CONSTITUTIONAL LAW—EIGHTH AMENDMENT—INVOLUNTARY EXPOSURE TO SECOND-HAND SMOKE IN PRISON SUPPORTS A VALID CRUEL AND UNUSUAL PUNISHMENT CLAIM IF THE RISK TO ONE'S HEALTH IS UNREASONABLE AND PRISON OFFICIALS ARE INDIFFERENT TO THAT RISK — *Helling v. McKinney*, 113 S. Ct. 2475 (1993).

> I call upon you to remember that cruel punishments have an inevitable tendency to produce cruelty in people. It is not by the destruction of tenderness,—it is not by exciting revenge, that we can hope to generate virtuous conduct in those who are confided to our care.[1]

The Constitution of the United States embodies the spirit of this message by limiting the nature of punishments the government may impose on convicted criminals.[2] Specifically, the Eighth Amendment provides that no person should endure cruel and unusual punishments.[3]

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[1] 1 SPEECHES OF SIR SAMUEL ROMILLY 477 (Peter ed., 1820). Sir Samuel made this declaration in the English House of Commons in 1813, referring to a bill to cease disembowelment as punishment for high treason. *Id.* at 477-79.

[2] *See* Whitley v. Albers, 475 U.S. 312, 318 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)) (observing that the Eighth Amendment "inten[ds] to limit the power of those entrusted with the criminal-law function of government"); Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (distinguishing between application of the Eighth Amendment with regard to prisoners and of Fourteenth Amendment Due Process with regard to pre-trial detainees); *Ingraham*, 430 U.S. at 671-72 n.40 (clarifying that the Eighth Amendment applies only after a person has been convicted of a crime and is thus subjected to punishment).

[3] U.S. CONST. amend. VIII. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The Cruel and Unusual Punishments Clause has been incorporated and applied to the states through the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666, 667 (1962) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947)).

The origin of the Cruel and Unusual Punishments Clause can be traced as far back as the thirteenth century's Magna Carta, which stated a clear prohibition on excessive punishments. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-46 (1969) (citations omitted). A cruel and unusual punishments clause first appeared in the United States in the Virginia colony's Declaration of Rights in 1776. James S. Campbell, Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 996 n.1 (1963-64) (citations omitted); *see* Granucci, *supra*, at 840 (citation omitted). The Virginia colony copied the wording of the English Bill of Rights of 1689, stating: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Granucci, *supra*, at 840 (citation omitted); *see* John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 482 (1990) (citation omitted).

Subsequently, eight other states incorporated the clause into their constitutions, and in 1791, it was included in the Federal Constitution as the Eighth Amendment.

Despite this affirmative mandate to the government and the implicit rights created for prisoners, early Supreme Court panels infrequently considered the Eighth Amendment.[4] Disuse of the Eighth Amendment may be attributable to the courts' failure to determine what constitutes cruel and unusual punishments.[5] Originally, courts limited the Eighth Amendment's applicability to the most egregious punishments,[6] but ultimately the judiciary acknowl-

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Granucci, *supra*, at 840 (citation omitted). In each of these instances, the clause was adopted with little debate. *Id.* (citation omitted). Such easy acceptance led commentator Granucci to conclude that the language of the clause was "constitutional 'boilerplate.'" *Id.* (citation omitted). During state conventions to ratify the Bill of Rights, Granucci stated, debate prevailed over the interpretation of the Cruel and Unusual Punishments Clause despite the delegates' agreement over the particular wording of the clause. *Id.* at 840-41; *see infra* note 5 and accompanying text (examining the ambiguity in the meaning of the clause).

[4] *See* Elizabeth F. Edwards & Nancy G. LaGow, Note, *Prison Overcrowding As Cruel and Unusual Punishment in Light of* Rhodes v. Chapman, 16 U. RICH. L. REV. 621, 623 (1982) (citation omitted) (documenting that the Eighth Amendment originally had little use because the punishments originally prohibited were no longer practiced in the United States); Campbell, *supra* note 3, at 996 (observing that the courts infrequently employed the provisions of Eighth Amendment); Granucci, *supra* note 3, at 842 (citations omitted) (noting that, because the Cruel and Unusual Punishments Clause was originally interpreted to address only the types of torture employed by the Stuart kings, the clause laid dormant throughout the nineteenth century); *see also* Kirschgessner v. State, 198 A. 271, 272-73 (Md. 1938) (reasoning that because "[n]o standard was fixed by the two sections [of the Declaration of Rights of Maryland] invoked [by the defendant] as to what is cruel and unusual, so that Legislatures and courts can only regard these provisions as advisory, . . . the demurrer was properly overruled").

The Eighth Amendment remained essentially dormant until 1910 when the Supreme Court decided *Weems v. United States*, holding the punishment imposed for falsifying official documents disproportionate to the crime and unconstitutionally excessive pursuant to the Eighth Amendment. Weems v. United States, 217 U.S. 349, 366-67 (1910); Edward & LaGow, *supra*, at 623 (citations omitted).

[5] Campbell, *supra* note 3, at 996 (citation omitted). Campbell postulated that the lack of application resulted primarily from the inability of courts and commentators to clearly define when punishment becomes "cruel and unusual." *Id.* One group of legal scholars proffered that the framers intended the Cruel and Unusual Punishments Clause to prohibit torture and particular means of punishment. Wefing, *supra* note 3, at 482; *see infra* note 6 (listing the egregious punishments precluded by the Clause). An opposing group of commentators interpreted the Cruel and Unusual Punishments Clause to provide a "proportionality review to determine if the punishment is excessive in light of the crime committed and was not limited to a prohibition on types or forms of punishment." Wefing, *supra* note 3, at 482 (citations omitted). An additional explanation for the Amendment's dormancy is that prior to 1962 the Cruel and Unusual Punishments Clause was not applicable to the states. *Id.* at 483 (citations omitted).

[6] *See generally*, Granucci, *supra* note 3 (discussing the original meaning and intended purpose of the prohibition on cruel and unusual punishments). Such punishments included crucifixion, disembowelment, public dissection, beheading, the thumbscrew, the rack, burning at the stake, and breaking on the wheel. *Robinson*, 370 U.S. at 675 (Douglas, J., concurring) (citations omitted); *In re* Kemmler, 136 U.S. 436,

edged that what constituted "cruel and unusual" punishment must reflect societal mores.[7]

While accepting the imprecision of the Eighth Amendment's language, the Supreme Court noted its intrinsic flexibility and interpreted that fluidity to mean that the application of the Amendment derived from society's evolving standards of decency.[8] In

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446 (1890); Wilkerson v. Utah, 99 U.S. 130, 136 (1878); Granucci, *supra* note 3, at 854, 855-56; Wefing, *supra* note 3, at 482.

7 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); *see* Stanford v. Kentucky, 492 U.S. 361, 378 (1989) ("The punishment is either 'cruel *and* unusual' (*i.e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States."); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citing *Trop*, 356 U.S. at 101) (other citiations omitted) (following prior case law by accepting that the Eighth Amendment proscribes punishments incompatible with socially accepted standards of decency); Gregg v. Georgia, 428 U.S. 153, 171, 173 (1976) (recognizing that public opinion of a sanction dictates whether or not it violates the Eighth Amendment); French v. Owens, 777 F.2d 1250, 1251 (7th Cir. 1985) (citations omitted) (recalling that an Eighth Amendment claim must be analyzed according to evolving standards of decency as defined by society); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (reasoning that although the parameters of the Eighth Amendment are indefinite, "broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable").

In *Trop*, Chief Justice Warren reasoned that denationalization, as punishment for a dishonorable discharge for a wartime offense, was inherently cruel and consequently violative of the Eighth Amendment. *Trop*, 356 U.S. at 101. The Court explained that while no physical injury is inflicted, denationalization is a form of punishment at least as uncivilized as torture. *Id.* The Court recognized that denationalization strips an individual of his or her political existence and status in both the national and international communities. *Id.* Denationalization, the Court observed, renders an individual stateless thus denying the individual the protection of his state of origin. *Id.* Chief Justice Warren stressed that "[i]n short, the expatriate has lost the right to have rights." *Id.* at 102.

Chief Justice Warren continued by stating that each punishment challenged before the Court should be scrutinized in terms of the Eighth Amendment's "basic prohibition against inhuman treatment." *Id.* at 100 n.32. The Court further discussed the interplay of the individual words "cruel" and "unusual" and suggested that no independent emphasis should be placed on the word "unusual." *Id.* at 100-01 n.32. *Contra Stanford*, 492 U.S. at 369-70, 378 (citation omitted) (emphasizing the individual importance of the words "cruel" and "unusual").

8 *Trop*, 356 U.S. at 100-01 (citation omitted). In *Trop*, the Court established the prevailing guideline of "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Chief Justice Warren, writing for the majority, perceived the words of the Amendment as malleable and not static. *Id.* at 100-01. The Chief Justice further postulated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

The Court discussed the concept of evolving standards of decency in *Weems v. United States*. *Weems*, 217 U.S. at 366-67. In this 1910 case, the Court expounded that certain penalties may "amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* The Court later articulated that unnecessary and wanton inflictions of pain violated this standard. Rhodes v. Chapman, 452

forming Eighth Amendment jurisprudence, the Court also determined that in addition to the existence of inherently unconstitutional punishments, some penalties constituted cruel and unusual punishment because the crime did not warrant such severe repercussions.[9]

This early interpretation of the Eighth Amendment broadened the scope of the Amendment by recognizing excessive punishments as cruel and unusual.[10] This expansive wave, however, fell short of reaching general prison conditions until well into the

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U.S. 337, 346 (1981) (citations omitted); Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976) (citations omitted). *See also* Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459, 464 (1947) (affirming that, in carrying out a death sentence, a second electrocution did not inflict unnecessary and wanton pain after an unforeseeable malfunction obstructed the first attempt). *See generally* Wefing, *supra* note 3, at 487-97 (discussing the meaning and methods of determining societal standards of decency).

In explaining the standard, the *Rhodes* Court reiterated that prisoners must pay their debts to society and that not every hardship in prison will give rise to an Eighth Amendment cause of action. *Rhodes*, 452 U.S. at 347, 349; Rodney L. LaGrone, Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 GEO. L.J. 699, 1440 (1990) (citations omitted). Although the Court has generally conceded that prison life must be hard, "the [E]ighth [A]mendment does, nevertheless, protect prisoners' rights to humane living conditions, provision of adequate medical care, protection from other prisoners, and freedom from the use of excessive force by prison officials." *Id.* at 1440-41; *see Rhodes*, 452 U.S. at 347.

9 *Weems*, 217 U.S. at 368 (citation omitted); Matthew J. Giacobbe, Note, *A Prisoner Must Prove that Prison Officials Acted With Deliberate Indifference to Confinement Conditions for Such Conditions to Constitute Cruel and Unusual Punishment*—Wilson v. Seiter, 22 SETON HALL L. REV. 1505, 1510 & n.33 (1992) (citing *Weems*, 217 U.S. at 368) (other citations omitted). The first mention of the possible unconstitutionality of an excessive prison sentence occurred in *O'Neil v. Vermont*. Campbell, *supra* note 3, at 1003-04 (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). In *O'Neil*, Justice Field opined that "[t]he inhibition is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *O'Neil*, 144 U.S. at 339-40 (Field, J., dissenting).

The Court further grounded the concept of excessive punishment in *Weems* by striking down as excessive a sentence of 15 years at hard labor for falsifying documents. *Weems*, 217 U.S. at 380-81, 382. Furthermore, Justice Douglas, in his concurrence in *Robinson v. California*, specifically illustrated the Eighth Amendment's application to both inherently cruel and disproportionately cruel punishments. *Robinson*, 370 U.S. at 675-76 (Douglas, J., concurring) (citations omitted); *see* Campbell, *supra* note 3, at 1004 (discussing the initial recognitions of both inherently and excessively cruel punishments).

10 *Id.* (citations omitted) (reviewing the case law that established the acceptance of cruelly excessive punishments). In the *O'Neil* dissent, Justice Field postulated for the first time that excessive sentences may constitute cruel and unusual punishment. *Id.* (quoting *O'Neil*, 144 U.S. at 339-40 (Field, J., dissenting)). More significantly, in *Weems*, the Court held that a sentence of 15 years at hard labor in chains was an excessively cruel punishment for the crime of forgery. *Weems*, 217 U.S. at 382; Campbell, *supra* note 3, at 1004-05 (citation omitted).

1960s.[11] Traditionally, courts restricted the application of the Eighth Amendment's prohibition on cruel and unusual punishment to the issue of individual criminal sentences[12] and refrained from reviewing the overall conditions existing in the nation's prison systems.[13] The courts remained reticent because conventional wisdom dictated that internal management of prisons fell outside the reach of judicial authority,[14] remaining solely within

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11 Richard D. Nobleman, Note, Wilson v. Seiter: *Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 281-82 (1992) (citations omitted); Giacobbe, *supra* note 9, at 1507-08 (citations omitted).

12 Nobleman, *supra* note 11, at 287; *see, e.g.*, *Gregg*, 428 U.S. at 207 (holding that the death sentence does not violate the Eighth Amendment); *Trop*, 356 U.S. at 103 (determining that denationalization as a punishment for desertion is cruel and unusual); *Resweber*, 329 U.S. at 464 (sustaining a second electrocution of a prisoner after the first attempt failed due to a malfunction); *Weems*, 217 U.S. at 382 (declaring excessive a sentence of 15 years at hard labor in chains for falsifying documents); *In re* Kemmler, 136 U.S. 436, 444-45, 449 (1890) (concluding that death by electrocution is not cruel and unusual punishment); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (averring death by public firing squad did not transgress the Cruel and Unusual Punishments Clause).

13 Nobleman, *supra* note 11, at 287; *see, e.g.*, Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) (regarding the hands-off doctrine as a reasonable restriction of judicial review of necessary deprivations consistent with incarceration) (citations omitted); Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967) (acknowledging the Judiciary's historic practice of refusing to hear claims regarding prison discipline) (citation omitted); Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967) (espousing that discipline and care of inmates lie with the attorney general, and for this reason, courts should refrain from reviewing management of prisons, unless officials act arbitrarily or with caprice) (citations omitted); Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) (stating "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations").

In declining to consider the question of prisoners' rights, the courts relied upon the hands-off doctrine, embodied in a policy of abstention and deference to prison administrator's policies. Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 795-96 (1977) (citation omitted); Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970-71); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1273-74 (1968-69) (citation omitted) [hereinafter *Prisoners' Rights*]. The hands-off doctrine made it impossible for prisoners to obtain judicial relief from harsh living conditions and mistreatment. Haas, *supra*, at 796.

14 William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3d 111, 135 (1973) (surveying the evolving attitude towards the hands-off doctrine); *see generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (providing a general overview of the hands-off doctrine). Commentators Goldfarb and Singer noted that both federal and state courts utilize the hands-off doctrine. Goldfarb & Singer, *supra* note 13, at 182. Indeed, federal courts relied upon the hands-off doctrine as grounds for rejecting state prisoner petitions because "'[i]t is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law.'" *Id.* (quoting United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410, 412 (7th Cir. 1963)).

the scope of the Legislative and Executive Branches.[15] Justifications for this hands-off approach[16] varied from court to court.[17] Some posited that prisoners were slaves of the state and thus no longer enjoyed any rights worth protecting.[18] Most, however, relied on the principles of separation of powers, federalism, lack of expertise, avoidance of undermining prison discipline, and judicial economy.[19]

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15 *Prisoner's Rights*, *supra* note 13, at 1274 & n.23 (citations omitted); *see, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979)) (reminding courts that the operation of penitentiaries is not the role of the Judiciary and courts should step in only to review claims of unconstitutional conditions); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."); Clemmons v. Bohannon, 956 F.2d 1523, 1529 (10th Cir. 1992) (en banc) (cautioning that courts should not "spearhead" and delimit societal standards but should only interpret and apply constitutional standards).

16 For a definition and brief discussion of the hands-off doctrine, see *supra* note 13.

17 *See generally* Haas, *supra* note 13 (providing a thorough examination of the justifications for the hands-off doctrine and the reasons for its demise).

18 *Id.* at 797 (suggesting that many judges promoted the hands-off doctrine because they believed individuals who violate the law do not enjoy the same rights and protections as law-abiding citizens); *see* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (referring to prisoners as slaves of the state, and considering the Bill of Rights to apply only to free men, not to men convicted of crimes and thus civilly dead); Goldfarb & Singer, *supra* note 13, at 179 (citations omitted) (discussing prison administrators' traditionally negative attitudes toward individuals in their custody).

19 *Prisoners' Rights*, *supra* note 13, at 1274-75 (citations omitted); Goldfarb & Singer, *supra* note 13, at 181 (citations omitted). Separation of powers is the most commonly used justification. Haas, *supra* note 13, at 798. This theory centers on the concept of "complete delegation" of all prison management issues from the legislatures to correction authorities. *Id.* at 798-99. The courts interpreted "complete delegation" as absolute, and thus concluded that they possessed no authority to interfere in the administration of the prison systems. *Id.* at 799 (quoting Williams v. Steele, 194 F.2d 32, 34 (8th Cir. 1952)).

The Federalism rationale once again relies on the courts' reluctance to venture into areas where their powers have traditionally been limited. *Id.* at 803-04. Based on traditional notions of comity and the desire to avoid conflicts between the state and federal governments, courts refrained from hearing cases regarding powers reserved to the states. *Id.* at 803, 804. The courts viewed the oversight of state prisons as one of those powers retained by the states. *Id.* at 804 (quoting Siegal v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950)).

The idea that judges lacked expertise in the area of prison administration was usually not explicitly stated as the reason for not hearing such cases. *Id.* at 806-07 (citations omitted). Rather, the courts couched their explanations in terms of deference to the expertise of prison officials. *Id.* at 807 (citations omitted). The courts rationalized that most judges had never been to a prison, and that only prison officials who were intimately familiar with prison routine "could be expected to have great insight into the rehabilitative and disciplinary needs of inmates, and the programs and treatment modalities best suited to meet these needs." *Id.*

The fear of subverting prison discipline and security was two-fold. *Id.* at 810.

As unacceptable conditions in the nation's prisons became common knowledge, the courts perceived the pressure of evolving societal standards of decency and altered their hands-off attitude.[20] Some of the circumstances that the Court has recognized as violative of the Eighth Amendment are overcrowded conditions,[21] unsanitary solitary confinement units,[22] deliberate indifference to medical needs,[23] and excessive use of physical force by prison guards.[24]

In one of the most recent prison conditions cases, *Helling v. McKinney*,[25] the Supreme Court of the United States reviewed the validity of a prisoner's claim that involuntary exposure to environ-

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First, prison administrators questioned whether judges could appreciate the dangers and difficulties encountered by prison workers in maintaining the proper behavior of inmates. *Id.* Secondly, there appeared to be a belief that inmates would interpret the courts' review of prison administrators' actions as support for their cause and encourage inmates to violate prison rules. *Id.*

The courts viewed the recognition of "new" rights to prisoners as opening a "Pandora's Box," which would lead to a flood of litigation. *Id.* at 821. Furthermore, the courts expected such increased litigation would involve them in virtually every aspect of prison life as prisoners bombarded the system with frivolous and spurious claims. *Id.* (citation omitted).

20 *Id.* at 795. "[T]he current trend of both federal and state courts is a rejection of the hands-off doctrine for a policy that emphasizes a case-by-case balancing test to determine whether particular prison policies are unduly restrictive of the fundamental constitutional rights of prisoners." *Id.* at 798; *see also* Goldfarb & Singer, *supra* note 13, at 183-85 (citations omitted) (recounting the dismantling of the hands-off doctrine in terms of the entire criminal and penal systems).

Summoning the Judiciary's attention to prisoner claims, Chief Justice Burger predicted:

> 'we must soon turn increased attention and resources to the disposition of the guilty once the fact-finding process is over. Without effective correctional systems an increasing proportion of our population will become chronic criminals with no other way of life except the revolving door of crime, prison and more crime.'

Id. at 185 (footnote omitted).

21 Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (considering whether double celling constitutes cruel and unusual punishment). For a discussion of the facts and holding of *Rhodes*, see *infra* notes 81-86 and accompanying text.

22 Hutto v. Finney, 437 U.S. 678, 687 (1978) (holding that the filthy conditions of solitary confinement cells constituted cruel and unusual punishment). For a discussion of the facts and holding of *Hutto*, see *infra* notes 75-80 and accompanying text.

23 Estelle v. Gamble, 429 U.S. 97, 106 (1976) (determining that deliberate indifference to inmates' medical needs violates the Cruel and Unusual Punishments Clause). For a complete discussion of the facts and holding of *Estelle*, see *infra* notes 71-77 and accompanying text.

24 Hudson v. McMillian, 112 S. Ct. 995, 997 (1992) (holding the use of excessive force constituted cruel and unusual punishment despite the fact that the prisoner did not sustain any serious physical injuries).

25 113 S. Ct. 2475 (1993).

mental tobacco smoke (ETS)[26] constituted cruel and unusual punishment.[27] The Court held that involuntary exposure to secondhand smoke[28] which poses an unreasonable risk to one's future health was a valid Eighth Amendment claim.[29] The Court then remanded the case for further consideration of the inmate's contention that the deliberate indifference of the prison administrators jeopardized his health.[30]

William McKinney, a prisoner in the Nevada state prison system, bunked with an inmate who smoked five packs of cigarettes a day.[31] In addition to the situation in his cell, McKinney endured virtually constant ETS exposure because prison rules lacked a formal smoking policy.[32] According to McKinney, this exposure

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26 Environmental tobacco smoke (ETS) is composed of mainstream and sidestream smoke. Robin Terry, Note, 11 CAMPBELL L. REV. 363, 363 (1989) (citation omitted). Mainstream smoke generates from a puff on a cigarette and is then exhaled by the smoker. *Id.* Sidestream smoke emanates from a burning cigarette, pipe, or cigar into the environment. Donna S. Stroud, *When Two "Rights" Make A Wrong: The Protection of NonSmokers' Rights in the Workplace*, 11 CAMPBELL L. REV. 339, 340 n.4 (1989). Eighty-five percent of environmental smoke consists of sidestream smoke, and this smoke possesses much higher concentrations of toxic substances than other types of smoke composing ETS. *Id.* (citation omitted).

27 *McKinney*, 113 S. Ct. at 2479-80. After the district court dismissed the case in favor of the defendant prison administrators, the court of appeals reversed and remanded for trial. McKinney v. Anderson, 924 F.2d 1500, 1512 (9th Cir. 1991). The Supreme Court then granted *certiorari*. Helling v. McKinney, 112 S. Ct. 291, 291 (1991). Upon consideration, the Court remanded the case to the circuit court to apply the standards espoused in the then recent case *Wilson v. Seiter*. *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321 (1991)). After the Ninth Circuit had considered McKinney's complaint for a second time, the Court again granted *certiorari*. Helling v. McKinney, 112 S. Ct. 3024, 3024 (1992).

28 The Environmental Protection Agency (EPA) classifies ETS as a human lung carcinogen and attributes the deaths of approximately 3000 non-smokers per year to ETS exposure. U.S. ENVTL. PROTECTION AGENCY, EPA/600/6-90/006F, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS 1-1 (Dec. 1992) [hereinafter EPA REPORT]. Furthermore, the EPA confirmed the association of ETS exposure with other lung maladies and respiratory problems. *Id.* at 1-2 (citations omitted). Medical studies, the EPA reported, show that children have acute reactions to ETS exposure in the form of increased respiratory tract infections, asthma, middle ear effusion, lung reduction, pneumonia, bronchitis, and bronchiolitis. *Id.* at 1-5. For a general discussion of the effects of ETS exposure see Rebecca R. Smith, Comment, *Workplace Smoking in New Jersey: Time for a Change*, 24 SETON HALL L. REV. 958, 958-61 (1993) (citations omitted).

29 *McKinney*, 113 S. Ct. at 2481.

30 *Id.* at 2482.

31 McKinney v. Anderson, 924 F.2d 1500, 1507 (9th Cir. 1991). The court noted that the two inmates shared a poorly ventilated six-foot by eight-foot cell. *Id.*

32 *Id.* The court pointed out that the only areas where smoking was restricted were the infirmary and food preparation areas. *Id.*

caused him immediate maladies and jeopardized his health.[33] Additionally, his repeated requests for single housing or a non-smoking cellmate proved futile.[34]

In December 1986, McKinney filed a *pro se* complaint in federal court alleging civil rights violations under 42 U.S.C. § 1983.[35] McKinney alleged, *inter alia*, that his exposure to ETS and its effects on his health constituted cruel and unusual punishment as proscribed by the Eighth Amendment.[36] The magistrate[37] held that McKinney did not possess a constitutional right to a smoke-free environment.[38] In contrast, the magistrate noted that a claim for deliberate indifference to medical needs would be deemed valid if the plaintiff provided the requisite evidence.[39] The magistrate determined that McKinney failed to produce the necessary evidence, and thus granted a directed verdict for the defendant prison administrators.[40]

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[33] *Id.* at 1502. McKinney complained of headaches, nosebleeds, loss of energy, and chest pains. *Id.*

[34] *Id.*

[35] Helling v. McKinney, 113 S. Ct. 2475, 2478 (1993). Section 1983 provides in pertinent part:

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

42 U.S.C. § 1983 (1993). For a comprehensive analysis of § 1983 as a corrective remedy to prisoners' rights claims, see generally *Prisoners' Rights*, *supra* note 13.

[36] *McKinney*, 113 S. Ct. at 2478. The complaint also alleged that when prison administrators sold cigarettes to inmates, they failed to properly educate the inmates about the adverse effects secondary-smoke would have on non-smoking inmates. *Id.* Furthermore, McKinney claimed that cigarettes continuously burned, thus emitting some type of chemical. *Id.*

[37] The parties agreed to try the case before a federal magistrate and jury. *Id.*

[38] McKinney v. Anderson, 924 F.2d 1500, 1503 (9th Cir. 1991). "The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs." *Id.*; *see also* Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc) (declaring that a smoke-free environment is not one of the core areas protected by the Eighth Amendment); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990) (ruling that freedom from passive smoke is not a constitutionally protected right); Stroud, *supra* note 26, at 348 ("[T]he constitution clearly does not provide protection for nonsmokers' rights, yet, it does not guarantee a right to smoke either.").

[39] *McKinney*, 924 F.2d at 1503. The magistrate required McKinney to prove present serious medical needs. *Id.* The court of appeals, however, pointed out that the magistrate excluded evidence related to McKinney's future medical status and documentation pertaining to the potential health effects of ETS exposure. *Id.*

[40] *Id.*

On appeal, the Ninth Circuit agreed with the magistrate's directed verdict regarding the prison administrators' deliberate indifference to McKinney's existing symptoms.[41] The panel also supported the magistrate's determination that there exists no constitutional right to a smoke-free environment.[42] Nevertheless, the court reversed and remanded the case to the district court for further proceedings concerning whether McKinney's exposure to ETS constituted an unreasonable danger to his future health.[43] Relying on both scientific opinion supporting the claim that ETS does cause health problems and the negative societal attitude toward smoking, the court held that a valid cause of action had been stated under the Eighth Amendment.[44] Accordingly, the Ninth

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41 *Id.* at 1512. The court agreed with the magistrate that the record failed to provide evidence of deliberate indifference to McKinney's current medical needs. *Id.* Indeed, the court pointed out that the prison medical staff had examined McKinney and determined he did not suffer from any ailments requiring treatment. *Id.* at 1511.

42 *Id.* at 1505 n.3; *see supra* note 38 (noting that the Constitution does not protect an individual's right to a smoke-free environment).

43 *McKinney*, 924 F.2d at 1512. In its reasoning, the court recalled its previous holding that "conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional." *Id.* at 1507 (citing Hoptowit v. Spellman, 753 F.2d 779, 783-84 (9th Cir. 1985)). The court further postulated that if stagnant air in a prison violates the Eighth Amendment, air permeated with known human carcinogens must certainly constitute cruel and unusual punishment. *Id.*

ETS has been classified as a Group A carcinogen—one causing cancer in humans. U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING, FACT SHEET 2 (Jan. 1993) [hereinafter FACT SHEET]; EPA REPORT, *supra* note 28, at 1-1.

44 *McKinney*, 924 F.2d at 1508, 1509. The court relied on a long line of government reports by federal agencies and the Surgeon General. *Id.* at 1506-07 (citations omitted). The court emphasized that in 1986, the Surgeon General shunned critics and conclusively stated that ETS caused lung cancer and acute and chronic respiratory diseases. *Id.* at 1506 (citation omitted). Furthermore, the court stressed that the Environmental Protection Agency reported even more distressing data in 1990: (1) that ETS was causally linked to the occurrence of lung cancer in non-smoking adults and that ETS was a human carcinogen; and (2) that approximately 3800 non-smoking American adults die each year from ETS induced lung cancer. *Id.* at 1506 (citation omitted). The panel warned that classifying ETS as a human carcinogen equated it to arsenic, asbestos, benzene, chromium compounds, and vinyl chloride, substances commonly accepted as particularly lethal. *Id.* at 1507 (citation omitted).

The court attested that current public opinion considered involuntary exposure to excessive levels of smoke a health hazard and a violation of current standards of decency. *Id.* at 1509. To determine the state of societal mores, the court relied on active statutes and regulations controlling smoking in public places. *Id.* at 1508 (citation omitted). The court noted that as of 1987, only five states had not enacted laws restricting smoking in public areas and that the federal government had also banned smoking on domestic air flights as well as by other federal agency rule promulgation. *Id.* at 1509 (citing Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1988) (other citations omitted)). Most importantly, the court cited the Federal Bureau of Prison regulations that prohibit smoking in prison areas where smoking would jeopardize

Circuit explained that the magistrate erred in directing a verdict for the defendants without allowing McKinney to present the jury with evidence of unreasonable future health risks.[45]

The Supreme Court of the United States granted *certiorari*.[46] The Court remanded the case to the Ninth Circuit to be reconsidered under the guidelines established by the Court in *Wilson v. Seiter* in 1991.[47] In *Wilson v. Seiter*, the Court noted that in cases regarding inhumane prison conditions or failure to provide medical care, the prisoner must demonstrate that the objective facts of the case support an Eighth Amendment claim.[48] The *Wilson* Court then mandated that the prisoner establish an additional subjective element showing that prison administrators acted with deliberate indifference.[49] Accordingly, the Court remanded McKinney's case back to the court of appeals for reconsideration of his claims based on the subjective standard of deliberate indifference as set forth in *Wilson v. Seiter*.[50]

On remand, the Ninth Circuit, applying the additional subjective component, sustained its conclusion that involuntary exposure to ETS can support a cause of action for cruel and unusual punishment.[51] The defendant prison administrators again petitioned for *certiorari* on the ground that this decision conflicted with the Tenth

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people's health; the regulations also empower wardens to designate non-smoking and smoking areas. *Id.* (citing 28 C.F.R. § 551.162 (1989)).

45 *McKinney I*, 924 F.2d at 1503-04. The court of appeals argued that the magistrate neglected to see that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes a valid Eighth Amendment claim. *Id.*

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

47 *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321 (1991)). For a discussion of the conditions of confinement test established in *Wilson*, see *infra* notes 99-109 and accompanying text.

48 *Wilson*, 111 S. Ct. at 2324 (citation omitted). For a detailed discussion of the holding and facts of *Wilson*, see *infra* notes 99-109 and accompanying text.

49 *Wilson*, 111 S. Ct. at 2324 (citation omitted). The deliberate indifference standard was first posited in *Estelle v. Gamble*. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted); *see infra* notes 75-80 and accompanying text (detailing the *Estelle* Court's reasoning in establishing the deliberate indifference standard).

50 *McKinney*, 112 S. Ct. at 291 (citing *Wilson*, 111 S. Ct. at 2324).

51 McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir. 1992). The Ninth Circuit explained: "The Court's establishment in *[Wilson v.] Seiter* of a subjective component for an Eighth Amendment claim does not vitiate our determination of what satisfies the objective component. . . . *[Wilson v.] Seiter* simply adds another element to an Eighth Amendment claim that McKinney must prove." *Id.* The court of appeals distinguished current medical problems from extended involuntary exposure to ETS. *Id.* The circuit court then remanded the case to the district court for further consideration of the evidence in order to determine if McKinney could meet the subjective component of *Wilson*. *Id.*

Circuit's *en banc* decision in *Clemmons v. Bohannon*.[52] The Court granted the petition to decide (1) whether the court of appeals possessed jurisdiction to hear the issue of future harm because the issue was not expressly addressed at the trial level, and (2) whether the plaintiff's assertion of unreasonable jeopardy to his health supported a valid claim.[53]

In affirming the Ninth Circuit's decision, Justice White, writing for the majority, pronounced that the court of appeals properly operated within its interpretative powers in determining that the issue of a smoke-free environment encompassed the question of future harm to McKinney's health.[54] More significantly, the Court held that a prisoner can state an Eighth Amendment claim based on the future detrimental health effects resulting from ETS exposure.[55]

The Supreme Court originally limited the application of Eighth Amendment review to actual prison sentences or the implementation of those sentences.[56] A change in this attitude, however, was first exemplified in a series of Arkansas cases[57] that forged the

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52 Helling v. McKinney, 113 S. Ct. 2475, 2479 (1993) (citing Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) (en banc)). In *Clemmons*, an *en banc* panel held an inmate's occasional, involuntary ETS exposure while sharing a cell with a smoker failed to fall within the purview of the Eighth Amendment. *Clemmons*, 956 F.2d at 1528, 1529. For a detailed discussion of *Clemmons*, see *infra* notes 110-17 and accompanying text.

53 *McKinney*, 113 S. Ct. at 2479.

54 *Id.* Justice White recognized the ambiguity of the record on this point, but nevertheless deferred to the court of appeals' reading that McKinney's claim regarding a smoke-free environment encompassed the claim that ETS exposure jeopardized his future health. *Id.*

55 *Id.* at 2481. The majority soundly rejected the "petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment." *Id.*

56 Nobleman, *supra* note 11, at 287; see *supra* note 12 for examples of cases demonstrating the application of the Eighth Amendment to particular criminal sentences.

57 Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) [hereinafter *Holt II*]; Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) [hereinafter *Holt I*]; Tally v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). In *Jackson*, Circuit Judge Blackmun (later Supreme Court Justice Blackmun) scrutinized the treatment of prisoners by their keepers. *Jackson*, 404 F.2d at 572. Judge Blackmun issued the Arkansas Circuit's final decree on the issue first raised in *Talley* regarding the use of corporal punishment in a prison setting. *Id.* In holding that the use of the strap to discipline inmates was *per se* unconstitutional, Judge Blackmun recognized the ambiguity surrounding the definition of cruel and unusual. *Id.* at 577, 579 (citations omitted). Judge Blackmun, however, relied on the proposition espoused in *Trop v. Dulles* that an Eighth Amendment violation should be judged on the evolving standard of decency of a maturing society. *Id.* at 579 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)). The court then concluded that the use of the strap no longer conformed with societal standards. *Id.* In its holding, the court relied upon the fact that only two of the 48 states allowed the use of this device. *Id.* at 580. Furthermore, Judge

path for recognition of general prison conditions as potentially cruel and unusual punishment.[58] For example, in *Holt v. Sarver*[59] (*Holt I*), the district court reviewed prisoners' complaints regarding the adequacy of medical care, the conditions of isolation cells, and the prison administrator's failure to provide a safe living environment for all inmates.[60] While the court rejected the allegation of deficient medical care,[61] it did find that the squalid condition of the isolation units and the state's failure to protect inmates from physical abuse at the hands of other inmates violated the Eighth Amendment.[62]

In assessing the unsanitary, overcrowded conditions of the isolation units,[63] the court acknowledged that prison life was sup-

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Blackmun pointed out that less barbaric means of disciplining prisoners existed. *See id.* at 580.

58 Nobleman, *supra* note 11, at 282. The *Holt II* court specifically noted that these proceedings marked the first state or federal attack upon an entire prison system by prisoners subject to its conditions. *Holt II*, 309 F. Supp. at 365. In an earlier California district court case, the court conducted a full hearing concerning prison conditions, in particular solitary confinement. *See generally* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). The *Jordan* court, astonished at the filthy and inhumane solitary confinement conditions, issued a permanent injunction against the use of cruel and unusual punishment as part of solitary confinement. *Id.* at 680, 683 (citations omitted).

59 300 F. Supp. 825 (E.D. Ark. 1969).

60 *Id.* at 826 (citation omitted). The court noted that the case's lengthy record covered a variety of complaints regarding prison life, but the primary areas of concern were the isolation units, medical care, and the safety of the inmates. *Id.* at 826, 828.

61 *Id.* at 828, 831. The court acknowledged that the medical and dental facilities could be considered deficient in various ways, but not to the extent of constitutional violation. *Id.* at 828.

62 *Id.* The court stated that "from a preponderance of the evidence [the court found] that the State ha[d] failed and is failing to discharge its constitutional duty with respect to the safety of certain convicts, and that the conditions existing in the isolation cells, including overcrowding, render confinement in those cells under those conditions unconstitutional." *Id.* Showing some lingering effects of the hands-off doctrine, the court declined the opportunity to dictate what measures the prison administration should take to remedy these constitutional violations. *See id.* at 833. Rather, the court ordered the administrators to devise a detailed plan of action to present to the court, and the court reserved jurisdiction of the case in order to review the administrators' progress. *Id.* at 834.

63 *Id.* at 831-33. The court observed that up to 11 inmates were crowded into the cells, provided mattresses covered with soiled linens, and given a different mattress night after night. *Id.* at 832. The mattress situation especially troubled the court in light of the fact that many inmates in the isolation cells suffered from contagious diseases. *Id.* at 832, 834. Reconsidering the conditions of solitary confinement at the time of *Holt II*, the court found the overcrowding issue ameliorated, while unsanitary prison conditions persisted. *Holt II*, 309 F. Supp. at 378. Nevertheless, the *Holt II* court deemed it no longer necessary to monitor the isolation cells because the court concluded that the persisting unhealthy conditions resulted almost solely from the conduct of the inmates themselves. *Id.*

posed to be difficult and at times unpleasant, but nevertheless, emphasized the limits established by the Eighth Amendment.[64] The court elaborated that conditions that debase or degrade, offend modern sensibilities, or place one's health in jeopardy constitute cruel and unusual punishment.[65]

Turning to the issue of providing adequate protection for inmates, the court first asserted that individuals who find themselves in the custody of the state are entitled to reasonable protection of their lives and safety while incarcerated.[66] The court examined the organization of the living quarters at the prison and determined that the open barrack set-up and the insufficient number of "free-world" guards placed inmates in grave jeopardy.[67] The court focused on the numerous assaults that occur as inmates sleep and the unwillingness of the inmate "floorwalkers" to prevent these assaults.[68]

A year later in *Holt v. Sarver*[69] (*Holt II*), the Arkansas courts

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64 *Holt I*, 300 F. Supp. at 833; *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981). For a further discussion of *Rhodes*, see *infra* notes 88-93 and accompanying text.

65 *Holt I*, 300 F. Supp. at 833. The court counseled that "the conditions that have been described [are] mentally and emotionally traumatic as well as physically uncomfortable. It is hazardous to health. . . . It offends modern sensibilities, and, in the Court's estimation, amounts to cruel and unusual punishment." *Id.*

66 *Id.* at 827. The court expressed "that the State owes to those whom it has deprived of their liberty an even more fundamental constitutional duty to use ordinary care to protect their lives and safety while in prison." *Id.*

67 *Id.* at 830-31. The court explained that the general population in Arkansas prisons was housed in a series of open barracks where inmates slept on cots and were guarded by inmate "floorwalkers" rather than by a full compliment of "free-world" guards. *Id.* at 830. The court related that at least one free-world guard was on duty each night but outside of the barracks. *Id.* The court expressed concern that this scenario left inmates vulnerable to life-threatening attacks and sexual abuse at the hands of the trustees and other inmates. *Holt II*, 309 F. Supp. at 376-78 (citing *Holt I*, 300 F. Supp. at 830). Indeed, the court noted that in the 18 months preceding the trial 17 stabbing incidents occurred, four resulting in death. *Holt I*, 300 F. Supp. at 831.

68 *Id.* at 830. The court reported that at night only one or two prison-employee guards were on duty in the vicinity of the barracks. *Id.*; *Holt II*, 309 F. Supp. at 376. The primary responsibility for maintaining order in the barracks, the court observed, laid with the inmate floorwalkers. *Holt I*, 300 F. Supp. at 830. The court concluded that the floorwalkers failed to be effective because they either feared repercussions if they called the free-world guards for assistance, or they conspired with the actual offenders. *Id.* Furthermore, the court expressed concern regarding the nature of the open barracks because it afforded every prisoner easy access to every other inmate and facilitated the pervasiveness of the violent attacks. *Id.*

69 309 F. Supp. 362 (E.D. Ark. 1970); *see generally* Recent Case, *Cruel and Unusual Punishment—Arkansas State Penitentiary System Violates the Eighth Amendment.*—Holt v. Sarver, 84 HARV. L. REV. 456 (1971); Comment, *Prison Reform—Entire Prison System Found Unconstitutional Contravening Eighth Amendment*, 16 N.Y.L.F. 659 (1970).

reconsidered the conditions within the state's penal system.[70] The significance of *Holt II* centers on the court's recognition that general conditions of confinement can rise to the level of a constitutional violation, regardless of the effects on individual inmates, when such conditions offend society's sense of decency.[71] In concluding that the environment of the Arkansas prison system continued to violate the Eighth Amendment, the *Holt II* court characterized the experience of a convict as exile into a corrupt world run by inmates and dominated by violence and fear.[72] Both the *Holt I* and the *Holt II* courts concluded that the failure of the state to provide a safe living environment for its inmates constituted an Eighth Amendment violation.[73] Although the *Holt I* court admitted that the state was not an absolute guarantor of its prisoners' safety, the court nonetheless underscored the state's duty to use ordinary care to ensure the safety and protect the lives of prisoners living within its system.[74]

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[70] *See Holt II*, 309 F. Supp. at 373.

[71] *Id.* at 372-73. The court proclaimed:

> [C]onfinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

Id.

[72] *Id.* at 381. The court specifically stated: "For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world . . . administered by criminals under unwritten rules and customs completely foreign to free world culture." *Id.* The court portrayed the trustee system as a criminal administration. *Id.* The court explained that trustees were specially selected inmates who assisted in maintaining order and discipline and were often armed. *Id.* at 373, 374. Despite the good intentions of the program, the court cautioned that penologists universally denounced trustee systems. *Id.* at 373. Indeed, the court warned that the practical effect of such a system rendered the trustee guards all-powerful and left lower status inmates fearing for their lives and harboring intense hatred for the trustees. *Id.* at 374-75.

[73] ; *Holt II*, 309 F. Supp. at 378; *Holt I*, 300 F. Supp. at 827, 828, 831. The *Holt I* court emphasized that prisoners "ought at least to be able to fall asleep at night without fear of having their throats cut before morning, and that the State has failed to discharge a constitutional duty in failing to take steps to enable them to do so." *Holt I*, 300 F. Supp. at 831.

In *Holt II*, the court also denounced the absurdity of the practice of "coming to the bars." *Holt II*, 309 F. Supp. at 377. "Coming to the bars" refers to the routine of some inmates who felt compelled to spend entire nights clinging to the bars of the barracks, closest to the guards, in hopes of avoiding the sexual assaults, fights, and stabbings that would inevitably occur each night. *Id.*

[74] *Holt I*, 300 F. Supp. at 827; *see* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (acknowledging the state's duty to care for those

During the six years following *Holt II*, the Supreme Court remained silent regarding the Eighth Amendment's application to conditions of confinement until *Estelle v. Gamble*.[75] In *Estelle*, prisoner Gamble alleged cruel and unusual punishment as a result of inadequate medical care.[76] The Court declared that Gamble had not suffered cruel and unusual punishment.[77] Nonetheless, the Court explored the scope of the Eighth Amendment and reiterated that it extended beyond the boundaries of "physically barbarous punishment" and must comport with the societal standards of decency.[78] Such requirements, the majority deduced, established the government's duty to provide adequate health care to those in its custody.[79] Based on this duty, the *Estelle* Court held that denial

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within its custody) (citation omitted); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)) (other citation omitted) (reaffirming a liberty interest in personal safety and attesting that it is cruel and unusual punishment to confine prisoners in unsafe conditions); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (citation omitted) (reasoning that due to the fact that inmates are completely dependent on the state, the state must reasonably care for them); *see also* Goldfarb & Singer, *supra* note 13, at 186-97 (recounting the development of a prisoner's rights to decent treatment and protection of his safety and health, as well as arguing the appropriateness of allowing judicial intervention to remedy Eighth Amendment violations).

75 429 U.S. 97 (1976); Nobleman, *supra* note 11, at 289. *Estelle* dealt with the treatment received by one individual prisoner, and as such, some legal scholars dispute whether this case is a true conditions of confinement case. *Compare* Wilson v. Seiter, 111 S. Ct. 2321, 2330 (1991) (White, J., concurring) (citing Rhodes v. Chapman, 452 U.S. 337 (1981); Hutto v. Finney, 437 U.S. 678 (1978)) (other citations omitted) (stressing that *Estelle* fails to represent a condition of confinement case because the incident at issue related to the acts or omissions of specific prison administrators rather than the overall conditions of the prison, and limiting the true condition of confinement cases to *Rhodes* and *Hutto*) *with Wilson*, 111 S. Ct. at 2325 n.1 (citation omitted) (responding to the concurrence by stating that the withholding of an inmate's medical treatment is a condition of his confinement regardless of whether other inmates share the same deprivation).

76 *Estelle*, 429 U.S. at 98. In the course of the prisoner's work, a heavy bale of hay fell on him and he sustained back injuries. *Id.* at 99. The prisoner then claimed that prison administrators failed to properly respond to his pain and diagnose his ailment. *Id.* at 107.

77 *Id.* The Court noted that during the period in question, medical personnel examined the prisoner on 17 separate occasions. *Id.* Furthermore, the Court recognized that doctors diagnosed the prisoner's back pain as the result of muscle strain, and they prescribed bed rest, pain killers, and muscle relaxants. *Id.* Suggesting that an x-ray may have proven helpful in accurately assessing the extent of Gamble's injuries, the Court nevertheless concluded that such an issue is a classic question of medical judgment and will not be second-guessed by the courts. *Id.*

78 *Id.* at 102 (citing Gregg v. Georgia, 428 U.S. 153, 171 (1976); Trop v. Dulles, 356 U.S. 86, 100-01 (1958); Weems v. United States, 217 U.S. 349, 373 (1910)).

79 *Id.* at 103-04 (citations omitted). For additional case law supporting the proposition that the state owes those in its care a duty of reasonable protection of their well-being see *supra* note 74.

of medical care could cause sufficient pain and suffering to amount to cruel and unusual punishment.[80]

Two years later, in *Hutto v. Finney*,[81] the Court accepted that the totality of the conditions at a prison facility could combine to give rise to unconstitutional conditions of confinement.[82] In *Hutto*, the Court again considered the conditions of the Arkansas penitentiary system first examined in *Holt I* and *Holt II*.[83] Ultimately, the Court mandated that prison administrators take remedial action

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80 *Estelle*, 429 U.S. at 104 (citation omitted). The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment." *Id.* (quoting *Gregg*, 428 U.S. at 173). Deliberate indifference exists "when there is an unreasonable risk of harm to prisoners which was known or should have been known to prison officials, and a failure to take reasonable steps to prevent harm." Nobleman, *supra* note 11, at 311-12 (citation omitted).

Additionally, the Court defused apprehension concerning a flood of inadequate medical treatment claims by stressing the intentional nature necessary to sustain a claim. *Estelle*, 429 U.S. at 105-06. The Court explained further that accidental or negligent acts do not support claims under the Cruel and Unusual Punishments Clause. *Id.* at 105.

For example, in *Louisiana ex rel Francis v. Resweber*, Justice Reed held that conducting a second electrocution after the first one failed due to a malfunction did not constitue cruel and unusual punishment because there was no wanton infliction of pain. Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459, 464 (1947). The *Resweber* Court reasoned that the first electrocution was impeded by an unforeseeable accident. *Id.* Therefore, despite any additional suffering experienced by the prisoner, the prison officials lacked the culpable state of mind for their actions to be considered punishment contrary to the Eighth Amendment. *See id.* at 464.

81 Hutto v. Finney, 437 U.S. 678 (1978).

82 *Id.* at 687. This case began in the Arkansas district as *Holt I*. *Id.* at 681 n.2 (citing *Holt I*, 300 F. Supp. 825 (1969)). The Court concluded that "taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment." *Id.* at 687.

Prior to *Hutto*, the courts evaluated prison conditions cases by one of three methods. Nobleman, *supra* note 11, at 294. The first method is "discrete adjudication" where courts analyzed each condition individually and reach separate conclusions. *Id.* (citations omitted). The second technique is the "totality of conditions" test. *Id.* (citations omitted). In applying this method, courts considered the effects of the conditions as a whole and when combined. *Id.* (citations omitted). Finally, a court could have employed a compromise method that combined the conditions when they were related, but viewed them in isolation when no sufficient nexus existed. *Id.* at 294-95 (citations omitted).

In *Hutto*, the Court suggested a preference for the totality of conditions test by selecting the language "taken as a whole." *See Hutto*, 437 U.S. at 687. Furthermore, in the subsequent case *Wilson v. Seiter*, Justice Scalia clarified that regardless of individual or multiple conditions, if an inmate is deprived of an identifiable human need, the Eighth Amendment has been violated. Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991).

83 *Hutto*, 437 U.S. at 682-84. The *Holt I* and *Holt II* courts considered both the unsanitary, overcrowded, and unsafe conditions of the isolation units as well as the prison administration's failure to provide a safe living environment for the inmates. *Holt II*, 309 F. Supp. 362, 373-78 (E.D. Ark. 1970); *Holt I*, 300 F. Supp. at 828. For a general discussion of *Holt I* and *Holt II*, see *supra* notes 57-74 and accompanying text.

regarding the conditions in the isolation cells and affirmed the limitation of isolation unit sentences to thirty days.[84] The Court deferred to the district court's factual findings and maintained its decision that the state failed to cure the constitutional violations previously identified in *Holt I* and *Holt II*.[85] The Court then articulated that the referenced conditions did indeed affront civilized standards of human decency, and as such, violated the Eighth Amendment's Cruel and Unusual Punishments Clause.[86]

Based on *Hutto*'s acknowledgment that confinement conditions can be a form of punishment and thus subject to Eighth Amendment scrutiny, the Supreme Court next considered whether the double-bunking of inmates constituted cruel and usual punishment.[87] In *Rhodes v. Chapman*,[88] the Court considered whether an increase in the prison population, forcing prisoners to share cells,

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84 *Hutto*, 437 U.S. at 687-88. The Court cited *Finney v. Arkansas Board of Correction* to identify the fact that since the court relinquished its supervisory role in 1973, the conditions in the prison, particularly in the isolation cells, had deteriorated to a large extent. *Id.* at 684 (citing Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976) (other citation omitted)). The *Finney* court remarked that conditions had greatly deteriorated since the court withdrew its supervisory jurisdiction in 1973. *Finney*, 410 F. Supp. at 275. Emphasizing the persecution of weaker inmates, overcrowding of cells, and vandalism of the isolation units, the district court imposed guidelines for improving the isolation units by limiting the number of men permitted in one cell, improving their diet, and establishing a maximum sentence of 30 days. *Id.* at 276-78.

Based on the record presented, the *Hutto* Court concluded that the district court's order was "supported by the interdependence of the conditions producing the violation." *Hutto*, 437 U.S. at 688. The Court expounded:

> The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Id. at 687.

85 *Id.* The Court paid special deference to the district court judges' discretion because of the judges' first-hand knowledge and long-term association with the Arkansas prison system's problems. *Id.* at 688.

86 *Id.* at 686-87; *see* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted); Trop v. Dulles, 356 U.S. 86, 101 (1958); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (citation omitted). The *Hutto* Court noted that confinement of an inmate to an isolation unit is not *per se* unconstitutional. *Hutto*, 437 U.S. at 686. The Court proclaimed, however, that incarceration in filthy, overcrowded cells and consumption of unwholesome diets for extended periods of time may indeed constitute intolerably cruel conditions. *Id.* at 686-87.

87 Rhodes v. Chapman, 452 U.S. 337, 339, 345 (1981). The *Rhodes* Court stated: "It is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'" *Id.* at 345 (quoting *Hutto*, 437 U.S. at 685) (other citations omitted).

88 452 U.S. 337 (1981).

rose to the level of cruel and unusual punishment.[89] Concentrating on the objective factors of the case, the Court found that the housing situation did not deprive inmates of essential food, medical care, or sanitation.[90] Thus, the *Rhodes* Court held that this double-bunking practice did not constitute punishment subject to Eighth Amendment scrutiny.[91] Further clarifying its position, the Court emphasized that there exists no constitutional guarantee to comfortable prisons and, in particular, that persons housed in maximum security facilities must expect some level of discomfort.[92]

The *Rhodes* Court concentrated solely on the objective factors of the case in order to determine violations of Eighth Amendment standards.[93] In *Whitley v. Albers*,[94] however, the Court resurrected the subjective factor of Eighth Amendment analysis that requires a showing of deliberate indifference on the part of prison officials.[95]

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89 *Id.* at 339. The Court noted that this challenge to overcrowding in a prison marked the first disputed contention of general conditions of confinement. *Id.* at 339, 344. In *Hutto*, an earlier case where the Court reviewed overall conditions of confinement, the prison administration did not contest the determination that the unsanitary, overcrowded conditions within its facilities were unconstitutional. *Hutto*, 437 U.S. at 685. The *Hutto* defendants only objected to the remedial action ordered by the district court. *Id.*

90 *Rhodes*, 452 U.S. at 346, 347 (citation omitted). The Court referred to *Estelle*'s deliberate indifference standard, but nonetheless failed to identify any intent on the part of prison officials. *Id.* at 347, 348 (quoting *Estelle*, 429 U.S. at 103). The Court reasoned that regardless of prison officials' intent, the objective evidence failed to affront common standards of decency. *Id.* at 347. Although the Court disavowed any Eighth Amendment violations in *Rhodes*, it asserted in dicta that the scope of the Eighth Amendment with regard to confinement conditions reached factual situations that differ from those in *Hutto* and is not limited to medical care as in *Estelle*. *Id.* (citing *Hutto*, 437 U.S. at 687; *Estelle*, 429 U.S. at 103).

91 *Id.* at 348 ("[T]here is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.").

92 *Id.* at 349. The Court conceded that while double celling may not be the most desirable situation, it does not violate common standards of decency. *Id.* at 349 n.13. Indeed, the Court related that these prisoners lived in exceptionally modern cells that were well heated, ventilated, and equipped with bathroom facilities and hot and cold water. *Id.* Each cell even had its own radio. *Id.* (citation omitted). Despite its holding, however, the Court submitted that harsh conditions of confinement may violate the Cruel and Unusual Punishments Clause if not "part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347.

93 *Id.* at 346 (citation omitted). The Court stressed that court decisions "'should be informed by objective factors to the maximum possible extent.'" *Id.* (citation omitted).

94 475 U.S. 312 (1986).

95 *Id.* at 319 (citations omitted). Clarifying the necessity of an intent element, the Court elucidated that conduct unrelated to punishment must exhibit more than an absence of due care for an inmate's well-being to support an Eighth Amendment claim. *Id.* The Court articulated:

> It is obduracy and wantonness, not inadvertence or error in good faith,

The *Whitley* Court concluded that the shooting of an inmate during the prison officials' attempt to regain control of a cellblock did not transgress the Eighth Amendment.[96] The Court expanded upon the deliberate indifference standard articulated in *Estelle* and advocated a higher level of intent to support an Eighth Amendment claim when officials act in response to prison disturbances.[97] The Court reasoned that based on both the general intensity of prison uprisings and the risks involved in quashing them, a prisoner must establish the infliction of unnecessary and wanton pain and suffering through evidence of malicious and sadistic acts intended to cause harm.[98]

In *Wilson v. Seiter*,[99] however, the Supreme Court retreated

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> 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.

Id. The Court explicitly stated that implicit in the Eighth Amendment is a distinction between mere negligence and wanton conduct. *Id.* at 322; *see also Estelle*, 429 U.S. at 105-06 (supporting the proposition that the negligence of medical officials in diagnosing a prisoner's medical condition fails to rise to the level of cruel and unusual punishment).

96 *Whitley*, 475 U.S. at 326. The majority reasoned that "the actual shooting was part and parcel of a good-faith effort to restore prison security. As such, it did not violate respondent's Eighth Amendment right to be free from cruel and unusual punishments." *Id.* In *Whitley*, a prison guard was taken hostage during a riot in one of the cellblocks. *Id.* at 314-15. After a period of negotiation, the prison officials decided to organize an "assault team" to rescue the guard taken hostage and to subdue the agitated inmates. *Id.* at 315, 316. In the course of the intervention, an officer shot an inmate in the knee as the inmate attempted to climb the cellblock stairs to evade the gunshots. *Id.* at 316. The inmate's left leg was severely injured and he brought an action against the prison officials for cruel and usual punishment. *Id.* at 317.

97 *Id.* at 320 (citation omitted). The Court directed that, during a period of unrest, prison officials need to be concerned with quelling strife and ensuring the safety of the prison staff, administrative personnel, visitors, and the inmates. *Id.* (citing Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). The Court elaborated that in the case of prison riots, "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.*

98 *Id.* at 320-21 (citation omitted). The Court explained that the conduct of prison officials and the degree of force used during a prison security measure should not be judged unreasonable and unnecessary simply because the actions appear excessive in retrospect. *Id.* at 319. The Court expounded that the measures necessary to control a disturbance inescapably involve significant risks to the safety of both inmates and guards. *Id.* at 320. Consequently, the Court determined that "the question whether the [prison security] measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21 (citation omitted).

99 111 S.Ct. 2321 (1991).

from this very high standard of intent.[100] In *Wilson*, the Court again considered a prisoner's charge of unconstitutional conditions of confinement.[101] In this instance, Justice Scalia, writing for the Court, addressed the specific issue of prison official culpability.[102] The Court separated this overall issue into two sub-issues: (1) does the Eighth Amendment require a showing of prison officials' intent; and (2) if yes, what is the requisite state of mind?[103] Relying on *Estelle*, *Rhodes*, and *Whitley*, the Court interpreted the meaning of punishment for Eighth Amendment purposes to necessarily entail a deliberate act.[104] If the pain does not directly flow from the punishment formally imposed by statute or judge, the Court asserted, it is not punishment within the purview of the Eighth Amendment unless the acting prison official possesses a culpable state of mind.[105]

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100 *Id.* at 2326, 2327 (citations omitted). While the holding in *Wilson* concentrated on the state of mind question, the Court in dicta elucidated the language used in *Rhodes* that conditions of confinement "alone or in combination" may suffice to support a claim of cruel and unusual treatment. *Id.* at 2327 (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). The Court interpreted the language to mean that certain conditions of confinement may combine when each on its own would be inadequate to sustain a cause of action under the Eighth Amendment, so long as the resulting deprivation affected a solitary, identifiable human need. *Id.* The Court added, "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.*

101 *Id.* at 2322. The conditions complained of in *Wilson* included "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.

102 *Id.* at 2322.

103 *Id.*

104 *Id.* at 2324, 2325. Justice Scalia reminded that "the Eighth Amendment itself . . . bans only cruel and unusual *punishment*." *Id.* at 2325.

105 *Id.* The Court contended, "If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* In support of this proposition, Justice Scalia reiterated Judge Posner's view:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.

Id. (citation omitted).

"Punishment" is defined as "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." BLACK'S LAW DICTIONARY 1234 (6th ed. 1990). "Cruel and Unusual Punishment" is defined as:

> such punishment as would amount to torture or barbarity, and any

In terms of the required level of intent, the *Wilson* Court clarified that in identifying wantonness, no one definition fits every situation. Thus, the Court stated that the determination of wanton conduct on the part of prison officials is fact sensitive.[106] Moreover, the Court explained that the *Whitley* standard of malice applied only in cases where prison officials responded to disturbances.[107] Stipulating that the high standard set in *Whitley* did not apply to general conditions of confinement cases, the Court held that the proper standard to apply was "deliberate indifference," as established in *Estelle*.[108] By mandating a state of mind requirement for prison condition claims, the Court announced a two part test requiring both an objective finding that the deprivation was sufficiently serious and a subjective conclusion that officials acted with a sufficiently culpable state of mind.[109]

Shortly after *Wilson*, the Tenth Circuit, *en banc*, applied the *Wilson* two-part test in *Clemmons v. Bohannon*[110] and held that sharing a cell with an inmate who smoked did not constitute cruel and unusual punishment.[111] In reference to the test, the court found

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> cruel and degrading punishment not known to the common law, and also any punishment so disproportionate to the offense as to shock the moral sense of the community. . . . Such punishment cannot be defined with specificity; it is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane. . . .

Id. (citations omitted).

106 *Wilson*, 111 S. Ct. at 2326 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). Justice Scalia further enunciated the characterization of wantonness as depending upon the situation in which the prison official finds him or herself. *Id.* Interestingly, this proposition simultaneously compliments but also appears to run counter to a similar premise set forth in *Rhodes v. Chapman*. *See* Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (Brennan, J., concurring). In *Rhodes*, Justice Brennan, in concurrence, espoused that the "touchstone" of an Eighth Amendment analysis focuses on the "effect on the imprisoned." *Id.* at 364, 366 (citation omitted). This apparent discrepancy is reconciled, however, by the two-part test set forth in *Wilson*. *See Wilson*, 111 S. Ct. at 2324. Justice Scalia's statement in *Wilson* referred to the subjective component of the Eighth Amendment. *See id.* at 2324, 2326. Justice Brennan in *Rhodes* addressed the objective component. *See id.*; *Rhodes*, 452 U.S. at 364, 366 (Brennan, J., concurring).

107 *Wilson*, 111 S. Ct. at 2326, 2327 (citations omitted).

108 *Id.* at 2327 (citations omitted). The Court quoted Justice Powell, retired and sitting by designation, concluding that "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.* (citations omitted).

109 *Id.* at 2324.

110 956 F.2d 1523 (10th Cir. 1992) (en banc).

111 *Id.* at 1525, 1529. Several other circuits, and now the Supreme Court, have also addressed the issue of whether exposure to ETS rises to the level of cruel and unusual punishment. *Compare* Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993) (holding that

that the plaintiff, Clemmons, neither substantiated his claim that his health had been adversely affected by ETS exposure,[112] nor demonstrated that the prison officials acted with deliberate indifference to his medical needs.[113]

In so holding, the court of appeals reiterated the "core areas" of an Eighth Amendment claim to be "shelter, sanitation, food, personal safety, medical care, and adequate clothing."[114] The court then stressed that a smoke-free environment was not within

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allegations of involuntary ETS exposure stated a cause of action under the Eighth Amendment); Hunt v. Reynolds, 974 F.2d 734, 736 (6th Cir. 1992) (espousing that forcing an inmate with serious medical conditions to live with a cellmate who smokes violates the objective component of the Eighth Amendment analysis); Franklin v. Oregon, State Welfare Div., 662 F.2d 1337, 1347 (9th Cir. 1981) (finding that a prisoner stated an Eighth Amendment cause of action when he alleged that living with a smoking cellmate aggravated the tumor in his throat); Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1988) (determining that involuntary exposure to ETS is more than discomforting and is cognizable under the Eighth Amendment); *with* Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991) (averring proof of prison official's intent to harm through exposure to ETS an "insurmountable hurdle"); Guilmet v. Knight, 792 F. Supp. 93, 95 (E.D. Wash. 1992) (opining that a prisoner could not sustain a claim based on ETS exposure when his health afflictions were not severe and he was removed from the environment); West v. Wright, 747 F. Supp. 329, 332 (E.D. Va. 1990) (recognizing the possibility of a cause of action premised on ETS exposure, but dismissing the case due to an insufficient factual basis); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990) (prescribing a constitutional right to be free from ETS). *Cf.* Grass v. Sargent, 903 F.2d 1206, 1206 (8th Cir. 1990) (declaring that there is no constitutional right to smoke while incarcerated).

112 *Clemmons*, 956 F.2d at 1526. Clemmons complained of shortness of breath, irritation to his throat, eyes, and nose, as well as stress. *Id.*

113 *Id.* at 1525. The court explained that because Clemmons offered evidence of only an occasional sore throat and a runny nose, his claim based on medical needs failed. *Id.* at 1527. Moreover, with respect to future health problems, the court continued that "[t]he Eighth Amendment does not sweep so broadly as to include possible latent harms to health." *Id.* The court also determined that the facts presented by Clemmons failed to comprise deliberate indifference on the part of the prison administration. *Id.* at 1525. Noting that the administration agreed to pair Clemmons with a non-smoking cellmate if he could find one, the court concluded that the defendants could not have "made a more reasonable accommodation than that to which they extended." *Id.* at 1528. In fact, the court pointed out that at the time of trial Clemmons was sharing a cell with a non-smoking inmate. *Id.*

114 *Id.* at 1527 (citing Ramos v. Lamm, 639 F.2d 559, 566 & n.8 (10th Cir. 1980) (other citations omitted). In *Ramos*, the Tenth Circuit assessed the living conditions of inmates in a Colorado maximum security facility. *Ramos*, 639 F.2d at 562, 563. Although the court determined that several of the allegations failed to support Eighth Amendment claims, the court did conclude that in many ways the prison officials failed to provide a "healthy habilitative environment" and conditions were "grossly inadequate and constitutionally impermissible." *Id.* at 568, 569, 570, 572, 574, 578, 586. The court based its holding on the fact that the main living areas of the prison were unsanitary and unfit for human habitation; inadequate ventilation and faulty plumbing created innumerable health and safety problems; the cells were infested with vermin and rodents; food was prepared in unsanitary conditions that jeopardized inmate health; inmates lived with constant threats and in perpetual fear of violence

one of these protected spheres, and moreover, that the prison administration did not deny Clemmons any of his basic human needs.[115] Additionally, the court rejected the suppositions that the Eighth Amendment applied to future health problems and that potential harm to a prisoner's health could be construed as a serious medical need warranting present attention.[116] Despite what appeared to be an outright rejection of ETS as grounds for an Eighth Amendment claim, the court of appeals suggested that prolonged ETS exposure is patently cruel where it gravely affects a prisoner's health.[117]

The Supreme Court ultimately confronted this possibility in the recent conditions of confinement case, *Helling v. McKinney*.[118] Justice White, writing for the majority, reaffirmed that the scope of the Eighth Amendment reaches treatment of prisoners as well as conditions of confinement.[119] The Justice then discredited the

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and assaults from other inmates; and the medical and dental care provided was grossly inadequate. *Id.* at 567, 569, 571-72, 572, 578.

115 *Clemmons*, 956 F.2d at 1527 (citations omitted). The court commented that ETS exposure did not involve one of the core areas, nor did it "'deprive [Clemmons] of the minimal civilized measure of life's necessities.'" *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1982) (other citation omitted)); *see also* Youngberg v. Romeo, 457 U.S. 307, 324 (1981) (insisting that the state must provide adequate personal safety, shelter, clothing, food, and medical care to those within its care); *Rhodes*, 452 U.S. at 347 (observing that double-bunking was uncomfortable, but alone, not a deprivation of basic human needs).

116 *Clemmons*, 956 F.2d at 1527. The court conjectured that, because Clemmons's ETS exposure had not inflicted any current adverse physical conditions, his complaint was of lesser magnitude than those of other prisoners whose complaints of deliberate indifference to medical needs were successful. *Id.* at 1527-28. Furthermore, the court justified that "[n]either the Supreme Court nor this court has ever held that a potential, distant harm to a prisoner's health is a serious medical need." *Id.* at 1527.

117 *Id.* at 1528. The court insisted that evidence of ETS exposure alone was insufficient to sustain an Eighth Amendment claim. *Id.* The court required that the prisoner allege the subjective component of the *Wilson* test, demonstrating deliberate indifference on the part of prison officials. *Id.* Indeed, the court acceded that "[i]f the [prisoner] had shown or even alleged that defendants forced him to live with others who smoked and that they did so intentionally, knowing the smoke would have serious medical consequences for him, a different result might obtain." *Id.* The facts of the *Clemmons* case allowed the court to profess such a position and still dismiss the case. *See id.* at 1525. Clemmons had several different roommates—some smoking, some non-smoking. *Id.* at 1526. His requests for a non-smoking roommate were accommodated as often as possible, and his medical needs were properly addressed. *Id.* at 1528-29. The medical staff found no signs of negative effects from ETS exposure. *Id.* at 1529. In the final analysis, the court concluded that Clemmons's true objective was to obtain a single cell and a smoke-free environment. *Id.* at 1528 n.1.

118 113 S. Ct. 2475, 2478 (1993).

119 *Id.* at 2480. Justice White was joined in the majority opinion by Justices Blackmun, Brennan, Kennedy, O'Connor, Rehnquist, and Souter. *See id.* at 2475. Justice Thomas, joined by Justice Scalia, dissented, arguing that the majority unnecessarily expanded the scope of the Eighth Amendment to encompass future harm. *Id.* at

prison officials' position that the Eighth Amendment only protects against current injury and indignities, and that threats of future harm, regardless of how grievous, do not qualify for protection.[120] The majority emphasized the inconsistency that prison administrators must attend to current health and medical needs while simultaneously disregarding conditions known to cause or extremely likely to cause illness only because of the absence of physical symptoms.[121] Expounding on this premise, Justice White noted that the Court would not excuse prison authorities' liability for intentionally exposing inmates to communicable diseases simply because the

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2482-83 (Thomas, J., dissenting); *see* Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991) (citations omitted) (acknowledging that prison conditions fall within the control of the Eighth Amendment, and that to prevail, plaintiffs must show deliberate indifference on the part of prison officials); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (citations omitted) (recognizing that once the state takes a person into its custody, it is responsible for that person's general well-being and the state must act within the breadth of the Eighth Amendment); *Rhodes*, 452 U.S. at 347 (confirming that conditions of confinement are subject to Eighth Amendment scrutiny); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted) (declaring deliberate indifference to prisoners' medical needs constitutes cruel and unusual punishment contrary to the Eighth Amendment).

120 *McKinney*, 113 S. Ct. at 2480. The Court agreed with McKinney that a plethora of circuit court cases manifest Eighth Amendment protection against "sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering . . . ." *Id.* at 2481; *see, e.g.*, Powell v. Lennon, 914 F.2d 1459, 1464 (11th Cir. 1990) (holding that exposure of an inmate to friable asbestos threatens the inmate's life and health, thus violating the Cruel and Unusual Punishments Clause); Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (finding that prolonged periods without physical exercise harmful to an inmate's health); Martin v. Sargent, 780 F.2d 1334, 1337-38 (8th Cir. 1985) (citation omitted) (ruling inadequate diet, unhealthy prison conditions, denial of personal hygiene items, and lack of physical exercise sufficient to support an Eighth Amendment claim); French v. Owens, 777 F.2d 1250, 1252-53, 1254, 1255 (7th Cir. 1985) (declaring double celling unconstitutional where the ventilation, climate control, and lighting are inadequate; lavatories are "virtually uncleanable;" no hot water is available for showers; prisoners are shackled to metal bed frames for days; the diet is unwholesome; and the kitchen is infested with vermin); Hoptowit v. Spellman, 753 F.2d 779, 783-84 (9th Cir. 1985) (holding that inadequate ventilation, plumbing, lighting, fire safety standards, and general cleaning supplies, as well as vermin infestation violated the Eighth Amendment); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (concluding that the lack of fresh air and regular physical exercise constitutes cruel and unusual punishment); Cunningham v. Jones, 567 F.2d 653, 659, 660 (6th Cir. 1977) (opining that an unwholesome diet constitutes cruel and unusual punishment); Landman v. Royster, 333 F. Supp. 621, 647, 648 (E.D. Va. 1971) (citations omitted) (determining that a bread and water diet (approximately 700 calories per day) and solitary confinement exposing inmates to the cold of winter—because of denuding and broken windows—imperils inmates' health).

121 *McKinney*, 113 S. Ct. at 2480. The Court refused to accept that "prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id.*

inmates were still healthy.[122]

After surveying the relevant case law, the Court articulated that protecting inmates from future harm was not a novel idea.[123] Justice White recalled that the Court in *DeShaney v. Winnebago County Department of Social Services*[124] preserved prisoners' rights as basic human needs under the Eighth Amendment.[125] The Justice emphasized that one of those basic human needs was reasonable

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122 *Id.* In support of its proposition, the majority suggested that an inmate could successfully complain about unsafe drinking water prior to developing dysentery. *Id.* Following this idea through its logical progression, the majority further expounded that prison officials may not disregard inmates' exposure to serious, contagious diseases because the complaining inmates manifest no symptoms. *Id.*; *see, e.g.*, Hutto v. Finney, 437 U.S. 678, 682-83, 687 (1978) (noting that the crowded conditions and presence of inmates with communicable diseases in isolation cells required a remedy under the Eighth Amendment); Glick v. Henderson, 855 F.2d 536, 539-40 (8th Cir. 1988) (citation omitted) (recognizing that an inmate could sustain an Eighth Amendment claim if he could show that there existed a pervasive risk of contracting AIDS and that prison officials failed to reasonably respond); Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (reasoning that the prison administration's failure to screen for communicable diseases and thus separating ill inmates evidences deliberate indifference to the medical needs of the general population); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (stating that allowing inmates with contagious diseases to mingle and reside with the general population without medical care for more than a month violates the required standard of adequate medical attention); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 266 (S.D.N.Y. 1990) (positing that prison officials must take reasonable steps to ensure that inmates do not contract contagious diseases from other inmates).

123 *McKinney*, 113 S. Ct. at 2480; *see supra* notes 120, 122 (discussing the plethora of case law supporting an Eighth Amendment cause of action for imminent as well as present harm).

124 489 U.S. 189 (1989). In *DeShaney*, a young boy, Joshua, and his mother sued county and local social services workers for not protecting Joshua from his abusive father. *Id.* at 191. The father had custody of Joshua and there was history of abuse of which the county was aware. *Id.* at 191, 192-93. On the occasion in question, the father beat his son so severely that he suffered permanent brain damage; he was "expected to spend the rest of his life confined to an institution for the profoundly retarded." *Id.* at 193. The petitioners contended that the state had a "special relationship" with Joshua that imposed an affirmative duty on the state to protect him from harm. *Id.* at 197. The Court rejected this claim, distinguishing the situation from that of prisoners and other individuals whose liberty the state has restrained through incarceration, institutionalization, or other means. *Id.* at 198-200 (citations omitted). In performing this evaluation, the Court reviewed the responsibilities of the state with regard to protecting and ensuring the safety of prisoners and others who it voluntarily takes into its custody. *Id.* at 200 (citing Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)). The Court stressed that the harm inflicted upon Joshua occurred while in the care and at the hands of his father, who was not a state actor. *Id.* at 201. The Court continued that despite the fact that the state at one time had temporary custody of Joshua, the state did not cause his injuries, leave him more vulnerable to his father's actions, or become the permanent insurer of his safety. *Id.* In the end, the Court determined that the state did not owe Joshua any constitutional duty of protection. *Id.*

125 *McKinney*, 113 S. Ct. at 2480-81 (citing *DeShaney*, 489 U.S. at 200). Justice White

safety.[126] Furthermore, the Court pointed out that *Youngberg v. Romeo*[127] clarified that unsafe prison conditions constitute cruel and unusual punishment.[128] In view of the reasonable safety requirement, the majority questioned the logic of denying an injunction to an inmate encountering dangerous conditions because he had not yet been injured.[129] Justice White lauded the court of appeals for astutely recognizing that an inmate does not have to wait until a tragic event occurs before being able to obtain a remedy from the state.[130]

The majority ultimately held that an Eighth Amendment cause of action could be grounded in allegations that prison administrators were deliberately indifferent to an unreasonable risk to one's health posed by involuntary ETS exposure.[131] On remand, the Court ordered McKinney to satisfy both the objective factor and the subjective factor established in *Wilson*.[132] The Court

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recalled the Court's interpretation of the Eighth Amendment that required states to furnish inmates with their basic human needs, including personal safety. *Id.*

126 *Id.*

127 Youngberg v. Romeo, 457 U.S. 307 (1982). In *Youngberg*, a retarded man, Romeo, had been involuntarily committed to a state institution. *Id.* at 309-10. Romeo and his mother sued the institution under the Due Process Clause of the Fourteenth Amendment because of, *inter alia*, the unsafe conditions of confinement. *Id.* at 310. Romeo had suffered injuries on more than 63 separate occasions during his two years at the institution. *Id.* In evaluating Romeo's claim to a right to a safe environment, the Court noted that involuntary commitment, even of a penal nature, does not extinguish an individual's right to personal safety. *Id.* at 315. The Court reasoned, "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* at 315-16.

128 *McKinney*, 113 S. Ct. at 2481 (quoting *Youngberg*, 457 U.S. at 315-16). Justice White pronounced, "It is 'cruel and unusual punishment to hold convicted criminals in unsafe conditions.'" *Id.* (quoting *Youngberg*, 457 U.S. at 315-16).

129 *Id.* The Court emphasized: "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.*

130 *Id.* Justice White noted approvingly that "[t]he Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event." *Id.*; *see* Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980) (asserting that a prisoner does not have to wait until he has been physically assaulted to obtain relief); Gates v. Collier, 501 F.2d 1291, 1300, 1303 (5th Cir. 1974) (holding that threats posed by exposed electrical wiring, inadequate fire fighting measures, and interaction with inmates with contagious diseases constituted a claim under the Eighth Amendment); *see also supra* notes 120, 122 (reviewing case law that supports the position that the Eighth Amendment can remedy unsafe conditions before actual harm occurs).

131 *McKinney*, 113 S. Ct. at 2481.

132 *Id.* 2481-82. For a discussion of the objective and subjective factors espoused in *Wilson*, see *supra* notes 99-109 and accompanying text.

The Court affirmed the court of appeals' holding that McKinney pled a valid Eighth Amendment cause of action, and required that McKinney demonstrate at trial that the level of ETS exposure was in fact excessive, that this level offended the sensi-

instructed that the objective factor required McKinney to prove that he was actually subjected to excessive ETS levels.[133] Moreover, in addition to the scientific evidence supporting the notion that ETS causes illness, the Court required McKinney to demonstrate that society deems this health risk to be so great that involuntary exposure exceeds the bounds of decency.[134] Justice White recognized that McKinney may not meet this burden of proof because prison officials moved him to a non-smoking facility and also implemented a formal smoking policy.[135] The Justice, nevertheless, reserved this determination for the lower court.[136]

Next, the Court reiterated that the subjective standard demands proof that prison authorities were deliberately indifferent to the effects of ETS exposure.[137] Justice White proffered that determining this state of mind requires courts to focus on the current attitudes and conduct of the officials.[138] Once again, due to the Nevada prison system's recent adoption of a formal smoking policy, the Court suggested that deliberate indifference on the part of prison administrators may be difficult to establish.[139]

Justice Thomas, joined by Justice Scalia, authored a dissent warning against the majority's unnecessary expansion of the Eighth Amendment.[140] The dissent emphasized that prisoners must prove

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bilities of society, and that the prison officials were deliberately indifferent to his exposure. *McKinney*, 113 S. Ct. at 2481-82.

133 *Id.* at 2482.

134 *Id.* The Court elaborated that for conduct to be considered cruel and unusual under the Eighth Amendment, society must be unwilling to tolerate its occurrence. *Id.*

135 *Id.* Justice White reported that on January 10, 1992, the Director of the Nevada State Prisons established a formal smoking policy for all state prisons. *Id.* The Court discovered that the policy permits smoking only in designated areas and bans it in "program, food preparation/serving, recreational and medical areas." *Id.* Furthermore, the Court noted that wardens now possess the authority to identify non-smoking dormitory areas, where space allows, and will make reasonable efforts to honor the requests of non-smoking inmates in double-bunking situations. *Id.* (citation omitted).

136 *Id.* at 2481. Justice White admitted, "We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS." *Id.*

137 *Id.* at 2482.

138 *Id.*

139 *Id.* Justice White appreciated that the prison systems' adoption of a smoking policy will play a significant role in determining deliberate indifference. *Id.* In assessing the implication of the newly enacted policy, the Court recounted McKinney's counsel's concession that "depending on how the new policy was administered, it could be very difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure to ETS." *Id.* (citation omitted).

140 *Id.* at 2482-83 (Thomas, J., dissenting). Justice Thomas criticized: "Today the Court expands the Eighth Amendment in yet another direction, holding that it ap-

not only that the act was cruel and unusual, but that it also constituted punishment.[141] The dissent centered its argument on the question of what falls within the scope of "punishment."[142] Justice Thomas fundamentally disagreed with the premise articulated in *Estelle* recognizing unsatisfactory prison conditions as cruel and unusual punishment.[143] The Justice examined the historical application, as well as the ordinary meaning, of the word "punishment"[144] and determined that the meaning of punishment never included, and should continue to exclude, a harm suffered by a prisoner that does not directly correlate to the prisoner's sentence.[145]

In questioning the soundness of *Estelle*, Justice Thomas noted that *Estelle* relied primarily on lower court decisions.[146] Justice Thomas explained that these lower court decisions, like *Estelle*,

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plies to a prisoner's mere *risk* of injury. Because I find this holding no more acceptable than the Court's holding in *Hudson*, I again dissent." *Id.* In *Hudson v. McMillian* the Court held that excessive use of force against prisoners violates the Eighth Amendment even if it only causes minor injuries. Hudson v. McMillian, 112 S. Ct. 995, 997 (1992).

141 *McKinney*, 113 S. Ct. at 2485 (Thomas, J., dissenting).

142 *Id.* at 2483 (Thomas, J., dissenting). Justice Thomas postulated that the "understanding of the word [punishment], of course, does not encompass a prisoner's injuries that bear no relation to his sentence." *Id.*

143 *Id.* Justice Thomas doubted the basis for every conditions of confinement case. *Id.* The Justice questioned whether deprivations while in confinement constitute punishment subject to Eighth Amendment scrutiny despite the fact that the conditions were not imposed as an element of a criminal sentence. *Id.* For a detailed discussion of *Estelle*, see *supra* notes 75-80 and accompanying text.

144 *McKinney*, 113 S. Ct. at 2483 (Thomas, J., dissenting). Justice Thomas revealed that the framers and ratifiers of the Eighth Amendment intended the ordinary meaning of the word punishment to apply because they failed to specify otherwise. *Id.* The Justice explained that the framers understood punishment to refer to "the penalty imposed for the commission of a crime." *Id.* (citations omitted). Justice Thomas continued that the Cruel and Unusual Punishments Clause derived from the English Declaration of Rights of 1689, which responded to sentencing abuses of the King's Bench but did not forbid harsh and uncomfortable prison conditions. *Id.* (citing Harmelin v. Michigan, 111 S. Ct. 2680, 2686, 2688 (1991)). *But see* Granucci, *supra* note 3, at 843 (advancing that the framers misinterpreted the original intent of the drafters of the English Declaration of Rights).

145 *McKinney*, 113 S. Ct. at 2484 (Thomas, J., dissenting). Justice Thomas noted that punishment, as a legal term of art, is defined as a "'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'" *Id.* at 2483 (Thomas, J., dissenting) (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990)).

146 *Id.* at 2484-85 (Thomas, J., dissenting). The dissent also distinguished the Supreme Court cases relied on in *Estelle v. Gamble*, stating that none of them entertained conditions of confinement but rather evaluated the challenges made to criminal sentences. *Id.* at 2484 (Thomas, J., dissenting). For example, the Justice cited *Gregg v. Georgia*, where the Court held that the death penalty was not unconstitutional. *Id.* at 2484 n.1 (Thomas, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

failed to analyze the substantive issues involved in extending the Eighth Amendment to prison conditions.[147] Justice Thomas further criticized the courts' conclusory and assumptive assertions that the Eighth Amendment applied in these instances.[148]

Despite the prolific number of cases that have since followed *Estelle*, Justice Thomas maintained that the historical development of the Amendment prior to the 1960s and the plain language meaning of "punishment" indicates that only judges or juries impose punishment within the meaning of the Eighth Amendment.[149] Justices Thomas and Scalia advocated that prison officials

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147 *Id.* at 2484, 2485 (Thomas, J., dissenting) (citations omitted). The Justice illuminated that the *Estelle* Court purported to rely on prior Supreme Court decisions, but the cases the Court selected challenged the sentences imposed on the inmates and not the prison conditions they endured. *Id.* at 2484 (Thomas, J., dissenting). The dissent insisted that

> the only authorities cited in *Estelle* that supported the Court's extension of the Eighth Amendment to prison deprivations were lower court decisions (virtually all of which had been decided within the previous [ten] years) . . . and the only one of those decisions upon which the Court placed any substantial reliance was *Jackson v. Bishop* . . . .

Id. at 2484-85 (Thomas, J., dissenting) (citations omitted). Justice Thomas acknowledged, however, that *Jackson* may be distinguishable from the other circuit court cases because the prisoner in that case challenged the utilization of the strap to discipline prisoners. Id. at 2485 n.2 (Thomas, J., dissenting). The Justice rationalized that

> it is at least arguable that whipping a prisoner who has violated a prison rule is sufficiently analogous to imposing a sentence for violation of a criminal law that the Eighth Amendment is implicated. But disciplinary measures for violating prison rules are quite different from inadequate medical care or housing a prisoner with a heavy smoker.

Id. For further detail on *Jackson*, see *supra* note 57 and accompanying text.

148 *McKinney*, 113 S. Ct. at 2484-85 (Thomas, J., dissenting). Justice Thomas characterized *Estelle* and its progeny as stretching the Eighth Amendment to encompass prison conditions based almost solely on *ipse dixit*. *Id.* at 2484. *Ipse dixit* is "a bare assertion resting on the authority of an individual." BLACK'S LAW DICTIONARY 828 (6th ed. 1990). The Justice further condemned the *Estelle* Court for failing to analyze the text of the Eighth Amendment and for limiting the majority's discussion of the Amendment's history to a quick mention that it precluded torture and other barbarous methods of punishment. *McKinney*, 113 S. Ct. at 2484, 2485 (Thomas, J., dissenting) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

Justice Thomas then turned his attention to the Eighth Circuit's decision in *Jackson v. Bishop*. *Id.* at 2485 (Thomas, J., dissenting) (citation omitted). In addressing the circuit court's consideration of the issue, the dissent noted that the Eighth Circuit's discussion was limited to a two-sentence paragraph in which the court was content to state the opposing view and then reject it: 'Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both.' *Id.* (quoting Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968)).

149 *Id.* at 2484 (Thomas, J., dissenting). Justice Thomas stressed that courts traditionally interpreted the Eighth Amendment in harmony with its text. *Id.* The Justice advanced that the lower courts "routinely rejected 'conditions of confinement' claims

simply implement those punishments.[150] Accordingly, the dissent concluded, deprivations in confinement do not fall within the ambit of the Amendment.[151]

Justice Thomas, however, declined to advocate that *Estelle* should be overruled at this juncture because the *McKinney* facts did not directly address the strict application of *Estelle*.[152] Rather, the dissent argued that the majority's holding extended *Estelle* to include cases where absolutely no injury existed.[153] Justice Thomas recognized the importance of *stare decisis*,[154] but rejected the notion that it mandated unnecessary expansions of precedent.[155]

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well into this century." *Id.* Such outcomes demonstrate the stronghold the hands-off doctrine commanded within judicial thought. *See* Haas, *supra* note 13, at 796. The dissent further lamented that the lower courts did not apply the Cruel and Unusual Punishments Clause to prison conditions until the 1960s. *McKinney*, 113 S. Ct. at 2484 (Thomas, J., dissenting) (citations omitted). It was not until the mid-1970s, Justice Thomas continued, that the Supreme Court, in *Estelle*, also accepted the Eighth Amendment's relevance to prison deprivations. *Id.* (citation omitted). Justice Thomas subsequently suggested, '[A]lthough the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose 'punishment.'' *Id.*

150 *See id.*; *see also* Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991) (reasoning that because the Eighth Amendment only applies to situations involving punishment, prisoners must show deliberate indifference to the confinement conditions to prevail).

151 *McKinney*, 113 S. Ct. at 2484 (Thomas, J., dissenting). Justice Thomas challenged that

> the original meaning of 'punishment,' the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged. It was certainly not discharged in *Estelle v. Gamble.*

Id.

152 *Id.* at 2485 (Thomas, J., dissenting). Justice Thomas opined, "Were the issue squarely presented, . . . I might vote to overrule *Estelle.* I need not make that decision today, however, because this case is not a straightforward application of *Estelle.* It is, instead, an extension." *Id.*

153 *Id.*

154 *Stare decisis* is the policy that courts should abide by precedent. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). "[W]hen court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply to it all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." *Id.* (citation omitted).

155 *McKinney*, 113 S. Ct. at 2485 (Thomas, J., dissenting). The dissent seriously doubted that *Estelle* had been correctly decided, and clarified that "*[s]tare decisis* may call for hesitation in overruling a dubious precedent, but it does not demand that such a precedent be expanded to its outer limits." *Id.*

In line with this reasoning, Justice Thomas also dissented in another recent Eighth Amendment case, *Hudson v. McMillian. Id.* at 2483; *see* Hudson v. McMillian, 112 S. Ct. 995, 1004 (1992). In *Hudson*, Justice O'Connor, writing for the majority, rejected the premise that a prisoner must sustain severe injuries in order to establish an Eighth Amendment claim. *Id.* at 1000 (citation omitted). Rather, the majority

The Justice further concluded that when prison conditions are subjected to Eighth Amendment scrutiny, the line must be drawn at actual serious injuries in order to exclude speculative future events.[156]

While the *McKinney* Court delved into an aspect of prison life never directly addressed in prior Supreme Court cases,[157] it nevertheless remained true to the application of Eighth Amendment precedent.[158] The Judiciary now accepts conditions of confinement as within the purview of the Amendment, and as such the treatment of prisoners while incarcerated is subject to Eighth Amendment scrutiny.[159]

Justice Thomas's characterization of the majority's holding as an unprecedented expansion of the Eighth Amendment is tenuous.[160] As Justice White pointed out, recognition of future harm is

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held that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury." *Id.* at 997.

156 *McKinney*, 113 S. Ct. at 2485 (Thomas, J., dissenting). The dissent disagreed with the majority's application of the Court's prior holdings to support the conclusion that the Eighth Amendment protects against future harm. *See id.* Justice Thomas pointed out that in *Hutto v. Finney* the prison administrators did not contest that the prison conditions were unconstitutional; the defendants only challenged the district court's remedy. *Id.* at 2485 n.3. (Thomas, J., dissenting) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)). For a detailed discussion of *Hutto*, see *supra* notes 81-86 and accompanying text.

Furthermore, the dissent noted that *Youngberg v. Romeo* "involved the liberty interests (under the Due Process clause) of an involuntarily committed mentally retarded person, and *DeShaney v. Winnebago County Dept. of Social Services* . . . involved the due process rights of a child who had been beaten by his father in the home." *McKinney*, 113 S. Ct. at 2485 n.3 (Thomas, J., dissenting) (citing DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 191 (1989); Youngberg v. Romeo, 457 U.S. 307, 309-10 (1982)); *see supra* notes 124, 127 (discussing *DeShaney* and *Youngberg*, respectively, in more detail).

157 The Court had not addressed ETS as an egregious condition of prison life until *McKinney*, but the circuit and district courts considered this circumstance of imprisonment as early as 1981. *See* Franklin v. Oregon, State Welfare Div., 662 F.2d 1337, 1337, 1347 (9th Cir. 1981); *see also supra* note 111 (discussing other lower court decisions considering the issue of prisoner exposure to ETS).

158 The *McKinney* Court ordered the application of the two-part test established in *Wilson* requiring the prisoner to show both the objective and subjective elements of Eighth Amendment analysis. *McKinney*, 113 S. Ct. at 2481-82. This test encompassed the rulings of *Rhodes v. Chapman*, *Estelle v. Gamble*, and *Trop v. Dulles*. Wilson v. Seiter, 111 S. Ct. 2321, 2323, 2324 (1991) (citing Rhodes v. Chapman, 452 U.S. 337 (1981) (acknowledging that conditions of confinement are subject to Eighth Amendment scrutiny); Estelle v. Gamble, 429 U.S. 97 (1976) (requiring deliberate indifference to medical needs) (other citations omitted)).

159 *See Rhodes*, 452 U.S. at 345 (citations omitted) (declaring that conditions of confinement are forms of punishment within the scope of the Eighth Amendment).

160 *See McKinney*, 113 S. Ct. at 2482 (Thomas, J., dissenting) (citation omitted).

not a novel proposition.[161] One of the basic human needs that the state must provide for is a safe and sanitary environment.[162] Both the Supreme Court and the circuit courts recognize that inmates have a right be protected from conditions that threaten their health.[163] Indeed, it would be illogical to mandate that prison officials address conditions causing immediate harm while allowing them to ignore those conditions that cause latent harm.[164] Accordingly, numerous situations have been found to constitute cruel and unusual punishment because they jeopardize the future well-being of prisoners: inmates with contagious diseases housed with the general population or, worse yet, in crowded solitary confinement cells;[165] lack of protection for inmates vulnerable to physical and

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161 *Id.* at 2480 (citing *DeShaney*, 489 U.S. at 200; *Youngberg*, 457 U.S. at 315-16; Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980); Gates v. Collier, 501 F.2d 1291, 1291 (5th Cir. 1974)). For an overview of the case law supporting the proposition that the Eighth Amendment proscribes future harm, see *supra* notes 120 and 122.

162 *See supra* notes 120, 122, and accompanying text (discussing case law demonstrating that the Eighth Amendment protects inmates from conditions that jeopardize their health and safety).

163 *McKinney*, 113 S. Ct. at 2480; *see* Powell v. Lennon, 914 F.2d 1459, 1464 (11th Cir. 1990) (concluding that exposure to friable asbestos creates an unsafe and unhealthy environment in violation of the Eighth Amendment); Glick v. Henderson, 855 F.2d 536, 539-40 (8th Cir. 1988) (determining that a prisoner stated a valid Eighth Amendment claim if he could show that prison officials responded unreasonably to a pervasive risk of contracting AIDS); Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (ruling that extensive periods of depriving inmates of physical exercise jeopardized their health and violated the Cruel and Unusual Punishments Clause); Laureau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (declaring that a prison administration infringes upon the Eighth Amendment rights of prisoners if it fails to take reasonable steps to ensure that inmates do not contract contagious diseases).

In *McKinney*, Justice White asserted, without citing supporting case law, that inmates have the right to be protected from health risks. *McKinney*, 113 S. Ct. at 2480. Nevertheless, the Justice's lack of detail should not detract from the common sense of his statement. Adequate support, however, clearly exists for this propostion. *See supra* notes 120, 122 (setting forth lower court decisions finding that exposure to risk of future harm gives rise to Eighth Amendment concerns). For a review of Justice White's reasoning in *McKinney* regarding future harm, see *supra* notes 120-30 and accompanying text.

164 *McKinney*, 113 S. Ct. at 2480. In examining the prison conditions in *Hoptowit v. Spellman*, the Ninth Circuit proffered that prisoners have the "right not to be subjected to unreasonable threat of injury or death by fire and need not wait until actual causalities occur in order to obtain relief from such conditions." Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) (citing *Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir. 1980)).

165 Hutto v. Finney, 437 U.S. 678, 682-83, 687 (1978) (citing Holt v. Sarver, 300 F. Supp. 825, 832 (E.D. Ark. 1969)); *Lareau*, 651 F.2d at 109.

In *Hutto*, the Court agreed with the district court's concern that prisoners confined in the isolation unit were subjected to overcrowded cells and often celled with inmates carrying infectious diseases. *Hutto*, 437 U.S. at 682-83, 687. The *Hutto* Court expressed further concern that the mattresses used by the inmates were not necessar-

sexual assaults by other inmates;[166] exposed electrical wiring in cells and inadequate fire prevention measures;[167] deficient ventilation and climate control;[168] lack of routine exercise;[169] unsanitary conditions, including filth and vermin infestation;[170] and exposure

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ily returned to the same inmate each night, thus facilitating the spread of disease. *Id.* For more detail on *Hutto*, see *supra* notes 81-86 and accompanying text.

In *Laureau*, the court of appeals sustained the district court's determination that failure to screen new inmates for communicable diseases before introducing them into the general population transgressed the Eighth Amendment. *Laureau*, 651 F.2d at 109. The court agreed that the risk of spread of disease constituted an "[omission] sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

166 *Holt II*, 309 F. Supp. 362, 376-77 (1970). The court in *Holt II* reviewed the Arkansas prison system's confinement of inmates in open barracks. *Id.* The court determined that these inmates live in constant fear that each and every night they would be victims of physical assault and rape. *Id.* at 377. Ultimately, the court held that these and other conditions violated society's standard of decency and thus affronted the Eighth Amendment. *Id.* at 381. For a more detailed discussion of *Holt II*, see *supra* notes 69-73 and accompanying text.

167 Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985); Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974). In *Gates*, the court reviewed the physical facilities of a Mississippi state prison and regarded the conditions as "unfit for human habitation under any modern concepts of decency." *Id.* In arriving at this conclusion, the court placed significant weight on the fact that frayed, exposed electrical wiring represented a safety hazard and that fire fighting equipment was so deficient it would be virtually impossible to extinguish a fire. *Id.* The court also discussed the spread of disease due to an antiquated sewage system. *Id.*

In *Hoptowit*, the court sustained the district court's determination that substandard fire prevention equipment abridged the Eighth Amendment because it endangered the lives of prisoners. *Hoptowit*, 753 F.2d at 784. The court promulgated that "[p]risoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions." *Id.* (citing Leeds v. Watson, 630 F.2d 674, 675-76 (9th Cir. 1980)); *cf.* French v. Owens, 777 F.2d 1250, 1257-58 (7th Cir. 1985) (acknowledging that "fire and occupational safety are legitimate concerns under the [E]ighth [A]mendment," but holding that prison administrators only have to meet a minimal constitutional standard and do not have to comply with the Indiana Fire Code).

168 *Id.* at 1252 (ruling that the inadequate ventilation and inability of the air circulation system to properly distribute warm and cool air, combined with a double celling condition, unconstitutional); *Hoptowit*, 753 F.2d at 784 ("The lack of adequate ventilation and air flow undermines the health of inmates and the sanitation of the penitentiary.").

169 Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985). The *Martin* court held that claims of insufficient opportunity to exercise are cognizable under the Eighth Amendment, and an inmate should be afforded the chance to present evidence of such lack of opportunity at trial. *Id.*

170 *French*, 777 F.2d at 1252; *Hoptowit*, 753 F.2d at 783; Wright v. McMann, 387 F.2d 519, 521-22 (2d Cir. 1967). The *French* court approved the district court's finding that the filth-encrusted toilets and lavatories and the dirty, odorous rooms comprised unconstitutional conditions. *French*, 777 F.2d at 1252. Similarly, the *Hoptowit* court held that the health hazards created by vermin infestation in conjunction with "unsanitary conditions such as standing water, flooded toilets and sinks, and dank air, is an unnec-

to asbestos.[171]

As often occurs in the above mentioned situations, the manifestation of the physical ailments resulting from ETS exposure is often delayed.[172] Nevertheless, the health risks involved in these situations proved sufficient reason to raise judicial concern. In fact, ETS exposure may be even more perilous than some of these other conditions because of its deadly ramifications. As a Ninth Circuit judge aptly expressed, "this case is not about a sore throat, a runny nose, or red eyes; it is about cancer."[173] The risks to one's health attributed to ETS exposure have also been documented by both the Surgeon General and the Environmental Protection Agency (EPA).[174] Significantly, the EPA classified ETS as a Group A carcinogen[175]—a substance known to cause cancer in human beings.[176]

In *McKinney*, the United States as *amicus curiae* acknowledged that there are certain toxic substances to which no one should be exposed, and thus conceded that subjecting inmates to such exposure would sufficiently offend society to constitute cruel and unusual punishment.[177] It is likely that cancer-causing agents like

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essary and wanton infliction of pain proscribed by the Eighth Amendment." *Hoptowit*, 753 F.2d at 783.

In *Wright*, the court concluded that the atrocious conditions of a strip cell in which an inmate was confined for periods of 33 days and then 21 days were unconstitutional. *Wright*, 387 F.2d at 525. The court reported that the cell was "fetid and reeking from the stench of the bodily wastes of previous occupants which [the inmate alleged] covered the floor, the sink, and the toilet." *Id.* at 522. The court further noted that the inmate was deprived of any hygienic implements such as soap, towels, toilet paper, toothbrush, and comb with which to groom himself. *Id.* at 521.

171 Powell v. Lennon, 914 F.2d 1459, 1463 n.9, 1464. (holding prison administrator's refusal to move a prisoner to an asbestos-free cell after notice of the danger constitutes deliberate indifference to a serious medical need).

172 Illnesses associated with ETS exposure are lung cancer, reductions in lung functions, increased respiratory discomfort such as coughing and wheezing, middle ear effusion, asthma, pneumonia, bronchitis, and bronchiolitis. EPA REPORT, *supra* note 28, at 1-1, 1-5, 1-15.

173 Clemmons v. Bohannon, 956 F.2d 1523, 1530 (10th Cir. 1992) (en banc) (Seymour, J., dissenting).

174 EPA REPORT, *supra* note 28, at 1-1, 1-2, 1-5, 1-15 (cataloguing the diseases and negative effects attributed to ETS exposure); BUREAU OF BUS. PRAC., ENVIRONMENTAL TOBACCO SMOKE IN THE WORKPLACE: HEALTH, LEGAL AND ECONOMIC IMPACTS 9 (1993) (reporting the Surgeon General's finding that ETS is a health risk for both smokers and non-smokers).

175 Other substances in this category include asbestos, benzene, beryllium, mercury, and vinyl chloride. *See* ROBERT V. PERCIVAL, *et al.* Environmental Regulation Law, Science, & Policy 855, 861 (1992).

176 FACT SHEET, *supra* note 43, at 2; EPA REPORT, *supra* note 28, at 1-1.

177 *McKinney*, 113 S. Ct. at 2481. In *McKinney*, the majority recounted that

> [t]he Government recognizes that there may be situations in which ex-

benzene, vinyl chloride, asbestos, and now ETS would be among those "toxic substances" to which the government referred in its brief. In fact, the Eleventh Circuit ruled that deliberate indifference to an inmate's exposure to asbestos, a human carcinogen like ETS, violated the Eighth Amendment even though the inmate did not yet manifest any symptoms of asbestos-related illness.[178]

Accordingly, a successful cause of action can be grounded upon ETS exposure if the inmate establishes the objective and subjective elements espoused in *Wilson*.[179] It is important to remember that Justice White did not toll a victory bell for McKinney. McKinney did not receive the injunction nor the monetary damages he sought.[180] Rather, the majority ruled only that McKinney stated a cause of action under the Eighth Amendment.[181] McKinney must still demonstrate at trial that the prison officials acted with deliberate indifference in exposing him to a harm sufficiently serious to affront the societal standards of decency.[182]

Apparently, Justice Thomas would restrict the interpretation of the Eighth Amendment to a textual reading within the Amendment's historical context.[183] In so doing, Justice Thomas disre-

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> posure to toxic or similar substances would 'present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of anyone to the substance should therefore be prevented—that' the Amendment's protection would be available even though the effects of exposure might not be manifested for some time.

Id. (citations omitted).

178 Powell v. Lennon, 914 F.2d 1464 (11th Cir. 1990). The *Powell* court observed that prison officials were aware that the inmate's life was threatened due to his exposure to friable asbestos, yet they refused to place the inmate in an asbestos-free cell. *Id.* The court concluded that the officials were deliberately indifferent to the inmate's serious medical needs when they ignored his request to be housed in an asbestos-free cell. *Id.*

179 *See* Wilson v. Seiter, 111 S. Ct. 2321, 2321 (1991). For a discussion of the *Wilson* Court's application of objective and subjective components to Eighth Amendment analysis, see *supra* notes 99-109 and accompanying text.

180 McKinney v. Anderson, 924 F.2d 1500, 1502, 1503 (9th Cir. 1991). The magistrate granted the defendants' motion for directed verdict, and therefore denied McKinney's request for both injunctive relief and damages. *Id.* at 1503. Thus, on appeal, McKinney's overall objective was to have the appellate court reinstate his cause of action and remand for a new trial. *See id.*

181 *McKinney*, 113 S. Ct. at 2481.

182 *Id.* As Justice White suggested, the recent changes in Nevada's prison smoking policy and the fact that McKinney no longer lives with a smoking cellmate play a significant role in whether McKinney will be able to substantiate his case. *Id.* at 2482.

183 *Id.* at 2483-84 (Thomas, J., dissenting). Justice Thomas lamented that "[j]udicial interpretations of the Cruel and Unusual Punishments Clause were, until quite recently, consistent with its text and history." *Id.* at 2484. *But see* Granucci, *supra* note 3 (theorizing that the framers misconstrued the original intent of the drafters of the 1689 English Bill of Rights).

garded the Court's determination that the Eighth Amendment is not static.[184] The Amendment is flexible and derives its meaning from society's evolving standards of decency.[185] Determining what society deems acceptable treatment of prisoners, however, is not an easy task.[186] When the Court has conducted such an analysis, it has considered a variety of factors including legislative action, jury decisions, opinions from other countries, public opinion polls, learned groups, and informed citizens.[187]

In the case of ETS exposure, public opinion polls and community action such as the Great American Smokeout demonstrate public concern over the effects of smoking and passive smoking.[188] Legislative action, however, provides a more clear and dependable picture.[189] By 1989, forty-one states and the District of Columbia had enacted statutes restricting smoking in public.[190] Further-

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184 *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958); *see also* Weems v. United States, 217 U.S. 349, 368 (1910) (noting that the language of the Eighth Amendment is not precise).

185 *See* Gregg v. Georgia, 428 U.S. 152, 173 (1976); *Trop*, 356 U.S. at 100-01; *see also* Wefing, *supra* note 3, at 484 (noting that "the Court has not attempted to interpret this provision of the Constitution in a purely historical or static manner but has accepted the concept that it must develop over time").

186 *Id.* at 485-86. Professor Wefing underscored that the Court has struggled to develop objective criteria for determining society's perspective regarding what constitutes decency. *Id.* at 485. Ultimately, the Professor concluded that the Court is divided over "who makes the decision—the Justices after considering different views of society, or the society and the Justices simply figure out what society's decision is." *Id.* at 491-92.

187 *Id.* at 487.

188 The Great American Smokeout is a nationwide rally held on the third Thursday of November each year and sponsored by the American Cancer Society. THE GREAT AMERICAN SMOKEOUT PUBLIC RELATIONS PROMOTION GUIDE (American Cancer Society, Atlanta, GA) June, 1994, at 23. The Smokeout encourages smokers to forego smoking for 24 hours, and the intent of the program is to prove to smokers that if they can quit for one day, they can give up cigarettes forever. *Id.* The Smokeout began in 1971 as a local effort in Randolph, Massachusetts to raise money for a high school scholarship fund. *Id.* at 3. In 1977, the Smokeout became a national event. *Id.* As of 1994, the Smokeout is in its eighteenth year, and over the years, the Smokeout has enjoyed the support of numerous national celebrities such as actors Ed Asner and Larry Hagman, singers Sammy Davis, Jr. and Natalie Cole, and model Fabio. *Id.* The Smokeout, however, is not only for smokers; nonsmokers can also participate

> by adopting family members, friends, and co-workers who smoke and encouraging them to quit . . . . [they support participants by] being a calm, smiling, reassuring influence, continually offering praise and encouragement . . . and agreeing, for the day, to give up something they love, such as chocolate, coffee, soft drinks, or soap operas.

Id. at 23.

189 *See* Thompson v. Oklahoma, 487 U.S. 815, 822 (1988) (observing that evolving standards of decency may be determined by a perusal of recent state legislative acts and jury determinations).

190 Stroud, *supra* note 26, at 343 n.22. The 41 states include: Alaska, Arizona, Arkan-

more, the federal government has restricted smoking on airline flights of two hours or less.[191] Indeed, in October, 1993, Senator Lautenberg of New Jersey proposed a bill that would ban smoking in all public areas.[192]

Legislation directed specifically at prison administrations also provides restrictions on smoking. For example, wardens have the authority to establish non-smoking areas within the prison.[193] It is also important to note that the Model Act for the Protection of the Rights of Prisoners provides that prisoners have a right to a "generally healthful environment."[194] Moreover, and very significantly, the rules governing prison administration provide that prison officials must "accommodate nonsmoking inmates in nonsmoking living quarters. The sharing of a cell or living area between a smoker and a nonsmoker will be avoided except where impractical due to circumstances, and then may be done only for a limited duration."[195]

The abundance of legislative activity demonstrates that the public conscience considers the dangers of secondhand smoke important enough to be formally addressed and regulated. It additionally evidences that nonsmokers are no longer willing to tolerate the risks imposed upon their health.[196] The tobacco in-

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sas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. *Id.* at 349 n.67.

191 49 U.S.C. app. § 1374(d) (1988).

192 The bill "prohibits smoking in all public facilities, defined as spaces regularly entered by [ten] or more people at least once a week, unless a smoking area has separate ventilation." *Congressmen Aim to Ban Smoking in Public Places*, CHI. TRIB., Oct. 30, 1993, at 2.

193 28 C.F.R. § 551.160 (1987).

194 Danne, *supra* note 14, at 130.

195 28 C.F.R. § 551.162(b) (1991).

196 *See* Andrew Blum, *Secondhand Smoke Suits May Catch Fire*, NAT'L L.J., Mar. 1, 1993 at 1, 12. (reporting the developing trend of plaintiffs suing cigarette manufacturers for health problems associated with ETS exposure); Stroud, *supra* note 26, at 340 ("One may have a 'right' to harm his own health if he so chooses, but he does not have any right to harm the health of others. . . .").

Twenty years ago, no one even considered regulating cigarette smoking, much less banning it. Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 STAN. L. REV. 475, 476 (1991). Indeed, the government promoted the industry through subsidies and by distributing free cigarettes to the troops engaged in war. *Id.* Even the popular culture supported smoking through depictions in films, posters and advertising. *Id.* Over time, however, the "cool" image of smoking has changed. *Id.* "Quite simply, the starting point for restrictive regulatory action is the perception of a social problem." *Id.* at 477.

dustry argues that these regulations are unnecessary and excessive because people can choose whether or not to enter places that allow smoking.[197]

Inmates, however, cannot exercise such an option. Thus, exposure to ETS in such a setting is often both involuntary and inescapable. While inmates are clearly not the social group most engendering sympathy,[198] they nevertheless retain certain rights while in prison.[199] How a society treats its criminals reflects on the moral fiber of the society.[200] Modern legal systems have progressed beyond *lex talionis*—an eye for an eye, a tooth for a tooth. Thus, despite the animosity often felt toward criminals, society must focus on the goal of preserving human dignity.[201]

In deciding *McKinney*, the Court weighed all of these factors and ultimately afforded McKinney the opportunity to prove that the harm he experienced was serious and sufficiently offensive to common standards of decency. This holding is not an extension of Eighth Amendment jurisprudence but it is simply recognition of another appropriate application of the Amendment.

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197 *Vow in Congress to Ban Smoking in Public Places, Lawmakers 'Declare War' on Powerful Tobacco Lobby*, SAN FRANCISCO CHRON., Oct. 30, 1993, at A9.

198 *See* Rhodes v. Chapman, 452 U.S. 337, 358 (1958) (Brennan, J., concurring). Justice Brennan recognized that society shudders at prison conditions only when they reach abominable levels. *Id.* The Justice observed that prison conditions do not receive much attention by the public at large because inmates are "'voteless, politically unpopular, and socially threatening.'" *Id.* (quotation omitted).

199 Cooper v. Pate, 378 U.S. 546 (1964); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968). The appellate court stated, "A prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors." *Id.* (quotation omitted). Additionally, by virtue of *Estelle*, *Rhodes*, and their progeny, the Eighth Amendment also follows prisoners behind those doors. *See supra* notes 75-80 and notes 87-93 and accompanying text (detailing the facts and holdings of *Estelle* and *Rhodes*, respectively).

200 *See* Granucci, *supra* note 3, at 844-45 (reviewing the development of acceptable standards of punishment through the centuries).

201 *See* Trop v. Dulles, 356 U.S. 86, 100 (1958); Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court*, 27 ARIZ. L. REV. 25, 60 (1985) (arguing that the development of the cruel and unusual punishments doctrine can only progress forward toward greater respect for human dignity); Granucci, *supra* note 3, at 844 (surveying the development of limitations on punishment since biblical times).