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Constitutional Law - Prisoners' Rights - Recognition That Involuntary Exposure to Environmental Tobacco Smoke May Constitute Cruel and Unusual Punishment - Avery v. Powell

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NOTES

CONSTITUTIONAL LAW—PRISONERS' RIGHTS—RECOGNITION THAT INVOLUNTARY EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE MAY CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT—Avery v. Powell

INTRODUCTION

Environmental tobacco smoke (ETS) is smoke emitted from a cigarette between puffs (sidestream smoke) and that exhaled from a smoker (mainstream smoke).1 Triggered by the current public up-roar asserting the health hazards of ETS, prisoners are pursuing eighth amendment actions in hopes of securing rights to less hazardous environments.

The eighth amendment of the United States Constitution reads “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”2 A century ago, prisoners had virtually no rights.3 A series of cases beginning in 1890 expanded prisoners' rights, however, allowing the prohibition against cruel and unusual punishment to take on many forms.4 Today, to define the eighth amendment, courts must examine “evolving standards of decency that mark the progress of a maturing society.”5 A recent application of these standards in Avery v. Powell...

2. U.S. Const. amend. VIII.
3. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (an inmate was described as a slave of the state).
4. See infra notes 28-37 and accompanying text.
5. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (deprivation of citizenship based on one day desertion from military found to be cruel and unusual).

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ery v. Powell,6 resulted in a further expansion of prisoners’ rights. The Avery Court held that if a prisoner could prove that exposure to a smoke-filled environment was hazardous to his health and offended evolving standards of decency, then the exposure constituted cruel and unusual punishment.7 In Avery v. Powell, the United States District Court in New Hampshire denied the defendant’s motion to dismiss for two reasons. First, the court found that exposure to ETS is not merely discomforting but may constitute punishment.8 Second, the court found that exposure to ETS might violate society’s evolving standards of decency.9

The Avery Court relied on the rule of law in Rhodes v. Chapman10 which held that to determine evolving standards of decency, a court must look to “objective factors to the maximum possible extent.”11 In Rhodes, the United States Supreme Court, for the first time, considered the limitations that the eighth amendment imposes on conditions of confinement.12 Avery v. Powell broadened the scope of these limitations being the first case to specifically address the question of whether exposure to ETS constitutes punishment in and of itself.

Under Avery, nonsmoking prisoners have a much better chance of success in claiming cruel and unusual punishment based on ETS. This Note will analyze how the Avery Court reached its conclusion. In addition, this Note will examine Avery’s reliance on the Rhodes v. Chapman standard. The main thrust of this Note will be to demonstrate the widespread recognition of the harmful effects of ETS and how the Avery Court used that recognition to acknowledge plaintiff’s cause of action.

THE CASE

Plaintiff, Clifford Avery, is a nonsmoking inmate incarcerated

7. Id. at 637, 639-40.
8. Id. at 639. The court justified this finding by relying on current scientific authority which concluded that exposure to tobacco smoke was hazardous to health.
9. Id. at 640. The Avery Court relied on a prior Supreme Court case which held that evolving standards of decency were to be determined by reviewing legislative work products and juries’ sentences. Id. at 639.
11. Id. at 346.
12. Id. at 344-345.
at the New Hampshire State Prison. In a pro se civil rights action allowed under 42 U.S.C. Section 1983, Avery complained that "his continuous exposure to passive tobacco smoke as a condition of confinement violates the eighth amendment . . . to the United States Constitution and state law." Plaintiff sought a declaratory judgment against prison officials claiming that their actions were unconstitutional and an injunction requiring the establishment of smoking and nonsmoking areas within the prison.

The district court first considered whether constant involuntary exposure to tobacco smoke constitutes punishment as opposed to a mere consequential discomfort of prison. The court cited numerous cases holding that involuntary exposure to an environment that could cause death or disease that violated the eighth amendment. The court also relied on the Surgeon General's 1986 Report entitled The Health Consequences of Involuntary Smoking to determine that ETS may rise to the level of punishment cognizable under the eighth amendment. Before reaching a conclusion, the court listed only three cases relevant to the question of whether ETS may be considered punishment, and distinguished the only case that considered the constitutional question. After admitting that exposure to ETS may be punishment and not mere discom-
fort, the court proceeded to the question of whether exposure to ETS violates society's "evolving standards of decency." The court concluded that because Mr. Avery might establish that ETS was hazardous to his health, the complaint stated a sufficient claim asserting cruel and unusual punishment under the eighth amendment. This conclusion was based on the fact that a majority of state legislatures had enacted regulations concerning tobacco use, including the State of New Hampshire in addition to legislation by the federal government. "Those objective factors, buttressed by significant scientific authority, indicate that tobacco smoke may be harmful and possibly a lethal indoor pollutant." Therefore, the court denied the defendant's motion to dismiss.

BACKGROUND

I. DEVELOPMENT OF EIGHTH AMENDMENT RIGHTS

A. Cruel and Unusual Punishment

Historically, a prisoner had no rights. However, the United States Constitution prohibits the federal government from imposing cruel and unusual punishment on prisoners for federal crimes. Originally, the eighth amendment's proscription focused on prohibiting torture and other barbarous methods of execution. However, the United States Supreme Court, in a series of cases spanning ninety-five years, enlarged the eighth amendment's proscription. For example, in 1890, the Supreme Court found that the eighth amendment prohibited breaking on the wheel punishment because it was unnecessarily cruel. In 1910, the Court

22. Sampson, 693 F.2d at 568.
26. Id.
27. Id.
29. U.S. Const. amend. VIII. The amendment also prohibits excessive fines and bail.
31. See infra notes 28-38 and accompanying text.
32. In re Kemmler, 136 U.S. 436, 447 (1890) (Court held that breaking on the
stated that the eighth amendment also prohibited "unnecessary and wanton infliction of pain." More recently, the Supreme Court expanded the unnecessary and wanton infliction of pain prohibition to include deliberate indifference to medical needs of prisoners. Further, after *Trop v. Dulles*, even a punishment that inflicts no physical pain may be found to be cruel and unusual because the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The eighth amendment also prohibits imposing punishment disproportionate to the severity of the crime. The plurality in *Coker v. Georgia*, illustrated this prohibition by concluding that death was a disproportionate penalty for the crime of raping an adult woman.

Recently, another aspect of the prohibition was established when the ninth circuit court in *Hoptowit v. Spellman* held that involuntary exposure to an environment that may cause disease or death violates the eighth amendment. *Hoptowit* addressed the problems of inadequate lighting, substandard plumbing, vermin infestation, substandard fire prevention, ventilation and air flow and safety hazards.

wheel (form of torture where victim is mutilated by stretching or disjointing) was unconstitutional.

33. Weems v. United States, 217 U.S. 349,381 (1910) (public official received fifteen years in chains at hard labor and surveillance for life for falsifying an official document.).

34. Estelle v. Gamble, 429 U.S. 97,103 (1976) The ruling was based on the rationale that a prisoner is without medical care if it is not provided by prison officials.


36. *Id.* at 101.


39. *Id.*

40. 753 F.2d 779 (9th Cir. 1985).

41. *Id.* at 784.

42. *Id.* at 783-84. When the prison lighting was investigated, it was found to be so deficient as to hinder reading and make sanitary conditions difficult to maintain. Also, concerning safety conditions, inmates were entitled to a certain level of safety to be provided because they could not provide for their own safety.
B. Cases addressing ETS

Three decisions address the question of whether ETS may be considered punishment. Avery cited all three. These three decisions are Lee v. Carlson, Beeson v. Johnson, and Sampson v. King.

1. Lee v. Carlson

Plaintiff, Douglas E. Lee, an inmate at Greenhaven State Prison, New York, alleged, among other things, that the defendants denied him a tobacco-free environment. The United States District Court in New York summarily dismissed this claim based on failure to state a cause of action because the record failed “to indicate that plaintiff was being exposed to smoke in violation of any then existing statute or regulation.” The Lee Court also held that government officials had absolute immunity from common law tort liability.

2. Beeson v. Johnson

Plaintiff, Jerry Lee Beeson, brought a pro se action against prison officials claiming health problems resulting from his exposure to a smoke-filled environment. Plaintiff introduced documented evidence that he suffered from asthma, chronic rhinitis

44. Lee, 645 F. Supp. 1430 (S.D.N.Y. 1986), aff’d mem., 812 F. Supp. 712 (2nd Cir. 1987). Plaintiff sued thirteen federal officials for: (1) improper confinement in a holding cell with inadequate facilities; (2) improper medical treatment; (3) denial of a tobacco-free environment; (4) loss of personal property; and (5) improper monitoring of his telephone calls. Id at 1432.
45. Beeson, 668 F. Supp. 498 (E.D.N.C. 1987) plaintiff brought a pro se action against prison officials, alleging medical problems as a result of his exposure to a smoke-filled environment.
46. Sampson, 693 F.2d 566 (5th Cir. 1982) (inmate alleged he was injured by pesticide used on prison farm.).
47. Lee, 645 F.Supp. at 1432. Inmate also claimed he was improperly confined in a holding cell with inadequate facilities, that he received improper medical treatment, that some of his personal property was lost and that his telephone calls were improperly monitored. Id.
48. Id. at 1438. The court fails to say whether there was such a statute - just that there was nothing in the complaint nor the record referring to such a statute.
49. Id.
(inflammation of nasal mucous membranes) and sinus trouble.\textsuperscript{51} The federal district court for the eastern district of North Carolina refused to grant defendant's motion for summary judgment anticipating a decision on the merits concerning whether defendants were deliberately indifferent to plaintiff's condition.\textsuperscript{52} However, in discussing the appropriateness of summary judgment, the \textit{Beeson} Court recognized that "the hazards of tobacco smoke are developing at a rapid rate."\textsuperscript{53} The \textit{Beeson} Court explained the differences between mainstream smoke (that which is inhaled) and sidestream smoke (that emitted from the cigarette) and recognized that sidestream smoke is much more dangerous than mainstream smoke because of the increased number of chemicals emitted.\textsuperscript{54} The court pointed out that "smoking is considered by the federal government to be such a hazard to health, including the health of nonsmokers, that it is now tightly controlled in federal buildings, including, as [p]laintiff points out, this very court."\textsuperscript{55}

3. \textit{Sampson v. King}

Plaintiff, incarcerated in the Louisiana State Penitentiary claimed he was injured by exposure to a pesticide, parathion,\textsuperscript{56} used in the prison's farming operations.\textsuperscript{57} Although the United States District Court for the district of Louisiana found that inmate's contact with parathion constituted cruel and unusual punishment because inmates were required to enter recently sprayed fields and prohibited further use of the pesticide, the Court of Ap-

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} at 499. Evidence included a report from a Raleigh physician which stated that plaintiff's problems were exacerbated by passive exposure to tobacco smoke. The report also included recommendations that plaintiff-inmate be kept in a smoke-free environment as much as possible.
\item \textsuperscript{52} The court also commended plaintiff on his complaint. In addition to his own testimony and medical records, plaintiff filed a substantial number of articles about the hazards of ETS. 668 F. Supp. at 503.
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} Sidestream smoke is more dangerous because when a smoker inhales, the fire on the cigarette becomes hotter. This higher temperature causes more combustion which burns more dangerous chemicals away.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} Parathion is described as an extremely toxic insecticide by Webster's New Collegiate Dictionary 825 (1981).
\item \textsuperscript{57} \textit{Sampson}, 693 F.2d at 568. Plaintiff alleged he came in contact with the insecticide because of overhead spraying by cropdusters and because prison officials forced him to work in fields recently sprayed.
\end{itemize}
peals for the Fifth Circuit reversed. Without addressing the possibility of harm to inmates caused by the pesticide, the court of appeals declined to hold the operation of a prison to the same safety standards of private industry. Instead, Sampson held that "a prison farm which adheres to the reasonable customs and usages of the surrounding area cannot be said to be imposing cruel and unusual punishment." 

II. THE EIGHTH AMENDMENT AND EVOLVING STANDARDS OF DECENCY

The Avery Court relied on Rhodes in determining the outcome of the plaintiff's claim. The Supreme Court in Rhodes, considered for the first time, "the limitation that the Eighth Amendment imposes on conditions of confinement." 

Rhodes involved claims by inmates that "double ceiling" violated the Constitution. The inmates sought an injunction barring prison officials from housing more than one inmate in a cell except on a temporary basis. In reversing the lower court's conclusion that double ceiling constituted cruel and unusual punishment, the Supreme Court found no deprivation of food, sanitation or medical care, nor an increase in violence. Also, the Court held that limited work hours and delays in educational opportunities due to the increased number of inmates neither inflicted pain nor constituted punishment.

In reaching its decision, the Rhodes Court cited its previous decision of Gregg v. Georgia, holding that "cruel and unusual" was to be interpreted "in a flexible and dynamic manner." The Rhodes Court pointed to the fact that today the eighth amend-

58. Id. at 570.
59. Id. at 569.
60. Id. (the court noted there had been no showing that local farmers did not regularly use parathion on their farms).
61. Avery, 695 F. Supp. at 635.
63. Id.
64. Id. at 348.
65. Id. (work hours were limited and education opportunities delayed because of the increased number of inmates housed than originally planned).
66. 428 U.S. 153 (1976). Defendant was charged with armed robbery and murder. He was convicted and sentenced to death. The death sentence for the crime of murder under Georgia law was found to be constitutional.
ment proscribes not only barbarous punishments but also those which "involve the unnecessary and wanton infliction of pain," and those punishments grossly disproportionate to the severity of the crime. The Rhodes Court also recognized that no specific test measured confinement conditions, and quoting Coker v. Georgia, held that any "judgment should be informed by objective factors to the maximum possible extent." Following Gregg's lead, the Rhodes Court considered "objective indicia" including history, action of state legislatures and sentences by juries. The Rhodes court also cited Trop in reiterating that a court "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Although it is a firmly established principle that "the Constitution contemplates that in the end a court's own judgment will be brought to bear on the question of the acceptibility of a given punishment," the Rhodes Court was required to consider the objective factors listed previously. Applying these principles and contemporary standards, if confinement conditions are cruel and unusual, then they are unconstitutional. Avery applied these modern standards and found that plaintiff's exposure to ETS could constitute cruel and unusual punishment.

ANALYSIS

In determining the denial of the defendant's motion for summary judgment, the Avery Court considered a two pronged test. First, if plaintiff could prove that involuntary exposure to a smoke-filled environment was hazardous to his heath, this constituted punishment. Second, if plaintiff could prove that confinement conditions (punishment) offended society's evolving standards of decency, then the conditions were not only punishment but cruel and unusual.

68. 452 U.S. at 346 (quoting Gregg v. Georgia, 428 U.S. at 173).
69. 452 U.S. at 346 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977). In Coker, the death penalty was held to be disproportionate to the crime of rape.
70. 433 U.S. 584, 592.
71. Id.
75. Id. at 101.
77. Avery, 695 F. Supp. at 640.
78. Id. at 637.
and unusual punishment.\textsuperscript{79}

Under the first prong, the court decided the plaintiff could prove possibly that ETS was dangerous to his health thereby constituting punishment.\textsuperscript{80} A line of cases hold that involuntary exposure to an environment that may cause death or disease violates the eighth amendment.\textsuperscript{81} Each of these cases deals with environmental conditions. Such harmful conditions found to be violative of the eighth amendment include a lack of adequate ventilation and air flow,\textsuperscript{82} intentional subjection of inmates to a cold, rainy, roach-infested facility,\textsuperscript{83} continuous exposure of inmates to other inmates with contagious diseases,\textsuperscript{84} and confinement in barracks that threaten physical health.\textsuperscript{85}

The conditions in \textit{Avery}, where plaintiff was involuntarily subjected to ETS, are comparable to those found above to violate the eighth amendment. Plaintiff's health was threatened. The \textit{Avery} Court relied on increasing scientific authority warning of the consequences of ETS to hold that plaintiff's claim ascended mere discomfort and became punishment under the eighth amendment.\textsuperscript{86}

Under the second prong, the \textit{Avery} Court followed \textit{Thompson}\textsuperscript{79} at 639.\textsuperscript{80} \textit{Id. at 639.}

\textsuperscript{81} See supra notes 69-72 and accompanying text.

\textsuperscript{82} Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) (lack of adequate ventilation was found to affect the health of inmates and undermine the sanitation of the penitentiary.).

\textsuperscript{83} Bienvenu v. Beauregard Parish Police Jury, 705 F.2d 1457, 1460 (5th Cir. 1983) (plaintiff, an unconvicted detainee, claimed defendants intentionally exposed him to a cold, wet, roach-infested cell and provided him with non-working, scum-encrusted toilet facilities).

\textsuperscript{84} Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.), cert. dismissed, 453 U.S. 950 (1981), rev'd on other grounds, 790 F.2d 1174, 1175 (5th Cir. 1986). The court also found racial discrimination, constant threats of violence and sexual assault, overcrowded conditions, unsanitary conditions, an unbalanced diet and no outdoor exercise.

\textsuperscript{85} Gates v. Collier, 349 F.Supp. 881, 894 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974). The barracks were found to be lacking equipment and a sufficient medical staff. The court also found at Mississippi's only state prison racial discrimination, an inadequate sewage system, the need for a new water system, inadequate heating equipment and insufficient toilet facilities. Also, the court found substandard kitchen facilities, rodent infestation, inadequate firefighting equipment and constitutional violations when prisoners were confined to dark "holes," naked, with no hygienic materials and on starvation diets.

\textsuperscript{86} \textit{Avery}, 695 F. Supp. at 637.
v. Oklahoma's lead by agreeing that the framers of the Constitution had not defined cruel and unusual punishment but "delegated that task to future generations of judges who have been guided by the evolving standards of decency that mark the progress of a maturing society." The Thompson Court then determined society's evolving standards of decency by looking at legislative enactments. The Avery Court followed the Thompson analysis in looking at legislative enactments and observed that as of 1987, forty-five states had enacted legislation regulating the use of tobacco. The Avery Court found that a substantial amount of this legislation specifically addressed ETS exposure. The court then pointed out that New Hampshire had passed legislation regulating smoking in enclosed public places and in the workplace. The Avery Court reasoned that since enclosed public places are defined as "any enclosed, indoor area which is publicly owned or supported by tax revenues," the definition could be read as applying to prisons.

Under both prongs, the Avery Court relied on prior case law, legislative enactments and scientific authority. These authorities are good indicators of the levels of decency our society demands for the incarcerated. The Avery Court correctly analyzed the situation by first determining whether the conditions were punishment and second, whether the punishment was cruel and unusual.

I. PUNISHMENT DEFINED

A. Rhodes v. Chapman

The Avery Court correctly relied on Rhodes. In Rhodes, a relatively recent decision, the Supreme Court for the first time considered the eighth amendment's limitation on conditions of confine-

88. Id. at 2691. The Court considered the issue of whether a death sentence was cruel and unusual punishment for a crime committed by a fifteen-year-old child and held that it was due to the juvenile's lesser culpability and growing capacity as well as society's obligations to its children.
89. Id. The Court noted near unanimity among the states in which juveniles are treated as minors for certain purposes such as voting, jury duty, driving privileges, etc. Also, all states have designated the maximum age for juvenile court jurisdiction at no less than sixteen. Id. at 2692.
91. Id. (the Avery Court did not recite specific percentages).
92. Id.
93. Id.
ment. The Rhodes Court traced the development of the concept of cruel and unusual punishment. The Court concluded that certain confinement conditions could constitute such cruel and unusual punishment.

To resolve whether confinement conditions rose to the level of cruel and unusual punishment, the Court considered several objective factors. The Rhodes majority focused on specific conditions at the prison. The Court found the prison provided adequate food, sanitation and medical care. Decreases in work hours and education delays were not considered punishment. Further the Court determined double ceiling did not constitute punishment. Justice Brennan concurred but concentrated on other factors that courts should consider when scrutinizing confinement conditions. Justice Brennan felt "the courts have emerged as a critical force behind efforts to ameliorate inhumane conditions. Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied." Justice Brennan concluded judicial decisionmaking involved two steps. First, the court must directly examine "the actual conditions under challenge." Second, the court must apply "realistic yet humane standards." Justice Brennan recognized utilization of these steps would be difficult and agreed with the outcome in Coker that the court must rely on its own experience and knowledge of contemporary standards. But Justice Brennan reemphasized that the key to determining whether a punishment is cruel and unusual is the "effect upon the imprisoned."

Rhodes stands for the proposition that confinement conditions can reach the level of cruel and unusual punishment. To decide

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94. Id. at 635.
95. Rhodes, 452 U.S. at 345-47.
96. Id. at 347.
97. Id. at 348.
98. Id. (the Supreme Court found no increase in violence and no infliction of unnecessary or wanton pain).
99. Id. at 352-368. (Brennan, J., concurring).
100. Id. at 359.
101. Id. at 362.
102. Id. at 363.
103. Id. at 364 (citing Coker v. Georgia, 433 U.S.584, 597 (1977)).
104. Id.
105. Id. (quoting Laaman v. Helgemoe, 437 F.Supp. 269, 323 (N.H. 1977)).
106. Id. at 347.
if that level has been reached, Rhodes requires a court to look to objective factors and contemporary standards. The Rhodes decision broadens earlier decisions and affords a more workable standard upon which courts may rely. Avery used the Rhodes standard in determining that involuntary exposure to ETS could rise to the level of cruel and unusual punishment.

B. Contemporary Standards

The defendants in Avery argued that to be cruel and unusual, punishment must be painful. However, the painfulness of punishment is not the correct standard. Confinement conditions are to be measured against evolving standards of decency, not against amounts of pain inflicted. Consequently, there have been many cases where courts have overturned long honored practices in applying more modern standards of decency.

Defendants also argued that ETS was mere discomfort to plaintiff. To counter this argument, the Avery Court noted that numerous courts have ruled that involuntary exposure to dangerous environments violate the eighth amendment. These decisions include Hotowit v. Spellman and Gates v. Collier, focusing on environmental conditions.

In addition to reliance on cases to garner support for its decision that ETS could be cruel and unusual punishment, the Avery Court paid special attention to the ever increasing scientific evidence attesting to the dangers of ETS on the nonsmoker. The court relied heavily on the 1986 Surgeon General’s Report entitled The Health Consequences of Involuntary Smoking. The Re
port’s preface was quoted by the 

Avery Court. “It is now clear that disease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale tobacco smoke emitted into the air.” \(^{118}\) One of the Report’s three major conclusions was that healthy nonsmokers could contract diseases including lung cancer from involuntary smoking. \(^{119}\) The 

Avery Court acknowledged that the Report had been criticized but chose to believe its conclusions.

II. ETS PRECEDENTS AND AVERY

A. Lee v. Carlson

Avery rejected using Lee because Lee failed to reach the merits of plaintiff’s ETS claim. \(^{120}\) In fact, the Lee Court barely acknowledged plaintiff’s claim. \(^{121}\) Finding no specific statute allowing such a claim, the court found that plaintiff failed to state a cause of action. \(^{122}\)

B. Beeson v. Johnson

The Avery Court briefly mentioned this case in passing finding that the Beeson Court interpreted the ETS claim as a deliberate indifference to medical care. However, Beeson could have been utilized more by Avery because Beeson’s long and detailed account explaining how ETS was gaining the reputation of being dangerous to nonsmokers. \(^{123}\) The Beeson Court listed dangerous chemicals that are contained in cigarette smoke. \(^{124}\) The Beeson Court also explained why smoke was thought to be more dangerous to nonsmokers. \(^{125}\) The Avery Court should have used this outpouring to

\(^{118}\) Id.

\(^{119}\) Id. at 7 (the other two major conclusions were that: (2) children of smoking parent have an increased frequency of respiratory problems and (3) that separation of nonsmokers and smokers may reduce but does not remove exposure to nonsmokers).

\(^{120}\) Lee, 645 F. Supp. at 1438.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Beeson, 668 F. Supp. at 503-04.

\(^{124}\) Id. at 503 (the court listed tar, nicotine, carbon monoxide, cadmium, nitrogen dioxide, ammonia, benzene, formaldehyde, and hydrogen sulphide).

\(^{125}\) Id. Sidestream smoke is more dangerous because when a smoker inhales, the fire on the cigarette becomes hotter. This higher temperature causes more combustion which burns more dangerous chemicals away). See supra note 48.
their advantage. After all, the Beeson Court determined that genuine issues of material fact existed to preclude summary judgment.126

C. Sampson v. King

The Avery Court correctly distinguished this case from its own situation. Sampson proceeded on a tangent of its own and did not follow the eighth amendment standard established by Rhodes.127 As already noted, the Rhodes standard was the correct one.

Avery also enumerated three other commanding reasons for distinguishing Sampson. First, a regular practice is not protected merely because it is regular.128 Otherwise, all well-established practices would be static with no progression enabling the practices to adapt to our changing environment. Second, Avery noted that community attitudes about pesticide use were not equivalent to current community intolerance to ETS.129 As previously stated, recognition and opposition to ETS is flourishing. Third, Avery reemphasized that ETS could pose a health hazard even though Sampson failed to recognize the health hazards involving pesticide use.130

III. IMPACT OF AVERY

Avery represents ground gained by nonsmokers. More specifically, it gives nonsmoking prisoners a platform on which to stand when voicing their complaints about ETS. Although not conclusive because there has been no decision on the merits, Avery at this stage, will serve as added support to the nonsmokers' claims.

Avery broadens the eighth amendment's reach to environmental conditions caused by ETS. Other environmental conditions have already been recognized as harmful.131 Avery brings the hazardous exposure to ETS within the scope of the eighth amendment.

The Avery Court was painstaking in concluding that involuntary exposure to ETS was harmful to a nonsmoker's health. The

126. Id. at 504.
127. Avery, 695 F. Supp. at 638. Sampson did not look at "objective factors to determine evolving standards of decency."
128. Id.
129. Id.
130. Id. at 637.
131. See supra notes 69-72 and accompanying text.
Avery Court cited the 1986 Surgeon General's Report, *The Health Consequences of Involuntary Smoking.* The Report concluded that involuntary smoking was a cause of disease to healthy non-smokers. Further, in examining "objective indicia" to determine if society's evolving standards of decency had been breached, the court examined prior cases relevant to the question of whether ETS may be considered punishment. The *Avery* Court distinguished the only case applicable to the issue at bar. Next, the *Avery* Court looked at state and federal legislation and found a sufficient amount of legislation at both levels specifically aimed at regulating exposure to ETS. These objective factors, strengthened by significant scientific authority, indicate that tobacco smoke is an injurious and noxious contaminant of a nonsmoker's environment.

In recognizing plaintiff's claim, the *Avery* Court opened another avenue for inmate-plaintiffs. Now, inmates are equipped to battle against involuntary exposure to an environment that may cause disease or death. Since exposure to similarly harmful environments has been found to violate the eighth amendment, *Avery* is the next logical step in the progression of prisoners' rights.

IV. PRACTICE AFTER AVERY

A prison warden has discretionary power to establish nosmoking areas within a prison. Therefore, statutorily, complying with nonsmoking prisoners' complaints would be relatively easy. Segregation would cause little disruption and should actually ease tension between inmates.

Attorneys will find a smoother path in proceeding with a nonsmoking prisoner's claim if documentation of the client's condition caused by ETS is available. Attorneys should also determine if the inmate had a pre-existing medical condition. If an inmate suffered from a pre-existing medical condition, this factor may provide more evidence of specific irritation by ETS and therefore result in

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133. *Id.* at 7.
134. *See supra* notes 39-41 and accompanying text.
135. *Avery,* 695 F. Supp at 638-39 (citing Sampson v. King, 693 F.2d 566 (5th Cir. 1982)).
136. *Id.* at 640.

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a stronger case.

When the complaint is pro se, it must be liberally con-
strued.\textsuperscript{138} Therefore, it must be “construed in the light most
favorable to plaintiff and taken as admitted, with dismissal to be
ordered only if the [p]laintiff is not entitled to relief under any set
of facts he could prove.”\textsuperscript{139} This may mean a prisoner will have an
easier time of surviving a motion for summary judgment if brought
as a single action.

\section*{Conclusion}

The Avery decision to deny defendants’ motion to dismiss was
significant. In Avery, a court for the first time recognized that in-
voluntary exposure to ETS, in and of itself, may justify an eighth
amendment claim. Numerous other courts have found environ-
ments hazardous to inmates’ health to be violative of the eighth
amendment. Thus, previous decisions formed a foundation for Av-
ery’s holding. Avery used this foundation to acknowledge plain-
tiff’s claim and further buttressed its decision by examination of
prior case law, legislative enactments and significant scientific au-
thority. Although Avery’s precedential value is arguably weak as
there was no decision on the merits, the Avery Court went through
a careful process to justify its conclusion. Avery furthered the con-
cept of examining contemporary standards of decency by looking
to recent scientific findings of the health hazards of ETS to the
nonsmoker in addition to precedent and legislation. Later courts
now have a more workable standard when searching for evolving
standards of decency.

However, no doubt exists that the issue is becoming capri-
cious. More studies using increasingly accurate methods are result-
ing in more definite findings of the harmful effects of ETS. Our
society stresses equality. Both smokers’ and nonsmokers’ rights
should be respected. Avery demonstrates the recognition of both
smokers’ and nonsmokers’ rights in the prison system.

\textit{Robin Terry}

\textsuperscript{138} Beeson, 668 F. Supp. 498 (quoting Haines v. Kerner, 404 U.S. 519
(1972)).

\textsuperscript{139} Avery, 695 F. Supp. at 634 (quoting Chasan v. Village Dist. of Eastman,
572 F.Supp. 578,579 (D.N.H. 1983), aff’d mem., 745 F.2d 43 (1st Cir. 1984)).