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You've Come a Long Way, Felon: Helling v. McKinney Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment

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You've Come a Long Way, Felon: *Helling v. McKinney* Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment

Americans have grown increasingly intolerant of secondary[1] tobacco smoke.[2] The 1986 Surgeon General's Report outlining the potential health risks associated with secondary smoke[3] caused an explosion in legislation protecting nonsmokers' rights.[4]

This Note explores the extension of similar protection to individuals incarcerated in our nation's prisons. Specifically, it addresses the Supreme Court's recent decision in *Helling v. McKinney*[5] and its expansion of Eighth Amendment[6] protection to include exposure to secondhand smoke and other risks of future harm.[7] The Note traces the Supreme Court's evolving interpretation of the Eighth Amendment: once used solely to prevent barbaric treatment of our nation's prisoners, the Eighth Amendment is now used by the Court to scrutinize the conditions in which prisoners are confined.[8] The expanded scope of permissible claims under the Cruel and Unusual Punishment Clause culminated in *Helling*, in which the Supreme Court held that allegations of future health risks comprise a valid Eighth

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1. Tobacco smoke is characterized as sidestream smoke—smoke released between puffs—or mainstream smoke—smoke inhaled by the smoker. Secondary smoke, also called Environmental Tobacco Smoke (ETS), is a "combination of sidestream smoke and the fraction of exhaled mainstream smoke not retained by the smoker." U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL 7 (1986) [hereinafter INVOLUNTARY SMOKING].

2. In 1964, 46% of adults thought proximity to a smoker was an annoyance; by 1986, the figure had risen to 69%. U.S. DEP'T OF HEALTH AND HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 23 (1989). Additionally, "[i]n a 1985 Gallup poll, 75 percent of the respondents (including 62 percent of the smokers) felt that smokers should refrain from smoking in the presence of nonsmokers." INVOLUNTARY SMOKING, *supra* note 1, at 320.

3. The report found that involuntary smoke may cause lung cancer and possibly other diseases. INVOLUNTARY SMOKING, *supra* note 1, at 13-14.

4. A majority of states have passed some sort of antismoking legislation. *See, e.g.*, MINN. STAT. ANN. §§ 144.411-.417 (West 1989 & Supp. 1994) (prohibiting smoking in public places and at public meeting places except in specified areas); S.C. CODE ANN. § 44-95-20 (Law. Co-op. Supp. 1993) (making it illegal to smoke or carry lighted smoking material in places such as public schools, health-care facilities, and public theaters, except in designated smoking sections); VA. CODE ANN. § 15.1-291.1 to 15.1-291.11 (Michie Supp. 1993) (prohibiting smoking in specified places such as elevators, public school buses, and hospital emergency rooms, while requiring nonsmoking areas in others, such as restaurants, educational buildings, and health-care facilities).

5. 113 S. Ct. 2475 (1993).

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

7. *See infra* notes 13-35 and accompanying text.

8. *See infra* notes 36-70 and accompanying text.

Amendment claim.[9] Finally, this Note suggests other possible ways to protect inmates from secondary smoke and similar future risks—options outside of the Eighth Amendment.[10] The Note concludes that limiting Eighth Amendment protection and utilizing such alternate forms of relief would prevent the "cruel and unusual punishment" prohibition from becoming a catch-all provision for discontented inmates[11] and providing prisoners more constitutional protection than other citizens.[12]

In 1986, William McKinney, a prisoner in the Nevada State Prison in Carson City,[13] shared a cell with an inmate who smoked five packs of cigarettes a day.[14] In January 1987, McKinney filed a pro se complaint in the United States District Court for the District of Nevada, alleging that he suffered from nose bleeds, headaches, chest pains, and lack of energy due to his involuntary exposure to secondhand smoke.[15] He sought injunctive relief and damages from the director of the prison, the warden, and others for this alleged violation of his Eighth Amendment right to freedom from cruel and unusual punishment.[16] The trial court granted a directed verdict for the defendants because the plaintiff could show no causal connection between his medical problems and his cellmate's smoking.[17]

The Court of Appeals for the Ninth Circuit[18] found that McKinney stated a cause of action under the Eighth Amendment when he alleged that his involuntary exposure to Environmental Tobacco Smoke (ETS)[19] posed

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9. *Helling*, 113 S. Ct. at 2481; *see also infra* text accompanying note 23.

10. *See infra* notes 120-22 and accompanying text.

11. *See infra* notes 106-08 and accompanying text.

12. *See infra* notes 108-16 and accompanying text.

13. McKinney v. Anderson, No. CV-N-87-36-ECR, 1988 U.S. Dist. LEXIS 18594, at *2 (D. Nev. Apr. 8, 1988) (magistrate's report and recommendation).

14. *Id.*

15. *Id.*

16. *Id.* at *3.

17. McKinney v. Anderson, No. CV-N-87-36-PHA, 1989 U.S. Dist. LEXIS 18338, at *2 (D. Nev. Dec. 26, 1989) (order denying the plaintiff's motion for production of trial transcripts and payment of court reporters at the government's expense).

18. McKinney v. Anderson, 924 F.2d 1500, 1512 (9th Cir.), *vacated and remanded sub nom.* Helling v. McKinney, 112 S. Ct. 291 (1991), *reinstated and remanded*, McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992), *aff'd and remanded sub nom.* Helling v. McKinney, 113 S. Ct. 2475 (1993). The magistrate concluded that freedom from cigarette smoke was not a right guaranteed by the Constitution. *Id.* at 1503. Additionally, the magistrate found no Eighth Amendment violation because McKinney had failed to present evidence of medical problems resulting from exposure to the smoke or deliberate indifference to his present medical needs on the part of prison officials. *Id.* The court of appeals affirmed these findings but nevertheless found an Eighth Amendment violation. *McKinney*, 924 F.2d at 1509.

19. *See supra* note 1.

an unreasonable health risk.[20] The court held that McKinney should have been permitted to prove his case.[21]

The United States Supreme Court ultimately affirmed the court of appeals,[22] holding that McKinney stated "a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health."[23] In reaching this conclusion, Justice White, writing for himself and six other justices, rejected the defendants' argument that, based on precedent, McKinney was entitled to Eighth Amendment protection only if the prison conditions caused him to suffer a serious, current medical problem.[24] The Court held that the Eighth Amendment applies to serious *risks* of harm as well.[25] To support its decision, the majority pointed to precedent holding that the Constitution mandates safe prison conditions.[26] Because McKinney's exposure to ETS could be an unsafe condition, the Court remanded the case in order for McKinney to have the chance to prove his allegations.[27] Consistent with its decision in *Wilson v. Seiter*,[28] the Court required McKinney to satisfy both the subjective and objective components of an Eighth Amendment claim.[29]

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20. *McKinney*, 924 F.2d at 1509. To bolster its decision, the court pointed to scientific opinion regarding the dangers of ETS and the fact that "it indeed violates society's standards of decency to expose an unwilling inmate to levels of ETS that pose an unreasonable risk of harm to human health." *Id.* at 1505.

21. *Id.* at 1509.

22. After its first review of the case, the Supreme Court remanded for further consideration in light of a recent opinion. Helling v. McKinney, 112 S. Ct. 291 (1991). That case held that prisoners who allege unconstitutional conditions of confinement must prove a subjective component of deliberate indifference on the part of prison officials, in addition to an objective requirement of a serious injury. Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991); *see also infra* notes 58-64 and accompanying text. On remand the court of appeals reinstated its prior decision, reasoning that this subjective component merely added to McKinney's burden of proof and had no bearing on its previous finding that his exposure to ETS satisfied the objective component of his claim. McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir.), *cert. granted sub nom.* Helling v. McKinney, 112 S. Ct. 3024 (1992), *aff'd*, 113 S. Ct. 2475 (1993).

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

24. *Id.* at 2480. Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter joined Justice White's opinion. *Id.*

25. Justice White wrote: "It 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." *Id.* at 2481.

26. *Id.* at 2480-81. The Court cited DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (stating that the Eighth Amendment requires prisoners to be provided with basic human needs, including "reasonable safety") and Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (reiterating that it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions").

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

28. 111 S. Ct. 2321, 2326 (1991); *see also supra* note 22.

29. The Court found that the objective component required proof of exposure to unreasonably high levels of ETS that could lead to potential harm and proof that such exposure to second-

In his dissent, Justice Thomas, joined by Justice Scalia, expressed concern about the impact the Court's holding would have on Eighth Amendment jurisprudence. Justice Thomas argued that the majority in *Helling*, and every other court that had found conditions of confinement to violate the Eighth Amendment, overlooked a fundamental requirement—that the act in question be "punishment."[30] Justice Thomas believed that, by upholding this claim under the Eighth Amendment, the Court stretched the definition of punishment beyond anything within the reasonable contemplation of the framers of the Bill of Rights.[31] Because Justice Thomas refused to presume that injuries suffered in prison constituted punishment for Eighth Amendment purposes,[32] and none of McKinney's allegations conformed with the historical definition of punishment,[33] he found the Eighth Amendment inapplicable.[34] Furthermore, Justice Thomas proposed that even if the Court were to expand Eighth Amendment protection to conditions of confinement, there was no reason to apply it to cases such as McKinney's in which "there has been no injury at all."[35]

Interpretation of the Eighth Amendment has evolved gradually over the years since its ratification in 1791.[36] Originally the Court, acting according to what it perceived to be the intentions of the Amendment's drafters,[37] limited its applicability to the prevention of torturous or barbaric

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hand smoke violated contemporary standards of decency. The subjective component required McKinney to prove that prison officials were deliberately indifferent to these risks. *Helling*, 113 S. Ct. at 2482.

30. *Id.* at 2483-84 (Thomas, J., dissenting).

31. Justice Thomas defined punishment as a penalty inflicted for the perpetration of a crime. *Id.* at 2483 (Thomas, J., dissenting). He concluded that there was no historical evidence that the "framers and ratifiers of the Eighth Amendment had anything other than this common understanding of 'punishment' in mind." *Id.* (Thomas, J., dissenting). Additionally, Justice Thomas reasoned that because the Supreme Court had not considered conditions of confinement to be protected by the Eighth Amendment during the first 185 years following its adoption, such situations were never intended to be covered by the provision. *Id.* at 2484 (Thomas, J., dissenting).

32. *Id.* at 2483 (Thomas, J., dissenting).

33. *Id.* (Thomas, J., dissenting).

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

35. *Id.* (Thomas, J., dissenting). Justice Thomas questioned the majority's use of precedent, stating: "None of our prior decisions, including the three that are cited by the Court today . . .[,] held that the mere threat of injury can violate the Eighth Amendment." *Id.* at 2485 n.3 (Thomas, J., dissenting).

36. *See* Gregg v. Georgia, 428 U.S. 153, 171 (1976) (stating that "the Amendment has been interpreted in a flexible and dynamic manner"); Furman v. Georgia, 408 U.S. 238, 329 (1971) (Marshall, J., concurring) (finding that Eighth Amendment interpretations have varied over time, evidenced by the fact that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today"); Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (recognizing that "the words of the Amendment are not precise, and that their scope is not static") (footnote omitted).

37. *Gregg*, 428 U.S. at 170 (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)).

punishment.[38] In the twentieth century, however, realizing that "a principle to be vital must be capable of wider application than the mischief which gave it birth,"[39] the Court began to expand the scope of the Eighth Amendment. Yet, after extending Eighth Amendment protection to disproportionate and excessive punishments[40] and to those degrading to "the dignity of man,"[41] many courts were still unwilling to delve into matters of prison administration or conditions.[42]

In 1976, however, the Supreme Court held that the Eighth Amendment applies to deprivations that are not part of a sentence, yet are suffered during imprisonment. In *Estelle v. Gamble*,[43] an inmate claimed that the failure of prison officials to provide him with adequate medical treatment violated his Eighth Amendment rights.[44] The Court agreed, holding that deliberate indifference to a prisoner's serious medical needs can constitute cruel and unusual punishment.[45] The *Estelle* Court determined that the government is responsible for providing medical treatment to prisoners in

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38. *See, e.g.*, *Furman*, 408 U.S. at 264-65 (Brennan, J., concurring) (stating that early Eighth Amendment cases limited protection to torture or similarly outrageous actions); *In re* Kemmler, 136 U.S. 436, 447 (1890) (declaring that "[p]unishments are cruel when they involve torture or a lingering death"), *overruled by* Gregg v. Georgia, 428 U.S. 153 (1976); Wilkerson v. Utah, 99 U.S. 130, 135 (1879) (finding Eighth Amendment violated by atrocities such as disembowelling, beheading, and quartering), *overruled by* Gregg v. Georgia, 428 U.S. 153 (1976).

39. Weems v. United States, 217 U.S. 349, 373 (1910).

40. In *Weems*, the Court found that 12 years imprisonment for falsifying public records was cruel and unusual. *Id.* at 381.

41. Trop v. Dulles, 356 U.S. 86, 100 (1958). Finding that denationalization for wartime desertion violated the Eighth Amendment, the Court reasoned:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Id. at 100-01. Thereafter, the Court applied this holding to the death penalty, finding that in some cases its imposition violated the Eight Amendment. *Furman*, 408 U.S. at 239. *But cf. Gregg*, 428 U.S. at 169 (holding that the death penalty does not violate the Constitution).

42. *See, e.g.*, Kirby v. Thomas, 336 F.2d 462, 464 (6th Cir. 1964) ("[F]ederal courts do not have the power to regulate ordinary internal management and discipline of prisons."); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.) (declaring the traditional belief that courts should not supervise treatment of prisoners), *cert. denied*, 342 U.S. 829 (1951); *see also* 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, 1344 (1992) (discussing the Supreme Court's "hands off" treatment of prison condition cases until the 1960s).

43. 429 U.S. 97 (1976).

44. *Id.* at 97.

45. *Id.* at 104. In this case, the Court failed to find sufficient proof of deliberate indifference because medical personnel had seen the prisoner 17 times in a three-month period, and their only failure had been neglecting to order an X-ray that would have been beneficial to the prisoner's treatment. *Id.* at 107.

its custody, because those inmates are unable to provide for their own needs.[46]

The Supreme Court further extended the boundaries of the Eighth Amendment in *Rhodes v. Chapman*,[47] the first case in which the Court examined general prison conditions under the Cruel and Unusual Punishment Clause.[48] Before *Rhodes*, the Supreme Court had deferred to state legislatures and prison officials on conditions of confinement.[49] Once it entered this arena, the Court had to set new standards for relief since prison conditions cases involved different considerations than those alleging torturous and barbaric actions. *Rhodes* and the cases that followed attempted to define the necessary components of this "new" Eighth Amendment claim.

In determining whether housing two inmates in a cell designed for one amounted to cruel and unusual punishment, the *Rhodes* Court focused on what may be described as the objective component of the Eighth Amendment: It attempted to determine whether the deprivation suffered was serious enough to state a claim.[50] While the Court acknowledged that double celling may cause pain, it is not the "unnecessary or wanton" infliction of pain that would constitute an Eighth Amendment violation.[51] The Eighth Amendment was inapplicable because the inmates suffered no deprivation of "essential food, medical care, or sanitation."[52]

In the next case addressing the rights of prisoners under the Eighth Amendment, the Court further defined the standard of relief by requiring the fulfillment of a subjective component. In *Whitley v. Albers*,[53] the Court held that prison officials must possess a culpable state of mind.[54] In *Whitley*, an inmate shot by a prison official during a riot alleged a violation of his Eighth Amendment rights.[55] The Court concluded:

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46. *Id.* at 103.

47. 452 U.S. 337 (1981).

48. *Id.* at 347.

49. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (stating that solving prison difficulties "require[s] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government" and that "courts are ill-equipped to deal with the . . . problems of prison administration and reform"), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

50. *Rhodes*, 452 U.S. at 346-47.

51. *Id.* at 348-49 (applying the standard set forth in Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The Court also declared that "the Constitution does not mandate comfortable prisons, and prisons of [this] type, which house persons convicted of serious crimes, cannot be free of discomfort." *Id.* at 349.

52. *Id.* at 348.

53. 475 U.S. 312 (1986).

54. *Id.* at 319.

55. *Id.* at 317. Prison officials shot some inmates in an attempt to free another prison official whom the inmates had taken hostage. *Id.* at 316.

> To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It 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, supplying medical needs, or restoring official control over a tumultuous cellblock.[56]

Because the prison official in *Whitley* applied the force in a good faith effort to restore peace, the Court refused to find a violation of the inmate's Eighth Amendment rights.[57]

In 1991, in *Wilson v. Seiter*,[58] the Court qualified the subjective prong of Eighth Amendment condition claims. In *Wilson*, a prisoner alleged that various prison conditions, when considered as a whole, amounted to cruel and unusual punishment.[59] The Court concluded that for conduct not formally imposed as punishment to be cruel and unusual, the prisoner's allegations must satisfy both the objective and subjective components of the Eighth Amendment.[60] However, the Court rejected the argument that the *Whitley*[61] standard of obduracy and wantonness applied in prison condition cases.[62] Instead, it found that the lower threshold of deliberate indifference required in *Estelle v. Gamble*[63] was the proper standard for questions of inadequate conditions.[64]

A year later in *Hudson v. McMillian*,[65] the Supreme Court reaffirmed *Whitley*, which had held that excessive force cases merely require satisfac-

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56. *Id.* at 319 (emphasis added).

57. *Id.* at 326.

58. 111 S. Ct. 2321 (1991).

59. *Id.* at 2323. Wilson alleged "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.*

60. *Id.* at 2325, 2327. The Court reasoned that since the word "punishment" implied an intentional act, if the act in question was not part of the punishment meted out, the Eighth Amendment requires a culpable state of mind. *Id.* at 2326.

61. Whitley v. Albers, 475 U.S. 312 (1986); *see also supra* text accompanying note 56.

62. *Wilson*, 111 S. Ct. at 2326.

63. 429 U.S. 97 (1976); *see also supra* text accompanying notes 43-46.

64. *Wilson*, 111 S. Ct. at 2327. The Court found that the deprivations Wilson suffered were not sufficiently serious to satisfy the objective component and amount to an Eighth Amendment violation. The Court stated, "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* However, the Court did recognize that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Id.* at 2327.

65. 112 S. Ct. 995 (1992).

tion of the subjective component,[66] and extended the holding to cases in which force is used absent a prison disruption.[67] In *Hudson*, the Court held that the use of excessive force against a prisoner may amount to cruel and unusual punishment even if the prisoner suffers only minor injuries.[68] The Court found the objective component to be "responsive to 'contemporary standards of decency.' "[69] Therefore, it briefly addressed, but ultimately dismissed, the requirement of a serious injury as unimportant in excessive force cases. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated."[70]

Coming so soon after *Hudson*, the refusal of the *Helling* Court to require a significant present injury in order to state an Eighth Amendment claim may not seem surprising. However, *Hudson* is distinguishable because it involved the use of force. In the past, the Court afforded allegations of excessive force special treatment and distinguished cases, such as *Helling*, in which the inmate alleged unconstitutional conditions of confinement.[71] Whereas conditions cases retained the *Estelle* standard of deliberate indifference,[72] force cases required a heightened standard of maliciousness.[73] The Court in *Hudson* did away with the objective requirement of a serious deprivation or injury for cases claiming undue force precisely because of this intensified subjective standard. Since McKinney alleged unconstitutional conditions and not excessive force, the *Helling* Court was not justified in eroding the previously stringent requirement of an injury[74] without requiring the heightened culpability that an allegation of force mandates.

The key to evaluating the *Helling* Court's decision is defining what constitutes an "injury": a present injury or a significant risk of future in-

66. Whitley v. Albers, 475 U.S. 312, 319 (1986); *see also supra* notes 53-57 and accompanying text.

67. *Hudson*, 112 S. Ct. at 999.

68. *Id.* at 997. After an argument, Officer McMillian punched the prisoner, Hudson, several times while another officer held Hudson down. *Id.*

69. *Id.* at 1000 (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

70. *Id.*

71. *Compare* Whitley v. Albers, 475 U.S. 312, 319 (1986) (holding that when excessive force is alleged, the Eighth Amendment is violated even absent significant injury if force is applied in an unnecessary and wanton manner) *with* Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (requiring both present injury and deliberate indifference); *see also supra* notes 53-64 and accompanying text.

72. *Wilson*, 111 S. Ct. at 2327 (holding that prisoners who claim that conditions violate the Eighth Amendment must show deliberate indifference on part of prison officials); *see also supra* notes 58-64 and accompanying text.

73. *See, e.g., Whitley*, 475 U.S. at 319; *see also supra* text accompanying note 56.

74. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (holding that although double celling probably caused the inmates pain, it did not constitute the unnecessary and wanton infliction of pain that the Eighth Amendment prohibits); *see also supra* notes 50-52 and accompanying text.

jury. Technically, the *Helling* Court did require proof of an objective as well as a subjective component.[75] The Court simply was willing to accept proof of an unreasonable risk of injury to satisfy the objective component[76]—an unprecedented ruling in the Eighth Amendment context. The majority reasoned that the Eighth Amendment should not allow prison officials to ignore potentially harmful conditions merely because prisoners have not yet suffered symptoms.[77] According to the Court, the Eighth Amendment should protect not only those who suffer a present injury, but also should extend to individuals whose conditions of confinement create a risk of future harm.[78] To support this conclusion, the Court relied on prior decisions holding that unsafe conditions are cruel and unusual punishment.[79] The Court concluded that exposure to ETS could constitute such an unsafe condition.[80] Thus, the Court used the Cruel and Unusual Punishment Clause as a form of "preventative medicine," whereas critics such as Justice Thomas[81] would prefer a mentality more akin to the old notion about not fixing things that are not broken.

The Court's decision to extend Eighth Amendment protection in this case may reflect current sentiment deploring secondhand smoke.[82] *Trop v. Dulles*[83] held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[84] The Court in *Helling* consequently held that, on remand, McKinney would have to prove that his involuntary exposure to ETS violates present standards of decency.[85] The Court obviously thought that establishing this fact was indeed possible and provided McKinney with the opportunity to make his case.[86] In a country where people often enjoy statutory protection

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75. *See supra* note 29 and accompanying text.

76. *See supra* notes 23-29 and accompanying text.

77. *Helling*, 113 S. Ct. at 2481; *see also supra* note 25.

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

79. *Id.* at 2480-81; *see also supra* note 26 and accompanying text.

80. *Helling*, 113 S. Ct. at 2481. The Court, however, failed to consider whether exposure to ETS constituted a definite health risk and was therefore unsafe. Medical research has yet to determine this question. *See infra* note 106.

81. *See supra* notes 30-35 and accompanying text.

82. *See supra* note 2 and accompanying text.

83. 356 U.S. 86 (1958).

84. *Id.* at 101.

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

86. Application of the "standards of decency" test, however, presumes that conditions of confinement constitute punishment in the first place. At the time *Helling* reached the Supreme Court, the applicability of the Eighth Amendment to cases alleging improper conditions was well established. *Id.* at 2480; *see also supra* notes 43-49 and accompanying text. However, the basis for such an "undisputed" proposition still warrants questioning. As Justice Thomas argued in his dissent in *Helling*, the Court has never analyzed the text and history of the Eighth Amendment in deciding whether prison conditions constitute punishment, but instead has simply stated it to be true. *Helling*, 113 S. Ct. at 2484-85 (Thomas, J., dissenting).

from involuntary exposure to secondhand smoke in the private workplace,[87] in elevators,[88] and on domestic airline flights,[89] the Court may have been correct.[90]

On the other hand, some evidence shows that the risk of which McKinney complained is not grave enough to constitute a violation of common standards of decency. After the parties filed their briefs in this case, the Bush Administration and thirty-four states requested that the Court rule against McKinney.[91] The Administration claimed there was "no basis for ruling that exposure to secondhand smoke could even theoretically violate the Eighth Amendment," because smoking is " 'widespread in society' " and " 'a habit that is deeply rooted in our history and experience.' "[92] Additionally, several lower federal courts have refused prisoners' ETS claims, finding that exposure to ETS did not violate public standards of decency.[93]

The Court's decision in *Helling* may also reflect the recent willingness of some courts to recognize claims of significant future risks as remediable.[94] Such claims, much like McKinney's, "involve allegations of harm from a disease not yet contracted and not certain to occur."[95] Courts granting relief for this allegation often do so in one of two ways. First, they may allow recovery for future damages to be added to a "present injury" claim.[96] However, in the absence of an obvious, present physical injury, certain jurisdictions have been lenient in interpreting what constitutes a "present"

87. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-40q (West Supp. 1993) (mandating that employers establish at least one smoke-free workplace for employees); *see also* V.I. CODE ANN. tit. 23, § 892 (1993) (requiring that preferences of nonsmokers prevail over those of smokers in offices).

88. *See, e.g.*, NEV. REV. STAT. ANN. § 202.2491-1(a) (Michie Supp. 1993); S.C. CODE ANN. § 44-95-20(4) (Law. Co-op. Supp. 1993).

89. 49 U.S.C. § 1374(d)(1)(A) (1988).

90. Other courts have reached the same conclusion. *See, e.g.*, Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1988).

91. Linda Greenhouse, *Court Offers Inmates a Way to Escape Prison Smokers*, N.Y. TIMES, June 19, 1993, at A8.

92. *Id.* (quoting the Bush Administration brief).

93. *See, e.g.*, Caldwell v. Quinlan, 729 F. Supp. 4, 6 (D.D.C. 1990) ("[C]ontemporary society has yet to view exposure to second-hand smoke as transgressing its 'broad and idealistic concepts of dignity, civilized standards, humanity and decency.' " (citation omitted)), *cert. denied*, 112 S. Ct. 295 (1991); Gorman v. Moody, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (finding the Eighth Amendment inapplicable because "society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment").

94. *See* Melissa Moore Thompson, Comment, *Enhanced Risk of Disease Claims: Limiting Recovery to Compensation for Loss, Not Chance*, 72 N.C. L. REV. 453, 454 (1993). Other courts refuse to grant relief for mere exposure to dangerous material that poses an increased risk of future harm. *See, e.g.*, Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.) (requiring "manifest injury" for tort claim because recovery based on mere exposure would compensate those who never become injured), *cert. denied*, 474 U.S. 864 (1985).

95. Thompson, *supra* note 94, at 453.

96. *Id.* at 461-65.

injury.[97] Some courts have held that mere exposure to a threatening substance alone is sufficient.[98] Other jurisdictions view the increased risk of disease as a present injury.[99] One court held that "[d]izziness, leg cramps and a persistent stinging sensation in feet and fingers"—symptoms similar to those alleged by McKinney[100]—constituted a present injury.[101] Second, some courts recognize an enhanced risk cause of action.[102] These courts allow plaintiffs a cause of action for either "(1) a present injury with future consequences, or (2) an invasion of a legally protected interest actionable absent any other manifestation."[103]

Regardless of the method of relief, many courts only allow recovery for future damages if they are "more likely than not" or " 'reasonably certain' " to happen.[104] Although the *Helling* Court similarly recognized a future risk as remediable, it went beyond these holdings. It allowed relief under the Eighth Amendment even when there is uncertainty about whether any harm will occur.[105]

While extending Eighth Amendment protection to risks of future harm, the *Helling* Court offered little guidance for determining what risks are sufficient. This lack of direction leaves the lower courts to struggle with the problem of determining when a condition poses "an unreasonable risk of serious damage to . . . future health."[106] Because the Supreme Court was willing to entertain claims involving ETS exposure even though research has not determined the extent of this risk,[107] prisoners may swamp the courts with cases claiming insignificant risks. The decision in *Helling* could open the floodgates for Eighth Amendment claims just as the decision

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97. *Id.* at 462-63.

98. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412 (5th Cir.) ("injury . . . is the inhalation of asbestos fibers"), *cert. denied*, 478 U.S. 1022 (1986).

99. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 322 (W.D. Tenn. 1986), *aff'd in part and rev'd in part*, 855 F.2d 1188 (6th Cir. 1988).

100. *See supra* text accompanying note 15.

101. Hagerty v. L. & L. Marine Servs., 788 F.2d 315, 317 (5th Cir. 1986).

102. Thompson, *supra* note 94, at 465; *see, e.g.*, Elam v. Alcolac, Inc., 765 S.W.2d 42, 208 (Mo. Ct. App. 1988), *cert. denied*, 493 U.S. 817 (1992).

103. Thompson, *supra* note 94, at 465-66.

104. *Id.* at 462, 464 (citations omitted).

105. *See, e.g.*, ENVIRONMENTAL TOBACCO SMOKE 369-70 (Donald J. Ecobichon & Joseph M. Wu eds., 1990) (summarizing conference reports suggesting that ETS exposure does not cause any increased risk of cardiovascular disease or cancer).

106. *Id.*

107. *See generally id.* at 375 (concluding that research has failed to establish ETS as a health hazard); INVOLUNTARY SMOKING, *supra* note 1, at 13-14 (finding that secondary smoke is a cause of disease but calling for more conclusive research to determine the magnitude of risk).

Additionally, these studies question whether the Court was justified in upholding McKinney's claim on the basis that unsafe conditions comprise an Eighth Amendment violation. *See supra* note 26 and accompanying text.

to expand the doctrine beyond torturous and barbaric actions did a few decades ago.[108]

Helling may also have an impact on nonsmokers' rights in general. In *Helling,* the Supreme Court stopped just short of holding that McKinney had a constitutional right to a smoke-free environment. However, by permitting McKinney to bring his case under the Eighth Amendment, the Court allowed him more protection than courts have permitted unincarcerated nonsmoking citizens under the same Constitution.[109]

Many nonsmokers have attempted to assert a constitutional right to a smoke-free environment, arguing that involuntary exposure to ETS "deprives them of life, liberty, and property without due process, invades their right to privacy, [and] chills First Amendment speech rights."[110] Although some courts have recognized a common-law claim for a smoke-free workplace,[111] courts have generally refused to hear nonsmokers' claims under the Constitution.[112] Instead, courts have found legislatures to be the proper forum for such relief.[113] One court warned: "For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes."[114]

In short, prisoners are the only nonsmokers who have succeeded in claiming that exposure to ETS violates their constitutional rights. Although

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108. *Cf.* Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion,* 11 GEO. MASON U. L. REV. 1, 6 (1988) (stating that prisoners filed 218 cases in 1966 alleging constitutional violations; by 1982, the number had risen to over 16,000).

109. *See infra* note 112 and accompanying text. The *Helling* Court allowed this expansion of the Eighth Amendment despite an instruction set forth in *Rhodes* to "proceed cautiously" in Eighth Amendment decisions because " '[revisions] cannot be reversed short of a constitutional amendment.' " Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

110. Elizabeth B. Thompson, Note, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?,* 43 VAND. L. REV. 491, 504 (1990).

111. *See, e.g.,* Smith v. Western Elec. Co., 643 S.W.2d 10, 13 (Mo. Ct. App. 1982) (finding failure to eliminate exposure to secondhand smoke to be breach of duty "to provide a reasonably safe workplace"); Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408, 415-16 (N.J. 1976) (holding that common-law duty to provide safe workplace required New Jersey Bell to provide a smoke-free workplace for its employees).

112. *See, e.g.,* Federal Employees for NonSmokers' Rights v. United States, 446 F. Supp. 181, 185 (D.D.C. 1978) (stating that there is no First or Fifth Amendment constitutional protection for nonsmokers against exposure to smoke), *cert. denied,* 444 U.S. 926 (1979); Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 721 (E.D. La. 1976) (holding that there was no deprivation of any constitutional right under the First, Fifth, Ninth, or Fourteenth Amendments in allowing smoking in a public facility).

113. *Gasper,* 418 F. Supp. at 722; *see also Federal Employees,* 446 F. Supp. at 185 (stating that "such matters are better left to the legislative or administrative process").

114. *Gasper,* 418 F. Supp. at 722.

common sense and fairness may dictate otherwise, the Supreme Court is giving people incarcerated for crimes against society more constitutional rights than law-abiding citizens. Arguably, prisoners should receive their relief from secondhand smoke in the same manner as the rest of the population—statutorily.[115] Some may attempt to justify decisions like *Helling* on the ground that prisoners are forced to remain in the presence of secondhand smoke while the rest of the population is free to leave; yet this rationale is not always a sound justification for preferential treatment of prisoners. Other members of the population can be similarly "trapped" in a hospital room with a smoker or in a job in which they are exposed to smoke, for example, and receive no aid from the Constitution.[116] The fact that the government incarcerates some individuals due to their unlawful behavior may entitle them to provision of their basic needs.[117] Nevertheless, it should not entitle them to greater constitutional protection from secondhand smoke than others involuntarily exposed to it every day.

The *Helling* Court's desire to protect McKinney and other prisoners from prospective dangers is both understandable and reasonable based on precedent applying the Eighth Amendment's protections to prison conditions.[118] Exposure to ETS may be "cruel and unusual" because it may violate current standards of decency. Yet when one examines the implications of the Court's holding the dangers of the decision become clear.

Now that the Court has expanded the Eighth Amendment to encompass future harm, the Eighth Amendment provides prisoners with an enormous amount of protection under the Constitution—arguably, even more protection than the rest of the population. Although a constitutional provision may have to mature with society, extending it too far beyond the original expectations of the drafters is dangerous. To protect Eighth Amendment jurisprudence from unlimited expansion,[119] the Supreme Court should have drawn the line in *Helling* by requiring a present injury for Eighth Amendment claims. Without such a restraint, the Amendment may

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115. *See supra* note 4 and accompanying text.

116. Surely a person confined to a hospital bed deserves to be free from exposure to ETS, yet even an ill person would not get this protection if statutes or hospital administrators did not prevent his roommate or health-care providers from lighting up. Similarly, a waitress may be economically "trapped" in a job where she must involuntarily breathe ETS and may be unable to get relief unless the legislatures make restaurants smoke-free. "Imprisonment" means more than being behind bars.

117. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989) (explaining that when the State restrains individuals in such a way that they cannot care for themselves, it has a duty to provide for basic human needs).

118. *See supra* notes 43-70 and accompanying text.

119. In his dissent in *Hudson*, Justice Thomas worried that, by allowing recovery absent a serious injury, the Court was turning the Eighth Amendment into a "National Code of Prison Regulation." Hudson v. McMillian, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting).

eventually be read to provide redress to prisoners complaining of minor prison discomforts.

Although McKinney's plight evokes sympathy, the Eighth Amendment is not the proper source of relief in this case.[120] Legislatures and prison officials should determine prison smoking policies; courts should reserve Eighth Amendment protection for cases involving punishment that constitutes present injury, or at the very least, for future harm that is more likely than not to occur. At least one state has already enacted legislation that bans smoking in prison areas.[121] Additionally, the federal prison system and many states "have adopted policies that restrict smoking to designated areas of prisons and prohibit wardens from assigning a nonsmoking inmate to the same cell as a smoker except when impractical."[122] By refusing to involve itself in this aspect of prison regulation, the Court could have left this problem in the proper hands of the prison system or the legislatures, two bodies that could have remedied, and in McKinney's case did remedy,[123] the problem of secondhand smoke in prisons. Instead, the Court chose to address the problem by expanding an already elastic and unpredictable constitutional doctrine.

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120. In the alternative, McKinney could possibly have brought a state law claim. *See* Gray, *supra* note 42, at 1342 n.15 (noting the possibility that prisoners complaining of improper prison conditions may receive relief in state law actions for tort or injunctive relief, among others). Discussion of these alternative remedies is beyond the scope of this Note.

121. ALASKA STAT. § 18.35.300 (1990).

122. Greenhouse, *supra* note 91, at 8.

123. After he filed his claim, McKinney was moved to a different facility which had a nonsmoking policy and was assigned a nonsmoking cellmate. Additionally, on January 10, 1992, the Director of the Nevada State Prisons adopted a formal nonsmoking policy that restricts smoking to specifically designated areas. *Helling*, 113 S. Ct. at 2482.