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NOTE
SECONDHAND SMOKE SIGNALS FROM PRISON

Scott C. Wilcox*

INTRODUCTION

Setting: present day, a prison somewhere in the United States. The camera focuses on a lone inmate, Sheila Thomas, passing time in her cell. The soundtrack captures the dissonant rhythm of her sporadic coughing. The camera pans across neighboring cells, showing twenty fellow inmates smoking. Between them, the inmates simultaneously consume a pack of cigarettes, filling the air with toxic chemicals. The scene shifts to the prison’s infirmary, where a line of inmates awaits medical treatment. Text scrolls onto the screen: “Approximately 115 inmates die each year as a result of exposure to secondhand smoke. By contrast, in 2006, only 53 inmates were legally executed in the United States.”


While this example relies on cinematic techniques for dramatic effect, its subject is far from fictional. Inmates unwittingly take part in such smoke-filled scenes in prisons through the country, where secondhand smoke ("SHS") may permeate every remote corner. Many prisons facilitate the pervasiveness of SHS by selling tobacco at prison commissaries and by failing to implement and adequately enforce smoking bans. Because a majority of states have instituted complete inmate smoking bans, SHS in prisons is less pervasive than it once was. Nevertheless, the risk remains very real in the twenty-one states that still permit inmate smoking on prison grounds.

The Eighth Amendment ostensibly affords prisoners some protection against SHS. The Supreme Court has interpreted the Eighth Amendment's proscription against the infliction of "cruel and unusual punishment" broadly, such that it applies not only to an inmate's sentence but also to the conditions of his or her confinement. In 1993, the Court held in Helling v. McKinney that the Eighth Amendment protects inmates against the deliberate indifference of prison officials to a serious risk of harm posed by SHS. Under Helling, inmates alleging SHS exposure must prove that the risk they face is "not one that today's society chooses to tolerate" and that prison officials exhibit deliberate indifference by consciously disregarding that risk.

Notwithstanding the Court's decision in Helling, the Eighth Amendment has provided little actual recourse for inmates' SHS-related claims in lower courts. The Supreme Court has held that courts must use objective indicia to make factual determinations with respect to Eighth Amendment claims in order to avoid the appearance that the court's subjective viewpoint dictates

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2. This Note uses "prison" to refer generally to any facility that houses prisoners, whether it is specifically classified as a prison, jail, or other correctional facility.

3. While many sources use the term environmental tobacco smoke ("ETS"), this Note adopts the approach of the recent Surgeon General report on smoking by consistently using the term secondhand smoke ("SHS"). see 2006 SURGEON GENERAL REPORT, supra note 1, at 9 (concluding that the term "secondhand smoke" captures the involuntary nature of nonsmokers' exposure to tobacco smoke better than does "environmental tobacco smoke"), except when quoting from a source using a different term.

4. See infra notes 71-72 and accompanying text (reporting that fifteen states allow smoking on prison grounds, banning only smoking indoors, and six states have not yet banned inmate smoking even indoors).

5. U.S. CONST. amend. VIII.


7. Helling v. McKinney, 509 U.S. 25, 35 (1993) (affirming the Ninth Circuit's holding that a prisoner states a cause of action under the Eighth Amendment by alleging that prison officials have, with deliberate indifference, exposed him to levels of SHS that pose an unreasonable risk of serious damage to his future health).

8. Id. at 36.

the results. Despite the requirement of objective analysis, inmates encountering a risk from SHS in states allowing inmate smoking have rarely been able to obtain relief. Instead, their claims are often summarily dismissed in opinions presenting little analysis of factual findings necessitated by the Helling standard.

This Note argues that courts should acknowledge current societal and medical perspectives on SHS and afford real protection to prisoners against SHS through injunctive relief. Part I examines evidence that conclusively demonstrates the serious risk of harm posed by SHS to the health of inmates. It reports that inmates' long-term exposure to SHS increases their risk of contracting lung cancer, heart disease, and other potentially life-threatening conditions. Part II argues that, as required by the Helling standard, contemporary society does not tolerate involuntary, long-term exposure to SHS and that prison officials exhibit deliberate indifference by


11. See infra note 12. One notable exception, where an inmate recovered on an SHS claim, is Tudor v. Moore, No. 2:98-1927, slip op. at 23 (D.S.C. Oct. 5, 2005), aff'd sub nom. Tudor v. Harrison, 195 F. App'x 160 (4th Cir. 2006), where the plaintiff was awarded $3,200 in damages. See Tudor, No. 2:98-1927, slip op. at 23 (concluding that the plaintiff had “some pain, discomfort, and exacerbation of his asthmatic condition due to SHS requiring increased use of his inhaler”). Another is Reilly v. Grayson, 157 F. Supp. 2d 762, 773-74 (E.D. Mich. 2001), aff’d, 310 F.3d 519 (6th Cir. 2002), where the plaintiff was awarded $54,750 in damages. See Reilly, 157 F. Supp. 2d at 773-74 (awarding compensatory and punitive damages based on the denial of a smoke-free cell to an asthmatic inmate for five years). Denials of summary judgment are scarce in SHS cases; however, some courts have found genuine issues of material fact. E.g., Denis v. N.Y. State Dep't of Corr. Servs., No. 05 Civ. 4495 (LAK), 2006 WL 406313, at *1 (S.D.N.Y. Feb. 22, 2006) (order denying summary judgment), enforcing 2006 WL 217926, at *20 (S.D.N.Y. Jan. 30, 2006) (Mag. Rep. & Recommendation) (finding genuine issues of material fact with respect to whether defendant’s policy was adequate as written and as enforced). Occasionally, appellate courts have overturned dismissals of SHS claims. The Sixth Circuit, for example, held that “the mere existence of non-smoking pods” does not insulate a prison from liability where deliberate indifference to a prisoner’s future health is alleged. Talal v. White, 403 F.3d 423, 428 (6th Cir. 2004) (vacating a dismissal order and remanding). Such cases, however, remain exceptional.

12. For example, in Holman v. Gillen, No. 00 C 0833, 2002 WL 31834875 (N.D. Ill. Dec. 17, 2002), the court was “unpersuaded that the mere possibility of increased risk of cancer or other smoke-related disease” constituted a substantial risk of harm in violation of the Eighth Amendment. Id. at *3-4 (granting defendant’s motion for summary judgment based on conclusion that the “possible health problems” associated with SHS are “risks that society chooses to tolerate”). In Henderson v. Martin, 73 F. App’x 115 (6th Cir. 2003), the Sixth Circuit concluded that the plaintiff’s claim lacked medical documentation of a “sufficiently serious” risk and further that officials at the Michigan prison where the plaintiff was housed were not deliberately indifferent because they had adopted an indoor nonsmoking policy. Id. at 118 (affirming summary judgment). In another case, the Seventh Circuit granted summary judgment on the basis that prison officials could not have been deliberately indifferent because they “generally enforce[d]” a policy of separating smokers from nonsmokers. Harrison v. Helman, No. 97-3287, 1998 WL 133426, at *1 (7th Cir. Mar. 12, 1998). The Eleventh Circuit, in its first SHS case, held that the inmate failed to proffer adequate evidence to show that the prison ventilation was not sufficient and lacked objective evidence of unreasonably high levels of SHS. Kelley v. Hicks, 400 F.3d 1282, 1285 (11th Cir. 2005) (affirming summary judgment to defendants). The Fifth Circuit affirmed a dismissal of an SHS claim where the plaintiff had been exposed to some level of smoke. Callicutt v. Anderson, 48 F. App’x 916, 916 (5th Cir. 2002) (affirming dismissal after a bench trial on the basis that plaintiff had failed to prove the prison officials were deliberately indifferent). The court reported that the defendants’ expert testified that the plaintiff’s medical condition did not reflect that he had suffered any harm and the record showed that the single guard assigned to the plaintiff’s unit could not always prevent prisoners from violating a smoking policy. Id.
allowing inmates to possess tobacco without effectively addressing the risk of harm that policy creates for other inmates. Additionally, Part II rejects the proposition that a court confronted with an Eighth Amendment violation may fail to act merely because legislative action may eventually cure the constitutional deficiency. Finally, Part III contends that a court is empowered to remedy this Eighth Amendment violation effectively by easing an inmate’s burden of production and by ordering prison officials to adopt increasingly strict smoking restrictions until the inmate no longer faces a serious risk of harm.

I. THE SERIOUS RISKPOSED BY SECONDHAND SMOKE

In 1993, when *Helling* was decided, the scientific community suspected that SHS was causally linked to a number of diseases, but research into the linkage was still in its infancy. Today, however, it is clear that the carcinogens in SHS present a serious risk of harm to smokers and nonsmokers alike. This Part reviews the medical evidence on SHS, documenting that SHS poses an especially serious risk of harm to the health of exposed inmates.

Significant evidence demonstrates that SHS, which contains as many as 250 known toxic substances or carcinogens, leads to disease. A 2005 study estimated that SHS annually kills more than 49,000 adult nonsmokers in the United States due to lung cancer and coronary heart disease. DNA-damaging material found in SHS leads to genetic mutations that cause lung cancer. Coronary heart disease results from the interference of SHS with the cardiovascular system’s “normal functioning.” SHS so rapidly impacts the cardiovascular system that exposure lasting even thirty minutes will have a measurable impact on indicators associated with increased risk of disease.

14. Id. at i (reporting U.S. estimates of 3000 annual deaths relating to lung cancer and 46,000 deaths relating to coronary heart disease).
15. Id. at 45; see also Kirsti Husgafvel-Pursiainen et al., *p53 Mutations and Exposure to Environmental Tobacco Smoke in a Multicenter Study on Lung Cancer*, 60 Cancer Res. 2906, 2906, 2910 (2000) (concluding that “mechanisms of lung carcinogenesis” observed in individuals who had been exposed to SHS but who had never smoked themselves include mutations in the tumor suppression gene p53, similar to those occurring in smokers). Similar mechanisms cause lung cancer as a result of exposure in active smokers and those affected by SHS. 2006 Surgeon General Report, supra note 1, at 667.
16. 2006 Surgeon General Report, supra note 1, at 64. Exposure to SHS also amplifies the risk of coronary heart disease for a number of other reasons: increased clot formation, a negative impact on cholesterol levels (increased low-density lipo-protein and decreased high-density lipo-protein levels), increased likelihood of developing atherosclerosis, increased severity of myocardial infarction, reduced heart rate variability, and increased demand for oxygen simultaneous with a reduced oxygen-delivering capacity. Id. at 53, 57–59, 63.
17. See Joaquin Barnoya & Stanton A. Glantz, Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking, 111 Circulation 2684, 2687 (2005), available at http://circ.ahajournals.org/cgi/content/full/111/20/2684 (explaining that SHS begins to impair the heart’s ability to convert oxygen into an energy molecule after only a single thirty minute exposure); see also 2006 Surgeon General Report, supra note 1, at 64 (indicating that some immediate effects on the cardiovascular system of even short exposure to SHS appear as large as those resulting from
and will affect the cardiovascular system eighty to ninety percent as much, on average, as active smoking. SHS stimulates myriad other adverse effects, especially diseases affecting the respiratory system, such as asthma, lung impairment, and possibly chronic obstructive pulmonary disease.

The risk of harm posed by SHS to the health of an exposed inmate exceeds the risk confronting the average nonsmoker. Inmates are usually confined to specific areas of the prison facility and have little opportunity to escape contaminated air. They spend the majority of their time in commonly affected spaces, including living areas, dining halls, recreational spaces, and prison libraries. Moreover, overcrowding may cause prison officials to convert areas with insufficient ventilation for use as additional housing, leading to significantly increased SHS concentrations.

Attempts to reduce the harm posed by SHS, including separating smokers and nonsmokers, regularly cleaning the prison air, and replacing indoor air with outdoor air, have proven ineffective. Since SHS consists of a "complex mixture of [solid] and gaseous components," the characteristics of active smoking of a pack of cigarettes daily). Exposure to SHS for just two hours can reduce heart rate variability by twelve percent, a result associated with increased risk of ventricular fibrillation and heart disease. See Barnoya & Glantz, supra, at 2693–94.

18. Barnoya & Glantz, supra note 17, at 2694.

19. 2006 SURGEON GENERAL REPORT, supra note 1, at 46 (reporting that the respiratory system is especially at risk, because it is the "portal of entry" for SHS). Maternal exposure to smoke during pregnancy is a major risk factor for sudden infant death syndrome and neurobehavioral development problems in infants. Id. at 50. Moreover, a recent California state report concluded that SHS is causally associated with breast cancer in younger, primarily premenopausal, women. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, PROPOSED IDENTIFICATION OF ENVIRONMENTAL TOBACCO SMOKE AS A TOXIC AIR CONTAMINANT app. III, at 7–82 (2005), available at ftp://ftp.arb.ca.gov/carbis/regact/ets2006/ app3part%20b.pdf.

20. Cf. 2006 SURGEON GENERAL REPORT, supra note 1, at 628 (reporting that, where smoking is allowed inside prisons, nonsmokers will likely face exposure to significant concentrations of SHS). An estimated 450,000 to 850,000 nonsmokers reside in U.S. prisons and jails, as compared to an estimated 1.3 to 1.7 million smoker inmates. See id. (indicating that between sixty and eighty percent of U.S. prisoners smoke); HARRISON & BECK, supra note 1, at 2 tbl.1 (reporting that 2.1 million inmates resided in state and federal correctional facilities as of June 30, 2005).

21. Lisa Gizzi, Note, Helling v. McKinney and Smoking in the Cell Block: Cruel and Unusual Punishment?, 43 AM. U. L. REV. 1091, 1129 (1994) (observing that prisoners do not have the freedom to avoid SHS that is usually available to those outside prison walls).

22. Research conducted in two Vermont correctional facilities and a Massachusetts correctional facility found average nicotine concentrations ranging from 0.4 μg/m³ at a vocational center to 24.6 μg/m³ at a prison gym. S. Katharine Hammond & Karen M. Emmons, Inmate exposure to secondhand smoke in correctional facilities and the impact of smoking restrictions, 15 J. EXPOSURE ANALYSIS & ENVTL. EPIDEMIOLOGY 205, 208 tbl.1 (2005). Other areas tested were a common room (7.6 μg/m³) and three dorm rooms (3.9, 7.3, and 9.7 μg/m³ respectively). Id. These findings compare to average nicotine concentrations of 2 μg/m³ in a random selection of homes of smokers. Id. at 208. The atmospheric concentration of nicotine is a valid quantitative indicator of SHS indoors. 2006 SURGEON GENERAL REPORT, supra note 1, at 99.

23. Hammond & Emmons, supra note 22, at 210 (explaining that overcrowding can result in prison officials converting areas with insufficient ventilation for housing, such that SHS will "reach extremely high concentrations," and reporting that the study recorded levels in a converted former gymnasium five times greater than those found in a regular housing area).

24. 2006 SURGEON GENERAL REPORT, supra note 1, at i; see also id. at 92 (concluding that ventilation systems cannot adequately control exposure to SHS unless a complete smoking ban is enforced).
SHS evolve over time. Smoke emitted from the burning end of a cigarette releases "volatile compounds," which tend to hang in the air. The air filters used in most heating, ventilating, and air conditioning ("HVAC") systems are inadequate to fully cleanse the air because they typically fail to remove the small particles and gases comprising SHS. Replacing indoor air with outdoor air is similarly ineffective since such mixing does not completely change the air and does not impact air quality evenly throughout a room. Moreover, HVAC systems may minimize or shut off the influx of outside air in favor of contaminated indoor air when outside air is too warm, too humid, or too cold to be used to maintain an acceptable temperature. Finally, prison HVAC systems generally circulate air throughout the facility, potentially redistributing contaminated air.

In light of the inadequacy of ventilation-centered attempts to reduce exposure, and in the absence of effective smoking bans, significant concentrations of SHS confront inmates. Although the need for empirical research into SHS levels in prison has remained largely unfulfilled, a rare study conducted in Vermont prisons documented extreme nicotine concentrations when those prisons did not restrict smoking. Researchers measured levels over three nonconsecutive weeks: before any smoking ban, while a complete smoking ban was in effect, and after outdoor smoking privileges were reinstated. The study reveals that, in the absence of any smoking ban, prison air may contain nicotine concentrations up to twelve times higher than concentrations found in smokers' homes. Since there is a linear rela-

25. Id. at 85.
26. Id.
27. Id. at 86.
28. Id. at 88 (observing that no more than 63.2% of the original air in even a well-mixed space is likely to change in an hour).
29. Id. at 89–90.
30. Id. at 86, 91.
32. Id. at 206–07. Using nicotine samplers to test the air, the researchers took baseline nicotine samples in mid-June 1992, when smoking was freely allowed. The study included additional tests four months later in October, after Vermont instituted a complete smoking ban, as well as five months later in March 1993, after the Vermont prisons relaxed their ban to allow smoking outdoors. The Vermont sampling took place at two prisons, one housing inmates for relatively short stays and the other for much longer stays. The study relied on measurements taken over seven days by approximately forty nicotine samplers placed throughout each facility in locations inaccessible to the inmates. Id. In 2004, Vermont reinstituted a total smoking ban. AGENCY OF HUMAN SERVS., VT. DEP'T OF CORR., DIRECTIVE NO. 408.02, TOBACCO PRODUCTS (2004), http://www.doc.state.vt.us/about/policies/numeric/cort_services (follow "Tobacco Products" hyperlink) (last visited Mar. 30, 2007).
33. See Hammond & Emmons, supra note 22, at 208. The study found a mean nicotine concentration of 24.6 µg/m³ in a gym doubling as living quarters, whereas a previous study reported an average nicotine concentration of 2 µg/m³ in smokers' residences. Id.
tionship between exposure to SHS and the associated risk of developing lung cancer, permitting smoking poses a significant risk to inmates.

Data from the Vermont study suggest that a complete ban, which prohibits possession of tobacco by inmates, is most likely to minimize exposure to SHS, but only when that ban is regularly enforced and prison officials put in place effective measures to combat tobacco smuggling. Both the complete ban and the indoor ban significantly reduced—but did not eliminate—the presence of nicotine. The researchers indicated that the modified smoking restrictions might have been more effective if the consequences for violating the smoking policy were greater.

II. SECONDHAND SMOKE AND THE EIGHTH AMENDMENT

This Part argues that, under the Helling standard, prison officials violate the Eighth Amendment by failing to ban inmate smoking in order to prevent long-term exposure of inmates to significant levels of SHS. Section II.A explains the Helling standard. Section II.B argues that wide-reaching smoking bans demonstrate societal intolerance toward the serious risk of harm posed by involuntary, long-term exposure to significant levels of SHS. Section II.C contends that prison officials likely exhibit deliberate indifference by failing to completely ban the possession of tobacco by inmates despite recognizing that inmates’ likely noncompliance with any lesser ban will subject nonsmoker inmates to a serious risk of harm.

A. The Helling v. McKinney Standard

The Supreme Court held in Helling v. McKinney that the Eighth Amendment prohibits the deliberate indifference of prison officials to a serious risk of harm posed by SHS to inmates. The Eighth Amendment protects convicted prisoners against the infliction of cruel and unusual punishment. This protection applies to certain deprivations suffered during imprisonment, even


35. See Hammond & Emmons, supra note 22, at 209. While SHS concentrations observed during Vermont’s complete ban were higher than concentrations observed during the indoor ban in a few areas of the prison, this seemingly counterintuitive result may merely indicate that the relatively new complete ban was not yet being fully enforced.

36. See id. at 208 tbl.1. 210 (reporting postban nicotine concentrations ranging from 1.5 to 1.7 µg/m³ in areas where smoking had previously been allowed, a concentration of 0.6 µg/m³ in what had previously been the sole nonsmoking dorm, and concentrations ranging from 2.3 to 6.5 µg/m³ in central facilities excluding the booking area, the facility entrance, and the visiting rooms).

37. See id. at 210.


when the inmate’s sentence does not specifically provide for the deprivation.\textsuperscript{40} The Supreme Court has explained the rationale by noting that:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment.\textsuperscript{41}

These substantive limits change with the "evolving standards of decency that mark the progress of a maturing society,"\textsuperscript{42} incorporating contemporary notions of dignity, civilized standards, humanity, and decency.\textsuperscript{43}

While the Court has recognized that the Constitution does not require "comfortable prisons,"\textsuperscript{44} it has held that the Eighth Amendment guarantees a "minimal civilized measure of life’s necessities."\textsuperscript{45} The Court has specified that these necessities include food, clothing, shelter, medical care, and reasonable safety,\textsuperscript{46} the denial of which may "result in pain and suffering which no one suggests would serve any penological purpose."\textsuperscript{47}

Since 1976, it has been clear that the Eighth Amendment protects against deliberate indifference to a prisoner’s "serious medical needs."\textsuperscript{48} Successful Eighth Amendment claims contain both objective and subjective elements.\textsuperscript{49} The objective element requires the harm to be serious.\textsuperscript{50} The subjective element, deliberate indifference, exists only where a defendant consciously disregards a risk.\textsuperscript{51}

In \textit{Helling}, the Supreme Court held that an inmate stated a viable Eighth Amendment cause of action by alleging that prison officials, with deliberate indifference, subjected him to an unreasonable risk of serious damage to his future health by allowing his continued exposure to SHS.\textsuperscript{52} McKinney, a Nevada state prisoner, claimed that almost constant exposure to SHS from his cellmate’s and others’ cigarettes presented an unreasonable risk of harm.

\begin{itemize}
\item \textsuperscript{40} See \textit{Estelle v. Gamble}, 429 U.S. 97, 103–04 (1976).
\item \textsuperscript{41} \textit{DeShaney v. Winnebago County Dep’t of Soc. Servs.}, 489 U.S. 189, 200 (1989).
\item \textsuperscript{43} \textit{Hudson v. McMillian}, 503 U.S. 1, 11 (1992) (citing \textit{Estelle}, 429 U.S. at 102).
\item \textsuperscript{44} \textit{Rhodes}, 452 U.S. at 349.
\item \textsuperscript{45} \textit{Id.} at 347.
\item \textsuperscript{47} \textit{Estelle}, 429 U.S. at 103.
\item \textsuperscript{48} \textit{Id.} at 104.
\item \textsuperscript{49} \textit{Helling}, 509 U.S. at 35.
\item \textsuperscript{50} See \textit{Estelle}, 429 U.S. at 104.
\item \textsuperscript{51} \textit{Farmer v. Brennan}, 511 U.S. 825, 836 (1994).
\item \textsuperscript{52} \textit{Helling}, 509 U.S. at 35.
\end{itemize}
to his health. Nevada prison officials, according to McKinney, repeatedly denied his requests to transfer him to a single cell or to house him with a nonsmoker. The Court rejected the prison officials' argument that only deliberate indifference to current serious health problems of inmates should be actionable. It instead sanctioned "future harm" actions under the Eighth Amendment, indicating that it would be odd to deny relief to an inmate who has proven an unsafe, life-threatening condition on the ground that nothing has happened to him yet. The Court also rejected arguments from the United States as amicus curiae that the harm to any particular individual from exposure to SHS was speculative and that the risk was not sufficiently grave, as a matter of law, to implicate a serious medical need. The Court indicated that McKinney would have to prove on remand that "it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight." However, pursuant to a settlement agreement, the district court dismissed the case with prejudice before undertaking any inquiry upon remand.

B. Societal Intolerance Toward Significant Exposure

With respect to the objective element of an Eighth Amendment future harm claim, a court must 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." Stated differently, a prisoner must show that the risk of which he complains is "not one that today's society chooses to tolerate."

53. Id.
55. Helling, 509 U.S. at 34.
56. See id. at 33-34.
57. Id. at 34-35.
58. Id. at 35; see generally Elizabeth Alexander & David C. Fathi, Smoking, the Perception of Risk, and the Eighth Amendment, 13 ST. LOUIS U. PUB. L. REV. 691, 702 (1994) (criticizing the Helling standard for the implication that prisoners may be exposed to bad conditions merely because such conditions routinely exist among nonprisoners).
59. McKinney v. Anderson (McKinney II), No. CV-N-87-36-ECR (PHA), slip op. at 1 (D. Nev. Jan. 11, 1995). The settlement provided that, unless unusual circumstances existed, McKinney would be housed either in a single cell or in a double cell with a nonsmoking roommate. Id. at 3.
60. Helling, 509 U.S. at 36.
61. Id. Many courts require proof of "societal intolerance" for all Eighth Amendment claims involving SHS, even those alleging a deprivation of a serious medical need for a smoke-free environment. See, e.g., Talal v. White, 403 F.3d 423, 426 (6th Cir. 2005) (requiring, even in light of the inmate's documented allergy to SHS, that he demonstrate a risk "so grave that it violates contemporary standards of decency to expose anyone unwillingly" to it (quoting Helling, 509 U.S. at 36)). This arguably misapplies the Helling standard, since the issue before the Helling Court was whether alleging an unreasonable risk to McKinney's future health stated a claim. See Helling, 509 U.S. at 31. Where an inmate alleges pain arising from a preexisting serious medical need, such as allergies or a respiratory condition, the Eighth Amendment claim does not sound in a risk of future harm. Instead, it is grounded in present suffering, where the relevant objective test is whether the deprivation is sufficiently serious.
Although the Supreme Court has not offered lower courts further guidance on how to apply the *Helling* standard, the Court's capital punishment jurisprudence reveals how it has used objective factors to determine current standards of decency. In *Roper v. Simmons*, the Court held unconstitutional the execution of offenders who had committed their crimes as juveniles. Beginning its review with "objective indicia," the *Roper* Court found a societal consensus in the acts of many state legislatures abolishing the death penalty for juveniles. The Court has also found significant the number of states that have acted on a particular matter as well as "the consistency of the direction of change." Applying similar objective criteria, existing prison smoking bans demonstrate that society does not tolerate the significant exposure that inmates face. The Federal Bureau of Prisons bans inmate smoking indoors except in connection with authorized religious activity and allows its wardens the discretion to prohibit inmate smoking outdoors as well. While a 1993 survey found that no prison system had entirely banned smoking, all but a few states had adopted smoking policies for their prisons by the end of 2006, ranging from minimal restrictions to complete bans. As of the end of 2006, twenty-nine states and the District of Columbia completely banned inmate smoking on prison property. Supplementing statewide restrictions, many

to violate societal standards of decency, see Hudson v. McMillian, 503 U.S. 1, 9 (1992), not whether a risk is unreasonable. Applying language from *Helling* about how society views a risk despite an allegation of "present harm" confuses the *Helling* standard and improperly shifts attention from the appropriate inquiry into the seriousness of the present harm and suffering.

62. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (identifying factors relevant to the Court's determination that the Eighth Amendment forbids imposing the death penalty for rape, including public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions).


64. See id. at 564, 578. In a prior case, a plurality of the Court also considered the views of respected professional organizations, such as the American Bar Association and the American Law Institute, as relevant to standards of decency. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).


68. States have adopted many of the bans as a result of state clean indoor air acts, either by force of the statutes themselves, see, e.g., N.Y. PUB. HEALTH LAW § 1399-o (McKinney 2006); Clean Indoor Air Act of 1990, S.C. CODE ANN. § 44-95-20 (2005), or by regulations or policies promulgated as a result of the statutes, see 2006 Surgeon General Report, supra note 1, at 628 (noting that a 2003 survey concluded that two-thirds of responding correctional facilities which had adopted smoke-free policies reported that federal case law, state law, or local ordinances had mandated the implementation of the policies). Penal codes in some states specifically prohibit smoking by inmates and other individuals on prison grounds. See e.g., CAL. PENAL CODE § 5030.1 (West Supp. 2007).

69. The "complete ban" states are Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. The District of Columbia has also completely banned inmate smoking in its prisons. For examples of policies im-
county corrections officials and individual prison wardens completely ban inmate smoking within individual correctional facilities. Despite a trend toward complete smoking bans, twenty-one states have not yet adopted complete bans. Fifteen of these states prohibit smoking only indoors. Although the approaches of the remaining six states vary, common practices include housing nonsmokers with other nonsmokers upon request, permitting smoking indoors except in designated smoke-free zones, and delegating authority to wardens to develop institution-specific policies rather than implementing a statewide solution to prison smoking.

Outside the prison context, widespread smoking bans at federal, state, and local levels, and the actions of respected professional organizations, offer additional objective indicia of a societal consensus of intolerance toward long-term exposure to SHS. The federal government has banned smoking in most federal buildings and aboard airplanes. The United

70. See Raymond Hernandez, More Prisons Are Banning Cigarettes: “Smoke Free” Tensions Feared in Westchester, N.Y. TIMES, Feb. 5, 1995, at 37 (describing bans imposed on a county-wide basis or by individual prisons); Bruce Tomaso, Inmates adapting to smoking ban: Three years later, it’s hardly a hot issue, officials say, DALLAS MORNING NEWS, Mar. 8, 1998, at 43A (explaining that many local Texas jails ban smoking).

71. The “indoor ban” states are Alabama, Arizona, Florida, Georgia, Hawaii, Iowa, Kentucky, Michigan, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, and West Virginia. For examples of policies implementing indoor bans, see ALA. DEP’T OF CORR., ADMIN. REG. No. 009, SMOKE/TOBACCO FREE POLICY (2004); OHIO DEP’T OF REHABILITATION & CORR., No. 10-SAF-01, SMOKE-FREE WORKPLACE (2006). Remaining smoking policies and state responses to the author’s inquiries as of December 31, 2006, are on file with the author. While the total bans do not all operate similarly, they all prohibit the use and possession of tobacco by inmates on prison grounds.

72. The remaining states are Illinois, Louisiana, Mississippi, Pennsylvania, South Carolina, and Virginia. For examples of policies implementing restrictions less comprehensive than a full indoor ban, see PA. DEP’T OF CORR., POL’Y No. 1.1.7, SMOKE IN THE DEPARTMENT OF CORRECTIONS (2000) (prohibiting smoking in most common areas but exempting designated inmate break areas); S.C. DEP’T OF CORR., No. ADM-16.06, SMOKE ON SCDC PROPERTY (2002) (permitting smoking in inmate housing areas that have not been designated as nonsmoking by the warden). Remaining smoking policies and state responses to the author’s inquiries as of December 31, 2006, are on file with the author.

73. See McKinney I, supra note 54, 924 F.2d 1500, 1508 (9th Cir. 1991), vacated on other grounds sub nom. Helling v. McKinney, 502 U.S. 903 (1991) (citing as indicia state statutes restricting smoking in public places, federal regulations controlling smoking, smoking restrictions in correctional facilities at all levels, and local smoking laws); cf. Lauren I. Ginestra, Comment, Environmental Tobacco Smoke: Cruel and Unusual Punishment?, 42 U. KAN. L. REV. 169, 192 (1993) (arguing that society’s response to scientific evidence on SHS supports a conclusion that some levels of SHS exposure constitute cruel and unusual punishment).


States military has also significantly restricted indoor smoking with the exception of certain private lodging facilities. All states have recognized the risk posed by long-term exposure to SHS by imposing some restrictions on smoking indoors. Many states have enacted comprehensive solutions and hundreds of municipalities have adopted comprehensive local indoor clean air acts. Professional organizations, such as the American Correctional Association and the American Jailers Association, recommend that prisons adopt nonsmoking policies.

Courts should consider the existence of a societal consensus in light of the seriousness of the risk posed by the plaintiff’s exposure. Where an inmate plaintiff documents consistent, long-term exposure to significant levels of SHS, it is irrelevant under Helling that society may still tolerate exposure to lesser risks. Those who object to using the Eighth Amendment to protect inmates from SHS are correct that smoking remains common in the United States, but their criticism fails for two chief reasons. First, the relevant question under Helling is not whether society tolerates any risk of harm from SHS but rather if society tolerates high risk of the sort SHS poses to prisoners. Second, because nonsmokers’ exposure in prison is involuntary, it

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76. 2006 Surgeon General Report, supra note 1, at 586. In 1994, the Department of Defense ordered that all workplace settings under its control be made smoke-free. Id. Most military living facilities are also now smoke-free. Id.

77. Forty-nine states and the District of Columbia had restricted indoor smoking in some manner as of December 31, 2005. Id. at 582. According to the Centers for Disease Control database, which the Surgeon General Report cites, Kentucky was the lone holdout. See Centers for Disease Control, State Tobacco Activities Tracking and Evaluation (STATE) System, http://www.cdc.gov/tobacco/statesystem (follow “Detailed Report” hyperlink; then select “Topic: Legislation-Smokefree Indoor Air,” “Measure: Smokefree Indoor Air—Other Sites,” and “Year: 2005-4th Quarter” to view information for each state) (last visited Mar. 30, 2007) (reporting that all states but Kentucky had restricted indoor smoking in some fashion as of Dec. 31, 2005). However, since Kentucky now prohibits indoor smoking by inmates, see supra note 71, all states now acknowledge the risk of harm posed by SHS.

78. Although none of these bans yet completely prohibits smoking indoors, in the past five years, eleven states and the District of Columbia have enacted “comprehensive smoke-free laws throughout their jurisdictions that, when the laws take full effect as implemented in practice, will require almost all enclosed workplaces and public places, including restaurants and bars, to be smoke-free.” 2006 Surgeon General Report, supra note 1, at 582 (citing figures accurate as of April 2006). For example, the California legislature enacted a workplace smoking ban, indicating its intent to “prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section.” Cal. Lab. Code § 6404.5(a) (West 2003). The ban took effect on January 1, 2007. Id.

79. 2006 Surgeon General Report, supra note 1, at 583 (describing the popularity of municipal restrictions on indoor smoking).


is irrelevant that a minority of Americans voluntarily assume a greater risk than society generally tolerates.\textsuperscript{83}

Although many states have adopted prison bans,\textsuperscript{84} courts must still protect the Eighth Amendment rights of prisoners in those states that have not yet acted. Legislatures and prison officials in the remaining states have failed to adopt or have even explicitly rejected complete bans, continuing to allow smoking on prison grounds or indoors. For example, legislative efforts to introduce any ban in Illinois, where smoking is freely permitted indoors at all but one prison, have failed repeatedly.\textsuperscript{85} Michigan prison officials had originally planned to completely ban smoking by 1998, but instead they continue to allow smoking outdoors.\textsuperscript{86} The Florida State Assembly considered legislation to implement a complete prison smoking ban in 1998 but then amended it to allow smoking outside prison buildings.\textsuperscript{87} Although it is plausible that even these states will completely ban inmate smoking in the future, courts must act to remedy existing violations of the Eighth Amendment in cases brought before them.

\textbf{C. The Deliberate Indifference Inquiry}

To prove a violation under \textit{Helling}, an inmate must demonstrate not only that society does not tolerate the risk that confronts the inmate, but that

\textsuperscript{83}See \textit{Helling}, 509 U.S. at 35 (directing that the inquiry be whether "it is contrary to current standards of decency for anyone to be so exposed \textit{against his will}" (emphasis added)).

\textsuperscript{84}In implementing bans, a majority of states have demonstrated not only an interest in addressing the serious risk of harm posed by SHS but also a concern with controlling staggering prison health care costs. See, e.g., \textit{OFFICE OF SENATE FLOOR ANALYSES, ANALYSIS OF A.B. 384 (Cal. 2004) available at http://info.sen.ca.gov/pub/03-04/bill asm ab_0351-0400/ab_384_cfa_20040822_093739_sen_flo r.html} (last visited Mar. 30, 2007) (concluding that prior to a recent smoking ban the state spent approximately $266 million in additional health care costs for smoker inmates); Karen Cropsey, Gloria D. Eldridge, & Tina Ladner, \textit{Smoking among female prisoners: An ignored public health epidemic}, 29 ADDICTIVE BEHAVS. 425, 426 (2004) (describing high rates of cardiovascular disease, cancer, and other smoking-related problems in prisoners and noting that, despite their relative youth as a population, one in six inmates reports a serious medical problem). A 1998 survey reported that health care costs represented an average eleven percent of state corrections budgets. \textit{DEBORAH LAMB-MECHANICK \& JULIANNE NELSON, PRISON HEALTH CARE SURVEY: AN ANALYSIS OF FACTORS INFLUENCING PER CAPITA COSTS} tbl.1 (2000), \textit{available at http://www.nicic.org/pubs/2000/015999.pdf}. Health care costs continue to escalate rapidly. \textit{Id.} at 1.

\textsuperscript{85}Kurt Erickson, \textit{Prison smoking ban back in talks}, \textit{PANTAGRAPH.COM}, Sept. 21, 2006, http://www.pantagraph.com/articles/2006/09/21/news/doc4512b994dd757976267792.txt (last visited Mar. 30, 2007). To date, Illinois prison officials have opposed any effort for a ban, although the governor's office is making efforts to eliminate smoking in state buildings through collective bargaining, and it is possible that a prison ban could result from that process. \textit{Id.}

\textsuperscript{86}See Judy Putnam, \textit{Prisons to isolate indoor smokers: Tobacco-free zones will be set up} to protect non-smokers, \textit{GRAND RAPIDS PRESS}, Aug. 2, 2004, at B6. The Michigan Department of Corrections discontinued its plan after a trial ban at the Newberry prison reportedly resulted in "staff assaults and a new black market for cigarettes." \textit{Id.} As an alternative, Michigan wardens have designated voluntary tobacco-free zones within each prison facility with the hope that they would "remove[\ldots] the tobacco element completely and promote[\ldots] a cleaner environment." \textit{Id.}

prison officials have acted with deliberate indifference by failing to adequately address that risk. In conducting the deliberate indifference inquiry, courts should examine the reasonableness of prison officials' adoption or failure to adopt a smoking ban as well as the regularity of associated enforcement efforts. Applying this framework, prison officials who adopt a policy less restrictive than a complete prohibition on inmate smoking are likely acting unreasonably—and, thus, with deliberate indifference—to an ongoing risk of harm.

Because the Eighth Amendment prohibits only cruel and unusual punishment, prison officials exhibit deliberate indifference only when they consciously disregard a risk. Negligence alone is not enough to impose Eighth Amendment liability. The Court has noted that an official does not inflict punishment by "fail[ing] to alleviate a significant risk that he should have perceived but did not." The deliberate indifference standard takes into account prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." As a result, prison officials who recognize a risk to inmate health or safety are not liable if they "responded reasonably" to the risk, even if the harm was not averted.

In determining the reasonableness of the response, courts should examine prison officials' adoption or failure to adopt a smoking ban as well as the regularity of any associated enforcement efforts. In *Helling*, the Supreme Court stated that the adoption of a smoking policy will "bear heavily" on the inquiry into deliberate indifference for an SHS claim. The Supreme Court also indicated that courts may appropriately consider the "realities of prison

89. Wilson v. Seiter, 501 U.S. 294, 300 (1991) (holding that where the pain inflicted is not dispensed as punishment by a statute or sentencing judge, a mental element must be attributable to the inflicting officer).


91. Estelle v. Gamble, 429 U.S. 97, 105–06 (1976) (holding that an inadvertent failure to provide adequate medical care does not constitute "an unnecessary and wanton infliction of pain," nor is it "repugnant to the conscience of mankind").

92. Farmer, 511 U.S. at 838 (emphasis added).

93. Id. at 844–45 (citing Spain v. Procurier, 600 F.2d 189, 193 (9th Cir. 1979)).

94. Farmer, 511 U.S. at 844.

95. See Cornish F. Hitchcock, *Environmental Tobacco Smoke as Cruel and Unusual Punishment*, 13 St. Louis U. Pub. L. Rev. 661, 686 (1994) ("Determinations on this score are inevitably fact-bound, requiring an examination of... conditions... present in a particular facility, the adequacy of circulation, the existence of any policies restricting smoking... the extent to which those policies are, in fact, implemented, and other evidence relating to what prison officials knew and... did... "). Framed in this manner, the inquiry presumes that the defendants are responsible for setting policy and assigning resources for a state department of corrections or a specific prison.

administration" when undertaking this inquiry. Interpreting this language, one circuit has concluded that taking into account the realities of prison administration does not simply allow prison administrators to escape scrutiny without also showing that they have "afford[ed] sufficient weight to the constitutional rights of individuals.

When undertaking this inquiry, courts should acknowledge that SHS poses a sufficiently large risk of harm that prison officials' knowledge of the risk can be inferred. Society's efforts to reduce or eliminate exposure to SHS, including banning smoking in prisons, have received great attention by the media. Moreover, resolutions adopted by the major correctional associations urging nonsmoking policies demonstrate that prison officials are conscious of the risk of SHS to prisoners.

Consistent with this inference, the failure to ban smoking indoors should bear heavily on a determination that prison officials responded unreasonably to the risk of harm posed by SHS. For example, adopting voluntary smoke-free zones rather than imposing an indoor ban is unreasonable because the Surgeon General has concluded that segregating smokers and nonsmokers, even in separately ventilated areas, is insufficient to avoid the health risk posed by SHS.

Moreover, prison officials likely exhibit deliberate indifference when they fail to completely ban inmate smoking on prison grounds despite recognizing that the possession of tobacco by inmates perpetuates a serious risk of harm for nonsmoker inmates. Officials may "not escape liability if the evidence show[s] that [they] merely refused to verify underlying facts that [they] strongly suspected to be true, or declined to confirm inferences of risk that [they] strongly suspected to exist." Studies have estimated that sixty to eighty percent of inmates are smokers. Nicotine's addictive properties

97. Helling, 509 U.S. at 37.
98. Jordan v. Gardner, 986 F.2d 1521, 1529 (9th Cir. 1993) (en banc).
99. Cf. Fruit v. Norris, 905 F.2d 1147, 1150 (8th Cir. 1990) (citing Cortes-Quinones v. Jimenez-Nettleth, 842 F.2d 356, 358 (1st Cir. 1988)) (holding that some acts and omissions will be so dangerous that knowledge of the risk can be inferred).
100. See, e.g., Hernandez, supra note 70 (describing local efforts to ban smoking in prisons); Gregg Zoroya, Smoking bans spread to prisons, USA Today, July 22, 2004, at A3.
101. See supra notes 80–81 and accompanying text (describing American Correction Association and American Jailers Association resolutions advocating nonsmoking policies).
102. 2006 SURGEON GENERAL REPORT, supra note 1, at i; see also Lynn M. Galbraith-Wilson, The Call for State Legislation on Environmental Tobacco Smoke in State Prisons, 13 HAMLINE J. PUB. L. & POL'Y 335, 344 (1992) (arguing that separating smokers from nonsmokers would not alleviate the health threat posed by SHS).
105. In a study of Indiana prisoners conducted following a complete smoking ban, approximately eighty percent of smokers reported that it was "difficult or very difficult" for them to quit smoking.
motivate many inmates to smoke when they are allowed to possess tobacco in their cells, notwithstanding any indoor ban that may be in effect. As a result, indoor bans that do not prevent inmates' access to tobacco have proven ineffective, such that the majority of prisons have adopted complete bans.

Purported disciplinary concerns are insufficient to militate against a finding of deliberate indifference. Although some prison officials have predicted that inmates will turn violent after a smoking ban is implemented, such concerns have proven largely unfounded. In light of evidence showing that twenty-nine states have implemented complete bans, prison officials cannot credibly testify to a good faith belief that implementing a complete ban would pose a threat to prison order if handled properly. Similarly, tobacco smuggling has proven manageable at facilities that have adopted complete bans. Texas corrections officials found that smuggling was not widespread, even three years after the state adopted a complete prison smoking ban. Classifying tobacco smuggling in prisons as a felony, as Texas

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footnotes:
106. Putnam, supra note 86.
107. E.g., Reilly v. Grayson, 157 F. Supp. 2d 762, 769 (E.D. Mich. 2001) ("Smoking inside housing units was a persistent problem in [Department of Corrections] facilities; rules against indoor smoking were more honored in the break [sic] than the observance."); aff'd, 310 F.3d 519 (6th Cir. 2002).
108. E.g., Utah Dep't of Corr., Institutional Operations Division Manual, Ch. FDR21, CONTRABAND (1996) (finding that banning possession of tobacco by inmates was necessary to prevent tobacco smuggling and unauthorized smoking); see supra note 69 and accompanying text (indicating that twenty-nine states have completely banned inmate smoking in prisons).
109. E.g., Mary Ellen Klas, House Derails Prison Smoking Ban Over Safety, PALM BEACH POST, Mar. 12, 1997, at 1A (quoting a Florida corrections sergeant's prediction that a smoking ban would result in "officers going to the hospital in large numbers.").
110. See Zoroya, supra note 100. Colorado described minimal problems with its policy in 1999, explaining that three workers were fired for smuggling and several inmates (out of 14,000) became sick on tobacco substitutes, one from attempting to smoke a nicotine patch. Prison Smoking Ban: Despite Problems, Officials Pleased with Initial Results, CHI. TRIB., Apr. 16, 1999, at 7. A spokesperson for Washington's corrections department described the first week its nonsmoking policy was in effect: "[S]ome of the inmates were a little bit testy, but nothing significant." Zoroya, supra note 100. Similarly, Minnesota corrections official reported "business as usual" in state prisons a few weeks after a system-wide smoking ban took effect. Steve Karnowski, Inmates Say Smoking Ban a Real Drag: "I've Never Wanted a Cigarette So Bad in My Life," One Says, ST. PAUL PIONEER PRESS, Aug. 22, 1997, at 2C.
111. Cf. Jordan v. Gardner, 986 F.2d 1521, 1529 (9th Cir. 1993) (concluding that a prison administrator exhibits deliberate indifference by deciding to ignore grave suffering because of "irrelevant or unimportant concerns").
112. Tomaso, supra note 70. In 1998, three years after Texas prisons implemented a smoking ban, a spokesperson indicated that twenty-three cases of employee smuggling had been referred to the agency's internal affairs division. Id. At that time, it was a misdemeanor for a guard to sell tobacco to inmates, id., but the state later reclassified tobacco smuggling as a felony, see Prohibiting the Introduction of Possession of Certain Items in Correctional Facilities or on Certain Property of the Texas Department of Criminal Justice; Providing Penalties, 2003 Tex. Sess. Law. Serv. Ch. 470 (West) (codified as amended at TEX. PENAL CODE ANN. § 38.11(a)(3), (g) (Vernon 2005)). Texas houses over 171,000 prisoners.
has done, addresses the reality that tobacco smuggling can appeal to prison staff and helps to control any black market activity.

Moreover, smoking policies designed to restrict or ban smoking do not themselves generally implicate constitutional rights. At least three circuits have concluded there is no Eighth Amendment right to smoke in prison, rejecting the proposition that prison officials could inflict "cruel and unusual punishment" on smoker inmates by instituting a generally applicable smoking ban. First Amendment challenges are also likely to fail, including claims that prison officials must exempt smoking in religious ceremonies, such as those traditionally conducted by Native Americans, and that smoking in prison is "sufficiently expressive" to be protected under the First Amendment.

III. REMEDYING THE EIGHTH AMENDMENT VIOLATION

In light of the gravity of the risk associated with continued exposure to SHS and the unreasonableness of failing to address it with an effective smoking ban, courts should remedy Eighth Amendment violations resulting from SHS. Achieving a real remedy will require a willingness by courts to

30, 2005). Yet, from 2003 to 2006, an average of only forty-six cases of tobacco smuggling were opened each year by the prison system’s Office of Inspector General, which investigates employee misconduct. Telephone Interview with John Moriarty, Inspector Gen., Tex. Dep’t of Criminal Justice, in Austin, Tex. (Jan. 23, 2007).

113. TEX. PENAL CODE ANN. § 38.11(a)(3), (g) (Vernon 2005).

114. Steven Patrick & Robert Marsh, Current tobacco policies in U.S. adult male prisons, 38 SOC. SCI. J. 27, 34 (2001) (predicting that, where a prison has turned tobacco into contraband, easy, legal access to tobacco outside prison walls will cause prison staff to consider smuggling for the first time).

115. Some positive effects may offset problems posed by tobacco smuggling. An increase in tobacco smuggling may bring with it a desirable “sharp decline in contraband including other drugs.” Id. at 33. Corrections officials have reported that they prefer tobacco to alternative smuggling activities. Martin Horn, Commissioner of the New York City Department of Correction, suggested that he would "rather be chasing tobacco than drugs." Zoroya, supra note 100. A senior Texas corrections official echoed this sentiment. See Tomaso, supra note 70.


117. E.g., Mauchlin v. Hood, 167 F. App’x 735, 736 (10th Cir. 2006); Beauchamp v. Sullivan, 21 F.3d 789, 790–91 (7th Cir. 1994) (suggesting that the sudden withdrawal of an addictive substance could be employed as torture by police or guards but that a generalized policy addressing the risk of harm could not be unconstitutional, especially in light of the Supreme Court’s ruling in Hel- ling v. McKinney, 509 U.S. 25 (1993)); Grass, 903 F.2d at 1207.

118. Cf. Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (rejecting the proposition that religious beliefs excuse an individual from the need to comply with an “otherwise valid law prohibiting conduct that the State is free to regulate”). Nevertheless, some states exclude religious ceremonies from their smoking bans. See, e.g., COLO. DEP’T OF CORR., REG. NO. 800-01K, AMERICAN INDIAN EXCEPTION TO TOBACCO BAN (2006) (exempting American Indian pipe ceremonies from the inmate smoking ban); KAN. DEP’T OF CORR., POLICY MEMORANDUM ISSUANCE NO. 06-03-001 (2006), available at http://docnet.dc.state.ks.us/lMPPS/Chapter9/09107.pdf (describing an exception for religious ceremonies).

acknowledge evolving standards of decency and the seriousness of the risk of harm posed by SHS. Achieving a remedy will further require courts to address the reality that inmates frequently lack the resources necessary to meet the burden of production in SHS cases.\textsuperscript{120} Lower courts should heed the Supreme Court’s instruction that courts reviewing Eighth Amendment claims must be open to evidence and assistance from many sources, including expert testimony and studies as to how particular conditions will affect prisoners.\textsuperscript{121} This Part contends that courts are empowered to remedy an Eighth Amendment violation stemming from SHS by easing the burden of production confronting inmate plaintiffs and by ordering increasingly broad injunctive relief until the constitutional harm is averted.

Courts, by taking judicial notice of appropriate facts and by ordering testing to document the plaintiff’s exposure, can partially address the common inability of inmates to document the serious harm confronting them. Courts can also notice commonly accepted facts,\textsuperscript{122} such as the health risks of SHS\textsuperscript{121} and society’s acts expressing intolerance to SHS.\textsuperscript{124} Courts can further ease the burden by ordering testing of the plaintiff’s urine for cotinine, a valid marker for exposure to SHS.

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\textsuperscript{120} See Gizzi, supra note 21, at 1122 (arguing that scientific evidence may not be readily available to inmates without access to funds); Matthew H. Kraft, Case 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, 277 (1994) (arguing that the \textit{Helling} burden of proof demands many more “studies and financial resources than any inmate is likely to have”).


\textsuperscript{123} Cf. Fisher v. Caruso, No. 03-CV-71804-DT, 2006 WL 2711807, at *12 (E.D. Mich. Sept. 21, 2006) (noticing that the surgeon general concluded that ventilation is insufficient to address the health risks posed by SHS). A court can notice that it is common knowledge that SHS can have serious negative health consequences. A court can also notice that the surgeon general has concluded that SHS can amplify the risk of contracting lung cancer, heart disease, and other serious diseases. Even if a court is unwilling to treat the 2006 Surgeon General Report’s conclusions as irrefutable by taking notice of its contents, a court may still notice the report’s authenticity so it may be admitted into evidence. Federal Rule of Evidence 803(8) provides an exception to hearsay restrictions on the admissibility of evidence. FED. R. EVID. 803(8) (indicating that the hearsay rule does not exclude “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report”).

\textsuperscript{124} The Surgeon General Report documents legislative and regulatory policy responses to SHS. See 2006 SURGEON GENERAL REPORT, supra note 1, at 571–650.
of exposure to SHS.\textsuperscript{125} Courts can also appoint an independent expert\textsuperscript{126} in cases where cotinine levels are not sufficiently egregious as to make incontrovertible the existence of objective harm\textsuperscript{127} and can impose any associated costs on the defendants.\textsuperscript{128} Although the cumulative effect of such judicial acts will not eliminate inmates' burdens of production, these steps will help to ensure that legitimate claims are fully considered on their merits.

Once a plaintiff proves an ongoing Eighth Amendment violation relating to SHS, courts should order appropriate injunctive relief. While compensatory damages are the presumptive remedy for constitutional violations,\textsuperscript{129} damages are especially difficult to collect in future harm actions. Likely barriers include the Eleventh Amendment,\textsuperscript{130} qualified immunity,\textsuperscript{131} and a requirement

\begin{itemize}
  \item \textsuperscript{125} Cotinine is a metabolite of nicotine. \textit{ld.} at 101. Courts have previously ordered air-quality testing in order to determine a plaintiff's exposure to SHS. \textit{E.g.}, Tudor v. Moore, No. 2:98-1927-RBH, slip op. at 3 (D.S.C. Aug 31, 2001) (describing July 23, 2001 order requiring defendants to conduct air-quality testing around the plaintiff's cell). Courts have also examined cotinine concentrations as an indicator of exposure. \textit{E.g.}, McIntyre v. Robinson, 126 F. Supp. 2d 394, 404 (D. Md. 2000). A judicial order requiring cooperation from prison officials can minimize the challenges of obtaining an accurate specimen in a prison environment. If a court orders prison officials to collect the urine sample, the order should be tailored to achieve test results reflecting the normal prison environment. In support of this goal, the court would ideally select a testing date and communicate it to the parties with only minimal advance notice. The court could also require that prison officials certify they will not change their enforcement of any smoking policy from the time they receive the notice until the testing occurs.

  \item \textsuperscript{126} \textit{FED. R. EvID. 706} ("The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.").

  \item \textsuperscript{127} Before \textit{Helling} reached the Supreme Court, the Ninth Circuit recommended that the district court appoint one or more expert witnesses upon remand in order to aid the court's determination as to whether the risk posed by the plaintiff's exposure to SHS was serious enough to implicate the Eighth Amendment. \textit{McKinney I, supra} note 54, 924 F.2d 1500, 1511 (9th Cir. 1991), \textit{vacated on other grounds sub nom. Helling v. McKinney}, 502 U.S. 903 (1991). Acknowledging the "complexity of the scientific evidence," the Ninth Circuit concluded that the plaintiff was entitled to the benefit of the district court exercising its discretion to appoint an expert who could provide the court with scientific information on the health effects of SHS and the concentration of SHS in the prison. \textit{McKinney v. Anderson (McKinney II)}, 959 F.2d 853, 854 (9th Cir. 1992), \textit{aff'd sub nom. Helling v. McKinney}, 509 U.S. 25 (1993).

  \item \textsuperscript{128} A number of circuits have recognized that Federal Rule of Evidence 706(b) grants discretion to district courts as to how to apportion the costs of expert witnesses, which includes the authority to impose the costs on the prison officials. \textit{See, e.g.}, \textit{Ledford v. Sullivan}, 105 F.3d 354, 360–61 (7th Cir. 1997); \textit{McKinney I, supra} note 54, 924 F.2d at 1511; \textit{see also FED. R. EvID. 706(b)} ("In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."). The Seventh Circuit, for example, rejected a narrow reading of Rule 706(b) that would have prevented a district court from appointing an expert witness whenever one of the parties is indigent, notwithstanding that an expert's testimony would substantially aid the court. \textit{Ledford}, 105 F.3d at 361.


  \item \textsuperscript{130} The Supreme Court has interpreted the Eleventh Amendment to stand for the proposition that federal courts lack jurisdiction over suits by individuals against a state in the absence of the state's consent. \textit{Seminole Tribe of Fla. v. Florida}, 517 U.S. 44, 54 (1996) (citing \textit{Hans v. Louisiana}, 134 U.S. 1, 15 (1890)); \textit{see also U.S. Const. amend. XI}. "[I]mplementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the state." \textit{Kentucky v. Graham}, 473 U.S. 159, 167 n.14 (1985).

  \item \textsuperscript{131} A defendant official, sued in a personal capacity, may be entitled to qualified immunity when relying on an objectively reasonable interpretation of existing law. \textit{Graham, 473 U.S. at 166–67.}
that any award not be speculative.132 Consequently, injunctive relief will be more likely to vindicate an inmate plaintiff's rights. The Supreme Court has held that a district court's equitable powers are broad once the plaintiff has proven a constitutional violation, because "breadth and flexibility are inherent in equitable remedies."133 The Court has indicated that the remedy must nevertheless be "limited to the inadequacy that produced the injury."134 The Prison Litigation Reform Act of 1995 has codified these limitations on prospective relief affecting prisons,135 requiring such relief to be narrowly drawn, to extend no further than necessary, and to be the least intrusive remedy possible.136 Further, the Prison Litigation Reform Act requires that courts give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."137

Before considering injunctive relief, courts may give defendant prison officials the opportunity to remedy the harm.138 The Supreme Court has indicated that district courts may properly exercise their discretion by permitting prison officials time to "rectify the situation" before granting prospective relief.139 As one commentator has observed, inviting a self-remedy "relies upon the significant expertise of the defendant in managing its own organization," thereby satisfying separation of powers concerns.140 Implementing a complete ban on inmate smoking will cure the constitutional violation. Even if a complete ban is not a perfect remedy,141 prison officials who regularly enforce a complete ban are no longer deliberately

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Although *Helling* clearly established that deliberate indifference to an unreasonable risk of harm stemming from SHS states a claim, see *Alvarado v. Litscher*, 267 F.3d 648, 653 (7th Cir. 2001), qualified immunity may bar damages until courts in each circuit have found Eighth Amendment violations based on the unreasonable risk of harm from SHS and have further defined the contours of both "deliberate indifference" and "unreasonableness" in the SHS context, cf. *Mills v. Clark*, No. 99-6334, 2000 WL 1250781, at *3 (4th Cir. Sept. 5, 2000) (reversing denial of summary judgment to defendants on the basis that qualified immunity will protect superintendents in situations where a prisoner's exposure to SHS is not clearly unreasonably high).

132. While significant evidence documents the increased risk of serious disease posed by SHS, see supra Part I, it may prove impossible for a fact finder to accurately estimate a plaintiff's damages from an increased risk of developing lung cancer, heart disease, or other serious maladies.


136. Id. § 3626(a)(1).

137. Id.


141. See supra notes 112-115 and accompanying text (discussing tobacco smuggling).
indifferent.\textsuperscript{142} Gradually phasing in a complete ban, rather than implementing the ban immediately, could achieve two worthy objectives: increasing the efficacy of an eventual ban and minimizing disciplinary concerns.\textsuperscript{143}

If prison officials identify any remedy other than a complete ban on smoking,\textsuperscript{144} a court could adopt a minimum air-quality standard to determine the adequacy of that remedy.\textsuperscript{145} Federal outdoor air standards, although not a perfect measure of the impact of SHS indoors, would help courts define constitutional limits on exposure to SHS.\textsuperscript{146} The Environmental Protection Agency has established National Ambient Air Quality Standards ("Standards"), which restrict atmospheric pollutants, including fine particulate matter.\textsuperscript{147} Pollution from SHS includes "respirable particles," which are equivalent to particulate matter.\textsuperscript{148} The federal Air Quality Index ("Index")\textsuperscript{149} which incorporates the Standards, assigns various levels of particulate matter into categories ranging from good to unhealthy to very hazardous.\textsuperscript{150} Applying a model that may be especially helpful in environments such as prisons, Professor Repace recently used the Index to assess the indoor

\textsuperscript{142} Prison officials will not be deliberately indifferent if they respond reasonably to a risk of harm, \textit{Farmer}, 511 U.S. at 844, and regularly enforcing a complete ban on smoking is arguably the most reasonable response available to prison officials.

\textsuperscript{143} A delay could afford time for prison officials to educate prisoners and staff about a pending ban and to offer smoking-cessation assistance to make the transition easier on smokers.

\textsuperscript{144} Alternative remedies proposed by prison officials might include implementing an indoor ban on smoking where none exists, supplementing an indoor ban on smoking with a ban on possessing tobacco indoors, or increasing efforts directed at enforcing an existing policy.

\textsuperscript{145} \textit{See} Thomas, supra note 140, at 355. Setting an air-quality standard rather than initially requiring a specific policy will allow prison officials the flexibility to implement a policy of their choice, as long as the court determines the policy will alleviate the constitutional harm. \textit{See} Sandin v. Conner, 515 U.S. 472, 483 (1995) (noting that state officials' flexibility in the fine tuning of the ordinary incidents of prison life is especially warranted).

\textsuperscript{146} Although the creation of a new air-quality standard would fall outside the judiciary's institutional competence, courts are competent to apply a standard previously promulgated by a regulatory agency to determine whether prison officials have abated an unreasonable risk of harm. \textit{Cf.} Harris v. James, 127 F.3d 993, 1011 n.24 (11th Cir. 1997) (noting that courts can look to regulations to flesh out the precise contours of specific rights in order to make them judicially enforceable).

\textsuperscript{147} Am. Trucking Ass'n's v. EPA, 283 F.3d 355, 358–59 (D.C. Cir. 2002) (noting that the EPA must set primary National Ambient Air Quality Standards at levels necessary to protect the public health). Fine particulate matter consists of "solid particles and liquid droplets found in air" with diameters "between 2.5 and 10 micrometers." \textit{Id.} at 359.

\textsuperscript{148} \textit{See} James Repace, Elizabeth Hughes, & Neal Benowitz, \textit{Exposure to second-hand smoke air pollution assessed from bar patrons' urinary cotinine}, 8 NICOTINE & TOBACCO RES. 701, 701–02 (2006).


\textsuperscript{150} Repace et al., supra note 148, at 702. Although the Index does not perfectly capture the risks of SHS, a mixture which also comprises nonparticulate matter, \textit{see} supra text accompanying note 25, the Index offers courts a regulatory benchmark to inform their determinations as to whether a particular action plan will remedy the constitutional violation.
effects of SHS. The court can appoint an independent expert to assist with implementing an air-quality standard.

Where a plaintiff’s cotinine levels show continued exposure to seriously harmful levels of SHS, even after a remedy adopted by the prison has taken full effect, a court will be justified in ordering defendants to implement a more aggressive smoking policy. For example, where a prison has imposed only an indoor ban on smoking, a court may reasonably find that the ability of inmates to possess tobacco indoors bears a sufficient causal relationship to the potentially harmful levels of SHS that completely banning smoking on prison grounds will be the only effective remedy to the constitutional violation.

While critics may observe that imposing a prison smoking ban is an action that traditionally falls squarely within the executive or legislative domain, courts are empowered to take such remedial measures where defendants systemically fail to redress a constitutional violation. Broad injunctive relief is traditionally necessary only as a last resort, but if the court concludes from the record that no less intrusive remedy would suffice, it is empowered to require prison officials to adopt a complete

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151. Repace et al., supra note 148, at 701 ("smoking in bars produces levels of personal air pollution for bar patrons that merit air pollution alerts when sustained in the outdoor air"). The Repace study used urinary cotinine levels to determine that the respirable particle levels in three bars fell in the "unhealthy" range under the Index. Id. at 709. The Reilly court described Professor Repace as an expert on the effects of SHS. Reilly v. Grayson, 157 F. Supp. 2d 762, 766 (E.D. Mich. 2001), aff'd, 310 F.3d 519 (6th Cir. 2002).

152. See, e.g., Hadix v. Caruso, No. 4:92-CV-110, 2005 WL 2671289, at *1 (W.D. Mich. Oct. 19, 2005) (referencing the court’s appointment of a medical monitor to advise on the implementation of remedies in light of premature and possibly avoidable deaths stemming from inadequate prison medical care). A preliminary determination will be which Index category, for example, unhealthy or very hazardous, to adopt as the air-quality standard. See AIRNow, supra note 149. The long-term nature of inmates’ exposure suggests that even “moderate” levels of particulate matter will pose an unreasonable risk in the prison context, but that decision will lie with the court after hearing from the parties and experts. To monitor the defendants’ compliance with the air-quality standard effectively, the affected facility will need to be randomly tested until the court determines that the constitutional violation no longer exists. Because ventilation systems carry SHS around the facility, see supra note 30 and accompanying text, and because it is conceivable that the inmateplaintiff may be exposed to SHS while moving around the facility, monitoring compliance with the air-quality standard throughout the entire prison is likely the least intrusive means of addressing the harm.

153. See Thomas, supra note 140, at 309 (noting that, while a court’s ability to impose broad injunctive relief reaching defendant’s affiliated legal conduct beyond the illegal action itself is not unlimited, such relief has been upheld where the “enjoining of affiliated conduct is necessary to achieve the aim of remedying an illegality”). This necessity may exist where there is “a sufficient causal nexus to the legal harm,” which a plaintiff can demonstrate by showing “that the affiliated conduct shares a corresponding factual issue with the illegality and that the relationship is sufficiently close to justify its inclusion in the relief as measured by common notions of foreseeability and proximate cause.” Id.

154. See id. at 381. The Prison Litigation Reform Act does not bar even broad remedies when they are “necessary” to vindicate a plaintiff’s rights. Id. at 371.

155. Id. at 311.

156. Id. (arguing that a judge may not completely invent a prophylactic remedy but rather must seek inputs on the remedial question and then confine the result to the record).
smoking and possession ban.\textsuperscript{157} As one judge has noted, extensive court-ordered relief is necessary and proper where a defendant exhibits "a stubborn and perverse resistance to change."\textsuperscript{158}

**Conclusion**

Consistent with society's evolving standards of decency, claims that prison officials are deliberately indifferent to a serious risk of harm posed by SHS satisfy the *Helling v. McKinney* standard and warrant a judicial remedy. As required under *Helling*, exposure to SHS results in serious risks of harm, namely contracting lung cancer, heart disease, and other serious medical problems. Legislative pronouncements manifest society's intolerance to exposing anyone to levels of smoke that commonly exist in prisons lacking effective bans. Prison officials respond unreasonably to the risk posed by SHS, and, thus, with deliberate indifference, when they create an environment susceptible to widespread prisoner abuse by continuing to allow inmates to possess tobacco. Although inmate plaintiffs may consistently have been exposed to levels of SHS that satisfy the *Helling* standard, many lower courts have dismissed their allegations of significant, long-term exposure to SHS or granted summary judgment to defendant prison officials. Despite recognition by prison officials that exposure to SHS poses an unreasonable risk of harm to inmates, twenty-one states have failed to address the risk through a complete ban on inmate smoking. Although legislatures in the remaining states might eventually ban smoking in prisons, the Eighth Amendment requires courts to redress constitutional deficiencies at the time they exist. Responding to the gravity of the risk posed by SHS and the lack of resources available to many pro se inmates, courts can ease inmates' burdens of production by taking judicial notice of appropriate medical facts as well as society's restrictions on SHS. Courts are empowered to require, once a violation has been proven, that defendants adopt increasingly restrictive smoking policies until the constitutional harm is averted.

\textsuperscript{157} Requiring a complete smoking ban should not be perceived as granting additional rights to the plaintiff, as it would merely ensure practical enforcement of an existing right by clearly informing the defendant of expected behavior. See id. at 382.

\textsuperscript{158} Id. at 381 (quoting Honorable William Wayne Justice, Address at George Washington University National Law Center: The Two Faces of Judicial Activism (Mar. 10, 1992), in 61 Geo. Wash. L. Rev. 1, 7 (1992)).