Helling v. McKinney: CREATING A CONSTITUTIONAL RIGHT TO BE FREE FROM ENVIRONMENTAL TOBACCO SMOKE

William McKinney brought a civil rights action[1] alleging a violation of his Eighth Amendment rights as a result of being involuntarily exposed to environmental tobacco smoke (ETS).[2] At the time this case arose, McKinney was a prisoner in the Nevada State Prison in Carson City, Nevada.[3] Specifically, McKinney complained of being celled with an inmate who smoked five packs of cigarettes a day. McKinney charged that prison officials denied his requests for a transfer to either a single cell or a cell with a non-smoker. He claimed to suffer from nosebleeds, headaches and chest pains as a result of his exposure.[4] The magistrate analyzed McKinney's case based upon two issues: (1) whether an inmate has a constitutional right to a smoke-free environment while incarcerated, and (2) whether the prison officials were deliberately indifferent to McKinney's medical needs.[5]

The magistrate held that although McKinney had no right to a smoke-free environment in prison, he could state a claim regarding deliberate indifference to medical needs. The magistrate therefore granted a directed verdict in favor of the prison officials. The Ninth Circuit Court of Appeals affirmed the directed verdict regarding the issue of deliberate indifference to medical needs. The court held, however, that McKinney had stated a valid Eighth Amendment claim in alleging that involuntary exposure to ETS could pose an

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1. *See* 42 U.S.C. § 1983 (1988 & Supp. 1993).

2. Other phrases used interchangeably in reference to environmental tobacco smoke (ETS) are "passive smoke," "secondhand smoke," and "involuntary smoke."

3. Prior to this disposition, McKinney was transferred from this prison facility to Ely State Prison, where he is no longer the cellmate of a smoker. However, he is subject to being moved back to Carson City and being placed in a cell with a heavy smoker. Further, as of January 10, 1992, the Director of the Nevada State Prisons adopted a formal smoking policy restricting smoking in "'program, food preparation/serving, recreational and medical areas'." Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475, 2482 (1993). According to the policy, the wardens may also initiate additional non-smoking areas in the dormitory areas, should space permit.

4. McKinney v. Anderson, 924 F.2d 1500, 1502 (9th Cir. 1991), *vacated and remanded sub nom.*, Helling v. McKinney, __ U.S. __, 112 S. Ct. 291 (1991).

5. *Helling*, 113 S. Ct. at 2478 (citing App. to Pet. for Cert. D2-D3).

unreasonable future health risk constituting "cruel and unusual punishment."[6]

The United States Supreme Court granted certiorari and vacated and remanded[7] the case in light of the *Wilson v. Seiter*[8] decision. On remand, the Court of Appeals incorporated the *Wilson* "subjective factor" requirement, and reinstated its previous judgment.[9] The Supreme Court granted the prison officials' petition for certiorari and held that an inmate 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. *Helling v. McKinney*, 113 S. Ct. 2475 (1993).

Although courts have never specified the exact scope of the phrase "cruel and unusual punishment," "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[10] In *Trop v. Dulles*,[11] the Court concluded that the Eighth Amendment

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6. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), *vacated and remanded sub nom.*, Helling v. McKinney, 112 S. Ct. 291 (1991).

7. *Helling*, 112 S. Ct. 291.

8. 501 U.S. __, 111 S. Ct. 2321 (1991). In *Wilson*, the Court added a "subjective factor" requirement to the test for determining violation of the Eighth Amendment rights of prisoners per their conditions of confinement. The "subjective factor" requires that the prisoner show a "culpable state of mind" and "deliberate indifference" on the part of the prison officials to the well-being of the prisoners. *Id.* at 2326-27. This standard essentially extends the holding in Estelle v. Gamble, 429 U.S. 97 (1976), in which the Court required a showing of "deliberate indifference" by prison officials when the prisoner claimed denial of adequate medical care, to all claims regarding conditions of confinement. *Id.* at 104.

9. McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992), *aff'd sub nom.*, Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475 (1993).

10. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion). The phrase "cruel and unusual punishment" first appeared in the Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. Gregg v. Georgia, 428 U.S. 153, 169 (quoting Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 852-53 (1969)). It currently finds its place within the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. Amend. VIII.

11. 356 U.S. 86, 101 (1958) (plurality opinion) (citing Weems v. United States, 217 U.S. 349 (1910)). The *Trop* Court draws upon the early teachings of Weems v. United States, 217 U.S. 349 (1910), where the Court stated that the cruel and unusual punishment clause of the Eighth Amendment "'is not fastened to the obsolete but may acquire meaning as

must take its meaning from "the evolving standards of decency that mark the progress of a maturing society."[12] Therefore, the words are meant to be flexible and progressive, not static, in order to respond to the changes in public perceptions of decency.[13]

The caselaw establishing the scope of the Eighth Amendment therefore reflects the evolution of changing public opinion and standards of decency. The earliest cases raising Eighth Amendment claims focus on particular methods of execution, such as torture, and whether these methods were "barbarous" or involved the "unnecessary and wanton infliction of pain."[14] Over time the Court changed its focus to determining whether the punishment was proportionate to the crime committed.[15] The Court's analysis always maintained its grounding however, within the realm of concepts of "dignity, civilized standards, humanity and decency."[16]

It was not until *Estelle v. Gamble*,[17] that the Court expanded the application of the Eighth Amendment beyond the scope of physically barbarous punishment via judicial sentence, to prison deprivations. In *Estelle*, the Court held that a prison official's failure to provide adequate medical service to the prisoners with "deliberate indifference" to the prisoner's medical needs violates the Eighth Amendment. The Court found this "deliberate indifference" to be inconsistent with contemporary standards of decency and a "wanton infliction of pain."[18]

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public opinion becomes enlightened by a humane justice.'" *Gregg*, 428 U.S. at 171 (quoting *Weems*, 217 U.S. at 378).

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

13. *See* Thompson v. Oklahoma, 487 U.S. 815, 821 n.4 (1988) (citing *Weems*, 217 U.S. at 393).

14. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1879); *Gregg*, 428 U.S. at 173.

15. *Weems*, 217 U.S. at 371.

16. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968). Notably in *Trop,* 356 U.S. 86 (1958) (plurality opinion), the Court included the punishment of denationalization of a soldier, who was a deserter for one day, within the ambit of "cruel and unusual punishment." The Court reasoned that such a punishment "strips" the individual of his rights, removing the essential element protected by the Eighth Amendment: the dignity of man. 356 U.S. at 100-02. Therefore, early on the Court moved away from limiting the Eighth Amendment protection to only physical abuse of a prisoner.

17. 429 U.S. 97 (1976).

18. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182-83 (1976)). Inadvertent mistakes or negligence by a prison medical attendant however, do not state a valid claim. *Id.*

Following *Estelle*, the Supreme Court further expanded the application of the Eighth Amendment's "cruel and unusual punishment doctrine." First, in *Hutto v. Finney*[19] the Court considered for the first time the application of the Eighth Amendment to prisoner confinement issues. The *Hutto* Court held that confinement to an isolation cell for an indefinite period of time was "cruel and unusual punishment."[20]

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at 105-06. Notably, however, the United States Court of Appeals for the Ninth Circuit in Franklin v. Oregon, State Welfare Div., 662 F.2d 1337 (9th Cir. 1981) held that if a prisoner already has a condition that is aggravated by exposure to ETS, then deliberately ignoring such a condition and not tending to it by prison officials constitutes a violation of the Eighth Amendment. *Id.* at 1347.

The circuit courts have generally held that ETS exposure is unconstitutional when it acts to seriously aggravate a current medical condition. *See* Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (latent health defects are not cognizable as Eighth Amendment claim); Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992) (inmates who can attribute their current serious medical conditions to exposure to ETS are entitled to appropriate medical treatment, although potential health threats do not establish a valid Eighth Amendment claim). The prerequisite of a current and immediate health threat for purposes of establishing the objective factor of the two-part Eighth Amendment test was rejected by the *Helling* Court. Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475, 2481 (1993); *see infra* notes 43-45 and accompanying text.

In Hudson v. McMillian, __ U.S. __, 112 S. Ct. 995, 997 (1992), the Court did not require the inmate to prove severe injury when subjected to excessive force in order to find a violation of the Eighth Amendment. Similarly, the United States District Court for the District of New Hampshire in Avery v. Powell, 695 F. Supp. 632 (D. N.H. 1988), held that subjection to ETS constitutes cruel and unusual punishment without a showing of infliction of actual physical pain. *Id.* at 639.

19. 437 U.S. 678 (1978).

20. *Id.* at 685. The Court reasoned that such confinement deprived the prisoner of his basic human needs. *Id.* at 686-87. Further, the Court noted that an injunction to cease unconstitutional behavior would not be denied simply on grounds that the injury or life-threatening condition had not yet occurred. *See id.* at 690 (citing *Ex parte* Young, 209 U.S. 123 (1908)). It should be noted however, that the confinement herein was considered punitive within the traditional sense of formal judicial punishment.

Other later cases reiterate the assertion made in *Hutto*, that immediate health consequences are not required to establish a valid Eighth Amendment claim. *See, e.g.,* Rhodes v. Chapman, 452 U.S. 337 (1981); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

The distinction between current and future sustained harm resulting from "cruel and unusual punishment" is the central theory of the petitioners' case in *Helling*. 113 S. Ct. at 2479. The distinction is critical in regard to assessing ETS claims, since the actual impact of

Subsequently, in *Rhodes v. Chapman,* the Court considered the limitation that the Eighth Amendment imposes upon conditions of confinement that do not result directly from formal judicial punishment.[21] The Court held that double-celling its inmates was not unconstitutional in this case because it did not result in a deprivation of such essential needs as food, medical care or sanitation.[22]

Finally, in *Wilson v. Seiter*,[23] the Court applied the "deliberate indifference" standard of *Estelle* to general conditions of confinement.[24] The *Wilson* Court infused the requirement of finding

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exposure is entirely within the future and causes many to speculate as to the legitimacy of the claim as a whole.

[21]. 452 U.S. 337 (1981). Although this was the first time the Supreme Court specifically addressed the issue, the lower courts had reviewed the issue repeatedly. *See, e.g.,* Gates v. Collier, 501 F.2d 1291, 1302 (5th Cir. 1974) (adequacy of confinement of prisons, such as medical treatment, hygienic materials and physical facilities, is subject to Eighth Amendment scrutiny); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (finding conditions of confinement based on the state of overcrowding, sanitation, rape and other sexual assault activity to violate the Eighth Amendment); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (holding that the state is obligated to provide the prisoner with a "healthy habilitative environment" which includes protection from threats of violence and sexual assault from other inmates).

The lower courts however, draw the line of Eighth Amendment protection from ETS exposure at actual health threats versus "mere discomfort or inconvenience." *See* Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir. 1989), *cert. denied*, 493 U.S. 969 (1989); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991).

[22]. *Rhodes*, 452 U.S. at 348. The United States Court of Appeals for the Tenth Circuit has held that the "core areas" of any Eighth Amendment claim are "shelter, sanitation, food, personal safety, medical care and adequate clothing." Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (citing Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (finding that consistent and major deficiencies in medical, dental and psychiatric care were sufficiently serious to establish a valid Eighth Amendment cause of action)).

Justice Brennan concurred in *Rhodes* and noted that the lower courts "have learned [that] . . . judicial intervention is indispensable if constitutional dictates are to be observed in the prisons." 452 U.S. at 354 (Brennan, J., concurring). Although the administration of prisons will always receive judicial deference to the prison officials and the legislature, the Court must make the appropriate constitutional application and interpretation to ensure proper enforcement. Bell v. Wolfish, 441 U.S. 520, 562 (1979).

[23]. 501 U.S. __, 111 S. Ct. 2321 (1991).

[24]. The circuit courts have applied the "deliberate indifference" standard differently. The United States Court of Appeals for the Eighth Circuit has applied the standard as one of requiring "reckless disregard" by prison officials to the inmates in assessing an Eighth

both a culpable state of mind and deliberate indifference on the part of the prison officials.[25] These two components constitute the "subjective factor" and must be proven along with the "objective factor" which establishes the severity of the deprivation alleged.[26] Of

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Amendment violation. *See* Falls v. Nesbitt, 966 F.2d 375, 380 (8th Cir. 1992) (holding that an inmate who was stabbed by cellmate in a single event of violence without any prior indication of future harm, did not establish the requisite Eighth Amendment state of harm to satisfy "cruel and unusual punishment"). The United States Court of Appeals for the Second Circuit has held that express intent of the prison officials to harm the prisoners was not required although recklessness was some proof that the mandatory level of intent was present. *See* Hendricks v. Coughlin, 942 F.2d 109, 112-13 (2d Cir. 1991). The United States Court of Appeals for the Seventh Circuit requires that "officials must have knowledge of the threat, the threat must be readily preventable, and officials must allow the threat to materialize rather than intervene" in order to have the requisite deliberate indifference. Colette G. Matzzie & Charles Jones, *Prisoners' Substantive Rights*, *in* Twenty-Second Annual Review of Criminal Procedures: United States Supreme Court and Courts of Appeals 1991-1992, 81 GEO. L.J. 1621, 1639 n.2988 (1993) (citing McGill v. Duckworth, 944 F.2d 344, 350 (7th Cir. 1991)).

[25]. *Wilson*, 111 S. Ct. at 2324-2327. In *Wilson*, the prisoner alleged that he was subject to "cruel and unusual punishment" as a result of "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. The Court found that it was necessary for the prisoner to prove both a culpable state of mind in line with Whitley v. Albers, 475 U.S. 312 (1986), and "deliberate indifference" on the part of the prison officials per Estelle v. Gamble, 429 U.S. 97, 104 (1976). *Wilson*, 111 S. Ct. at 2326-27.

These requirements are necessary, according to the *Wilson* Court, because "'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 interest or safety. . . . It is obduracy and wantonness . . . that characterize conduct prohibited by the Cruel and Unusual Punishment Clause.'" *Wilson*, 111 S. Ct. at 2324 (quoting *Whitley*, 475 U.S. at 319). The Court additionally finds that the origin of the intent requirement is within the Eighth Amendment itself, and not within the "predilections of this Court." *Id.* at 2325.

[26]. *Id.* at 2324 (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). Some commentators believe that the "correct outcome" in any prisoner ETS case is dependent upon a proper application of the *Wilson* deliberate indifference, "subjective factor" test. *See, e.g.,* Charles J. Rogers, *Civil Rights—Second-Hand Smoke is Not Cruel and Unusual Punishment:* Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992), 20 AM. J. CRIM. L. 163, 172 (1992). The Court in *Steading* held that the increased potential of health risks as a result of exposure to ETS did not amount to an Eighth Amendment violation constituting "cruel and unusual punishment." Rogers, *supra*, at 166 (citing *Steading*, 941 F.2d at 500). In his article, Mr. Rogers argued that the *Steading* Court misapplied the *Wilson* "deliberate indifference" standard since "a properly applied 'deliberate indifference' standard

these two factors, the objective factor is linked most directly to the contextual argument of what falls within the contemporary "standards of decency."[27] Exposure to ETS has evolved into a controversial component of that ever-changing standard.

It is no surprise, therefore, that exposure to ETS has become a critical issue in Eighth Amendment cases involving standards of decency. Americans have become increasingly aware of the dangers of tobacco smoke and have brought this issue to the forefront in other areas of the law.[28]

On January 7, 1993, the Environmental Protection Agency (EPA) published a report [the 1993 Report] which classified environmental tobacco smoke as a Class A carcinogen.[29] This classification makes ETS a "known human carcinogen" placing it in

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should never allow prison authorities to subject inmates to the serious health risks associated with exposure to second hand smoke." Rogers, *supra*, at 172.

27. Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).

28. *See, e.g.,* U.S. Dep't of Health and Human Services, Public Health Service, The Health Consequences of Involuntary Smoking, A Report of the Surgeon General (1986) [hereinafter 1986 Report]. The 1986 Report reached three primary conclusions about exposure to ETS ("involuntary smoking"):

> (1) Involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers.
> (2) The children of parents who smoke compared with the children of non-smoking parents have an increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung function as the lung matures.
> (3) The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.

Id. at 7. The report refers to second-hand smoke inhaled by non-smokers as "side-stream smoke" which is the smoke emitted from an idle cigarette as compared to "mainstream smoke" inhaled directly by a smoker. *Id.* The Report goes on to explain the toxicity of the second-hand smoke, noting that the carcinogenic effects are qualitatively similar for the smoker as for the non-smoker. *Id.*

Additionally, the 1986 Report states that second-hand smoke contains "greater amounts of ammonia, benzene, carbon monoxide, nicotine, and the carcinogens 2-napthylamine, 4-aminobiphenyl, N-nitrosamine, benz[a]anthracene, and benzo-pyrene per milligram of tobacco burned" than does the smoke inhaled directly by the smoker. *Id.* at 7-8. Therefore, the smoke being inhaled by the "involuntary smoker" is more dangerous to him or her than the smoke directly inhaled by the smoker himself.

29. U.S. Environmental Protection Agency, Respiratory Effects of Passive Smoking: Lung Cancer and Other Disorders (1993) [hereinafter 1993 EPA Report].

the same category as arsenic and asbestos.[30] In addition to this newly announced classification, the 1993 Report concluded that there was a definite and direct link between ETS and lung cancer deaths of non-smokers, as well as increased respiratory problems in children.[31]

However, the legal battles over ETS in the civil forum have been met with variable success. Specifically, there have been a number of suits in which non-smoking employees sue their employers, complaining of detrimental exposure to ETS within the workplace.[32] Some plaintiffs have chosen to sue the tobacco

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30. Geoffrey Cowley, *Poison at Home and at Work*, NEWSWEEK, June 29, 1992, at 55.

31. 1993 EPA Report, *supra* note 29. Specifically the report concluded that: (1) ETS is responsible for about 3,000 non-smoker lung-cancer deaths per year; (2) ETS causes lower respiratory tract infections, including bronchitis and pneumonia, and is linked to such infections in 150,000 to 300,000 infants and toddlers each year; (3) ETS causes asthma attacks or increases the severity of such attacks in 250,000 to one million children a year and increases the risk that children will develop asthma. *Id.*

32. In Shimp v. New Jersey Bell Telephone Company, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976), the petitioner, an employee of New Jersey Bell, sued her employer to enjoin them from permitting workers to smoke within her work area because she was allergic to smoke. The exposure to the ETS resulted in serious health problems, which often led her to leave work early or take sick days. *Id.* at 410. The court granted the injunction and held that New Jersey Bell was denying Ms. Shimp a safe working environment by forcing proximity to smoking employees and by causing her to involuntarily inhale second hand smoke. *Id.* at 416. The court further noted that although the New Jersey Worker's Compensation Act barred Ms. Shimp from suing in tort for damage, she had a right to injunctive relief against occupational hazards. Lee Gordon and Carol Anne Granoff, *A Plaintiff's Guide to Reaching Tobacco Manufacturers: How to Get the Cigarette Industry Off Its Butt*, 22 SETON HALL L. REV. 851, 852 (1992) (citing *Shimp*, 368 A.2d 408, 412 (N.J. Super. Ct. Ch. Div. 1976)).

Since *Shimp*, courts have held that employers "must take reasonable steps to accommodate nonsmokers' comfort" although a universal smoking ban is not required. Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?,* 42 CASE W. RES. L. REV. 1025, 1035 (1992) (citing Vickers v. Veterans Administration, 549 F. Supp. 85, 87 (W.D. Wash. 1982). *But see* Broin v. Philip Morris Co., No. 91-49738 (Fla. Cir., May 19, 1992) (dismissing a class action filed by flight attendants alleging damages form ETS exposure).

In response to rising insurance costs and demands for sick days by employees, many employers have not only banned smoking in the office, but made it a requirement for employment. *Your Habit or Your Job*, WASH. POST, Jan. 24, 1987, at A22. USG Corporation effectively stated that if a smoking employee wanted to remain employed at USG, they would have to quit smoking. *See id.* This clearly runs into problems of job discrimination and an invasion of right to privacy, but illustrates the extremes of private response to the fear of ETS litigation and recognition of its potential gravity as a health issue.

manufacturers directly, claiming that they may be civilly liable to individuals who are exposed to ETS under the theory of "bystander liability" (the involuntary smoker thereby becoming the "bystander").[33] Therefore, although *Helling* is a "prisoner's rights" case on its face, it really reflects two more general issues: (1) the trend of the escalating regulatory movement towards a smoke-free environment that has been evolving in the private and public sector for years,[34] and (2) the acknowledgment of the detrimental effects of ETS on the non-smoker.[35]

More recently, a non-smoking employee of the Tennessee Valley Authority (TVA) sued her employer under the exclusivity provision of the Federal Employees' Compensation Act (FECA) claiming that the TVA did not maintain a smoke-free work environment and therefore subjected her to harassment and intimidation resulting in intentional infliction of emotional distress. Carroll v. Tennessee Valley Authority, 697 F. Supp. 508 (D.D.C. 1988). The Court held that she had stated a valid cause of action because they "clearly were 'work-related injuries'" to which FECA's exclusivity provision applies. *Id.* at 511.

Other ETS suits have been filed as tort claims, such as battery, intentional infliction of emotional distress, strict liability, product liability and breach of duty of employer to provide safe workplace. Cindy L. Pressman, Comment, *'No Smoking Please.' A Proposal for Recognition of Non-Smokers' Rights Through Tort Law*, 10 N.Y.L. SCH. J. HUM. RTS. 595, 608-09 (1993). As most businesses in the public and private sector have imposed "no smoking" policies in the workplace, these claims should lessen in the future. Although, similar to an asbestos claim, individuals may assert their rights later as to harm inflicted previously as a result of work-related ETS exposure.

33. Gordon & Granoff, *supra* note 32, at 894. "Cigarette manufacturers would be liable under the bystander liability theory for personal injury or property damage, based on the fact that the bystanders were in the vicinity of a dangerous instrumentality furnished by a manufacturer which fails to give notice (to the bystander) of the danger." *Id.* at 894-95 (*cf.* West v. Caterpillar Tractor Company, 336 So. 2d 80, 89 (Fla. 1976)). Contributory negligence would not be an available defense unless the ETS sufferer "'voluntarily and unreasonably proceed[s] to encounter a known danger, [which would commonly pass] under the name of assumption of risk.'" *Id.* at 895.

Although an individual's claim may not be able to withstand the scrutiny of the Wilson v. Seiter, 501 U.S. __, 111 S. Ct. 2321 (1991), "subjective factor" test ("deliberate indifference"), injuries caused by governmental negligence that are not redressable under the U.S. Constitution may be sufficient to state a claim under state tort law. Matzie & Jones, *supra* note 24, at 1637, n. 2984 (citing Daniels v. Williams, 474 U.S. 327, 333 (1986)).

34. In recent years, smoking has been prohibited in public transportation (buses, airplanes, etc.), elevators, hospitals and places of entertainment (movie theaters for example). Wendling, *supra* note 32, at 1033. *See also*, Morley Swingle, Note, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 454 (1980) (listing specific restrictions on state by state basis).

In the noted case, the Court first addressed the general authority for evaluating conditions of confinement within the guise of the "cruel and unusual punishment" clause of the Eighth Amendment. In doing so, the Court noted the "duty" incumbent upon the State to assume responsibility for the safety and well-being of the prisoners within the realm of societal standards of decency.[36] The Court further recognized the standard of inquiring into issues of deliberate

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The Occupational Safety and Health Act (OSH Act) was passed in 1970 and is administered by the Labor Department. 29 U.S.C. §§ 651-678 (1985). The Act empowers the Occupational Safety and Health Administration (OSHA) to mandate that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are . . . likely to cause death or serious physical harm to his employees." *Id.* at § 654(a)(1).

OSHA has not tried to regulate ETS to date. U.S. Department of Health and Human Services, Public Health Service, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress (1989), 612-13 [hereinafter 25 Years of Progress]. Interestingly, OSHA does regulate occupational exposure to twenty-four "airborne materials that are present in tobacco smoke." *Id.*

While OSHA may not seem to have been responsive to the growing ETS concerns, neither has the EPA prior to the issuance of the 1993 Report. Under the auspices of the Clean Air Act of 1963 (CAA) the EPA has the power to regulate all pollutants in the air. 42 U.S.C. § 7409 (1983). However, the EPA has only recognized the exercise of this power with regard to outdoor pollutants, thereby excising out ETS regulation. *See supra* 25 Years of Progress (1989).

35. The health consequences of exposure to side-stream smoke are greater for the "involuntary smoker" (the non-smoker subject to exposure to the smoke) than the direct inhalation of smoke is for the smoker: "[w]hen a lit cigarette is not being inhaled by the smoker, the tobacco is being burned at a lower temperature. Therefore, higher concentrations of the organic components of smoke are emitted into the air when the cigarette sits idling than if the smoker was actually smoking the cigarette." Lynn M. Galbraith-Wilson, *The Call for State Legislation on Environmental Tobacco Smoke in State Prisons*, 13 HAMLINE J. PUB. L. & POL'Y 335, 337 (1992).

It should be noted that the pervasiveness of the ETS health threat has reached another realm of litigation: family law. Courts have begun to use the smoking habit or lack thereof of a parent as a variable in custody determination. *See In Re* Marriage of Black, 837 P.2d 407 (Mont. 1992). Some court orders require that the parent not smoke in the child's presence under threat of child custody termination if the parent fails to comply. *See, e.g.,* De Beni Souza v. Kallweit, No. 807516 (Sacramento Sup. Ct. Oct. 11, 1990). Clearly the reach of ETS related laws within this atmosphere will have a sensitive effect on the issues of a parent's constitutional right to privacy, their right to smoke and general right to raise their own child. Wendling, *supra* note 32, at 1037.

36. Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475, 2480 (1993) (quoting DeShaney v. Winnebago County Social Services Dept., 489 U.S. 189, 199-200 (1989)).

indifference,[37] the state of mind of the prison officials (the subjective factor),[38] and the objective factor determination, in order to analyze an Eighth Amendment violation. However, the Court believed the primary issue for determination to be whether the lower court incorrectly found that McKinney had stated a valid Eighth Amendment claim in alleging that his exposure to ETS, although a future harm, constituted cruel and unusual punishment.[39]

The petitioners' primary thesis was that McKinney had not stated a valid claim because he was not currently suffering any harm as a result of his exposure to ETS.[40] Secondly, petitioners asserted that while the Eighth Amendment protects prisoners from immediate health problems, it does not stretch to protect them against threatened or future health problems.[41]

Citing *Hutto v. Finney*,[42] the Court stated that past decisions have never permitted prison officials to be deliberately indifferent simply because the injury or harm to the inmate was not immediately manifested.[43] Recognizing that the Eighth Amendment protection against future harm was not a new idea, the Court cited to *DeShaney v. Winnebago County Dept. Social Services*[44] and *Youngberg v.*

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37. Estelle v. Gamble, 429 U.S. 97 (1976).

38. Wilson v. Seiter, 501 U.S. __, 111 S. Ct. 2321 (1991).

39. *Helling*, 113 S. Ct. at 2480.

40. *Id.*

41. *Id.*

42. 437 U.S. 678 (1978).

43. *Helling*, 113 S. Ct. at 2480. In *Hutto*, inmates placed in isolation with others with contagious diseases were held to be subject to an unreasonable health risk in violation of the "cruel and unusual punishment" clause of the Eighth Amendment. 437 U.S. at 687. The Court in no way required an immediate showing of actual injury. Moreover, such a lack of injury in no way precluded a valid Eighth Amendment claim requiring a remedy.

44. 489 U.S. 189 (1989). *DeShaney* focuses upon the duty of the State to care for those taken into custody, specifically a child in the foster care system. *Id.* at 195. However, the case's application is intended to be broad. The case cites to both Estelle v. Gamble, 429 U.S. 97 (1976), and Youngberg v. Romeo, 457 U.S. 307 (1982), in its analysis. The *DeShaney* Court states that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200.

Romeo.[45] These cases illustrate the issue that a state's duty to an individual whom it takes into custody, whether it be a prisoner or otherwise, is to assume some level of responsibility for "his safety and general well-being."[46] The *Helling* Court notes that "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."[47] The *Helling* Court therefore rejected the argument that "only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment."[48]

The *Helling* Court fully accepted the Court of Appeals' ruling that McKinney stated a valid "cause of action under the Eighth Amendment by alleging that the petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health."[49] The Court therefore

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[45]. 457 U.S. 307 (1982) (holding that the substantive element of the Due Process Clause of the Fourteenth Amendment requires the State to provide involuntarily committed mental patients with a safe environment for themselves and others). The Court also noted that the Eighth Amendment cause of action was not contingent upon actual injury to the prisoner; unsafe conditions alone were sufficient. *Id.* at 315-16.

[46]. *DeShaney*, 489 U.S. at 200. Although the Court implicitly attaches the state's duty to protect to both present and future harm, an inmate still must prove that the threats to his personal safety existed. Rhodes v. Chapman, 452 U.S. 337, 348-51 (1981). For example, proof of exposure to electrical wiring, deficient fire-fighting measures, mingling of inmate with contagious diseases with other inmates etc. would produce valid proof of threat to personal safety. *See id.* at 347; *see also* Gates v. Collier, 501 F.2d 1291, 1300-01 (1974).

[47]. *Helling*, 113 S. Ct. at 2481.

[48]. *Id.* The dissent, offered by Justice Thomas (with whom Justice Scalia joins), completely rejects the idea that ETS is a harm within the purview of "cruel and unusual" punishment, reasoning that it presents only a "mere risk of injury." *Id.* at 2482 (Thomas, J., dissenting). In fact the dissent focuses entirely upon the definition of "punishment," concluding that only that which is related to the prisoner's sentence remains within the realm of the "cruel and unusual" punishment analysis. *Id.* at 2483 (Thomas, J., dissenting). Accordingly, any "threat" of injury clearly falls outside the dissent's boundaries of a valid "cruel and unusual" punishment cause of action.

[49]. *Helling*, 113 S. Ct. at 2481. The primary focus of the petitioners' argument rested on the fact that McKinney could prove no current manifestation of harm as a result of exposure to ETS. *Id.* at 2480. The Court effectively rebuts that assertion through the analysis of precedent. Specifically, the Court found no basis for immediacy of injury, in order for a state's duty to be implicated. *Helling*, 113 S. Ct. at 2481 (citing Hutto v. Finney, 437 U.S. 678 (1978); DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989); Youngberg v. Romeo, 457 U.S. 307 (1982); Rhodes v. Chapman, 452 U.S. 337

remanded the case and devoted the second part of its decision to discussing the elements which McKinney will have to prove on remand.

First, McKinney must prove the "objective factor" of the Eighth Amendment claim.[50] This turns on whether or not the deprivation of rights was serious.[51] The Court further asserted that it is not enough for McKinney to present scientific data as to the seriousness and potential harm of ETS exposure.[52] Rather, McKinney must demonstrate that "society considers the risk [to ETS exposure] . . . so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk . . . [T]he prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."[53]

Second, the inmate must prove the "subjective factor" as established in *Wilson v. Seiter*.[54] McKinney must prove "deliberate indifference" by the prison officials, and accordingly inquire into their state of mind.[55] This determination should focus on the current status of the prison authorities' conduct and attitude, including but not

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(1981); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) and Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). These cases are consistent in their implication and assertions that the Eighth Amendment "protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain." *Id.*

50. The "objective factor" is directly related to the Eighth Amendment interpretation requirement of looking to evolving standards of decency to determine the existence of a violation. *See Rhodes*, 452 U.S. at 346-47.

51. *Id.* at 347.

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

53. *Id.* Therefore, the Court is clearly analyzing the case within its contemporary context: are we as a society willing to tolerate involuntary ETS exposure? If the "free" public is not, then prisoners should not be subject to it solely because they have lost their freedom via incarceration.

Judge Seymour in his dissent in Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992), points to this distinction between the public at large and the incarcerated criminal. Specifically, he states that while the public is free to avoid exposure to ETS (in restaurants, workplace etc.), a prisoner is confined without that choice: "the fact that the people who are free to do so choose to expose themselves to serious health risks cannot justify the arbitrary, involuntary exposure of a prisoner to those risks." *Clemmons*, 956 F.2d at 1533 n.3 (Seymour, J., dissenting).

54. *Helling*, 113 S. Ct. at 2481-82 (citing Wilson v. Seiter, 501 U.S. __, 111 S. Ct. 2321, 2324 (1991)).

55. *Id.* at 2482.

limited to implementation of smoking policies in the prison's facilities.[56] The Court therefore established the right of a prisoner to state a cause of action, charging a violation of the Eighth Amendment's ban on cruel and unusual punishment, resulting from exposure to ETS.[57]

The holding in *Helling* both illustrates the Court's intent to expand prisoners' rights, and highlights the pervasiveness of the ETS issue. Although ETS has not always been a traditional "environmental" concern, people are beginning to recognize its undeniable effects on our immediate environment. As the caselaw consistently reiterates, the Eighth Amendment draws its foundations from evolving standards of decency as reflected in societal attitudes towards the dignity of man.[58] The *Helling* Court clearly announces society's standard today: disapproval of smoking to the point that even prisoners, who are generally not a favored class in society, are given the right to not be subjected to the ill effects of passive smoke.[59]

Placed within its contemporary context, the holding in *Helling* is consistent with the federal courts' intent to parallel the scope of the cruel and unusual punishment clause of the Eighth Amendment with emerging social norms. Once the Court recognized in *Estelle* that the Eighth Amendment protected the health of a prisoner, the courts were given the latitude to analogize threats to a prisoner's health with threats to physical safety of earlier cases.[60]

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56. *Id.*

57. *Id.* at 2475.

58. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). *See also* Ramos v. Lamm, 639 F.2d 559, 567 n.10 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Estelle v. Gamble, 429 U.S. 97 (1976); Avery v. Powell, 695 F. Supp. 632, 635 (D. N.H. 1988).

59. *Helling*, 113 S. Ct. 2475 (1993). Tobacco smoke is a compound that "'contains every toxic air polluting substance defined and regulated by the Environmental Protection Agency under the Clean Air Act.'" Galbraith-Wilson, *supra* note 35, at 337 (citing Alan B. Horowitz, Comment, *Terminating the "Passive" Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U.L. REV. 183, 195 (1991)). A burning cigarette releases over 4,000 chemicals into the air, forty-three of which are known to cause or promote cancer, over 400 others are toxins. *Id.* (citing Stanton A. Glantz & Richard A. Daynard, *Safeguarding the Workplace—Health Hazards of Secondhand Smoke*, TRIAL, June 1991, at 37).

60. In *Ramos*, the Court stated that a legitimate threat of mental or physical health was sufficient for an Eighth Amendment claim: "'while an inmate does not have a federal

The lower courts have drawn the line of ETS Eighth Amendment protection at actual health threats versus mere "discomfort or inconvenience," arguing that individuals do not have a constitutional right to be free from passive smoke.[61] However, prisoners themselves do not have a constitutional right to smoke.[62] The lower court's focus on current and immediate harm is consistent with the Court's more traditional analysis of physical abuse and the Eighth Amendment: if the physical injury resulted from a need to maintain discipline within the prisons, that injury was permissible;

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constitutional right to rehabilitation, he is entitled to be confined in an environment which does not . . . threaten[] his mental and physical well being.'" 639 F.2d at 566 (quoting Battle v. Anderson, 564 F.2d 388, 401 (10th Cir. 1977)). *See also* Akao v. Shimoda, 832 F.2d 119, 120 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1989) (Eighth Amendment claim was stated when inmates alleged that overcrowding had led to *inter alia* increased stress, tension and confrontations among inmates).

61. *See* Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir. 1989), *cert. denied*, 493 U.S. 969 (1989); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991). Interestingly, the maxim used in *Lynaugh* could arguably be incorrect given the current understanding of the effects of second-hand smoke. The Court states that "in this Circuit, we have recognized that conditions of confinement which expose inmates to communicable diseases and *identifiable health threats* implicate guarantees of the Eighth Amendment." *Lynaugh*, 878 F.2d at 849 (emphasis added). Certainly, involuntary exposure to ETS constitutes an "identifiable health threat" in 1993.

Some commentators believe the constitutional right of non-smokers to be free from ETS derives an individual's right to "clean air" via the Clean Air Act. Wendling, *supra* note 32, at 1036. To date, however, the courts have only accepted this argument in dicta by stating that the public has a constitutional right to be protected against "government action that endangers their 'personal state of life and health.'" *Id.* at n.84 (quoting Environmental Defense Fund v. Hoerner, 1 Env't Rep. (BNA) 1640, 1641 (Mont. 1970)).

62. Doughty v. Bd. of County Comm'rs for the County of Weld, State of Colorado, 731 F. Supp. 423 (D. Colo. 1989). *Doughty* held that the ban on smoking in the Weld County Jail did not violate the Eighth or Fourteenth Amendment rights of the prisoners, as there was "no constitutional right to smoke in jail or prison." *Id.* at 425. *See also* Blackwell v. Sheahan, No. 93 C 1748, 1993 WL 135758 at *2 (N.D. Ill. Apr. 28, 1993) (rejecting inmates' claim that they had a constitutional right to smoke, and that the right was violated when they were moved into a non-smoking facility).

Jails have also prohibited their own employees from smoking; therefore, the intent is not one of targeted punishment against the prisoners, but a more general health and safety concern for all those located in the prison facility. Lisa Belkin, *At More Jails, Smoking is Forbidden*, N.Y. TIMES, July 9, 1990 at A10.

however, if the abuse was wanton and unnecessary the Court would find a violation regardless of actual severity of injury sustained.[63]

With ETS analysis, the courts adopt a similar methodology: if there is deliberate indifference by the prison officials (the "subjective" element) and the injury is sufficiently serious (the "objective" element), then there exists a valid cause of action.[64] However, if these elements have not been met, there is no such cause of action. After *Helling*, the requirement that an ETS-related Eighth Amendment claim reflect a current or immediate showing of health ramifications is extinguished.[65] The Court seems to imply that issues such as ETS and other non-overtly physical injuries are to the twentieth century what torture was to the nineteenth century: neither are acceptable to the society within which they exist.

The holding in *Helling* will have an impact not only on prisoner's rights, but also on the rights of non-smokers in civil suits. The issue of ETS exposure is not an isolated prisoners' issue. Rather, it is an environmental and health issue that has risen to the level of constitutional protection because of its prominence and gravity of consequence.[66] Although the initial report linking smoking to lung cancer, and other disorders, was released in 1964,[67] it was not until 1986 that the Surgeon General published a report (the 1986 Report) focusing exclusively on the health consequences of "involuntary

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63. Hudson v. McMillian, __ U.S. __, 112 S. Ct. 995, 998 (1992) (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). In Justice Blackmun's concurrence in *Hudson*, he notes that the requirement of a significant injury is properly overruled by the Court. *Id.* at 1002. Justice Blackmun notes that such a requirement would permit a vast array of "cruel and unusual punishment" including but not limited to "whipping [prisoners] with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs." *Id.* at 1002-03.

64. Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475 (1993).

65. *Id.* at 2481 (stating "[w]e thus reject petitioners' central thesis that only deliberate indifference to *current* serious health problems of inmates is actionable under the Eighth Amendment") (emphasis added).

66. Over 3,800 Americans die each year from lung cancer which results from exposure to ETS. *See* 1993 EPA Report, *supra* note 29. More than 53,000 deaths are attributed to ETS exposure (including lung cancer as well as other ailments). *See* Galbraith-Wilson, *supra* note 35, at 338-39.

67. Report of the Surgeon General's Advisory Committee on Smoking and Health, January 11, 1964.

smoking," more commonly known as ETS.[68] With the recent release of the 1993 EPA report addressing ETS and its link to lung cancer and respiratory problems in children, there will be an inevitable surge in litigation.[69]

The classification of secondhand smoke as a Class A carcinogen has the potential to effectuate change in a variety of different areas, for both the lawyer and the lay-person. First, with regard to Eighth Amendment prisoners' rights, the whole issue of establishing an "objective element" may be moot. If the EPA has designated exposure to secondhand smoke to be a definite health risk, then by definition, it is a sufficiently severe deprivation of a prisoner's rights to satisfy the "objective factor" requirement. Granted, the degree and length of time of exposure may still be grounds for evidentiary debate. It seems however, that exposure to ETS can now be accepted as categorically fulfilling the "objective factor" requirement.

State legislatures have already begun to respond to the societal concerns of ETS by permitting prison wardens to implement no-smoking rules within their facilities.[70] In *Doughty v. Board of County Commissioners for the County of Weld, State of Colorado*,[71] the United States District Court for the District of Colorado upheld the county jail's complete ban on smoking within the prison, holding that there is no constitutional right to smoke in jail or prison.[72] Therefore, states may implement stricter no-smoking policies within prison facilities out of concern for not only the prisoners but also the prison officials. The existence of these stricter no-smoking policies also nullifies the "objective factor" requirement.[73]

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68. 1986 Surgeon General Report, *supra* note 28.

69. Joseph F. Magnan, *Extinguishing Claims From Passive Smokers*, 94 BEST'S REVIEW, PROPERTY-CASUALTY INSURANCE EDITION 72, (May 1993).

70. 28 C.F.R. § 551.160 (1993).

71. 731 F. Supp. 423 (D. Colo. 1989).

72. *Id.* at 425.

73. In Caldwell v. Quinlan, federal regulations permitted wardens to impose smoking regulations in the prisons if they deem it necessary. 729 F. Supp. 4, 5 (D.D.C. 1990), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991). The current Bureau of Prisons' regulation on smoking and non-smoking areas states that "[t]o the extent practicable, Chief Executive Officers shall accommodate non-smoking inmates in non-smoking living quarters. The sharing of a cell or living area between a smoker and nonsmoker will be

The 1993 EPA Report's findings will also likely flood the system with civil litigation by non-smoking prisoners and non-prisoners alike, claiming injury as a result of exposure to ETS. On June 22, 1993, in anticipation of this "flood," six tobacco growers and marketers (including Philip Morris and R.J. Reynolds Tobacco) sued the EPA in federal court in North Carolina.[74] The group wants the EPA to withdraw its classification of secondhand smoke as a Class A carcinogen, believing the findings to be false. Regardless of the report's validity, the group also feared that the public's response would encourage costly litigation.

State courts have already encountered multiple cases in the area of occupational ETS exposure dating back to 1976.[75] Plaintiff employees often seek redress via injunctive relief against their employers as well as through state and federal workers' compensation acts.[76] Unfortunately, direct suits by non-smokers against tobacco

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avoided except where impractical due to circumstances, and then may be done only for limited duration." 28 C.F.R. § 551.162(b) (1993). Even this regulation does not guarantee a completely smoke-free environment for the prisoner.

Although states will look to this federal regulation for guidance, many have already taken action. As of 1990, prisons in thirteen states had "banned or [were] considering banning smoking." Belkin, *supra* note 62. It is speculated that it is only a matter of time before all prisons ban smoking. *Id.* It is conceded, however, that many of the prisons that have banned smoking have done so for purposes of cleanliness and safety and not for the health of the inmates. *Id.*

74. Julie Tilsner, *Secondhand Smoke's Second Hearing?*, BUSINESS WEEK, July 5, 1993, at 40.

75. Shimp v. New Jersey Bell Telephone Company, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (plaintiff was granted injunctive relief against her employer to stop permitting smokers to smoke within her work area because she had experienced serious health problems from her exposure to ETS).

In other cases, individuals who spoke out against smoking in the workplace were harassed by their co-workers. Smith v. Martin, No. 91 C 4257, 1993 WL 243159 (June 29, 1993). In *Smith*, Chicago police detective John Smith was retaliated against by his co-workers for having sought enforcement of the Chicago Clean Indoor Air Ordinance in their office. The court ruled that the retaliation experienced by Smith was "truly outrageous." *Id.* at *1.

76. Carroll v. Tennessee Valley Authority, 697 F. Supp. 508 (D.D.C. 1988). In *Carroll*, a non-smoking employee of the Tennessee Valley Authority (TVA) sued her employer under the exclusivity provision of the Federal Employees' Compensation Act (FECA) claiming that as a result of TVA's permitting smoking in the workplace, she was subjected to harassment and intimidation resulting in intentional infliction of emotional distress. The court held that she had stated a valid cause of action because there "clearly

companies, seeking redress from harm sustained as a result of ETS exposure, have not yet been very successful.[77] The potential for growth of successful outcomes however is largely dependent upon jury sympathy.[78] Often in smokers' litigation, juries were less sympathetic than the smoking plaintiffs had hoped. Juries generally saw the smoker to have assumed the risk in choosing to smoke.[79] However, an ETS suit by a non-smoker may elicit empathy given the involuntariness of the non-smoking plaintiff and the harm sustained.[80] The "innocent bystander" suit may therefore prove to be a very lucrative plaintiff suit.[81]

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were 'work-related injuries'" to which FECA's exclusivity provision applies. *Id.* at 511 (quoting United States v. Lorenzetti, 467 U.S. 167, 169 (1984)).

Injunctive relief has also been sought outside the employee-employer realm. In Gasper v. Louisiana Stadium and Exposition District, 577 F.2d 897 (5th Cir. 1978), plaintiffs brought an action to enjoin the Louisiana Stadium and Exposition District from continuing to allow cigarette smoking in the Louisiana Superdome during scheduled events. The Fifth Circuit held that the plaintiffs had no constitutional right to stop others from smoking in the Superdome. *Id.* at 898. The court ultimately felt that the injunctive power of the court was the wrong tool to use in order to attack the secondhand smoke controversy. *Id.* at 898-99.

77. Wilson v. American Tobacco Company, 1990 WL 27394, at *2 (6th Cir. 1990) (unpublished opinion) (holding that a plaintiff who is a prisoner fails to state a claim upon which relief can be granted when the cause of action is based upon allegations that the tobacco company was negligent in not warning non-smokers about the harmful effects of ETS and that the product itself was defective and dangerous to non-smokers).

However, in Butler v. R.J. Reynolds Tobacco Co., 815 F. Supp. 982 (S.D. Miss. 1993), the plaintiff alleged that he suffered from lung cancer as a result of exposure to ETS in his barber shop. *Id.* at 983. Butler brought a strict products liability action (based on § 402A of the Restatement (Second) of Torts) against six tobacco products manufacturers and four tobacco retailers. *Id.* at 984. Specifically, the plaintiff argued that the tobacco products sold by the defendant retailers were "in a defective condition unreasonably dangerous to those exposed to environmental smoke." *Id.* at 985. The court held that a plaintiff may be able to recover against the tobacco retailers under a theory of strict liability. *Id.* at 986. The case was remanded to determine applicability of Mississippi law to the cause of action.

78. Magnan, *supra* note 69. Currently, there is definite finding that damage awards will be affected by the classification of second-hand smoke as a Class A carcinogen; however, it is something of which insurance underwriters must take note and be aware. *Id.*

79. *Id.*

80. *Id.* at 72. Regardless, the insurance industry will bear the defense costs of that litigation arising within general liability and workers' compensation policies held by businesses. *Id.*

81. Interestingly, arguments using smoking by a parent as a variable for child custody battles are analogous to those made in Helling v. McKinney, __ U.S. __, 113 S. Ct. 2475

In addition to triggering a flood of civil non-smoker litigation, the 1993 Report will likely initiate an overhaul of regulations by the Occupational Safety and Health Administration (OSHA) regarding private business. Although OSHA has always exhibited a sensitivity to the ETS issue, it never mandated a smoking ban in all indoor workplaces.[82] The General Services Administration (GSA) will also likely ban or limit smoking in all federal buildings.[83]

This impending movement towards a smoke-free society[84] is most recently reflected in President Clinton's health care reform

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(1993), and other ETS Eighth Amendment cases. An argument has been made that since there is no immediate threat to the child's best interests from exposure to ETS, the state cannot intervene to dictate a parent's habit to the extent that a parent could lose his or her child. *Wendling*, *supra* note 35, at 1053. However, given that the 1993 Report focuses largely on the detrimental effects that ETS can have on children, the requirement for demonstrable immediacy of harm would seem to fail as it did in *Helling*. Since many jurisdictions make child custody determinations based on the "best interest of the child" standard, it would seem clear that exposure to ETS does not fall within that category. *Id.* at 1059-60. Furthermore, applying the "contemporary community standards" approach announced in Weems v. United States, 217 U.S. 349 (1910), and Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion), such parental behavior seems to actively abridge such standards.

The analogy between the prisoner and the child in the context of ETS regulation is striking. The child like the prisoner is in a situation within which he/she has the ability to make few choices. Parents make choices for the child. If one of those choices is to smoke around the child, that is an action that the child is powerless to prohibit and must therefore suffer the consequences involuntarily. Similarly, the prisoner has had many of his freedoms taken away as a result of his incarceration. However, given *Helling*, the prisoner still maintains the freedom to not be subject to ETS. In light of *Helling*, it is hard to understand how a prisoner could be better protected by the state and the Constitution than a child. The use of the smoking variable is arguably logical.

82. Indoor Air Quality in the Workplace, 58 Fed. Reg. 24,595 (Dep't Labor (to be codified as 29 C.F.R. __ (1993)). "OSHA received two petitions for an Emergency Temporary Standard in May 1987." *Id.* Both requested that smoking be prohibited in all indoor workplaces except for certain designated areas. OSHA determined that the available data at the time did not establish that a "grave danger" existed in the workplace for those exposed to ETS, and therefore the petitions were denied. *Id.* An action was filed in the U.S. Court of Appeals for the District of Columbia in response to the denial. *Id.* The court upheld the OSHA denial. *Id.* It is likely that this policy decision will now be revisited and changed in light of the 1993 EPA Report.

83. Cowley, *supra* note 30, at 55.

84. *See* Alan Liddle, *EPA's "Smoking" Gun Could Rock Industry; Environmental Protection Agency Study of Environmental Tobacco Smoke*, NATION'S RESTAURANT NEWS NEWSPAPER, January 25, 1993, at 1.

package which intends to raise the necessary funds through, *inter alia*, taxes on tobacco products.[85] It is likely not mere coincidence that the tobacco industry was chosen to provide a source of income for the health care plan, as it is an industry that heavily contributes to health care costs. This policy in conjunction with EPA reports and cases like *Helling*, sends a message: smoking is no longer a tolerable habit in the United States.

The policy argument accepted by many courts cannot be ignored: the issue of secondhand smoke may be one of regulation and legislation and not judicial at all.[86] It would seem difficult, however, to remove the issue from the courts now that it has not only permeated the courts on a state level in both civil and criminal cases, but has also risen to the Supreme Court. It is imperative that the law continue to develop in a direction that reflects society's contemporary "standards of decency." After *Helling*, it seems plausible that, as the civil litigation regarding ETS increases, the Supreme Court will be forced to make a choice: give a constitutional right to either the smoker or to the non-smoker. With precedent established, it will be up to the Court to either extend the *Helling* holding into the civil suit realm by analogy, or to relegate the issue to a right to privacy. Just as with any previously unfamiliar toxic substance (such as agent orange, asbestos, etc.), it may take time for the courts to become actively involved in regulation. However, it is hard to see how courts could ignore such an important health issue, given its pervasiveness in today's society. By regulating and legislating against exposure to ETS we accomplish two important goals: saving people's lives and broadening the scope of environmental law's impact on society.

LOUISE E. WEISS

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85. Michael Weisskopf, *Lining Up Allies in the Health Care Debate, Providers and Payers Feverishly Cultivate Grass-Roots Advocates Across the Nation*, WASH. POST, Oct. 3, 1993, at A4.

86. Gorman Moody, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (failure to segregate smoking inmates from non-smoking inmates does not violate prisoner's Eighth Amendment rights).