS); Glantz & Daynard, *supra* note 201, at 37 (explaining that ETS is virtually impossible to eliminate by filtration or ventilation).

242. See *Rhodes v. Chapman*, 452 U.S. 337, 355-56 (1981) (Brennan, J., concurring) (providing overview of deplorable and violent conditions in some American prisons); Petitioner's Brief, *supra* note 81, at 19, 44 (emphasizing that risks in prison humble risks in outside world).

243. See *Lindsey v. Normet*, 405 U.S. 56, 82 (1972) (stating that Constitution does not provide judicial remedies for every social and economic ill).

244. See *Rhodes*, 452 U.S. at 347 (stating that so long as prison conditions meet standards of decency, prisoners may have to accept harsh and restrictive conditions as part of their penalty); Newman, *supra* note 51, at 989-90 (relating Supreme Court's view that harsh conditions that do not qualify as cruel and unusual punishment are price inmates pay for their transgressions of law).

245. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting) (emphasizing grim prison environment that amounts to "a separate netherworld"); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1291 (S.D. Tex. 1980) (describing pernicious conditions and pain and suffering that prisoners must endure daily).

246. See *DeShaney v. Winnebago County*, 489 U.S. 189, 200 (1989) (indicating that persons involuntarily in State custody are constitutionally entitled to reasonably safe environment); see also Gutterman, *supra* note 6, at 890 (arguing that "reasonably safe and sanitary" prison environment, free from unnecessary causes of "physical and mental deterioration" should be Supreme Court's goal in redressing deficient prison environment).

Whether the Supreme Court will broaden the scope of protection afforded to the incarcerated under the Cruel and Unusual Punishments Clause beyond the limited context of *Helling* is doubtful. *Helling* may seem to represent a new trend of judicial activism in the arena of prisoners' rights.<sup>247</sup> Yet, a more practical approach to *Helling* is that it constitutes an aberration, at best, in the Court's "modified hands-off" approach to prison issues. In 1974, the Court, in *Wolff v. McDonnell*,<sup>248</sup> formally proclaimed a renunciation of its policy of non-intervention in prison matters.<sup>249</sup> The prison cases that the Court has decided since 1974 have done anything but renounce a "hands-off" approach. Instead, the Court has adhered to its pre-*Wolff* view that courts should play a limited role in prison administration.<sup>250</sup> Precisely because prisons are "risky and dangerous places,"<sup>251</sup> the Court has recognized the prison officials' need for flexibility in their decisions concerning prison matters.<sup>252</sup> The Court thus has continued to defer to prison administrations, even if this meant sacrificing prisoners' constitutional rights.<sup>253</sup> As long as

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247. See *Rhodes v. Chapman*, 452 U.S. 336, 354 (1981) (Brennan, J., concurring) (stating that "judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons"); see also *Hudson v. McMillan*, 112 S. Ct. 995, 1000 (1992) (holding that whenever prison officials maliciously intend to cause harm, Cruel and Unusual Punishments Clause is always violated, even in absence of significant injury); Gutterman, *supra* note 6, at 899 (warning that if Court continues to defer to legislative and executive branches, Court runs risk of returning to period when barbaric and deplorable prison conditions were met with "judicial blind eye"); Newman, *supra* note 51, at 999 (stating that judiciary is "only savior of inmates" capable of redressing "grossly inadequate prison conditions"). But see Note, *supra* note 37, at 843 (listing problems and obstacles to judicial activism).

248. 418 U.S. 539 (1974).

249. *Wolff v. McDonnell*, 418 U.S. 539, 556 (stating that there must be "mutual accommodation" between needs and objectives of prison system and constitutional rights of inmates).

250. See *supra* notes 35-38, 43 (discussing Court's adherence to view that courts should defer to prison administrators' policies because prison matters are too complex for judges to solve).

251. *Wolff*, 418 U.S. at 559.

252. *Bell v. Wolfish*, 441 U.S. 520, 547 (1978). In writing for the majority in *Wolfish*, Justice Rehnquist concluded that "[C]ourts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations . . . . The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Id.* at 562. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (rejecting "strict scrutiny" of decisions of prison officials because such scrutiny would hamper their ability to provide for prison security and would "unnecessarily perpetuate" court intervention in prison affairs).

253. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (holding that prison policy prohibiting inmates working outside prison from returning to main prison facility during work day did not deny Muslim prisoners' Free Exercise rights under First Amendment even though policy prevented Muslim inmates from attending weekly Muslim congregational service held inside main facility); *Block v. Ruthford*, 468 U.S. 576, 586, 589 (1984) (upholding ban on contact visits for inmates because "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility" and regulation was "reasonably related" to these security concerns); *Wolfish*, 441 U.S. at 546, 550 (recognizing that "maintaining institutional security and preserving internal order and discipline are essential

the Court continues to review prisoners' rights cases under a rational basis of judicial scrutiny,<sup>254</sup> the constitutional rights of those confined in America's prison system will be restricted or abrogated when prison officials articulate some "legitimate penological objective"<sup>255</sup> for their decision.

*Helling* may signal a victory for American prisoners, but, in reality, it is a bittersweet victory. Under the *Helling* standard, inmates will not obtain a remedy for unhealthy conditions of confinement if no scientific data exists or if there is no consensus in public opinion regarding the alleged deprivation. Requiring a prisoner to show that it would violate contemporary standards of decency to expose anyone to the alleged risk<sup>256</sup> is an unrealistic burden. This standard should be lowered in light of the reality that society often has conflicting opinions regarding various social issues and health risks.

Before *Helling* can have a significant impact on providing prisoners with safe, sanitary living conditions, the Court should also clarify how serious a risk must be to implicate Eighth Amendment scrutiny. There must be a line between those conditions of confinement that a prisoner must tolerate as punishment for violating the law and living conditions that are so deplorable as to constitute unconstitutional cruel and unusual punishment. Drawing a line at an "unreasonable risk of serious damage" to an inmate's future health<sup>257</sup> is not an effective solution. Definite guidelines must be created defining what constitutes a "substantial risk." This is a task that should be delegated to the legislature. Until the objective element of *Helling* is refined and made more accessible for prisoners, the *Helling* decision will

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goals that may require limitation or retraction of the retained constitutional rights" of prisoners, and rejecting prisoner's First Amendment challenge to Bureau of Prisons rule prohibiting inmates from receiving hardback books, unless mailed directly from publishers or book stores); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 131-32 (1977) (stating that First Amendment rights to free association "must give way to the reasonable considerations of penal management" and that prison policies that potentially restrict prisoners' free speech will be upheld if reasonable).

254. See *Turner*, 482 U.S. at 89 (announcing that proper standard of review in prisoners' rights cases was rational basis). "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.*

The court also articulated four factors to guide courts in deciding whether a prison regulation is reasonable. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* Next, the court must look at "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the courts should determine the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Lastly, a prison regulation shall be deemed reasonable if there are no "ready alternatives." *Id.*

255. *Turner*, 482 U.S. at 89.

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

257. *Id.*

remain only a theoretical victory for prisoners' right to be protected from dangerous living conditions under the Cruel and Unusual Punishments Clause of the Eighth Amendment.