

COMMENTS

HELLING REVISITED: IS IT TIME TO FUNCTIONALLY DISPATCH WITH THE SOCIAL TOLERANCE PRONG OF THE ETS EXPOSURE CLAIMS?

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I. INTRODUCTION

It is now clearly established that the deleterious effect of secondhand smoke is a matter of public interest and concern.¹ Since the release of the 1986 United States Surgeon General's report detailing the harms of smoking, state and local legislatures have been quite active in creating measures to control secondhand smoke and protect the rights of non-smokers in society.² In 1993, the United States Supreme Court made the unprecedented decision to consider a prisoner's extreme exposure to secondhand smoke unconstitutional as cruel and unusual punishment, in violation of the Eighth Amendment of the Constitution.³ This landmark ruling of *Helling v. McKinney* recognized a theory of harm beyond that with which the Eighth

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1 See Patrick Kabat, Note, "Till Naught but Ash Is Left To See": *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y L. & ETHICS 128, 130 (2009) (noting the increase in smoking regulations in the past millennium); see also Ctrs. for Disease Control & Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57 MORBIDITY & MORTALITY WKLY. REP., 1226, 1226 (2008), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5745.pdf> (analyzing the mortality rates, years of potential life lost, and productivity losses resulting from smoking); *Fact Sheet: Respiratory Health Effects of Passive Smoking*, U.S. ENVTL. PROTECTION AGENCY (Jan. 1993), <http://www.epa.gov/smokefree/pubs/etsfs.html> (concluding "that the widespread exposure to environmental tobacco smoke in the U.S. present a serious and substantial public health risk"); *Secondhand Smoke*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm (last visited May 11, 2011) (discussing the health effects of secondhand smoke).

2 *E.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* (1986); see also Kabat, *supra* note 1 (presenting a survey of current legislation intended to curb public smoking).

3 *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

Amendment typically dealt.⁴ With this ruling, the Court extended Eighth Amendment protection to a situation where the plaintiff—a prisoner—neither lacked basic human necessities nor sustained positive present injury, or even certain future harm.⁵ Commentators have regarded the ruling as the Court’s acceptance of secondhand smoke as a serious health concern, as well as a signal to legislatures to regulate prison atmospheres accordingly.⁶

Eighteen years have passed since *Helling* came down from the Supreme Court. In the interim, the scientific and social consensus that environmental tobacco smoke (“ETS”) is positively harmful has crystallized.⁷ It is no longer legitimate to argue, as did the United States in its *Helling* amicus brief, that ETS exposure should not constitute harm because “[s]moking is widespread in society, and millions of people are exposed to its secondary effects on a daily basis.”⁸ Accordingly, some commentators have called for a minimum standard of

4 See Jacqueline M. Kane, Note, *You’ve Come a Long Way, Felon: Helling v. McKinney Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment*, 72 N.C. L. REV. 1399, 1401 (1994) (discussing how *Helling* held that future health risks can comprise an Eighth Amendment claim).

5 Cf. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (declaring excessive force against prisoner as definitively falling under Eighth Amendment protection); *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (determining Eighth Amendment applicable to deprivations of “essential food, medical care, or sanitation”); *Estelle v. Gamble*, 429 U.S. 97, 103–106 (1976) (finding Eighth Amendment violation when basic medical care was withheld from prisoner).

6 See, e.g., Matthew H. Kraft, Note, *Second Hand Smoke as Cruel and Unusual Punishment: Helling v. McKinney: The Insurmountable Burden of Proof and the Role of the Court*, 3 GEO. MASON INDEP. L. REV. 257, 278–79 (1994) (stressing the Court’s standard as flexible and cautious in the face of scientific uncertainty and societal divide).

7 See, e.g., IRA J. CHASNOFF & JEFFREY LINK, AM. MED. ASS’N, ENVIRONMENTAL TOBACCO SMOKE: OFFICE-BASED STRATEGIES FOR PREVENTION AND INTERVENTION (2008), available at <http://www.ama-assn.org/ama1/pub/upload/mm/433/environmental-tobacco-smoke.pdf> (setting forth in pamphlet form a set of goals for clinicians pertaining to ETS, including increasing physician knowledge and awareness, as well as direction on how to counsel patients and families on tobacco exposure reduction); WORLD HEALTH ORG., PROTECTION FROM EXPOSURE TO SECOND-HAND TOBACCO SMOKE 2 (2007), available at http://whqlibdoc.who.int/publications/2007/9789241563413_eng.pdf (prescribing a comprehensive set of policy recommendations for achieving smoke-free environments). See generally *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE SURGEON GENERAL (June 27, 2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/> (containing full 2006 Surgeon General’s Report, as well as extensive links to information on the dangers of secondhand smoke).

8 Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Helling v. McKinney*, 509 U.S. 25 (1993) (No. 91–1958), 1992 WL 12012062.

air quality for prisons.⁹ Our heightened knowledge of the effects of ETS has led to some dissatisfaction concerning *Helling's* approach to determining whether ETS exposure in a prison constitutes cruel and unusual punishment.¹⁰

In accordance with traditional Eighth Amendment jurisprudence, the *Helling* test has subjective and objective components. Subjectively, the plaintiff must show that authorities were deliberately indifferent to the harm being sustained;¹¹ this Comment does not deal with this aspect of the *Helling* test. Objectively, the plaintiff must show that he is sustaining unreasonable and scientifically cognizable harm.¹² Beyond an objective, scientific determination of sustained harm, however, the test further requires a determination of the extent of ETS exposure tolerated by society and subsequently an analysis of the plaintiff's sustained exposure relative to that benchmark of societal ETS tolerance.¹³ This Comment argues that the social tolerance inquiry of the *Helling* test, though consistent with Eighth Amendment jurisprudence, is unethical and legally inefficient in light of current knowledge of the harms of ETS exposure. Once a plaintiff establishes the occurrence of scientifically unreasonable exposure, the right of a prisoner to be free from unreasonable ETS exposure should not turn on a litigated conception of what level of ETS exposure society would choose to tolerate. By merging the objective harm and social tolerance inquiries and assuming, justifiably, that society would not tolerate anyone being forcibly subjected to a scientifically dangerous level of ETS, courts would recognize the recent shift to a presumptively ETS-intolerant society. Further, such a merger would obviate the necessity of relying upon a diffuse third party's opinion to determine the appropriate air standards for a given prisoner. Beyond yielding conceptual and ethical dividends, the changed approach to

9 See Scott C. Wilcox, Note, *Secondhand Smoke Signals from Prison*, 105 MICH. L. REV. 2081, 2101 (2007) (suggesting judicial and legislative remedies for Eighth Amendment violations).

10 See Kraft, *supra* note 6, at 272–79 (noting the scarcity of research on ETS in 1994 and the resultantly "insurmountable" standard of proof for prisoners); see also Elizabeth Alexander & David C. Fathi, *Smoking, the Perception of Risk, and the Eighth Amendment*, 13 ST. LOUIS U. PUB. L. REV. 691, 692–93, 704 (1994) (analyzing the creation of the social tolerance prong in *Helling* and labeling it a "pyrrhic victory for prisoners"); Wilcox, *supra* note 9 at 2094–97 (prescribing proper approach to the *Helling* standard in light of current research and attitudes regarding ETS). Wilcox approves of *Helling* (as do I), but shows concern for updating the mode of the application of its standard due to shifting social views and improved research data.

11 *Helling*, 509 U.S. at 36.

12 *Id.* at 35–36.

13 *Id.* at 36.

the *Helling* test would also eliminate duplicative litigation and lower evidentiary burdens for pro se litigants bringing claims of this type.

II. *HELLING V. MCKINNEY*: A GATEWAY TO THE RECOGNITION OF LEGAL HARM FROM COMPELLED ETS EXPOSURE

When the Supreme Court decided *Helling* in 1993, the general public was not well informed about the connection between ETS exposure and future harm. The Environmental Protection Agency (“EPA”) had that very year released a landmark report classifying ETS as a class A carcinogen, or a substance known to cause cancer in humans.¹⁴ Tobacco companies reacted quickly to discredit the damaging report.¹⁵ In addition to political maneuvers to discredit the EPA report, the tobacco companies also filed a lawsuit against the government with the intent of having the report formally vacated.¹⁶ The initial lawsuit succeeded in doing this, as a North Carolina District Court judge ruled that the EPA had exceeded its authority and violated procedural mandates in developing the 1993 report.¹⁷ The decision in that case would stand for nine years, until vacated by the Fourth Circuit in 2002.¹⁸ In the meantime, however, the case stood as a powerful tool for the tobacco companies to foster doubt about the 1993 report. Accordingly, public understanding of the causal link between ETS and future harm developed slowly,¹⁹ though legislatures were increasingly moving to outlaw smoking in public places.²⁰

14 U.S. ENVTL. PROT. AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING, at 1–1 (1993), available at <http://cfpub.epa.gov/ncea/cfm/ets/etsindex.cfm> (“ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers.”).

15 See Monique E. Muggli et al., *The Tobacco Industry’s Political Efforts to Derail the EPA Report on ETS*, 26 AM. J. PREVENTIVE MED. 167, 167–77 (2004) (detailing the tobacco industry’s reaction to the 1993 EPA report).

16 *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 466 (M.D.N.C. 1998), vacated 313 F.3d 852 (4th Cir. 2002).

17 *Id.* at 466.

18 *Flue-Cured Tobacco Coop. Stabilization Corp.*, 313 F.3d at 862.

19 With the EPA’s 1993 report under legal scrutiny, activity in medical journals was important for increasing public awareness of ETS harmfulness. See, e.g., Victor M. Cardenas et al., *Environmental Tobacco Smoke and Lung Cancer Mortality in the American Cancer Society’s Cancer Prevention Study II*, 8 CANCER CAUSES & CONTROL 57, 57–63 (1997) (finding results that “agree with the EPA summary estimate that spousal smoking increases lung cancer risk by about 20 percent in never smoking women”); Hari H. Dayal et al., *Passive Smoking in Obstructive Respiratory Diseases in an Industrialized Urban Population*, 65 ENVTL. RES. 161, 161–71 (1994) (finding passive smoking as a “significant risk factor” for obstructive respiratory disease); George Howard et al., *Active and Passive Smoking Are Associated with Increased Carotid Wall Thickness: The Atherosclerosis Risk in Communities Study*, 154 ARCH

The key to finding a prisoner's ETS exposure level unconstitutional would be to concretize the connection between the ETS exposure and future harm. Cases preceding *Helling* had established that, for Eighth Amendment purposes, inmates' basic human needs must be satisfied, including a condition of "reasonable safety."²¹ Many cases had approved a remedy for unsafe conditions prior to the materialization of a harmful event.²² Consequently, the Eighth Amendment had expanded to cover situations in which current practices clearly placed the prisoner in danger of future harm. Important cases of this type included remedies for a failure to provide proper medical care to prisoners, on the theory that withholding such care would result in a lingering discomfort somewhat akin to actual torture.²³ At this time, however, the idea of future harm manifesting as a direct result of ETS

INTERNAL MED. 1277, 1277–82 (1994) (finding a significant increase in carotid artery inter-medial thickness in men exposed to increasing hours of ETS exposure per week); David J. Howard et al., *Environmental Tobacco Smoke in the Workplace Induces Oxidative Stress in Employees, Including Increased Production of 8-Hydroxy-2'-Deoxyguanosine*, 7 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 141, 141–46 (1998) (finding evidence suggesting that exposure to ETS in the workplace causes "oxidative stress, resulting in DNA damage and potentially increasing the risk of certain diseases"); J. Trédaniel et al., *Exposure to Environmental Tobacco Smoke and Risk of Lung Cancer: The Epidemiological Evidence*, 7 EUR. RESPIRATORY. J. 1877, 1877–88 (1994) (surveying available studies and stating that "the causal association between ETS exposure and lung cancer now seems well-established; however, its public health impact is still debated"); A. Judson Wells, *Passive Smoking as a Cause of Heart Disease*, 24 J. AM. C. CARDIOLOGY 546, 546–54 (1994) (concluding that "passive smoking increases the coronary death rate among U.S. never smokers by 20%, to 70%"). *But see* Gio Batta Gori, *Environmental Tobacco Smoke and Coronary Heart Syndromes: Absence of an Association*, 21 REG. TOXICOLOGY & PHARMACOLOGY 281, 281–95 (1995) (asserting that "[b]y scientific standards, the weight of evidence continues to falsify the hypothesis that ETS exposure might be a CHD [coronary heart disease] factor"); S. Hockertz et al., *Acute Effects of Smoking and High Experimental Exposure to Environmental Tobacco Smoke (ETS) on the Immune System*, 10 CELL BIOLOGY & TOXICOLOGY 177, 177–90 (1994) ("[O]ur data do not favor immunosuppression and the possibility of increased risk of infection in nonsmokers exposed to ETS under real-life conditions."); Geoffrey C. Kabat et al., *Relation Between Exposure to Environmental Tobacco Smoke and Lung Cancer in Lifetime Nonsmokers*, 142 AM. J. EPIDEMIOLOGY 141, 141–48 (1995) (finding "little indication of an association of environmental tobacco smoke with lung cancer in nonsmokers").

²⁰ See Kabat, *supra* note 1, at 194–99 (tabulating existing ETS legislation including effective date of operation).

²¹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); *see also* *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (finding it "cruel and unusual punishment to hold convicted criminals in unsafe conditions").

²² *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) (holding that a prisoner need not actually be assaulted before gaining relief); *Gates v. Collier*, 501 F.2d 1291, 1303 (5th Cir. 1974) (entitling inmates to relief under Eighth Amendment when their personal safety was threatened by the removal of electrical wiring and the commingling of diseased prisoners).

²³ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

exposure was relatively attenuated and insufficient to show legal causation.

A brief overview of the facts of *Helling* are helpful to understand how the Supreme Court approached the case and came to apply an Eighth Amendment analysis to ETS exposure cases. In 1987, when the case first arose, William McKinney was incarcerated in the Nevada State Prison.²⁴ McKinney filed a pro se complaint under 28 U.S.C. § 1983, alleging that he had been assigned to a cell with an inmate who smoked five packs of cigarettes per day.²⁵ McKinney alleged that because of his compelled exposure to the accompanying cigarette smoke, he suffered from nosebleeds, headaches, chest pains, and a lack of energy.²⁶ McKinney sought monetary damages, an injunction prohibiting defendants from housing him with smoking inmates, and attorney fees.²⁷ The magistrate to whom the District Court delegated the issue analyzed McKinney's claims in two regards: First, whether an inmate has a constitutional right to a smoke-free environment, and second, whether the guards at his facility had been deliberately indifferent to McKinney's medical needs.²⁸ The District Court ultimately rendered a directed verdict against McKinney.²⁹ On appeal the Ninth Circuit held that "even if an inmate cannot show that he suffers from serious, immediate medical symptoms caused by exposure to ETS," compelled exposure could be cruel and unusual punishment if it posed an unreasonable risk of harm to the inmate's health.³⁰ The Supreme Court first granted certiorari to the case from the Ninth Circuit to mandate that the Court undertake the subjective analysis of whether prison authorities demonstrated "deliberate indifference" to the plaintiff's situation.³¹ The Court again took the case on appeal after the initial remand to clarify the entirety of the test to be applied to prisoner ETS claims.³² This latter Supreme Court decision came down in 1993; this Comment analyzes the present application of the test the Court then directed to be utilized in Eighth Amendment ETS exposure cases.

As stated, by 1993, some courts had entertained arguments of serious harm resulting from ETS exposure, but others were hesitant to

24 *Helling v. McKinney*, 509 U.S. 25, 28 (1993).

25 *Id.*

26 *McKinney v. Anderson*, 924 F.2d 1500, 1502 (9th Cir 1991).

27 *Id.*

28 *Id.* at 1503.

29 *Id.*

30 *Id.* at 1503–04.

31 *Helling v. McKinney*, 509 U.S. 25, 29–30 (1993).

32 *Id.* at 30–31.

find an immediate causal connection between ETS exposure and serious physical harm.³³ Indeed, this was McKinney's main hurdle at the outset of his lawsuit.³⁴ Against this backdrop, the argument of the United States as amicus in *Helling* that "the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a 'serious medical need,' and that exposure to ETS is not contrary to current standards of decency," is not markedly inappropriate.³⁵ The *Helling* Court, however, disagreed, and found that compulsory ETS exposure in prison could violate the Eighth Amendment as an unreasonable danger to health, provided that the plaintiff could satisfy all components of the test put forth by the Court.³⁶

The *Helling* test uses objective and subjective components to determine whether the ETS exposure rises to a violation of the Eighth Amendment.³⁷ The subjective component of the test for Eighth Amendment suitability of prison conditions requires that the prisoner demonstrate "deliberate indifference" on behalf of the prison authorities.³⁸ This standard is divorced from any consideration of the extent of the harm of ETS, as it seeks to ensure that prison officials are not punished for the existence of improper conditions of which they had no knowledge.³⁹

The objective component of the *Helling* test attempts to judge whether the ETS exposure is sufficiently grave as to warrant the key finding of causation between current practices and likely future harm.⁴⁰ This question of causation, in the case of latent harm and scientific uncertainty, is necessarily quite grey. The test requires that the prisoner show that his or her "future health [has been] unreasonably endangered, . . . that he himself is being exposed to unrea-

33 See, e.g., *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (characterizing ETS exposure as producing a "potential, distant harm" to health and stressing that prisoner displayed no symptoms "different from those suffered by everyone in society").

34 See *McKinney v. Anderson*, 924 F.2d 1500, 1503 (9th Cir. 1991) (detailing procedural history of the case).

35 *Helling*, 509 U.S. at 34 (citing Brief, *supra* note 8, at 20–22).

36 *Helling*, 509 U.S. at 35–36.

37 *Id.* at 35.

38 *Id.* at 36. See generally *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (holding that a prisoner must show a culpable state of mind on the part of the prison officials to prove an Eighth Amendment violation based on the conditions of confinement).

39 See *Wilson*, 501 U.S. at 300 (establishing the necessity of a subjective inquiry in an Eighth Amendment analysis by stating that "[t]he infliction of punishment is a deliberate act intended to chastise or deter") (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

40 *Helling*, 509 U.S. at 35.

sonably high levels of ETS.”⁴¹ This takes the form of a “scientific and statistical inquiry into the seriousness of the potential harm” and the likelihood of actual harm resulting from the ETS exposure.⁴² The Court noted that the prisoner’s *current* holding condition is “[p]lainly relevant” to this inquiry.⁴³ Regulatory mechanisms and policies in place at the holding facility for minimizing health risks from ETS are also relevant.⁴⁴ All of these factors are intuitive to the inquiry of whether the prisoner’s exposure to ETS is overwhelming enough to present a direct danger to his or her future health, and so constitute an Eighth Amendment violation.

The *Helling* Court, however, added one more consideration to the objective prong by requiring a court “to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”⁴⁵ “In other words,” the Court stated, “the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.”⁴⁶ This “social tolerance” prong is longstanding in Eighth Amendment jurisprudence.⁴⁷ It serves the important function of ensuring that the construction of the Eighth Amendment remains in tune with the current practices and knowledge of an ever-changing society.⁴⁸ In *Helling*, mandating the fulfillment of the social tolerance prong allowed the Court to send a signal that ETS had been proven dangerous to health, while remaining conservative by ultimately reserving the exact judgment of the extent of this danger to “society,” or more likely, the representative branches of government.⁴⁹ The social tolerance sub-inquiry theoretically would ensure that the constitutional standards for ETS exposure in prisons

41 *Id.*

42 *Id.* at 36.

43 *Id.* at 35–36.

44 *Id.* at 36.

45 *Id.*

46 *Id.*

47 *See* *Weems v. United States*, 217 U.S. 349, 378 (1910) (“The [Eighth Amendment] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”); *see also* *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

48 *See supra* note 47 and accompanying text.

49 *See* Kraft, *supra* note 6, at 279 (“If the *Helling* Court was to adhere to its limited role in the U.S. judiciary, it had only one choice: to send a signal to the legislatures and organizations that have the resources, the public support, and the power to address the problem of ETS.”).

would remain appropriate in the face of both changes in social attitudes regarding ETS and the future accumulation of knowledge concerning the causal relationship between ETS and future harm.

III. IN A DECADE OF ACCELERATING CHANGE, THE *HELLING* TEST BEGINS TO SHOW ITS WEAKNESSES

Eighteen years have passed since the formulation of the *Helling* test for determining unreasonable exposure to ETS in prisons. Since the EPA's classification of ETS as a class A carcinogen in 1993,⁵⁰ more state and local governments gradually began to pass general smoking bans affecting restaurants, bars, and most enclosed workplaces.⁵¹ Most general statewide bans contain varying numbers of exceptions, which leads to differential restrictions upon smoking in public spaces.⁵² However, more than thirty-five states currently have some statewide form of smoking control in place,⁵³ with Michigan⁵⁴ and Wisconsin⁵⁵ having recently joined the more restrictive ranks. The shift is clear: The public attitude toward smoking in enclosed and public spaces has shifted from generally permissive to presumptively barred, albeit to different extents according to state law.⁵⁶

In this light, it seems that the flexibility afforded by the *Helling* test's social tolerance prong would work to lessen the extent of ETS which a prisoner's holding environment might contain under the Constitution. In practice, however, the standard seems to have become muddled over time. And most unfortunately, the outcomes of

50 Press Release, Env'tl. Prot. Agency, EPA Designates Passive Smoking a "Class A" or Known Human Carcinogen (Jan. 7, 1993), available at <http://www.epa.gov/history/topics/smoke/01.htm>.

51 Kabat, *supra* note 1, at 134.

52 *Id.* at 135; see also *Public Place Smoking Bans in States, 2008*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparetable.jsp?ind=86&cat=2> (last visited May 11, 2011) (detailing the varying exceptions to the smoking bans in different states).

53 See *Public Place Smoking Bans in States, 2008*, *supra* note 52 (finding 35 states with active public place smoking bans in 2008, including Washington D.C.); cf. Kabat, *supra* note 1, at 191–92, 194–99 (listing different levels of smoking bans present in 2008, and considering 25 measures as sufficiently restrictive to constitute "modern statewide bans").

54 See Peter Luke, *Michigan Workplaces—Including Bars and Restaurants—Will Go Smokefree in May*, MLIVE.COM (Dec. 10, 2009), http://www.mlive.com/politics/index.ssf/2009/12/granholm_gets_smoking_ban_will.html (detailing the recent public smoking ban in Michigan).

55 See Stacy Forster *Smoking Ban Would Take Effect in July 2010*, JS ONLINE (May 6, 2009), <http://www.jsonline.com/news/statepolitics/44464502.html> (outlining the recent smoking ban in the state of Wisconsin).

56 See Kabat, *supra* note 1, at 130 ("Whereas smoking was previously permitted in public . . . we increasingly live in a country where insular smoking spaces are carved out of a public domain in which smoking is generally forbidden.")

many of the cases which turn on the objective prong of *Helling* appear to depend on the confused social tolerance sub-inquiry.

Simmons v. Sager exemplifies a relatively early approach by a court and is instructive as to why the social tolerance prong has become problematic in this sphere.⁵⁷ In this case, the plaintiff prisoner repeatedly asked to be moved to non-smoking quarters, as he had suffered bronchial pneumonia as a child and was susceptible to respiratory infections.⁵⁸ The court dismissed the case in a short opinion noting that the prison had extensive policies in place to mitigate the effects of ETS, and the plaintiff was not suffering from any symptoms of ETS overexposure.⁵⁹ The court fully explained its conclusion that the ETS exposure was not unreasonable by noting that the plaintiff had not alleged that his childhood respiratory problems had persisted into adulthood, and that the plaintiff had not made any ETS-related medical complaints while at the prison.⁶⁰

The opinion continued, however, to put forth a familiar argument:

[i]n many places in society, non-smokers must deal unwillingly with ETS on a daily basis—smoke on others' clothes or on the motel room drapes . . . or the defiant smoker in the non-smoking section of the restaurant or bus. These ETS occurrences in the free world are widely tolerated. As society has not yet demanded that all public areas be kept free of ETS, the court cannot find that society would require prisons to do so.⁶¹

The resurrection of the argument put forth in the 1993 United States amicus brief to *Helling*⁶² is superfluous to the determination in this case that the plaintiff, objectively, did not suffer scientifically unreasonable exposure to ETS. Courts' continued use of this social tolerance standard in the midst of a decade of quickly changing ETS laws has served only to complicate the task of determining a "reasonable" amount of ETS exposure, beyond that which might be scientifically determined.

One complication presented by continued reliance on the social tolerance inquiry is the difficulty courts will have in citing precedent as authority on the matter. As public opinion on ETS shifts, a level of ETS exposure which a court may have found tolerable in the time of *Helling* may no longer be considered so. While this appears to be the

57 *Simmons v. Sager*, 964 F. Supp. 210 (W.D. Va. 1997).

58 *Id.* at 211–12.

59 *Id.* at 212–13.

60 *Id.*

61 *Id.* at 213.

62 Brief, *supra* note 8, at 20.

Helling rule functioning properly, the inability of a court to strongly rest on precedent weakens the court's rulings concerning social tolerance or unreasonable ETS exposure. This disadvantage is particularly relevant in times of rapid change, such as the decade after the *Helling* decision. The court in *Gill v. Smith* noted this difficulty while laying out precedent relevant to the case at hand: "[W]hile this decision [considered as precedent] remains good law," the court cautioned, "it may not provide the current and accurate parameters for judging what levels of exposure to ETS are sufficient to support an Eighth Amendment claim."⁶³ The precedent in question, *Oliver v. Deen*, had been decided seven years earlier, in 1996.⁶⁴ The majority of the precedent the *Gill* court considered on the issue was hardly more recent.⁶⁵ While the difficulty recognized by the *Gill* court may not be present in every case,⁶⁶ it highlights one disadvantage, caused by the nature of the legal system, of pegging a determination of an individual's unreasonable exposure to ETS to a conception of the public's shifting tolerance for exposure to the carcinogen.

The social tolerance prong of the ETS exposure test also presents the difficulty of applying a general social standard to judge the impact of a substance on a given individual. In 1998, the court in *Scott v. District of Columbia* struggled with this very problem.⁶⁷ Notably, *Scott* serves as an important limitation to *Helling* by standing for the proposition that prisoners are not entitled to a smoke-free environment.⁶⁸ In the course of the opinion, however, the court wrestled with the concept of objectively determining the reasonableness of ETS exposure. Particularly relevant is the court's examination of a plaintiff's expert testimony dealing with causative difficulties. The court wrote:

[Plaintiff] failed to demonstrate a causal relationship between his conditions and an increased risk of harm to him from second-hand smoke. Dr. Munzer's testimony established no such nexus Dr. Munzer testified that the health effects of exposure to second-hand smoke var[y] tremendously with the individual, and in order to assess the actual

⁶³ *Gill v. Smith*, 283 F. Supp. 2d 763, 767 n.2 (N.D.N.Y. 2003).

⁶⁴ *Oliver v. Deen*, 77 F.3d 156 (7th Cir. 1996).

⁶⁵ *See Gill v. Smith*, 283 F. Supp. 2d 763, 767-68 (N.D.N.Y. 2003) (citing three cases from 1996, one from 1997, and one from 2000, as well as one case from 2003 concerning only the proper production of evidence).

⁶⁶ *See, e.g., Adams v. Banks*, 663 F. Supp. 2d 485, 490 (S.D. Miss. 2009) (citing two Fifth Circuit cases decided in the previous year which provided clear guidance on the evidentiary standard for summary judgment in ETS cases of this type).

⁶⁷ *Scott v. District of Columbia*, 139 F.3d 940 (D.C. Cir. 1998), *cert. denied sub nom.*, *Dawson v. District of Columbia*, 525 U.S. 851 (1998).

⁶⁸ *Id.* at 943.

risk . . . [he] would have to be familiar with the plaintiffs' medical histories.⁶⁹

Here the court primarily noted the lack of objective, scientific evidence which might have indicated that the plaintiff had been subjected to unreasonable amounts of ETS. The plaintiff's failure on the scientific harm sub-inquiry of *Helling's* objective prong was dispositive. However, the conceptual difficulties of the social tolerance sub-inquiry also began to emerge in this 1998 case. The nature of this inquiry is to take the level of societal ETS tolerance as instructive to an individual's complaint of cruel and unusual punishment. The expert witness for the plaintiffs, absent individual-specific information, clearly hesitated to opine as to the extent of possible effects of ETS upon a prisoner.⁷⁰ Dr. Munzer's professional statement prompts one to question why, if an individual's reaction to ETS "var[ies] tremendously" according to multiple factors,⁷¹ it is proper to hinge an Eighth Amendment determination of proper jail conditions upon the hypothetical ETS tolerance of a potentially fractured and uninformed society—a tolerance level which still may be quite harmful for an inmate particularly susceptible to ETS.

This question of propriety is somewhat illuminated by an understanding of the history behind why courts came to apply this social tolerance analysis to Eighth Amendment ETS cases. As mentioned above, the cruel and unusual clause of the Eighth Amendment historically applied to a quite different form of treatment. The provision, present in a similar form in the English Bill of Rights of 1689,⁷² was

⁶⁹ *Id.* (internal quotation marks omitted).

⁷⁰ *Id.*

⁷¹ *Id.*; see, e.g., Giorgos S. Metsios et al., *A Brief Exposure to Moderate Passive Smoke Increases Metabolism and Thyroid Hormone Secretion*, 92 J. CLINICAL. ENDOCRINOLOGY. & METABOLISM 208, 209–11 (2007) (finding that ETS exposure at bar/restaurant levels resulted in decrements in gonadal hormones for both sexes and marked increases in thyroid hormone secretion and systolic blood pressure in men); Brian W. P. Seymour et al., *Second-Hand Smoke Increases Bronchial Hyperactivity and Eosinophilia in a Murine Model of Allergic Aspergillosis*, 10 CLINICAL & DEV. IMMUNOLOGY 35, 41 (2003) (finding that ETS can cause exacerbation of asthma, demonstrated by functional airway hyper-responsiveness and elevated levels of blood eosinophilia); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 669 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf> ("As understanding increases regarding health consequences from even brief exposures to secondhand smoke, it becomes even clearer that the health of nonsmokers overall, and particularly the health of children, individuals with existing heart and lung problems, and other vulnerable populations, requires a higher priority and greater protection.").

⁷² THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL ARGUMENTS 57–60 (Gordon Lloyd & Margie Lloyd eds., 1998); see English Bill of Rights of 1689, reprinted in Carl Stephenson & Frank Marcham, *Sources of Constitutional History* (1937).

included primarily to prevent torture and barbarous forms of capital punishment.⁷³ The Eighth Amendment was therefore largely concerned with present forms of extreme physical and mental harm.⁷⁴ At the time, however, the Eighth Amendment was rarely used to prevent this type of harm.⁷⁵ But in 1910, the Supreme Court envisioned the Eighth Amendment as having a broader application, and it extended Eighth Amendment construction to cover proportionality of punishment to the crime committed.⁷⁶ This philosophy of a broad and progressive mode of interpretation has persisted, and *Helling* represents the extension of this principle to a type of harm—latent and causally unclear, caused by an agent common in society—previously not contemplated by Eighth Amendment jurisprudence.⁷⁷ Indeed, the recognition of ETS exposure as a potential “cruel and unusual punishment” was vigorously opposed not only by the *Helling* dissenters⁷⁸ but also by commentators.⁷⁹

When the Supreme Court expanded Eighth Amendment jurisprudence to this new form of punishment, it necessarily brought along the modes of analysis which it had developed to judge the circumstances previously recognized as forms of punishment.⁸⁰ The Court did not alter the existing jurisprudence to accommodate its novel and progressive decision. Therefore, a court must go beyond “a scientific and statistical inquiry into the seriousness of the potential

73 See also Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 376 (1995) (tracing in part the development of the judicial construction of cruel and unusual punishment). See generally Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 673 (2004) (arguing that the Eighth Amendment squarely applies to interrogation torture).

74 See *supra* note 73 and accompanying text.

75 Gutterman, *supra* note 73, at 376.

76 See *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital must be capable of wider application than the mischief which gave it birth.”).

77 *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

78 *Id.* at 37–38 (Thomas, J. dissenting) (“Today the Court expands the Eighth Amendment in yet another direction, holding that it applies to a prisoner’s mere *risk* of injury This decision . . . rests on the premise that deprivations suffered by a prisoner constitute ‘punishmen[t]’ for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence I have serious doubts about this premise.”).

79 See, e.g., Kane, *supra* note 4, at 1400 (arguing that *Helling*’s construction of the Eighth Amendment gives prisoners rights beyond those held by citizens in society); Sara L. Rose, Comment, “Cruel and Unusual Punishment” Need Not Be Cruel, Unusual, or Punishment, 24 CAP. U. L. REV. 827, 828 (1995) (taking issue with the broad construction of the Eighth Amendment and the analyses developed).

80 See generally *Helling*, 509 U.S. at 35–36.

harm and the likelihood that such injury to health [of the individual] will actually be caused by exposure to ETS,” and question society’s tolerance of this health risk.⁸¹ Since the Court shoehorned ETS cases into an existing mode of analysis, the question of whether the standard social tolerance inquiry might become problematic, outmoded, or conceptually improper was either marginalized, overlooked, or left to be resolved in the future.

IV. BEYOND LEGAL DIFFICULTIES: ETHICAL PROBLEMS WITH RETAINING AN INDEPENDENT SOCIAL TOLERANCE INQUIRY

The discovery of procedural and ethical difficulties with the application of a social tolerance analysis of Eighth Amendment ETS cases warrants a closer look at the problem. This Comment is concerned with the practical and ethical inconsistencies inherent in determining an imprisoned individual’s right to be free from unreasonable exposure to a class A carcinogen based on a mass and diffuse third party’s opinion of how tolerable exposure to that carcinogen might be. After further exploring the nature of the problem, this Comment will propose positive and practical steps judiciaries can take to improve the uncomfortable marriage of ETS case facts and traditional Eighth Amendment jurisprudence, for both judiciaries and plaintiffs.

First, there is a practical difficulty in the idea of determining the appropriate extent of safeguards for an individual’s health based on the opinion of a large and divided society. It is important that a court does not appear to make a determination of public tolerance of ETS in a manner susceptible to criticisms of being merely ad hoc. Looking to state legislation may be some indication of how firm the public stance is on a certain issue. But ETS legislation may not necessarily be a sound reflection of exactly what society thinks of that issue. Such legislation is a particularly unsuitable basis upon which to judge a matter of *gradation*, like ETS exposure. While the social tolerance inquiry is squarely suitable for questions of whether a certain practice or procedure is acceptable—dragging a condemned prisoner to the hanging site,⁸² for example—it seems unclear exactly how a judge can

81 *Id.* at 36.

82 See Jonathan H. Vold, Note, *The Eighth Amendment “Punishment” Clause after Helling v. McKinney: Four Terms, Two Standards, and a Search for Definition*, 44 DEPAUL L. REV. 215, 220 (1994) (outlining early practices barred under the Eighth Amendment, including dragging condemned prisoners to the hanging site, “burning at the stake, crucifixion, and breaking on the wheel”).

determine whether a given society deems a certain amount of smoke exposure to be tolerable.

For all of the discussion above regarding changing social attitudes about ETS, there is hardly a firm consensus amongst state legislatures on the proper limits of ETS restrictions.⁸³ This is problematic, again, because the inquiry is one of scale, not of existence. Courts are also faced with the difficulty of determining the proper weight to give legislation or executive orders and reports.⁸⁴ Further conceptual difficulties arise because many of the regulations that do exist are ultimately products of intense lobbying efforts from both sides of the issue.⁸⁵ The bans therefore often contain exclusions and inclusions of all types.⁸⁶ This result would seem to indicate the effectiveness of industry lobbyists more than any consensus of the people of a given state whether, for example, it is acceptable to allow smoking in tobacco lounges but not in bars.⁸⁷

Even were legislation assumed to be accurately reflective of society's tolerance for a certain level of ETS exposure, a final layer of practical difficulty in determining the tolerance of society for ETS is that the subject at issue, tobacco, is imbued in our historical and cultural consciousness.⁸⁸ This is a basic difference from the traditional subjects of the inquiry—modes of torture, capital punishment, and disproportionate legal penalties.⁸⁹ As a result, even in the case of strong anti-ETS legislation there are likely significant minority interests not reflected in the final legislation.

Two disconcerting ethical problems accompany the above practical difficulties of the social tolerance *Helling* sub-inquiry. At its most basic level, the inquiry works to turn the individual prisoner into the construct of an average person in society, who withstands exposure to

⁸³ See Kabat, *supra* note 1, at 137 (classifying states into five groups, each with their own internal differentiation, according to rigidity of ETS restrictions).

⁸⁴ See, e.g., *Atkinson v. Taylor*, 316 F.3d 257, 265 n.7 (3d Cir. 2003) (“The dissent characterizes this reference [to an Executive Order banning smoking in state buildings] as an attempt to form a societal consensus from a single state regulation. However, we refer to the regulation merely to show that Atkinson has offered some proof of a societal consensus. Proof of a national consensus might include, *inter alia*, the federal regulation which protects the public and federal employees from ETS in all federal workplaces . . .”).

⁸⁵ Kabat, *supra* note 1, at 131, 165–70.

⁸⁶ See *Public Place Smoking Bans in States, 2008*, *supra* note 52.

⁸⁷ See generally Kabat, *supra* note 1, at 179–84 (discussing the lack of advocates for tobacco lounges that can “asses their proper place within ETS regimes”).

⁸⁸ See generally *ALTERING AMERICAN CONSCIOUSNESS: THE HISTORY OF ALCOHOL AND DRUG USE IN THE UNITED STATES, 1800–2000* (Sarah W. Tracy & Caroline Jean Acker eds. 2004) (discussing the histories of different drugs in America, including tobacco and alcohol).

⁸⁹ See Vold, *supra* note 82, at 219–20 (tracing the background and development of the construction of “punishment” contained in the Eighth Amendment).

ETS accordingly. The problem, as noted above, is that susceptibility to ETS exposure “var[ies] tremendously with the individual.”⁹⁰ While it is true that prisoners give up some rights and privileges because of their crimes against society, individual status should not be one of them when the characteristic being glossed over is susceptibility to a class A carcinogen.

The potential ramifications of the *Helling* test, when viewed in this light, are somewhat unsettling. The *Helling* Court put forth the scientific reasonableness and social tolerance components of the objective prong as conjunctive factors, necessitating a finding of both for the claim to succeed on this basis.⁹¹ Accordingly, a prisoner with very high sensitivity to ETS could suffer scientifically unreasonable exposure to ETS yet lose his claim on *Helling's* objective prong if a court determined that the statistical measure of ETS exposure in that case would be tolerated by society. The inequity of this possibility—or at least puzzlement as to why this could be the case—demonstrates the value of a new approach to the social tolerance prong of prison ETS exposure cases.

With the current analysis, not only is the consideration of a prisoner's health-related treatment being outsourced to society, but so is the extent of his or her constitutional right to safe conditions of confinement.⁹² Again, the source of the difficulty lies in the nature of the subject being judged; if this were a question of an acutely harmful event, one's rights would likely be clearer, and the danger of an overriding “social opinion” less.⁹³ For example, one's right to not be assaulted is well-recorded throughout the country, a point which is not seriously disputed.⁹⁴ Accordingly, courts have held that prisoners assaulted by guards, or even placed in a position in which they are *likely* to be assaulted by others, are entitled to Eighth Amendment relief.⁹⁵

⁹⁰ See *supra* note 69 and accompanying text.

⁹¹ *Helling v. McKinney*, 509 U.S. 25, 35–36 (1993) (“With respect to the objective factor, McKinney must show that he himself is being exposed to unreasonably high levels of ETS Also with respect to the objective factor, determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry . . .”).

⁹² See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (discussing the duty imposed by the Constitution upon the state to assume responsibility to protect the safety of a prisoner); *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (considering the unconstitutionality of placing convicted criminals and the involuntarily committed in unsafe conditions).

⁹³ See *supra* note 73 and accompanying text.

⁹⁴ See MODEL PENAL CODE § 211.1 (1985) (defining different types of assault).

⁹⁵ *Hudson v. McMillian*, 503 U.S. 1, 11–12 (1992) (declaring excessive force against prisoner as definitively falling under Eighth Amendment auspices); *Ramos v. Lamm*, 639 F.2d

Since the activity considered is relatively uncommon and never tolerated, the individual's right seems to be in all cases coextensive with those in society. A similar, neat result occurs when analyzing a traditional Eighth Amendment subject, like torture.⁹⁶ But when the externalities of smoking are considered, the same analysis becomes blurred because it is a common activity long tolerated,⁹⁷ and only recently restricted in common areas to varying degrees.⁹⁸ In this case, pegging the prisoner's right to an idea of the public tolerance for ETS is bound to be subject to dissonant results. Does a prisoner in Utah have greater constitutional protection than a prisoner in North Carolina?⁹⁹ Did the extent of a Michigan prisoner's constitutional rights alter in May 2010?¹⁰⁰ While affirmative answers to these questions would seem absurd, determinations of the public's tolerance of ETS exposure by some other, more nebulous calculation may be seriously challenged as forming an ad hoc legal standard. In light of current scientific knowledge about ETS and its direct effects, the extent of a prisoner's rights should simply not be determined based on the outcome of a clouded analysis concerning social tolerance.

V. AMENDING JURISPRUDENCE: SUGGESTED PRACTICAL ALTERATIONS TO EIGHTH AMENDMENT ETS CASE ANALYSIS

It is not feasible to simply do away with the public tolerance inquiry. As stated, this is an important and traditional component of Eighth Amendment jurisprudence. The inquiry has sometimes offered a positive and valuable way to look at ETS cases around the time of the *Helling* decision. It has allowed, and may still allow, shifts in public sentiment to effectively substitute for absolute causative certainty. This extra flexibility in the objective *Helling* prong allowed courts to lower the evidentiary standard for causation and afford greater protection to prisoners who, by similar facts, may not have

559, 572 (10th Cir. 1980) (holding that a prisoner need not actually be assaulted before gaining relief). Note that both of these cases were decided before *Helling*.

96 See generally Rumann, *supra* note 73 (analyzing the Eighth Amendment as it relates to torture).

97 See *supra* note 88 and accompanying text.

98 See *Public Place Smoking Bans in States, 2008*, *supra* note 52 (detailing variations of public smoking bans in place in 2008).

99 Utah has one of the strictest public smoking bans in the nation, while North Carolina is the most permissive state when it comes to public smoking. See Kabat, *supra* note 1, at 138, 144–45.

100 See *supra* note 54 and accompanying text.

been given constitutional protection only a few years earlier.¹⁰¹ Absolute scientific certainty of causation between ETS and a given illness, or likelihood of a future illness, may ultimately be unattainable. Presently, however, a solely scientific and statistical inquiry should legally suffice to establish both probable ETS causation of harm and the appropriate Eighth Amendment threshold of harm. The heightened scientific consensus of the positive harmful effects of ETS and the recent social shift from permissive of public smoking to presumptively intolerant of ETS¹⁰² together signal the arrival of a critical point at which the “public tolerance” inquiry of *Helling* may be functionally dispatched. Doing so both simplifies the inquiry and brings it into proper consonance with an ethical analysis.

This Comment proposes a simple and not wholly unprecedented method to achieve the above, the adoption of which would not tamper with a court’s essential reasoning or final decision. By merging the two objective *Helling* inquiries, courts can signal a tougher stance on compelled ETS exposure in prisons, recognize that ETS exposure is highly consequential, and avoid determining the extent of a prisoner’s right to a healthy environment by referencing a narrow approximation of society’s tolerance for ETS exposure. As a result of such a merger, a finding of social intolerance would as a matter of course follow a determination of scientifically unreasonable ETS exposure.

Merging the inquiries of whether the prisoner has been subjected to an unreasonable amount of ETS and whether society would be tolerant of the amount of exposure would be a judicial signal that compelled exposure to unreasonably high level of ETS is per se intolerable and deserving of a remedy.¹⁰³ By this construction, a court would no longer have to go beyond the “scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS,” as *Helling*

¹⁰¹ Compare *Oliver v. Deen*, 77 F.3d 156, 161 (7th Cir. 1996) (granting summary judgment for defendants where the plaintiff, a mild asthmatic, was housed with a smoker for 133 days) with *McPherson v. Coombe*, 29 F. Supp. 2d 141, 147 (W.D.N.Y. 1998) (granting defendant’s summary judgment as to plaintiff’s First Amendment claim while denying summary judgment as to plaintiff’s Eighth Amendment claims, where the plaintiff was housed with 41 smokers in a poorly ventilated housing unit, because of factual questions as to whether smoke conditions in the prison violated contemporary standards of decency).

¹⁰² See *supra* notes 53–56 and accompanying text.

¹⁰³ Cf. *Kabat*, *supra* note 1, at 175–77 (characterizing courts as unable and imprudent to undertake changes to law, and it is up to the legislatures and other organizations to address the problems of ETS).

mandated in 1993.¹⁰⁴ Granted, the *Helling* Court's direction to do so has become quite venerated in cases of this type, as it is directly quoted in most of the cases relevant to this Comment. But merging the inquiries is not to do away with one or the other. It would simply be judicial recognition that, broadly, the idea of compelled exposure to unreasonably high levels of ETS has become intolerable to society generally.¹⁰⁵ This presumption, which the defendant would carry the burden of disproving, is justified by a majority of states having adopted public smoking bans.¹⁰⁶ Past cases and current attitudes indicate, however, that the presumption would rarely be overcome.

Courts have previously explored the idea of merging the inquiries in different ways. The most radical of these, since overruled, came in *Crowder v. District of Columbia*.¹⁰⁷ In *Crowder*, the court ruled that any exposure to ETS was per se intolerable and unreasonable.¹⁰⁸ Beyond simply being an illustration of a court's willingness to consider functionally dispatching the social tolerance inquiry—though by a much more extreme means in this case—*Crowder* instantiates the previously mentioned difficulties of looking to legislation for a determination of social ETS tolerance. In expressing a prisoner's right to a smoke-free environment, the court explicitly looked to legislation in the District of Columbia for authority.¹⁰⁹ In that jurisdiction, the legislature had extensively recognized the harms of ETS.¹¹⁰ The contention that mere exposure to ETS was significantly harmful, however, was still a litigable issue; in fact, the District of Columbia "request[ed] the Court to go along with . . . [the District's] repudiation [in its brief] of

¹⁰⁴ *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

¹⁰⁵ See *supra* note 56 and accompanying text; see also U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 71, at 667 ("Since 1986, the attitude of the public toward and the social norms around secondhand smoke exposure have changed dramatically to reflect a growing viewpoint that the involuntary exposure of nonsmokers to secondhand smoke is unacceptable.").

¹⁰⁶ About half of the states also currently ban tobacco use in their prisons in an effort to reduce health care costs; several others have partial bans in place. These prison-specific bans further justify a presumption that unreasonable exposure to ETS in prison is per se intolerable. See Andrew M. Seaman, *States with Tobacco-Free Prisons*, USA TODAY (Mar. 25, 2010, 12:30 PM), http://www.usatoday.com/news/nation/2010-03-24-prison-smoking-ban_N.htm.

¹⁰⁷ *Crowder v. District of Columbia*, 959 F. Supp. 6 (D.D.C. 1997).

¹⁰⁸ *Id.* at 8 n.6 (finding any exposure to tobacco smoke, whether from the same room or from an adjacent area, intolerable, by reference to D.C. legislative findings) *rev'd sub nom* Scott v. D.C., 139 F.3d 940, 942 (D.C. Cir. 1998) (rejecting the notion that prisoners have a constitutional right to a smoke-free environment). See generally Kane, *supra* note 4 (arguing that *Helling v. McKinney* grants prisoners the right to a smoke-free environment).

¹⁰⁹ *Crowder*, 959 F. Supp at 8–9.

¹¹⁰ *Id.* at 8.

its prior [legislative] findings concerning the ill-effects of second-hand smoke.”¹¹¹ In light of current knowledge, a state is less likely now to take such a hypocritical position on its own ETS laws when seeking to establish the applicable social tolerance standard. The developed state of social knowledge and attitudes concerning ETS exposure should, however, similarly encourage courts to take a fresh look at the approach to ETS exposure litigation.

While the *Crowder* decision did overreach, the general trend toward presumptive intolerance of ETS can be a sufficient basis for recognizing *unreasonable exposure* to ETS in prison as per se intolerable. Only such a single, broad determination is appropriate to ensure that prisoners of all states and districts have equally clear rights to a healthy environment. As this Comment has argued, knowledge and public opinion have reached a critical point at which this determination has become politically and judicially feasible. No inquiry past that of unreasonable exposure to ETS should be formally necessary, because litigation over the public tolerance of such a scientific and statistical determination is superfluous, duplicative, and unethical.

The suggestion of this Comment to functionally merge the two objective *Helling* inquiries is not as extreme as the 1997 *Crowder* decision. Rather, it walks the line between similar, accepted jurisprudence concerning asbestos exposure and the current practice of conducting both inquiries. Courts have held that prisoners who have asbestos exposure claims can establish, first, that “a reasonable person would have understood that exposing an inmate to friable asbestos could violate the Eighth Amendment.”¹¹² Second, the plaintiff may advance the theory that “the right to be free from deliberate indifference to serious medical needs, established in *Estelle v. Gamble*, best encompasses the alleged conduct” of knowingly exposing the prisoner to friable asbestos.¹¹³

Asbestos and ETS are both class A carcinogens, substances known to cause cancer in humans.¹¹⁴ It is therefore not extraordinary to treat them similarly in a legal sense; the analysis simply becomes a matter of degrees. Since smoking, as noted, is traditional in some

111 *Id.* at 9. The court responded: “This Court declines to accept the District’s unwise and indeed unconscionable position.” *Id.*

112 *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998).

113 *Id.* (citation omitted).

114 *See Known and Probable Human Carcinogens*, AMER. CANCER SOC’Y http://www.cancer.org/docroot/PED/content/PED_1_3x_Known_and_Probable_Carcinogens.asp (last updated Feb. 17, 2011) (listing all currently known, and potential, carcinogens).

sense and imbued in our national consciousness,¹¹⁵ it is politically and socially preferable to restrain the standard to one of reasonableness rather than complete extirpation.¹¹⁶ In *LaBounty v. Coughlin*, the Court used the “deliberate indifference to serious medical needs” reasoning of *Estelle*¹¹⁷ to avoid any inquiry into public tolerance of asbestos exposure.¹¹⁸ Merging the objective *Helling* inquiries theoretically removes an evidentiary barrier for a prisoner to withstand summary judgment on an ETS exposure case,¹¹⁹ somewhat replicating *Labounty*. This Comment does not argue for courts to analyze ETS cases by the *Estelle* and *LaBounty* application of “serious medical need” upon mere exposure—there is no constitutional right to a smoke-free atmosphere.¹²⁰ The more moderate merged inquiry analysis in this case recognizes only the right to be free from exposure to ETS of *such a level* that it would cause a serious medical need.

Recently, courts have demonstrated a willingness to shift evidentiary burdens in light of increased knowledge of the harms of ETS exposure.¹²¹ Notably, the holdings in question also remove the social

115 See generally ALTERING AMERICAN CONSCIOUSNESS: THE HISTORY OF ALCOHOL AND DRUG USE IN THE UNITED STATES, 1800–2000, *supra* note 88 at 2–3, 383–401.

116 Hence the reversal of *Crowder v. District of Columbia*, 959 F. Supp. 6 (D. D.C. 1997) by *Scott v. District of Columbia*, 139 F.3d 940 (D.C. Cir. 1998).

117 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

118 See *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998) (refusing to undertake the social tolerance inquiry).

119 If not technically lowering the standard, then procedurally lowering it by not requiring plaintiffs, many of whom are pro se, to submit evidence that their ETS exposure was of a level that the public would not tolerate *in addition to* evidence that such exposure was unreasonable; pro se litigants seem to often neglect the inclusion of the former type of evidence, perhaps because it is unintuitive to do so—however venerated or traditional the inquiry. See, e.g., Judge Castel, *Court Rejects Disabled Prisoners’ Second-Hand Smoke Claims Arising Before Prison’s Indoor Smoking Ban*, N.Y. L.J., Nov. 2, 2005, at 21–22 (“Plaintiffs have failed, in opposition to defendants’ motion, to present any evidence that they were exposed to levels of ETS so harmful that ‘it is contrary to current standards of decency for anyone to be so exposed against his will.’ Plaintiffs’ pro se status, while implicating a more liberal interpretation of their pleadings, does not excuse them from the burden of coming forward with concrete evidence . . . Defendants are entitled to summary judgment on the objective prong of plaintiff’s pre-2001 ETS claim.” (citations omitted)).

120 See *Scott*, 139 F.3d at 142.

121 See *Perkins v. Terrell*, No. 08–CV–1906, 2010 WL 5488234, at *3 (W.D. La. Dec. 6, 2010) (adopting objective standard hold[ing] that there is “no safe level of or exposure to second hand smoke” in denying summary judgment to defendant) (internal quotation marks omitted); *Hicks v. Corrections Corp. of Am.*, No. 08–CV–0687–A, 2009 WL 2969768, at *6 (W.D. La. Sept. 11, 2009) (denying summary judgment to defendant based on evidence adopted from 2006 Surgeon General’s Report finding “no safe level of or exposure to second hand smoke”); *Sivori v. Epps*, No. 2:07–CV–79–MTP, 2009 WL 799463, at *7 (S.D. Miss. Mar. 24, 2009) (applying a heightened standard to find objective *Helling* prong satisfied by prolonged ETS exposure for the purposes of withstanding summary judgment); see also *Fisher v. Caruso*, No. 03–CV–71804–DT, 2006 WL 2711807 at

tolerance evidentiary burden for plaintiffs seeking to avoid summary judgment. In these recent cases courts have taken judicial notice of a 2006 Surgeon General's Report (the "2006 Report") which concluded that "scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke."¹²² The report further found that "[s]ince 1986, the attitude of the public toward . . . secondhand smoke exposure [has] changed dramatically to reflect a growing viewpoint that the involuntary exposure of nonsmokers to secondhand smoke is unacceptable."¹²³ The Surgeon General's findings are clear on both the scientific harm of ETS and the shift in public opinion concerning involuntary ETS exposure.

By adopting the 2006 Report, these courts have found the objective *Helling* prong to be fully satisfied, for the purposes of withstanding summary judgment when a plaintiff merely shows prolonged exposure to ETS.¹²⁴ Upon the finding of prolonged exposure, the court further presumes that the public would not tolerate such exposure.¹²⁵ The defendant has an opportunity to rebut the presumption that the exposure at issue occurred and is harmful.¹²⁶ Given the state of ever-increasing knowledge of the harms of ETS and the steady trend away from ETS tolerance, it appears likely that this type of approach will become more prevalent in the years ahead.

Merging the objective *Helling* inquiries operates in the same vein as the aforementioned approach and preserves its reasoning through

*13 (E.D. Mich. Sept. 21, 2006) (denying summary judgment to defendant by adopting finding of 2006 report that "[s]eparating smokers and nonsmokers in the same airspace is not effective, nor is air cleaning or a greater exchange of indoor with outdoor air").

122 U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 71, at 11; *see also supra* note 120 and accompanying text.

123 U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 71, at 667.

124 *See Perkins*, 2010 WL 5488234, at *3 (adopting objective standard hold[ing] that there is "no safe level of or exposure to second hand smoke" in denying summary judgment to defendant) (internal quotation marks omitted); *Hicks*, 2009 WL 2969768, at *6-7 ("Accordingly, this court accepts the scientific evidence in the Surgeon General's 2006 Report as meeting the objective component of *Helling*, as well as *Helling's* requirement of a showing that society considers the risk to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk, as also set forth in the Surgeon General's report [Plaintiff's] evidence shows he was exposed to second hand smoke almost 24 hours a day every day, and the defendants have not refuted that."); *Sivori*, 2009 WL 799463, at *7 (looking to a heightened standard to find objective *Helling* prong satisfied by prolonged ETS exposure for the purposes of withstanding summary judgment).

125 *Hicks*, 2009 WL 2969768, at *6-7.

126 *See id.* at 6 ("The court takes judicial notice, pursuant to Fed. R. Civ. P. rule 201, that the United States Surgeon General's June 2006 report concluded that scientific evidence shows there is no safe level of or exposure to second hand smoke. Of course, defendants may dispute the Surgeon General's report and conclusions pursuant to the procedures set forth in Fed. R. Civ. P. rule 201.").

the trial stage. If prolonged exposure can be sufficient to satisfy *Helling's* objective prong on both inquiries to withstand summary judgment, so should *scientifically unreasonable* exposure suffice to satisfy the objective prong in its entirety at any stage. The adoption of the 2006 Report provides the necessary evidence to tie together the concepts of unreasonable and intolerable levels of exposure.

Indeed, tying these concepts together at either the summary judgment or trial stage would appear to be more judicially conservative than the approach used in the line of cases citing *Hicks*. Unlike the reasoning used in the aforementioned cases, merging the inquiries does not in itself create a heightened standard for air quality.¹²⁷ Only a showing of scientifically unreasonable exposure would obviate the inquiry into public tolerance. Furthermore, the same conclusion drawn from the 2006 Report and inferred from surveying state laws—that public opinion has evolved to the point where compulsory exposure to unreasonable levels of ETS is not tolerated—would apply at all stages of litigation.

Accordingly, upon a merger of the objective inquiries, litigation concerning the objective analysis of Eighth Amendment ETS exposure cases would become primarily scientific and statistical.¹²⁸ No formal inquiry into public tolerance would be made by this construction unless the defendant challenged the presumption that the public would not tolerate the exposure in question. The general move by a majority of states to restrict ETS exposure in public warrants a presumption that the public would be unwilling that anyone be exposed, compulsorily, to a scientifically dangerous level of ETS. By this synthesis of existing tests and standards, the analytical treatment of Eighth Amendment ETS exposure in prison cases would remain legally consistent with the test put forth in *Helling*¹²⁹ while becoming philosophically, ethically, and intuitively consonant, thereby eliminating an unintuitive evidentiary hurdle for pro se litigants in the process.

127 *Cf. Perkins*, 2010 WL 5488234, at *6 (discussing and “[a]pplying the heightened standard as adopted vis-à-vis the Surgeon General’s Report” that the *Hicks* court had applied in denying defendant’s motion for summary judgment).

128 *Cf. Helling v. McKinney*, 509 U.S. 25, 36 (1993) (“[D]etermining whether McKinney’s conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”).

129 *Id.*

VI. CONCLUSION

When the Supreme Court ruled in 1993 that compelled exposure to environmental tobacco smoke could constitute cruel and unusual punishment under the Eighth Amendment, it required plaintiffs to show not only a scientific likelihood of harm, but also that the public would not tolerate the exposure at issue.¹³⁰ Public opinion on the harmfulness of environmental tobacco smoke has changed drastically since that time. In the years following *Helling*, state legislatures quickly moved to recognize the public's intolerance of ETS exposure by passing laws greatly restricting public smoking. The resulting consensus that ETS exposure is not widely tolerated in public areas¹³¹ warrants an equally broad presumption that the public frowns upon compelled exposure to scientifically unreasonable amounts of ETS when experienced by anyone, including prisoners.¹³² Courts that continue to actively inquire into the social tolerance of ETS exposure fail to acknowledge the incredible steps taken by legislatures, in response to scientific advancements and shifting public opinion, to curb public smoking.¹³³ Ultimately, it is untenable to hinge a prisoner's right to a safe living environment on such an external, variable, and now irrelevant factor. Because the scientific and public opinions of the harms of considerable ETS exposure have crystallized, the time has come to functionally dispatch with the social tolerance inquiry the *Helling* Court put forth eighteen years ago.

130 *Id.*

131 *See Kabat, supra* note 1 (compiling data on public smoking bans and arguing that exposure to ETS has become presumptively intolerable).

132 *See Helling*, 509 U.S. at 36 ("It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.").

133 *See supra* note 56 and accompanying text.