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This Issue in Brief

Corrections Goes Public (and Private) in California.—Authors Dale K. Sechrest and David Shichor report on a preliminary study of two types of community correctional facilities in California: facilities operated by private for-profit corporations and facilities operated by municipal governments for profit. The authors compare the cost effectiveness and quality of service of these two types of organizations.

Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde.—According to author Henry Scott Wallace, mandatory minimums are "worse than useless." In an article reprinted from the *Federal Bar News & Journal*, he puts mandatory minimums in historical perspective, explains how they fall short of alleviating sentencing disparity, and offers some suggestions for correcting what he describes as a Jekyll-and-Hyde approach to sentencing reform.

Juvenile Detention Programming.—Author David W. Roush focuses on programming as a critical part of successful juvenile detention. He defines juvenile detention and programming; explains why programs are necessary; and discusses objectives of programs, what makes good programs, and necessary program components. Obstacles to successful programming are also addressed.

Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons.—In *Helling* v. *McKinney*, the Supreme Court held that inmates may have a constitutional right to be free from unreasonable risks to future health problems from exposure to environmental tobacco smoke. Authors Michael S. Vaughn and Rolando V. del Carmen discuss the legal and policy issues raised in *McKinney*, focusing on correctional facilities in which smoking or no-smoking policies have been a concern. They also discuss litigation in the lower courts before *McKinney* and how this case might shape future lower court decisions.

Community Corrections and the Fourth Amendment.—The increased use of community corrections programs has affected the special conditions of probation and parole imposed on offenders. Author Stephen J. Rackmill focuses on one such condition—that probationers submit to searches at the direction of their probation officers. Explaining the importance of the Supreme Court's decision in *Griffin* v. *Wisconsin*, the author assesses the case law before and after *Griffin* regarding searches and points out that policy regarding searches is still inconsistent.

A Study of Attitudinal Change Among Boot Camp Participants.—Authors Velmer S. Burton, Jr., James W. Marquart, Steven J. Cuvelier, Leanne Fiftal Alarid, and Robert J. Hunter report on whether participation in the CRIPP (Courts Regimented Intensive Probation Program) boot camp program in Harris County, Texas, influenced young felony offenders' attitudes. The authors measured attitudinal change in

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Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons

By Michael S. Vaughn and Rolando V. del Carmen*

Introduction

On June 18, 1993, the United States Supreme Court, in a 7 to 2 decision, held that inmates may have a constitutional right to be free from unreasonable risks to future health problems from exposure to environmental tobacco smoke (ETS). This article discusses the legal and policy issues in *Helling* v. *McKinney*,[1] focusing on correctional facilities in which smoking or no-smoking policies have been a concern. It also discusses litigation in the lower courts prior to *McKinney* and how this case might shape future lower court decisions. The article concludes with a discussion of the policy implications of smoking in correctional facilities and how correctional officials might want to explore more smoking restrictions than have traditionally been used in most prisons.

In *Helling* v. *McKinney*, an inmate in the Nevada State Prison in Carson City filed a § 1983 claim pursuant to the eighth amendment, alleging cruel and unusual punishment for involuntary exposure to ETS. William McKinney alleged that he was placed in a 6- by 8-foot cell with a five-pack-a-day smoker, resulting in involuntary exposure to ETS. Although not seriously ill when he brought the case,[2] McKinney alleged that such exposure constituted a threat to his future health. The inmate sought injunctive relief and monetary damages from prison officials for violating his constitutional right against cruel and unusual punishment.

Prison officials argued in the lower court that the inmate had no constitutional right to be free from ETS, citing evidence that the societal debate on smoking is far from over. A United States magistrate agreed, granting the defendant's motion for a directed verdict. On appeal, the Court of Appeals for the Ninth Circuit reversed, concluding that the scientific literature indicated that ETS might lead to serious health problems. The court held that the inmate stated a legitimate § 1983 claim under the eighth amendment because compulsory exposure to ETS "posed an unreasonable risk of harm to [the inmate's] future health."[3] Moreover, the court indicated that "evolving standards of decency" prohibited prison authorities from compelling an inmate to be exposed to "unreasonably dangerous levels of ETS."[4] The United States Supreme Court vacated the judgment of the Ninth Circuit, ordering the court to reconsider its ruling in light of *Wilson* v. *Seiter*.[5] In *Wilson*, the Supreme Court held that conditions of confinement cases require plaintiffs to show "deliberate indifference" through a culpable mental state on the part of prison officials. On remand, the Ninth Circuit reinstated its previous decision, prison officials appealed, and the United States Supreme Court granted certiorari.

The Majority Opinion

Deciding for the prisoner, the Court said that exposure to unreasonably high levels of ETS may sometimes be cruel and unusual punishment. Prison officials argued that only "deliberate indifference" to "current" health risks violates the eighth amendment, saying that the Ninth Circuit mistakenly extended eighth amendment protections to "future" serious health risks from exposure to ETS. Writing for the Court, Justice White rejected the assertion that the eighth amendment does not protect inmates from "future" health risks, maintaining that "a prison inmate [can make out a successful eighth amendment claim about] unsafe drinking water without waiting for an attack of dysentery."[6] The Court also rejected the "serious injury only" argument proposed by prison officials, holding that "deliberate indifference" to potential health risks may violate the eighth amendment even if they are not serious.

The Court also refused to side with the United States Government which submitted an *amicus curiae* brief in support of prison officials. The Government contended that ETS was not harmful and did not consist of a "serious medical need." The Government also claimed that exposing inmates to ETS did not violate "evolving standards of decency." The Court was unpersuaded, saying that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."[7]

The Court gave lower courts guidance on ETS cases by saying what potential plaintiffs must show to prevail on eighth amendment claims. In reaffirming *Wilson* v. *Seiter*, the Court said that plaintiffs must show both the *objective* and *subjective* components of the

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eighth amendment. The Court indicated that three questions must be addressed in regard to the objective component. First, plaintiffs must prove they are "being exposed to unreasonably high levels of ETS."[8] Second, inmates also must show, beyond "scientific and statistical inquiry,"[9] that potential serious health risks are actually caused by exposure to ETS. Third, prisoners must show that the risk of involuntary exposure is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."[10] The inmate must "show that the risk of which he complains is not one that today's society chooses to tolerate."[11]

As to the subjective element of the eighth amendment, the Court said that plaintiffs must show that prison officials were "deliberately indifferent" to potential serious health risks. Without defining "deliberate indifference," the Court indicated that it may "be determined in light of the prison authorities' current attitudes and conduct."[12] In determining "deliberate indifference," it would also be proper to make inquires into the operational constraints of correctional institutions. Significantly, however, the Court said that the policy adopted by the Nevada prison system in January 1992 might make it difficult to show "deliberate indifference." That policy, instituted after the case was filed, restricted smoking in "food preparation/serving, recreational, and medical areas." It also gave prison personnel directions "contingent on space availability, [to] designate nonsmoking areas in dormitory settings, and [instructed] institutional classification committees [to] make reasonable efforts to respect the wishes of nonsmokers where double bunking [occurs]."[13] The Court also concluded that since the prison authorities responded to McKinney's complaint by transferring him to another facility and adopting prison policies in regard to smoking inmates, it might be very difficult now to show that the prison officials were "deliberately indifferent" to McKinney's potential serious health risks. In sum, the inmate won the right to sue, but would likely lose standing if the case were retried.

The Dissent

Justice Thomas[14] was joined by Justice Scalia in dissent. Questioning the legitimacy and the basis of court intervention in all conditions of confinement cases,[15] Justice Thomas based his dissent on three principles. First, the original meaning of the term "punishment" did not include prison deprivations. The original framers of the eighth amendment, he maintained, did not intend for "prison deprivations that [are] not inflicted as part of a sentence [to be] 'punishment.'"[16] The word "punishment," he says, does not extend to "deprivations [that] have not been inflicted as part of the criminal sentence,"[17] saying that "the word 'punishment' refers to the penalty imposed for the commission of a crime."[18] In his view, "punishment" only applies to a "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense";[19] hence, only "judges or juries—not jailers—impose 'punishment.'"[20]

Second, no historical record exists that classifies "harsh prison conditions"[21] as cruel and unusual punishment. According to Justice Thomas, only the penalty provided by statute or the sentence given by a judge may be cruel and unusual punishment. He comes to this conclusion by analyzing the English Declaration of Rights of 1689, the English common law, the debates surrounding the framing and ratification of the United States Constitution and the Bill of Rights, and the text of the Delaware Constitution. In none of these documents did "the founding generation wish to make prison conditions a matter of constitutional guarantee."[22]

Third, the Supreme Court did not apply the eighth amendment's prohibition against cruel and unusual "punishment" to inmate prison injuries for the first 185 years of its existence. It was first applied to prison conditions of confinement by activist lower courts in the 1960's and 1970's. The Supreme Court joined in this judicial activism, according to Justice Thomas, when it held in *Estelle* v. *Gamble*[23] that "deliberate indifference" to serious medical needs violated the eighth amendment's prohibition against cruel and unusual punishment. Thus, Justice Thomas, in effect, argues for a return to the "hands-off" doctrine, criticizing the *Estelle* Court for applying the eighth amendment to conditions of confinement.[24] After condemning the Court for applying the eighth amendment to prison deprivations, he demurs by saying that if the eighth amendment must be extended to prison conditions, the line should be drawn "at actual, serious injuries" and not potential "risk of injury."[25]

Prior Lower Court Case Law on Smoking in Prisons

Helling v. *McKinney* clarifies the hitherto confused and conflicting state of lower court case law on the issue. Prior lower court case law on smoking in prisons falls into three categories: cases that upheld smoking bans, cases that denied inmates' requests for a smoke-free environment, and cases that granted inmates' requests for a smoke-free environment. Given the discordant state of case law, the Court decision in *Helling* v. *McKinney* was sorely needed.

Cases that Upheld Smoking Bans

Four lower courts held that there is no constitutional right to smoke in a correctional facility.[26] These courts

cited three justifications for why smoking restrictions do not violate constitutional protections: (1) they are not punishment,[27] (2) they further legitimate penological goals,[28] and (3) they do not deprive inmates of the essentials of a dignified and civilized life.[29] Policies prohibiting smoking are not punishment if there is no intent to punish. Moreover, such policies in correctional facilities uphold legitimate penological objectives such as safeguarding the rights of nonsmokers, protecting state property from smoke damage, reducing fire hazards, and detecting the burning smell of marijuana. Thus, banning smoking is reasonably related to the legitimate penological goals of maintaining safe, secure, and clean correctional institutions. Because inmates have neither a constitutional right to smoke nor a vested liberty or property interest to smoke in prison, a smoking ban does not deprive inmates of the "minimal civilized measure of life's necessities."[30] In sum, smoking bans do not constitute cruel and unusual punishment because inmates have no constitutional right to smoke in prisons or jails.

Cases Denying Inmates' Requests for a Smoke-Free Environment

Before the Court's *McKinney* decision, 14 courts[31] held that inmates had no constitutional right to be free from involuntary exposure to another inmate's ETS. These courts indicated that inmates could not prove that exposure to ETS resulted in cruel and unusual punishment. Courts deferred to decisions of prison administrators, allowing placement of a nonsmoking inmate in a prison smoking wing, permitting the double-celling of a nonsmoker with a smoker, and exposing a nonsmoking inmate with allergies to ETS.

Most courts believed that correctional administrators and state legislators should determine the smoking status of institutions based on the needs of the prison and the health care of the inmates. The legal standard most frequently applied was the eighth amendment's "evolving standards of decency."[32] To violate contemporary standards of decency, an inmate had to show prison officials were "deliberately indifferent" to the inmate's serious health needs, either "intentionally" or through "reckless disregard" in exposing the inmate to ETS.

Early courts also indicated that it might not be necessary to provide a complete smoke-free prison environment if good-faith measures were taken to either segregate smokers from nonsmokers or create adequate smoke-free conditions with ventilation. In the cases litigated, adequate safeguards included open windows, input and output vents in cells, fans in the living quarters, and smoking prohibitions in such areas as prison libraries, dining halls, gymnasiums, and health facilities. These safeguards provided adequate air circulation and protected nonsmokers from ETS.

Some of the pre-*McKinney* courts also held that exposure to ETS was a mere discomfort or inconvenience, compatible with the prison experience. These jurisdictions required passive smoking plaintiffs to show identifiable health risks. That usually required documentation of a preexisting medical condition before prison officials were required to provide a smokeless environment. For example, one court rejected an inmate's claim that exposure to passive cigarette and cigar smoke aggravated his allergies after a physician's examination showed there was minor lung irritation. In sum, the earlier cases showed that minor ailments in connection with exposure to ETS did not violate the Constitution. The common element in these pre-*McKinney* cases was the judiciary's deference to prison management and judges' belief that the legislative and executive branches of government, not the judiciary, should implement policy.

Cases Granting Inmates' Requests for a Smoke-Free Environment

Six pre-*McKinney* courts[33] held that inmates might have a constitutional right to a smoke-free institutional experience. The general rule was that inmates with preexisting medical conditions, greatly exacerbated by exposure to ETS, had a better chance to prevail on a constitutional claim than inmates without preexisting medical conditions. One court held that placing an inmate in a cell with a heavy smoker constituted "deliberate indifference" because the exposure worsened the inmate's throat tumor. In another case, a court concluded that exposure to smoke was punishment when correctional officers deliberately closed the prison ventilation system, exposing inmates to noxious smoke fumes.

Inmates had a better chance of succeeding if they documented repeated correspondence to prison officials requesting a smoke-free environment. The courts were less likely to find a claim frivolous if persistent requests were made for a smoke-free environment. In one case, a court held that double-celling smokers and nonsmokers for indefinite periods can amount to "deliberate indifference" to the health of nonsmoking inmates. The common thread permeating these pre-*McKinney* cases that held there might be a constitutional right to a smoke-free prison experience was that the state must provide a safe and sanitary environment for those incarcerated. This duty was heightened for inmates with serious medical conditions that were documented and exacerbated by exposure to ETS.

Policy Implications

The adverse health consequences of smoking and exposure to ETS are well documented in the medical

literature. Health risks associated with tobacco smoke also are generating a number of legal issues which have spread into corrections. Due to litigation in the courts and mounting empirical evidence showing the detrimental consequences of exposure to ETS, smoking has become a policy concern for correctional administrators.

It is clear from *McKinney* that the constitutional prohibition against cruel and unusual punishment applies to prison conditions and not just to punishment; neither is it limited to cases when the possibility of injury to health is current or imminent. The Court did not say, however, that prisoners have a constitutional right to a smoke-free prison environment; what it said was that the constitutional right against cruel and unusual punishment may be violated if an inmate can show that exposure to tobacco smoke constitutes a present or future threat to his or her health.

McKinney curtails the authority of prison administrators in some ways, but also enhances it in other ways. As a result of *McKinney*, administrators can no longer turn a deaf ear to complaints of prisoners who are celled with smokers. To do that would be to risk a lawsuit based on a violation of a constitutional right, if the inmate can prove present or possible injury resulting from such exposure. Conversely, however, administrators may have been given a stronger hand in banning smoking completely from their units. Doing that invites possible lawsuits from smokers, although every lower court that has ruled on the constitutionality of smoking bans in correctional facilities has upheld them. The Court has yet to decide whether an inmate has a constitutional right to smoke under conditions that do not expose other inmates to ETS. That issue may eventually reach the Court, but chances of success are remote because the inmate will have to establish a constitutional right to smoke, a difficult proposition to prove even in the free world.

Although 34 states filed amicus briefs in *McKinney*, asking the Court to rule against the prisoner, an increasing number of jails and prisons have adopted more restrictive smoking policies. The proliferation of these polices accelerated when the Environmental Protection Agency classified ETS as a class A carcinogen, known to cause cancer in humans.[34] A recent study showed that smoking is restricted to some extent in 90 percent of state correctional facilities.[35] Smoking was restricted most frequently in rehabilitation areas[36] as compared to leisure and living areas. Prisons placed less restrictions on inmates' smoking privileges in dormitories and cellblocks. Smoking in prisons is now banned entirely in California. Many other states, as well as the Federal prison system, are moving in that direction with their policies that "restrict smoking to designated areas of prisons and prohibit wardens from assigning a nonsmoking inmate to the same cell as a smoker except when impractical."[37]

Banning smoking in correctional facilities is sound public policy, given the increasing cost of medical care and the link between exposure to ETS and health problems.[38] Smoking restrictions also are desirable because inmates suffer more medical ailments than the population in general society.[39] Moreover, a smoking ban appears to be the most appropriate way to address the problem of inmate and staff exposure to ETS, given the logistical problems of moving smokers to nonsmoking areas. It is cost effective in that the costs of implementation are negligible in relation to the savings. One county reports a one-third decline in sick calls after banning smoking.[40] A no-smoking policy also diminishes possible fire risks, fosters a sanitary employment atmosphere, reduces smoke damage to floors, walls, and ceilings, removes burns from carpets and furniture, eliminates the yellow layer of film caused by burning tobacco, prevents the sewage system from becoming clogged with cigarette butts, and expunges the reek of tobacco odor from the facility.

Published research shows that many prison administrators believe that smoking restrictions would magnify tension, promote stress, increase contraband, and eventually lead to more disturbances.[41] These perceptions are rejected, however, by other administrators who report few problems from smoking bans, one sheriff saying that the belief that "smoking bans lead to violence appears to be a myth."[42] Many administrators that support smoking bans claim they should have done it earlier. The primary problem reported is increased tobacco smuggling by visitors, staff, and inmates. Although comprehensive research on state correctional systems that have banned smoking statewide is unavailable, case studies from prisons, large county jails, and municipal correctional facilities that have implemented smoking bans report few implementation or administrative problems.[43] With proper socialization and a gradual phase-in, prison administrators should be able to reduce smoking by a significant degree without increasing institutional security or jeopardizing inmate and staff safety.

A way to ease the trauma of smokers in a no-smoking prison system is to provide an institutional counseling program similar to those available for drug and/or alcohol dependency. Other programs also need to be in place. For example, prescription drugs, nicotine lozenges, or nicotine skin patches can be available to ease the nicotine addiction. In addition, video tapes and educational programs on strategies and approaches to smoking cessation could also ease chances of increased tension, unrest, and disturbances. These services provide smokers with additional help that decreases anxi-

ety and augments coping. They can be effective and should lessen resistance to no-smoking policies.

Some prison administrators may prefer to restrict smoking to certain areas instead of adopting a system-wide smoking ban. This should be constitutional in view of the Supreme Court's statement in *McKinney* that adopting a policy may diminish an inmate's chances of proving "deliberate indifference" to serious health risks. If smoking is allowed in certain areas, administrators must provide nonsmoking inmates smoke-free accommodations, including, but not restricted to, open windows and input and output vents in cells and the day rooms, fans in the living quarters, and smoking prohibitions in such areas as prison libraries, dining halls, gymnasiums, visiting rooms, and health facilities. These measures are assessed by courts in their totality to determine whether adequate measures have been provided to protect nonsmokers from ETS.

The experience of systems that have implemented smoking bans shows that they can be successful, although they create some manageable problems. The Prince George's County Correctional Center in Upper Marlboro, Maryland, implemented a smoking ban and reported only a few problems. Prince George's gradually implemented the ban over the course of 3 months, in which the amount of cigarettes inmates could buy per week from the jail canteen was gradually reduced from 20 to 3. In Fairfax County, Virginia, the jail implementation period was 6 months, during which the number of cigarettes inmates could possess was reduced from six packs a week to none. A grace period of several weeks usually follows a smoking ban to allow inmates the opportunity to use up the tobacco products that accumulate. Resulting problems were minimal.

Smoking restrictions may be met with more resistance from the staff rather than from the inmates. Realizing this, one jail offered a sensitizing program in which inmates and staff were offered over-the-counter nicotine medication to ease withdrawal. Other jurisdictions provide acupuncture programs to inmates and staff following a smoking ban. The programs helped keep the transition from a smoking to a nonsmoking institution relatively smooth and problem-free.

Conclusion

The Supreme Court in *McKinney* clearly articulated a two-pronged *objective* and *subjective* standard to determine the constitutionality under the eighth amendment of involuntary inmate exposure to ETS. Both prongs must be met to show a constitutional violation. There are three parts to the objective prong. First, plaintiffs must show they are exposed to unreasonably high levels of ETS. Second, plaintiffs must show that serious future health risks are caused by that exposure. Third, plaintiffs must show that the involuntary exposure violates evolving standards of decency. Under the subjective prong, plaintiffs must show the prison officials were "deliberately indifferent" to future serious health risks. The Court said that "deliberate indifference" may be shown by looking at officials' attitudes and conduct, by analyzing the operational constraints of the facility, and by examining smoking policies adopted by prison officials. The Court gave particular emphasis to the notion that a good-faith policy may alleviate any possibility of an eighth amendment violation. Given these criteria, holding prison officials liable for exposure to ETS would not be easy.

The *McKinney* case places prison administrators on notice, however, that they cannot involuntarily expose an inmate to unreasonably high levels of ETS without the risk of being sued successfully. This does not mean that every inmate has a constitutional right to a smoke-free prison environment. It does mean that prison officials must make good-faith efforts, in accordance with the limitations on budgets and space considerations, to comply with the wishes of nonsmoking inmates' requests to be free from ETS.

As the scientific evidence mounts that smoking and exposure to ETS pose a health hazard, society is adopting more restrictions on smokers.[44] Experience and evidence show that smoking bans in jails and some prisons, if properly planned and implemented, do not result in chaos, violence, or disorder. It is time for prison administrators to seriously consider banning smoking in their correctional facilities. By providing incentives to quit smoking, creating nonsmoking housing units for inmates, instituting a well orchestrated smoking education program, and beginning smoking cessation classes, prison officials may be able to significantly reduce health risks to staff and inmates. These safeguards minimize the problems associated with smoking bans and restrictions. *McKinney* gives prison administrators considerable support to implement a policy that is legally defensible, environmentally protective, and economically sound.

Notes

[1]61 L.W. 4648 (1993).

[2]*McKinney* v. *Anderson*, 924 F.2d 1500, 1502 (9th Cir. 1991) (McKinney's civil rights petition alleged that he suffered from nosebleeds, headaches, chest pains, and lack of energy).

[3]*Helling* v. *McKinney*, *supra* note 1, at 4649.

[4]*Id.*

[5]111 S. Ct. 2321 (1991).

[6]*Helling* v. *McKinney*, *supra* note 1, at 4650.

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.* (original emphasis).

[11]*Id.* at 4651.

[12]*Id.*

[13]*Id.* at 4650.

[14]See, John P. MacKenzie, *The Real Clarence Thomas: He Still Doesn't Know What Punishment Means*, NY TIMES, June 28, 1993, at A-14 (criticizing the dissent).

[15]*Estelle* v. *Gamble*, 429 U.S. 97 (1976) (holding that "deliberate indifference" to serious medical needs violates the eighth amendment's prohibition against cruel and unusual punishment).

[16]*Helling* v. *McKinney*, *supra* note 1, at 4652.

[17]*Id.* at 4651.

[18]*Id.*

[19]*Id.* (citing *Black's Law Dictionary* at 1234 (6th ed. 1990)).

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]429 U.S. 97 (1976).

[24]Justice Thomas broadly defines conditions of confinement to include medical care, which was the issue in *Estelle*.

[25]*Helling* v. *McKinney*, *supra* note 1, at 4652.

[26]*Doughty* v. *Board of County Commissioners for the County of Weld*, 731 F. Supp. 423 (D. Colo. 1989); *Elliott* v. *Board of Weld County Commissioners*, 796 P.2d 71 (Colo. App. 1990); *Grass* v. *Sargent*, 903 F.2d 1206 (8th Cir. 1990); *Washington* v. *Tinsley*, 809 F.Supp. 504 (S.D. Tex. 1992).

[27]*Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[28]*Turner* v. *Safley*, 107 S. Ct. 2254 (1987).

[29]*Rhodes* v. *Chapman*, 452 U.S. 337 (1981).

[30]*Id.* at 347.

[31]*Beeson* v. *Johnson*, 894 F.2d 401 (4th Cir. 1990) (Unpublished Disposition, Text in West Law No. 89-7146); *Bratcher* v. *Morris*, 930 F.2d 918 (6th Cir. 1991) (Unpublished Disposition, Text in West Law No. 90-3325); *Caldwell* v. *Quinlan*, 729 F. Supp. 4 (D.D.C.), aff'd, 923 F.2d 200 (D.C. Cir. 1990), cert. denied, 112 S.Ct. 295 (1991); *Clemmons* v. *Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc); *Gorman* v. *Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); *Guilmet* v. *Knight*, 792 F. Supp. 93 (E.D. Wash. 1992); *Harris* v. *Murray*, 758 F. Supp. 1114 (E.D. Va. 1991); *Johnson* v. *Moore*, 926 F.2d 921 (9th Cir. 1991); *Lee* v. *Carlson*, 645 F. Supp. 1430 (S.D.N.Y. 1986); *Martin* v. *Mason*, 895 F.2d 1413 (6th Cir. 1990) (Unpublished Disposition, Text in West Law No. 89-1742); *Murphy* v. *Dowd*, 975 F.2d 435 (8th Cir. 1992); *Steading* v. *Thompson*, 914 F.2d 498 (7th Cir. 1991); *Wilson* v. *Lynaugh*, *878 F.2d 846 (5th Cir. 1989)*; *West* v. *Wright*, 747 F. Supp. 329 (E.D. Va. 1990), remanded on other grounds, 932 F.2d 964 (4th Cir. 1991).

[32]*Trop* v. *Dulles*, 356 U.S. 86 (1958).

[33]*Avery* v. *Powell*, 695 F. Supp. 632 (D.N.H. 1988); *Franklin* v. *State of Oregon*, State Welfare Division, 662 F.2d 1337 (9th Cir. 1981); *Hunt* v. *Reynolds*, 974 F.2d 734 (6th Cir. 1992); *McKinney* v. *Anderson*, 924 F.2d 1500 (9th Cir. 1991), vacated and remanded sub nom., *Helling* v. *McKinney*, 112 S. Ct. 291 (1991), reinstated on remand, 959 F.2d 853 (9th Cir. 1992), aff'd, 61 L.W. 4648 (1993); *Murphy* v. *Wheaton*, 381 F. Supp. 1252 (N.D. Ill. 1974); *Smith* v. *Brown*, 940 F.2d 662 (6th Cir. 1991) (Unpublished Disposition, Text in West Law No. 91-1276).

[34]RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS, U.S. EPA (Dec. 1992).

[35]Michael S. Vaughn & Rolando V. del Carmen, *Research Note: Smoking in Prisons—A National Survey of Correctional Administrators in the United States*, 39 CRIME & DELINQ. 225, 231 (1993); *Also, see*, Ronald Smothers, *Smoking Behind Bars Changes as World Does*, NY TIMES, June 20, 1993, at 10.

[36]Rehabilitation areas: chapel, classrooms, library, hospitals, auditoriums, work assignments. Leisure areas: dining areas, gymnasiums, commissary line, recreational area, and day room. Living areas: showers, hallways, dorms/cells, cellblocks, elevators, and segregation units.

[37]Linda Greenhouse, *Court Offers Inmates a Way to Escape Prison Smokers*, NY TIMES, June 19, 1993, at 8.

[38]Vaughn & del Carmen, *supra* note 35; Michael S. Vaughn & Rolando V. del Carmen, *Smoke-Free Prisons: Policy Dilemmas and Constitutional Issues*, 21 J. CRIM. JUST. 151 (1993).

[39]Eric Nesser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 945 (1977); *Also, see*, Colin A. Romero & Frederick A. Connell, *A Survey of Prison Policies Regarding Smoking and Tobacco*, 7 J. PRISON & JAIL HEALTH 27 (1988).

[40]Vaughn & del Carmen, *supra* note 35; Andrew Skolnick, *While Some Correctional Facilities go Smoke-Free, Others Appear to Help Inmates to Light Up*, 264 JAMA 1509 (Sept. 26, 1990).

[41]*See*, Vaughn & del Carmen, *supra* note 35; *Also, see, A Burning Issue: Should Smoking be Banned in Correctional Facilities?*, 49 CORRECTIONS TODAY 14 (Aug., 1987) (86 percent of respondents reported that smoking restrictions would be difficult to implement).

[42]Andrew Skolnick, *Jails Lead Prisons in Smoking Bans*, 264 JAMA 1514 (Sept. 26, 1990).

[43]*But, see*, Lisa Belkin, *At More and More Jails, Smoking is Forbidden*, NY TIMES, July 19, 1990, at A-10 (reporting inmate disturbances from smoking bans. They appeared to be manageable, however, with proper implementation of the bans.).

[44]*See*, Robert Reinhold, *Los Angeles Bans All Restaurant Smoking*, NY TIMES, June 25, 1993, at A-7.