Helling v. McKinney: Warning . . . Second-Hand Smoke May Be Cruel and Unusual Punishment

I. INTRODUCTION

In 1986, the Surgeon General released a report entitled The Health Consequences of Involuntary Smoking. This report was a cause of serious concern to non-smokers because it concluded that "[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy non-smokers." More recently, the Environmental Protection Agency (EPA) confirmed that environmental tobacco smoke is a definite cause of lung cancer in non-smoking adults. In response to these studies, and due to the current trend toward a smoke-free society, non-smoking prisoners are pursuing Eighth Amendment actions alleging that compelled exposure to ETS poses an unreasonable risk of harm, and is cruel and unusual punishment.

The central issue to be explored in this Note is whether a prison inmate states a valid Eighth Amendment cruel and unusual punishment claim by alleging, in the absence of any preexisting medical conditions, that compelled exposure to second-hand tobacco smoke poses an unreasonable risk to his health. This is a timely subject, as the United States Supreme Court recently addressed this issue in the case Helling v. McKinney.

This Note will examine the legal analysis of Helling v. McKinney

2. Id. at 10.
3. Environmental tobacco smoke [hereinafter ETS] consists of the fraction of mainstream smoke that smokers exhale plus sidestream smoke, which burning cigarettes emit between puffs. 1986 REPORT, supra note 1, at 7. ETS is also referred to as second-hand smoke. Id.
and the interpretations of the decision by lower federal courts by examining ETS confinement cases decided before and after the McKinney decision. Section II provides a background of the medical evidence on ETS and the historical development of Eighth Amendment rights in conditions of confinement cases. Section III examines several federal court cases decided before and after McKinney that address the constitutionality of compelled exposure to ETS as a condition of confinement. In addition, the majority opinion of Helling v. McKinney is outlined. Section IV explores the guidance provided by the McKinney decision and considers its effect on future ETS confinement cases. This Note concludes with a recommendation aimed at better aligning prisoners rights with the current trend toward a smoke-free society.

II. BACKGROUND

A. The Scientific Evidence on ETS

Although medical evidence demonstrated the harmful effects of tobacco smoke on smokers as early as 1964, evidence of the harmful effects of second-hand smoke was not made available to the public until 1986. In 1986, the annual report of the Surgeon General revealed serious harmful long-term physical effects caused by repeated exposure to second-hand smoke. In the 1986 Report, the Surgeon General examined a number of studies of exposure to tobacco smoke and reached three major conclusions: (1) involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers; (2) the children of smoking parents compared with children of non-smoking parents have an increased frequency of respiratory infections; and (3) the simple separation of smokers and non-smokers within the same air space may reduce, but does not eliminate, the exposure of non-smokers to ETS.

Other studies have revealed that involuntary exposure to second-hand smoke presents a wide range of health problems to non-smokers. The National Research Council estimates that in a given year,
between 2490 and 5160 non-smokers will die because of exposure to ETS. Both the 1986 Report and the NRC Report found that exposure to second-hand smoke also causes less severe physical reactions, such as burning, itching and tearing eyes, sore throat and hoarseness, persistent cough, blocked sinuses, headaches, and nasal irritation. ETS has also been found to cause allergic reactions, such as dizziness, nausea, blackouts, memory loss, difficulty in concentration, cold sweats, aches and pains, skin eruptions, and vomiting.

More recently, researchers at the Harvard School of Public Health reported the first evidence that second-hand tobacco smoke creates potentially precancerous changes in the lungs of non-smokers. Although previous studies found an increased risk of lung cancer among non-smokers who lived with smokers, the new report is the first to find actual damage in the lungs of passive smokers, and thereby strengthens the causal link. The study, relying on autopsy examinations of non-smoking women who had died from causes not related to smoking, revealed that those married to smokers had significantly more precancerous lesions in their lungs than did those whose husbands did not smoke. The lesions were of a type suggesting that the women might have developed lung cancer had they survived.

In January, 1993, the EPA released a report classifying ETS as a "known carcinogen," labelling ETS as a "Group A" carcinogen—the same group in which benzene and asbestos are classified. The evidence yielded by the foregoing studies is significant in determining whether exposure to ETS rises to the level of

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10. NATIONAL RESEARCH COUNCIL ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986) [hereinafter NRC REPORT].
11. 1986 REPORT, supra note 1, at 229-39.
12. Id. at 239.
14. Id.
15. Id.
cruel and unusual punishment under the Eighth Amendment.

B. Applicable Eighth Amendment Principles

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."¹⁸ In the earlier cases interpreting the Eighth Amendment, the United States Supreme Court focused on prohibiting torture and other barbarous methods of punishment.¹⁹ In subsequent cases spanning over a ninety-five year period, the Supreme Court has interpreted the words "cruel and unusual" in a "flexible and dynamic manner,"²¹ and has extended the Eighth Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases.²² In Weems v. United States,²³ the Court rejected the proposition that the Eighth Amendment reaches only punishments that are "inhumane and barbarous, torture and the like."²⁴ The Court explained:

Time works changes, brings into existence new conditions and purposes . . . . [Thus] a principle to be vital must be capable of wider application than the mischief which gave it birth [as the Cruel and Unusual Punishments Clause] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.²⁵

Today, the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain,"²⁶ or are grossly disproportionate to the severity of the

¹⁸. U.S. CONST. amend. VIII.
¹⁹. See Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] . . . ."); In re Kemmler, 136 U.S. 436, 447 (1890) ("[P]unishments are cruel when they involve torture or a lingering death . . . .").
²¹. Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion) (holding capital punishment for homicide should not be invariably disproportionate to the crime, and should not involve the unnecessary and wanton infliction of pain).
²³. 217 U.S. 349 (1910).
²⁴. Id. at 368.
²⁵. Id. at 373, 378.
Furthermore, in *Trop v. Dulles* the Court held that the Eighth Amendment is to be interpreted as prohibiting punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society." The Court expanded this notion in *Estelle v. Gamble*, where it held the Eighth Amendment prohibits penalties that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity and decency."

The Court first considered the relationship between the Eighth Amendment and conditions of confinement in *Hutto v. Finney*. There, the Court enunciated that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards." It was not until 1981, however, that the Court first addressed a disputed contention that conditions of confinement constituted cruel and unusual punishment. In considering the limitation that the Eighth Amendment imposes upon conditions of confinement, the *Rhodes* Court relied on its earlier precedents in holding "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the 'evolving standards of decency that mark the progress of a maturing society.'" The Court further held that "'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges . . . [b]ut such 'judgment[s]' should be informed by objective factors to the maximum possible extent." The Court in *Rhodes* explained that "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor

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27. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding sentence of death for the crime of rape of adult woman is grossly disproportionate and excessive punishment forbidden by the Eighth Amendment).
29. Id. at 101.
30. 429 U.S. 97 (1976). Deliberate indifference to an inmate's medical needs is cruel and unusual punishment because "an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Id. at 103.
31. Id. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).
32. 437 U.S. 678 (1978) (where prison administrators did not dispute the district court's conclusion that conditions in the Arkansas prison constituted cruel and unusual punishment, the court upheld an injunction barring prison officials from confining prisoners to the isolation cell for more than 30 days).
33. Id. at 685.
35. Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
36. Id. (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)).
may they be grossly disproportionate to the severity of the crime warranting imprisonment." 37 This standard applies "when the conditions of confinement compose the punishment at issue." 38 Moreover, the Court recognized that "[c]onditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities" 39 which could amount to cruel and unusual punishment under the contemporary standards of decency recognized in Gamble.

The next relevant case decided by the Court was Whitley v. Albers. 40 There, the Court stated "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, [or] supplying medical needs . . . ." 41

Five years later, the Court redefined the standard governing conditions suits in Wilson v. Seiter. 42 Justice Scalia, writing for the majority, announced that a prisoner claiming that the conditions of his confinement violate the Eighth Amendment must prove a culpable state of mind on the part of prison officials. 43 The Court extended the deliberate indifference standard of Gamble to claims involving conditions of confinement, finding there is an intent requirement implicit in the Eighth Amendment's prohibition against cruel and unusual punishment. Specifically, the Court explained that inmates must prove that prison officials either created the conditions to inflict wanton pain or were deliberately indifferent as to whether the conditions had these effects. 44 The Court explained: "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify as cruel and unusual punishment un-

37. Id. at 347.
38. Id.
39. Id.
40. 475 U.S. 312 (1986) (inmate shot by guard who was attempting to quell a prison disturbance contended that he was subjected to cruel and unusual punishment in violation of Eighth Amendment).
41. Id. at 319.
42. 111 S. Ct. 2321 (1991). Wilson alleged Eighth Amendment violation due to "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." Id. at 2323.
43. Id. at 2324.
44. Id. at 2325-27.
der the Eighth Amendment." The practical effect of Wilson is that prisoners must now satisfy a two-pronged test. First, they must make an objective showing that the conditions of confinement violate the Cruel and Unusual Punishments Clause. Second, they must show that prison officials acted with a culpable state of mind.

III. ANALYSIS

A. ETS as a Condition of Confinement

"The practice of cigarette smoking has been part of the American culture and trade since the . . . early 1600's . . . ." "Nowhere is the practice of smoking a more imbedded institution than in the nation's prisons and jails, where the proportion of smokers to non-smokers is many times higher than that of society in general." According to Gregory Miller, a Seattle, Washington attorney who spoke on legal issues concerning smoking in prisons at the 13th National Conference on Correctional Health Care, "[i]t has long been a custom that all prisoners are entitled to three things—toilet paper, coffee, and tobacco." Depending on the particular institution, it is estimated that between sixty and ninety percent of most prison populations smoke. Moreover, it has been reported that the average U.S. cigarette smoker smokes thirty-two cigarettes per day at a rate of two cigarettes per hour. These statistics indicate that non-smoking prisoners are more frequently exposed to higher levels of ETS than are members of society in general. The Ninth Circuit has noted: "[u]nlike the general population, prisoners are not free to avoid or leave places where smoking is allowed. Prisoners cannot simply leave their cells when their cellmates decide to light up."

45. Id. at 2325.
47. Id.
51. McKinney v. Anderson, 924 F.2d 1500, 1507 (9th Cir. 1991), vacated and remanded
While it is well-established that the Constitution does not mandate a smoke-free environment in a prison setting, several states have successfully prohibited or restricted smoking in jails and prisons across the country. Moreover, a Federal Bureau of Prison regulation allows wardens to establish non-smoking areas, while another prohibits smoking in those areas of federal penitentiaries where "smoking would pose a hazard to health or safety." Furthermore, in federal prisons, officials are required to the extent practicable to "accommodate non-smoking inmates in non-smoking living quarters. The sharing of a cell or living area between a smoker and a non-smoker will be avoided except where impractical due to circumstances and then may be done only for limited duration." At its annual meeting in May, 1990, the American Jailers Association adopted a policy proposing a ban on smoking in jails, and offered a training program on how jailers can make their facilities smoke-free. According to Francis Ford, the Executive Director of the American Jailers Association, the attitude toward health has led to non-smoking policies becoming commonplace throughout jails across the country. Such prohibitions and restrictions on smoking in the nation's jails and prisons indicate an acknowledgement by many states and the federal government that ETS is a hazardous condition of confinement from which inmates should be protected.


52. See Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991) (prison authorities did not violate Eighth Amendment by failing to provide a smoke-free environment); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990) ("individuals do not have a constitutional right to be free from passive smoke"); Gorman v. Moody, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (evolving standards of decency do not yet "demand a smoke-free environment in a prison setting").

53. See Lisa Brems, More New England Jails Telling Inmates to Douse the Smokes, BOSTON GLOBE, Feb. 16, 1992, at 33, 37 [hereinafter More New England Jails]. To date, New Hampshire, Massachusetts, and Maine have imposed bans or restrictions on smoking in prisons. Vermont is currently implementing a smoking ban at all of its jails and prisons. In Connecticut, restrictions are currently under consideration. Id. See also Jails Lead Prisons In Smoking Bans, 264 JAMA 1514 (1990) (there are smoke-free correctional facilities in Virginia, Seattle and Kentucky) [hereinafter Jails Lead Prisons].


55. McKinney, 924 F.2d at 1509 (quoting 28 C.F.R. § 551.162 (1989)).

56. 28 C.F.R. § 551.162(b) (1989).


B. Cases Addressing ETS Eighth Amendment Claims

Since 1988, several federal courts have addressed the issue of whether an inmate's involuntary exposure to ETS may be considered cruel and unusual punishment. Many of these cases were decided prior to the Supreme Court's decision in *Helling v. McKinney* and consequently will be examined separately from those cases decided after McKinney.

1. Pre-McKinney Cases

Before the *McKinney* decision, courts in the various federal jurisdictions were divided on whether involuntary exposure to ETS may form the basis of an Eighth Amendment claim in the absence of any pre-existing medical conditions.59 *Avery v. Powell* is one of the earliest cases to address this issue. In *Avery*, a non-smoking inmate, incarcerated in the New Hampshire State Prison, brought a pro se civil rights complaint pursuant to 42 U.S.C. § 1983 against prison officials alleging that his continuous exposure to ETS subjected him to cruel and unusual punishment.61 Plaintiff sought an injunction requiring the establishment of smoking and non-smoking areas within the prison.62 The United States District Court for the District of New Hampshire denied the defendant prison officials' motion to dismiss,63 holding that "because 'the touchstone [of cruel and unusual punishment] is the effect upon the imprisoned,' and because society has recognized that exposure to ETS may be a potentially significant danger to health . . . [plaintiff] has stated a claim for cruel and unusual punishment under the Eighth Amendment."64 In reaching this decision, the *Avery* Court relied on the "totality of the circumstances"
test articulated in *Rhodes*. Specifically, the *Avery* Court focused on “objective factors to the maximum possible extent . . .” Relying on current community attitudes indicating an intolerance of ETS, scientific authority on ETS and legislation regulating tobacco, the court concluded that society’s attitudes have evolved to the point that unwanted exposure to ETS may amount to a violation of “society’s evolving standards of decency.”

In *Clemmons v. Bohannon*, a non-smoking inmate at the Kansas State Penitentiary brought a civil rights action pursuant to 42 U.S.C. § 1983 alleging Eighth and Fourteenth Amendment violations arising out of his involuntary subjection to ETS. The district court granted defendant prison officials’ summary judgment motion, holding that “involuntary exposure to ETS resulting from double-ceiling a non-smoker with a smoker was a mere ‘inconvenience’ with no constitutional significance.” The United States Court of Appeals for the Tenth Circuit agreed with *Avery* in holding that indefinite double-ceiling of smokers with non-smokers against their express will can amount to an Eighth Amendment violation. In reaching this conclusion, the Tenth Circuit cited the *Rhodes* standard with approval, and explained that “these evolving standards of decency must be informed by ‘objective factors to the maximum possible extent.’” In its objective analysis, the court took judicial notice of federal and state statutes, municipal ordinances, and Surgeon General reports on ETS. The court emphasized that its opinion was predicated on “longstanding judicial recognition that exposing a prisoner to an unreasonable risk of a debilitating or terminal disease does indeed offend these ‘evolving standards of decency.’”

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67. 918 F.2d 858 (10th Cir. 1990) [hereinafter *Clemmons I*]. Following a rehearing and rehearing en banc in *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) [hereinafter *Clemmons II*], the Tenth Circuit applied the two-pronged test of *Wilson v. Seiter*, and reversed its earlier decision, holding that the plaintiff had not alleged any specific health problems that would be violative of the Eighth Amendment. *Id.* at 1527. See infra notes 91–95 and accompanying text for a more detailed discussion of *Clemmons II*.
68. 918 F.2d 858, 860 (10th Cir. 1990).
69. *Id.* at 860-61.
70. *Id.* at 863.
71. *Id.* at 862 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).
72. *Id.* at 865 n.5.
73. *Id.* at 864.
In *Gorman v. Moody*, the United States District Court for the Northern District of Indiana used similar constitutional grounds to respectfully disagree with the *Avery* Court. Gorman, a pro se plaintiff and a lifelong non-smoker incarcerated at the Westville Correctional Center, filed suit against prison officials, purporting to state a claim under 42 U.S.C. § 1983. Plaintiff was challenging the failure of prison officials to segregate him from smoking inmates, alleging that he was being forced "to suffer the discomfort and consequences of second-hand smoke" and that this "caused him to suffer physical, emotional, and mental injury." Following the *Rhodes* totality of the circumstances test, the *Gorman* Court held that the evolving standards of decency that mark the progress of a maturing society do not yet demand a smoke-free environment in a prison setting. The court concluded that "smoking is a societal issue best resolved by the executive and legislative branches of government."

In *Steading v. Thompson*, the Seventh Circuit emerged as the first court to decide an Eighth Amendment ETS claim under the redefined constitutional standard articulated in *Wilson v. Seiter*. Steading, an asthmatic prisoner who could not escape tobacco smoke from guards and fellow inmates, filed a 42 U.S.C. § 1983 action, where he argued that prison authorities' failure to establish a smoke-free environment for non-smoking inmates violated the Eighth Amendment prohibition against cruel and unusual punishment. The district court dismissed Steading's claim, holding that even if ambient tobacco smoke is harmful, "Steading could not possibly establish that the defendants possessed the mental state necessary to show that exposure to smoke is a form of 'punishment.'" The United States

75. Id. at 1259.
76. Id. at 1257.
77. Id. at 1258.
78. Id. Plaintiff also challenged prison officials’ handling of his mail and its disciplinary proceedings. Id. at 1264-66.
79. Id. at 1259.
80. The court noted that "[a]s our society moves toward a . . . smoke-free environment and new laws are enacted, there may come a time when the 'evolving standards of decency that mark the progress of society' demand a smoke-free environment in a prison setting." Id. at 1262.
81. Id.
82. 941 F.2d 498 (7th Cir. 1991).
83. Id. at 498.
84. Id. at 499.
Court of Appeals for the Seventh Circuit acknowledged that other circuit courts were in conflict as to whether compelled exposure to ETS violates the Eighth Amendment. The Steading Court held that the Wilson v. Seiter decision required it to affirm the district court's dismissal of Steading's complaint because there was no evidence showing a culpable state of mind on the part of the defendant prison officials. Specifically, the court held that the subjective standard announced in Wilson established an insurmountable hurdle for Steading because prison officials' mere knowledge that ETS may cause discomfort does not rise to the level of intent required by Wilson. The apparent conclusion of the Steading Court was that the deliberate indifference articulated in Wilson requires an intent to punish. Thus, if prison officials "do not intend [a prisoner's] discomfiture they have not punished him, and so do not violate the cruel and unusual punishment clause as Wilson interprets [the Eighth] Amendment." The Steading Court did, however, point out that an inmate with a serious medical problem which can be attributed to or worsened by exposure to ETS is entitled to appropriate medical treatment "which may include removal from places where smoke hovers."

A clear example of Wilson v. Seiter's effect on ETS Eighth Amendment claims can be gleaned from Clemmons v. Bohannon. In Clemmons I, the Tenth Circuit applied an objective standard to assess the plaintiff's Eighth Amendment claim, and found that exposure to ETS can rise to the level of an Eighth Amendment violation. In Clemmons II, the Tenth Circuit vacated its previous decision, and held that in light of Wilson's two-pronged test, Clemmons had failed to show that prison officials acted with deliberate indifference to a sufficiently serious medical need. The court further held that "[e]ven if we concede that exposure to ETS can have serious medical consequences, the allegation of exposure in a penitentiary setting, without more, is not enough to satisfy the subjective compo-

85. Id.
86. Id. at 500.
87. Id.
88. Id.
89. Id.
90. 956 F.2d 1523 (10th Cir. 1992); see supra note 67 and accompanying text.
91. 918 F.2d 858, 868 (10th Cir. 1990).
92. 956 F.2d 1523, 1526, 1529 (10th Cir. 1992).
nent of cruel and unusual punishment."\(^3\) To satisfy this subjective requirement, a prisoner must provide specific evidence showing that the defendant prison officials' intent in making cell assignments was to disregard a serious medical need of that prisoner.\(^4\)

Several other ETS Eighth Amendment cases were decided since Wilson, but prior to *Helling v. McKinney*. In each case, the respective courts strictly adhered to Wilson's two-pronged test, and in each case the plaintiff non-smoking inmate was unsuccessful.\(^5\)

The vagueness of *Wilson v. Seiter* in its application to ETS Eighth Amendment actions was, to some extent, clarified when the United States Supreme Court decided *Helling v. McKinney*.\(^6\)

C. *Helling v. McKinney*

1. Facts

*Helling v. McKinney* originated when McKinney, a Nevada state prisoner filed a *pro se* civil rights action in December of 1986.\(^7\) In his complaint, McKinney named as defendants the director of the prison, the warden, the associate warden, a unit counselor, and the manager of the prison store.\(^8\) His complaint, brought pursuant to 42 U.S.C. § 1983, alleged that his involuntary exposure to ETS violated the Eighth Amendment. McKinney, a non-smoker, complained of being forced to share a six by eight foot cell with a series of inmates who were "heavy smokers."\(^9\) In particular, McKinney's complaint alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes a day.\(^10\) McKinney alleged that the

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\(^3\) Id. at 1528 (emphasis added).

\(^4\) Id. at 1529.

\(^5\) See Melendez v. Cunningham, No. 91-1950, 1992 WL 218956 (1st Cir. Sept. 10, 1992) (per curiam) (plaintiff could only show intermittent ETS exposure, and therefore failed to prove the objective component that he was deprived of the minimal civilized measure of life's necessities); Murphy v. Dowd, 975 F.2d 435, 437 (8th Cir. 1992) (Eighth Circuit grants prison officials qualified immunity from plaintiff inmate's Eighth Amendment claim based on involuntary exposure to ETS because "there was no clearly established constitutional right to be free from exposure to ETS."); Grant v. Coughlin, No. 91 CIV.3433, 1992 WL 142037 (S.D.N.Y. June 9, 1992) (court dismissed plaintiff inmate's complaint because it failed to establish the existence of the requisite objective and subjective elements of an Eighth Amendment violation).

\(^6\) 113 S. Ct. 2475 (1993).

\(^7\) McKinney v. Anderson, 924 F.2d 1500, 1502 (9th Cir. 1991).


\(^9\) McKinney, 924 F.2d at 1502.

\(^10\) Id.
constant exposure to ETS caused him nosebleeds, headaches, chest pains, and loss of energy.  

McKinney sought an injunction to prevent prison officials from housing him with inmates who smoke, as well as damages from each defendant.  

2. Procedural History

The parties consented to a jury trial before a magistrate. The district court magistrate viewed the case as stating two Eighth Amendment claims: (1) whether McKinney had a constitutional right to be housed in a smoke-free environment, and (2) whether prison officials were deliberately indifferent to McKinney's then-existing medical symptoms. The magistrate excluded evidence regarding the adverse health effects associated with exposure to ETS, and granted the defendant prison officials' motion for a directed verdict finding that there is no constitutional right for an inmate to be free from secondary cigarette smoke.

The United States Court of Appeals for the Ninth Circuit reversed the magistrate's dismissal of McKinney's claim in part, and held that "compelled exposure to ETS is . . . cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health." In reaching this conclusion, the court applied an objective Eighth Amendment test considering factors such as scientific evidence on ETS and the existence of nationwide smoking restrictions. The ultimate conclusion by the court was that McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreason-

101. Id.
102. Helling, 113 S. Ct. at 2478.
104. Id.
105. Id. at 1503-04.
106. The court followed an objective theory because Wilson v. Seiter had not yet been decided.
108. Id. at 1508-09. The court noted the various restrictions on smoking in 45 states, the ban on smoking on most domestic airline flights and federal prison regulations concerning smoking. Id.
able risk of harm to his health." Shortly after the decision, the State appealed. On October 15, 1991, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of its decision in Wilson v. Seiter.

On remand, the Ninth Circuit reinstated its earlier decision, holding that Wilson’s subjective component for an Eighth Amendment claim “does not vitiate our determination of what satisfies the objective component[,]” and “[o]ur holding 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 harm to his health constitutes the objective component . . . .” The court did, however, remand the case to the district court for a determination of whether Wilson’s subjective component was satisfied. On June 29, 1992, while the case was pending on remand, the Supreme Court granted the State of Nevada’s petition for a writ of certiorari.

3. The Supreme Court Decision

In a seven-to-two decision, the majority held that a plaintiff “states a cause of action under the Eighth Amendment 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,” and accordingly, affirmed the decision of the Ninth Circuit Court of Appeals. In reaching its decision, the Court made clear that a prisoner’s Eighth Amendment claim may be based not only on present health problems, but also on possible future health problems associated with exposure to ETS. As Justice

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109. Id. at 1509.
111. Id. at 853.
112. Id. at 854.
113. Id.
116. Id. at 2481.
117. Id. at 2480. The Court had “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.” Id.
White explained, "[t]hat the Eighth Amendment protects against future harm to inmates is not a novel proposition."118 For example in Hutto v. Finney,119 the Court upheld two lower court rulings that the conditions in punitive isolation in the Arkansas penal system violated the Eighth and Fourteenth Amendments.120 One of the several conditions leading to the Eighth Amendment violation was the fact that several prisoners "suffered from infectious diseases such as hepatitis and venereal disease."121 Nonetheless, each morning, the prisoners' mattresses were removed and jumbled together, and then returned to the cells at random in the evening.122 Thus, in Hutto, although the harm threatened was only potential, prisoners were permitted to challenge their exposure to the mere risk of contracting an infectious disease. In fact, there was no evidence in Hutto that any prisoner had actually contracted a disease as a result of this practice.123 Similarly, in Rhodes v. Chapman,124 the Court cited with approval four lower court decisions that found Eighth Amendment violations due to conditions which only threatened harm.125 Thus, the McKinney Court explained that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."126 Thus, the Court rejected petitioner prison officials' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.127

The Court also dispensed with the United States Government's argument that the harm from ETS exposure is only speculative and

118. Id.
120. Id. at 685.
121. Id. at 682-83.
122. Id.
125. For example, in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), the court held that a prisoner need not "wait until he is actually assaulted before obtaining relief." Id. at 572. Also, in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), the court found an Eighth Amendment violation due to inadequate fire-fighting apparatus, exposed electrical wiring, and the fact that "[s]ome inmates with serious contagious diseases are allowed to mingle with the general prison population." Id. at 1300.
127. Id.
thus not sufficiently grave to implicate a serious medical need.\textsuperscript{128} The Court was unable to rule that McKinney could not prove an Eighth Amendment violation based on ETS exposure; therefore, it would be premature to reverse the Ninth Circuit's decision on the basis suggested by the United States.\textsuperscript{129}

The Court then remanded the case to the district court, and held that on remand McKinney must prove both the objective and subjective elements required under the Eighth Amendment analysis.\textsuperscript{130} In proving the objective element, McKinney must establish that "he himself is being exposed to unreasonably high levels of ETS."\textsuperscript{131} The Court stated that this will require more than a scientific and statistical inquiry into the dangerousness and potential harm of ETS exposure.\textsuperscript{132} Instead, it must be proven that the risk that the prisoner complains of is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk."\textsuperscript{133}

The Court noted that McKinney may have difficulty showing that he is being exposed to unreasonably high levels of ETS because he has been moved to a new prison and "is no longer the cellmate of a five-pack-a-day smoker."\textsuperscript{134} Moreover, on January 10, 1992, the Director of the Nevada State Prisons adopted a new state prison smoking policy which restricts smoking to specifically designated areas and makes reasonable efforts to respect non-smokers wishes with respect to double bunking.\textsuperscript{135} Thus, in light of the foregoing, on remand it may be impossible for McKinney to prove the objective element. With respect to the subjective factor, deliberate indifference, the Court only noted that it should be determined in light of the prison authorities' current attitudes and conduct, which, as evidenced by the new smoking policy, "may have changed considerably" since the Court of Appeals' judgment.\textsuperscript{136}

\begin{flushright}
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 2481-82.
\textsuperscript{131} Id. at 2482.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\end{flushright}
D. Post-McKinney Cases

Since the Supreme Court's decision in *Helling v. McKinney*, there have been several unpublished cases interpreting the decision. Two of these cases will be analyzed in order to examine the effect the *McKinney* decision has had on ETS Eighth Amendment cases.

On September 2, 1993, the United States Court of Appeals for the Fourth Circuit decided *Gaster v. Campbell*. Gaster, a South Carolina state prisoner, filed a 42 U.S.C. § 1983 action alleging that South Carolina's failure to provide a smoke-free environment for prisoners constitutes cruel and unusual punishment because he is a non-smoker and must endure the cigarette smoke present in prison. The magistrate judge recommended dismissal on the grounds that complaints about cigarette smoke do not assert a cognizable constitutional claim. The district court reviewed the case de novo, and adopted the magistrate judge's recommendation and dismissed the case.

Relying on *Helling v. McKinney*, the Fourth Circuit held that the plaintiff's complaint stated a cognizable Eighth Amendment claim and the district court erred in dismissing it. The court subsequently remanded the case to the district court for a determination of whether the plaintiff is able to meet the subjective and objective elements of *McKinney*.

On September 30, 1993, the United States Court of Appeals for the Sixth Circuit decided the case *Wilson v. Hambrick*. Wilson, an inmate at the Federal Medical Center, an all female institution in Lexington, Kentucky filed a civil rights action pursuant to 42 U.S.C. § 1983 against the warden, her unit manager, her case manager, the Regional Director of the Mid-Atlantic Region of the Federal Bureau of Prisons, the Director of the Bureau of Prisons and the Attorney General of the United States. Wilson, a non-smoker, alleged...
that her exposure to ETS violated her Eighth Amendment right to be free from cruel and unusual punishment. Specifically, Wilson claimed that being housed in a smoke-filled environment with inadequate ventilation caused her hypertension, sore throats, eye and skin irritation, headaches, coughing, and other breathing difficulties. Wilson presented evidence that she had been allergic to cigarette smoke since childhood and had previously required emergency medical care for breathing difficulties associated with ETS. She further alleged that she had visited the prison infirmary several times with ETS-related ailments, such as coughing and throat infections. Wilson acknowledged that the prison had a smoking policy designed to limit smoking to designated areas, but maintained that the warden had consistently failed to enforce that policy.

In light of the McKinney decision, the Sixth Circuit held that the district court abused its discretion in dismissing Wilson’s ETS claim. The court concluded that the McKinney holding was broad enough to apply to Wilson’s assertion that the prison’s smoking policy was not adequately enforced. However, with respect to the subjective element, the court held that Wilson had only presented facts that support a finding of deliberate indifference against the warden, and had failed to show that the other named defendants were deliberately indifferent to her ETS-induced health problems. Wilson’s evidence that inmates smoked in prohibited areas, that she had written the warden several times informing him of this and of her ETS-related symptoms, and the warden’s refusal to move her away from the smokers, was sufficient to support an argument that the warden was deliberately indifferent to Wilson’s reactions to ETS.

146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id. at *2.
152. Id.
153. Id.
154. Id. at *2-3.
IV. THE FUTURE OF ETS EIGHTH AMENDMENT CLAIMS

A. The Objective Component

A prisoner’s complaint of compelled exposure to ETS at levels posing an unreasonable risk of serious harm is clearly cognizable under the Eighth Amendment’s objective component. The Supreme Court has explained that the objective component of an Eighth Amendment claim is “contextual and responsive to contemporary standards of decency.” 155 Indeed, as our technology advances, some risks previously perceived as innocuous, may be recognized as rising to constitutional significance. 156 As scientific awareness of the potential harms of ETS evolves, society’s standards of decency must evolve as well. 157 In assessing these standards, “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by this country’s legislatures 158 and the focus is on the standards accepted by modern American society as a whole.” 159

A review of state and federal legislation indicates that the “prevailing contemporary view” 160 of our society is to “limit compelled exposure to ETS.” 161 As of 1987, forty-five states and the District of Columbia had passed legislation regulating tobacco use. 162 More-

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156. Clemmons II, 956 F.2d 1523, 1532 (10th Cir. 1992) (Seymour, J., dissenting).
157. Id.
159. Id. (quoting Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989)).
160. Id.
161. Id.
over, Congress and federal agencies have enacted legislation limiting exposure to ETS. For example, Congress enacted a statute which permanently prohibits smoking on all domestic airline flights in the contiguous United States, regardless of duration, as well as a ban on all flights of six hours or less when to or from Alaska or Hawaii.\(^{163}\) In addition, smoking is prohibited on interstate and intercity bus trips\(^{164}\) and is regulated in Government Service Administration controlled buildings.\(^{165}\) Various Federal Bureau of Prison regulations also prohibit smoking in specifically delineated circumstances.\(^{166}\)

Municipal ordinances have been enacted to fill voids left by federal and state legislation. Since 1980, more than eighty cities and counties have enacted local ordinances regulating smoking.\(^{167}\) A recent survey of non-smoking legislation enacted by states and cities with a population of 25,000 or greater yielded significant results.\(^{168}\) For example, thirty-five state laws limited smoking in public places, twenty-two mandated non-smoking sections in restaurants, ten addressed smoking in the private workplace, and ten states had enacted comprehensive non-smoking laws.\(^{169}\) Locally, more than 500 cities "had taken some action to limit smoking" as of July, 1989.\(^{170}\) Significantly, the study concluded that by mid-1989, "nearly all urban Americans were covered by a state or local smoking restriction."\(^{171}\)

The foregoing federal, state and local legislation is objective evidence reflective of our society's growing intolerance toward exposure to ETS. Furthermore, it clearly shows that our society perceives ETS as posing an unreasonable risk of serious harm. When prisoners are subjected to a substantial risk of serious harm the Eighth Amendment is violated. The Supreme Court has recognized that "when the State

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165. Id. (citing 41 C.F.R. § 101-20.105.3 (1991)).
166. See supra notes 54-56 and accompanying text.
169. Id. at 41 (citing Rigotti & Pashos, supra note 168, at 3164).
170. Id. (citing Rigotti & Pashos, supra note 168, at 3164).
171. Id. (quoting Rigotti & Pashos, supra note 168, at 3166).
takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume responsibility for his safety and general well-being."\textsuperscript{172} The Court has also recognized that "it is cruel and unusual punishment to hold convicted criminals in unsafe conditions."\textsuperscript{173}

The federal courts have applied these principles in a variety of situations relating to an inmate's physical well-being.\textsuperscript{174} Given that inadequate ventilation and exercise have been recognized as unsafe conditions under the Eighth Amendment, it follows that involuntary exposure to ETS must necessarily be included as an unsafe condition from which prisoners have the right to be protected. As the Supreme Court recognized in \textit{McKinney}, the fact that an inmate is not presently suffering any adverse consequences due to ETS exposure should not interfere with an inmate's claim for relief.\textsuperscript{175} Instead, an inmate should be able to seek relief based on the risk that exposure to ETS entails.

If inmates were forced to wait until the risk to their health resulted in disease, the protection afforded by the Eighth Amendment would be meaningless. Under this type of approach, prison officials would be under no duty to remedy conditions that pose a serious risk, such as the threat of fire (as long as no fire had yet occurred), the risk of AIDS and other infectious diseases, and asbestos exposure.\textsuperscript{176} As the Third Circuit explained in \textit{Tillery v. Owens},\textsuperscript{177} there is "nothing in the Supreme Court's relevant jurisprudence that suggests [deplorable conditions] may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot."\textsuperscript{178} To the contrary, the Supreme Court has required that

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\item \textsuperscript{172} DeShaney v. Winnebago Cty. DSS, 489 U.S. 189, 199-200 (1988) (emphasis added).
\item \textsuperscript{173} Youngberg v. Romeo, 457 U.S. 307, 315-16 n.8 (1982).
\item \textsuperscript{174} See, e.g., Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (prolonged restriction on exercise that threatens an inmate's physical health); Hoptowit v. Spellman, 753 F.2d 779, 783-84 (9th Cir. 1986) (lack of adequate ventilation and air flow is unconstitutional); Spain v. Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979) (denial of regular outdoor exercise violates the Eighth Amendment).
\item \textsuperscript{175} Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993).
\item \textsuperscript{176} Brief for the American Civil Liberties Union and the American Civil Liberties Union of Nevada as Amicus Curiae in Support of Respondent at 8-12, Helling v. McKinney, 112 S. Ct. 291 (1991) (No. 91-1958).
\item \textsuperscript{177} 907 F.2d 418 (3d Cir. 1990).
\item \textsuperscript{178} Id. at 428.
\end{itemize}
prison officials ensure inmates' safety, and protect them from any "unnecessary and wanton infliction of pain." In light of the scientific authority labelling ETS a significant health hazard, and the legislation enacted in response to such authority, it is clear that society's standards have evolved to the point where compelled exposure to ETS will not be tolerated. Thus, involuntary exposure to ETS, a prison condition which poses a risk of serious harm, is cognizable under the Eighth Amendment's objective component.

B. The Subjective Component

The McKinney Court failed to define the requisite elements of the subjective component of an Eighth Amendment claim. It merely stated that the subjective factor, deliberate indifference, should be determined in light of prison authorities current attitudes and conduct. That the Court did not provide more guidance on the subjective component is unfortunate because most ETS Eighth Amendment cases are lost at this stage.

As the Court held in Wilson v. Seiter, the subjective component of an Eighth Amendment claim requires a showing of deliberate indifference. In the ETS Eighth Amendment cases decided since Wilson, it appears that the federal courts have misapplied Wilson, reading its subjective requirement too narrowly. The courts have erroneously believed that a showing of deliberate indifference requires that the prison officials actually intend to harm a prisoner. For example, in Clemmons II, the majority rejected a prisoner's Eighth Amendment ETS claim, holding that the prisoner failed to show "that defendants forced him to live with others who smoked and that they did so intentionally, knowing the smoke would have serious medical consequences for him . . . ." Similarly, in Steading v. Thompson, the Seventh Circuit concluded that the deliberate indifference standard articulated in Wilson requires an intent to punish, stating

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182. See supra note 95 and accompanying text.
183. See supra notes 44-45 and accompanying text.
185. Id. at 1528.
186. 941 F.2d 498 (7th Cir. 1991).
that if prison officials "do not intend [a prisoner's] discomfiture they have not punished him, and so do not violate the cruel and unusual punishment clause as Wilson interprets that amendment." 187

To the contrary, in Wilson, the Court rejected as too high the state of mind under which acts must be done "for the very purpose of causing harm." 188 In so doing, the Court clearly distinguished the "deliberate indifference" test from the more restrictive standard announced in Whitley v. Albers. 189 In Whitley, the Court held that an Eighth Amendment claim arising from an emergency situation, such as a prison disturbance, requires a showing that prison officials acted "maliciously and sadistically for the very purpose of causing harm." 190 Moreover, the Wilson Court cited with approval several lower court decisions clearly indicating that arbitrarily refusing to protect an inmate from a known risk of serious harm can constitute deliberate indifference, notwithstanding the absence of proof of an intent to cause harm. 191 Courts, therefore, should not restrict their inquiry to intent. This is especially true because the real defendants in conditions suits, including ETS cases, are not specific individuals, but institutions. 192 As stated by Justice White, in his concurring opinion in Wilson, "[i]n truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." 193 Moreover, prison officials could potentially use the intent

187. Id. at 500.
189. Id. at 2326. See Whitley v. Albers, 475 U.S. 312 (1986).
191. Clemmons II, 956 F.2d 1523, 1533 (10th Cir. 1992) (Seymour, J., dissenting). In Wilson, the Court cited with approval: Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) ("When prison officials intentionally place prisoners in dangerous surroundings . . . or when they are 'deliberately indifferent' either to prisoners' health or safety, they violate the Constitution."); LaFaut v. Smith, 834 F.2d 389, 392 n.4 (4th Cir. 1987) (prisoner need only show that the defendant was deliberately indifferent to his needs, not that defendant affirmatively intended to deprive him of the means of satisfying his needs); Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987) (deliberate indifference can be shown by "an obvious unreasonable risk of violent harm"). Wilson, 111 S. Ct. at 2327.
192. It is therefore difficult to ascertain whose intent is dispositive of the subjective component. See, e.g., Arthur B. Berger, Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards, 1992 UTAH L. REV. 565, 595 n.215 ("Does one look to a guard's intent? The warden's? The head of the department of corrections? The governor's? The taxpayers' . . . ?").
193. Wilson, 111 S. Ct. at 2330 (White, J., concurring).
requirement to their advantage "by proclaiming beneficent designs while asserting that their hands are fiscally bound." Justice White further noted that with the intent requirement, prison officials will be able to defeat 42 U.S.C. § 1983 conditions actions simply by showing that the conditions are caused by insufficient funding from the state legislature, rather than by any deliberate indifference on the part of prison officials.

Clearly, Justice White's concerns are valid. In an amici brief filed in support of prison officials in Helling v. McKinney, thirty-four states argued that the states have a very significant interest in "holding down the immense costs of building and operating prisons and jails within their states." The amici states argued that if ETS Eighth Amendment claims were allowed, it "would likely lead to even greater drains on state treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations." These concerns, while legitimate, are not of such significance that they override Eighth Amendment protections. Indeed, the Supreme Court has stated that the "cost of compliance is ancillary to ... order[s] enforcing federal law." Therefore, given the potential risk of harm at stake, the deliberate indifference standard demands that prison officials at a minimum be required to articulate real and legitimate administrative considerations to justify involuntarily exposing an inmate to ETS.

Clearly, a broader-based interpretation of the Wilson subjective component should be applied in ETS and other conditions of confinement cases. If an inmate shows that his compelled exposure to

194. Berger, supra note 192, at 595. In Wilson, Justice Scalia acknowledged that prison officials may use lack of funds as a defense to a cruel and unusual punishment claim. Wilson, 111 S. Ct. at 2326.
195. Wilson, 111 S. Ct. at 2330-31 (White, J., concurring).
197. Id. at 2-3.
198. Id. at 3.
ETS is objectively cruel and unusual, courts should then consider whether prison officials were deliberately indifferent to the inmate’s long-term health and physical well-being.

C. Remedies

It is important to recognize that not every complaint of ETS is serious enough to make out an Eighth Amendment violation. Indeed, it is well-settled that the Eighth Amendment is not intended to be a shield against “routine discomfort.” Thus, courts must decide each ETS Eighth Amendment case based on its individual facts, considering the level and degree of exposure to ETS, and whether that degree of exposure is sufficient to create an unreasonable risk of harm to an inmate’s health.

An inmate that successfully asserts an Eighth Amendment ETS claim is entitled to injunctive relief. The injunctive relief granted in each case will vary, depending on the conditions of the particular prison. At a minimum, an aggrieved inmate that states a valid ETS Eighth Amendment claim should be assigned to share a cell with a non-smoker. Where practicable, however, prison officials should be required to establish smoking and non-smoking areas within the prison. The next section will argue that the establishment of smoking and non-smoking areas within a prison is supported by practical considerations.

IV. RECOMMENDATION

Although there is no constitutional right to smoke in prison, the Constitution does not mandate a smoke-free setting. Thus, the most practical solution is the establishment of designated smoking and non-smoking areas within a prison.

Designated smoking areas within a prison will eliminate significant costs associated with smoking. First, there will likely be a noticeable decrease in sick calls by prisoners. This is significant in light of the fact that taxpayers incur the cost for prisoners' medical care. According to Sheriff Carl Peed, who runs the Fairfax County Virginia Adult Detention Center, smoking restrictions led to a one-third decline in sick calls at the institution. Peed noted that the institution's medical staff reported fewer smoking-related health problems, such as eye irritation, throat infections, and upper-respiratory infections, as well as a declining use of medication for these problems.

Of equal importance, smoking restrictions will lessen the extensive litigation costs of suits brought by inmates who claim injury from ETS. It is the taxpayers that bear the cost of such litigation. The threat of compensatory and punitive damages is significant enough to warrant segregation between smoking and non-smoking inmates.

V. CONCLUSION

With the Supreme Court's decision in *Helling v. McKinney*, and as smoking becomes less socially acceptable and the harmful effects of exposure to second-hand smoke become more widely known, the future will likely hold an increase in ETS Eighth Amendment litigation. An inmate's cruel and unusual punishment claim due to involuntary exposure to ETS will be evaluated according to an objective

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205. See supra note 52.


207. Id.

208. Id.
and subjective standard. From an objective perspective, the scientific authority labelling ETS a health hazard, coupled with the legislation limiting ETS exposure, supports the proposition that compelled exposure to ETS is cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health. Similarly, the subjective component of an Eighth Amendment claim may be satisfied if an inmate shows that prison officials arbitrarily refused to protect the inmate from a known risk of harm, such as ETS. Since the Eighth Amendment does not mandate an entirely smoke-free environment, the most practical remedy for an aggrieved inmate in an ETS action is the segregation of smokers and non-smokers.

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