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I. The Eighth Amendment as a Basis for Prison Conditions Litigation 991
II. Physical Conditions of Incarceration 992
A. Overcrowding 992
1. The Per Se Rule v. The Totality of the Circumstances 993
2. Double Celling 995
3. The Effects of Overcrowding 996
B. Sanitary and Hygienic Conditions of Prisons 998
C. Diet 1002
III. Inmate Health Care 1005
A. Generally 1005
B. Denial of Health Care 1007
C. Inadequate Health Care 1010
D. Psychiatric Care in the Prisons 1013
IV. Quality of Inmate Life 1014
A. Denial of Exercise 1014
B. Protection From Assault by Fellow Inmates 1018
V. Prison Conditions Litigation under the First Amendment 1021
A. Censorship and Access to Mail 1022
B. Inmate's Right to Practice Religion 1025
C. Visitation Rights of Inmates 1029
D. Right of Association 1031
VI. Conclusion 1031

I. The Eighth Amendment as a Basis for Prison Conditions Litigation

Although traditionally courts defer to the administrative decisions of prison officials,[1] the eighth amendment with its prohibition against cruel

1. *See* Comment, *An Overview of Prisoner Rights: Part I, Access To The Courts Under Section 1983*, 14 St. Mary's L.J. 957, 959-60 (1983) (discussion of judicial deference to penal officials).

and unusual punishment[2] allows inmates to succeed in procuring judicial relief from the substandard conditions found in many prisons.[3] The primary aim of the drafters of the Constitution was to prohibit "tortures" and other "barbarous" means of punishment;[4] however, the amendment in modern times proscribes punishments which may not be torturous or barbarous, but which "involve the unnecessary and wanton infliction of pain," including punishments that fail to further penological objectives.[5] The United States Supreme Court has not fixed a definition for "cruel and unusual," but rather has interpreted this provision broadly in terms of "evolving standards of decency."[6] It was not until 1981 that the Supreme Court directly addressed the application of the eighth amendment to conditions of penal incarceration,[7] finding in *Rhodes v. Chapman*[8] that conditions within prison walls could reach the level of punishment proscribed by the Constitution as cruel and unusual.[9]

II. PHYSICAL CONDITIONS OF INCARCERATION

A. *Overcrowding*

With the United States fast outgrowing its penal institutions[10] because

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2. *See* U.S. CONST. amend. VIII. The amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted." *Id.*

3. *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). Courts are ill suited to attempt to reform all the evils of prison systems; however, this does not mean that they should abstain where constitutional rights are violated. *See id.* at 404-05; Cruz v. Beto, 405 U.S. 319, 321 (per curiam); *see also* Bronstein, *Offender Rights Litigation: Historical and Future Developments*, in PRISONER'S RIGHTS SOURCEBOOK 26 (I. Robbins ed. 1980) (eighth amendment directly competes with "hands off" doctrine); Comment, *Confronting The Conditions Of Confinement: An Expanded Role For Courts In Prison Reform*, 12 HARV. C.R.C.L. REV. 367, 377 (1977).

4. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976); Granucci, *"Nor Cruel and Unusual Punishment Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969).

5. *See* Rhodes v. Chapman, 452 U.S. 337, 345-46 (1981); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977); Gregg v. Georgia, 428 U.S. 153, 171 (1976).

6. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

7. *See* Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981). In an earlier case dealing with prison conditions, the Supreme Court found it unnecessary to address the eighth amendment issue since the defendants in that case did not controvert the lower court's finding of cruel and unusual punishment. *See* Hutto v. Finney, 437 U.S. 678, 685 (1978); *see also* Rhodes v. Chapman, 452 U.S. 337, 345 n.11 (1981).

8. 452 U.S. 337 (1981).

9. *See id.* at 347.

10. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1127 (5th Cir. 1982) (Texas housing 33,000 inmates in 10,000 cells and a few crowded dormitories); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 395 (2d Cir. 1975) (rate of occupancy at New

of an ever increasing crime rate[11] coupled with inflation,[12] prison overcrowding has resulted in a voluminous amount of litigation.[13] The claimant in a prison congestion case typically relies upon the eighth amendment[14] as the basis for a constitutional challenge.[15] In the case of a pretrial detainee, however, the Supreme Court held in *Bell v. Wolfish*[16] that the proper constitutional standard is due process[17] with the eighth amendment prohibition against cruel and unusual punishment having no relevance.[18] Because they have not yet been afforded a trial and an adjudication of guilt or innocence as required by the Due Process Clause, pretrial detainees cannot constitutionally be punished.[19]

1. The Per Se Rule v. The Totality of the Circumstances

Courts have articulated two opposing views in determining whether overcrowded conditions reach constitutional proportions.[20] The per se ap-

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York jail was 170%); Johnson v. Levine, 450 F. Supp. 648, 655 (D. Md.) (16% increase in Maryland prisoners in single year), *aff'd in part and remanded*, 588 F.2d 1378 (1978).

11. *See* Rhodes v. Chapman, 452 U.S. 339, 351 n.16 (1981).

12. *See* Johnson v. Levine, 450 F. Supp. 648, 654 (D. Md.), *aff'd in part and remanded*, 588 F.2d 1378 (1978). The unwillingness of state legislatures to expend tax dollars in order to mitigate the population problems of penal institutions can be implied from a reading of the case law in this area. *See id.* at 654.

13. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 340 (1981) (prisoner suit alleging unconstitutional overcrowding as result of double celling held no cause of action); Bell v. Wolfish, 441 U.S. 520, 542 (1979) (overcrowding one of numerous complaints about conditions); Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981) (placement of five inmates in five-by-seven-foot cell held unconstitutional).

14. U.S. CONST. amend. VIII. The eighth amendment was made applicable to the states through the fourteenth amendment; thus state, as well as federal, penitentiaries fall under the proscription of cruel and unusual punishment. *See* Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981) (citing Robinson v. California, 370 U.S. 660 (1962)).

15. *See, e.g.*, Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980) (crowded conditions violative of eighth amendment where convicted prisoners kept in congested cells at all times except twice weekly showers and court appearances); Battle v. Anderson, 564 F.2d 388, 401 (10th Cir. 1977) (prison overcrowding held cruel and unusual punishment in light of effects on violence, sanitation, and health problems); Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977) (eighth amendment applicable to state prisons).

16. 441 U.S. 520, 535-37 (1979).

17. *See* U.S. CONST. amend. XIV. The fourteenth amendment reads in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." *See id.*

18. *See* Bell v. Wolfish, 441 U.S. 520, 536-37 (1979); *see also* Lock v. Jenkins, 641 F.2d 488, 491 (7th Cir. 1981) (court holding eighth amendment not applicable in case of pretrial detainee).

19. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

20. *Compare* Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980) (long periods of confinement in overcrowded cells unconstitutional per se) *with* Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (no single prison condition is, without more, unconstitutional; but

proach[21] views the overcrowding of prisons as sufficient justification for a finding of cruel and unusual punishment without consideration of other circumstances.[22] Courts applying the per se rule usually base holdings of cruel and unusual punishment on the inadequacy of living space provided each inmate; this typically arises where double celling has occurred.[23] A very slight minority of lower federal courts have applied this per se rule;[24] but most courts have approached overcrowding in light of a "totality of the circumstances" test under which overcrowding does not itself violate the eighth amendment.[25] Overpopulation must exacerbate other conditions before an eighth amendment violation will be found.[26] Some federal courts have construed the Supreme Court case of *Rhodes v. Chapman*[27] as implicit approval of the totality test.[28] The Fifth Circuit in *Ruiz v.*

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combination of overcrowding and other factors may violate eighth amendment).

21. *See, e.g.*, Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981) (confinement in small cell unconstitutional per se); Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980) (overcrowded cells unconstitutional standing alone); Smith v. Fairman, 528 F. Supp. 186, 200 (C.D. Ill. 1981) (noting correctness of *Chavis*).

22. *Cf.* Hutto v. Finney, 437 U.S. 678, 682, 685 (1978). In *Hutto*, a lower federal court had held that the placement of as many as 11 inmates in a windowless cell was unconstitutional per se. The Supreme Court seemingly approved of this holding although the phrase "per se unconstitutional" was not used. *See id.* at 682, 685. This approval, however, can be viewed as dicta because that issue was not before the Court. *See id.* at 685.

23. *See* Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980). In *Campbell*, inmates were given an average of 18 square feet per man of living space. The court found this to be a result of double celling but based its holding on the amount of space allocated and not on the double celling itself. *See id.* at 506.

24. *See* Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981) (confinement of four inmates in five-by-seven-foot cell per se violative of eighth amendment); Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980) (court had little trouble in finding cruel and unusual punishment where inmates held in cramped cells for long periods of time); *cf.* Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (court stated that overcrowding easily warranted per se holding but was unnecessary as effects of overcrowding violative of eighth amendment).

25. *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 634 n.54 (1981). Complex enforcement, or the "totality of the circumstances" test, looks to the reasonableness of all factors of prison life in determining the constitutionality of prison conditions. *See id.* at 634 n.54.

26. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir. 1982) (construing Rhodes v. Chapman, 452 U.S. 337 (1981) as Supreme Court approval of totality of circumstances test); Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980) (restrictions on prisoners, such as lack of exercise, only become unconstitutional in light of whole prison environment and resulting adverse effects); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (overcrowding unconstitutional only if adversely affects inmate protection, diet, health care, and sanitation), *cert. denied*, 450 U.S. 1041 (1981).

27. 452 U.S. 337 (1981) (Supreme Court treatment of double celling).

28. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir. 1982) (totality test approved by Supreme Court in *Rhodes*); Stewart v. Winter, 669 F.2d 328, 335-36 n.17 (5th Cir. 1982) (*Rhodes* implicit approval of totality test); Nelson v. Collins, 659 F.2d 420, 429-30 (4th Cir.

Estelle[29] discussed *Rhodes* at length, interpreting the Supreme Court's emphasis on the fact that double celling did not aggravate other problems as an implicit adoption of the totality approach.[30] Although Justice Brennan recognized the test in his concurrence in *Rhodes*, the Supreme Court has yet to adopt outright that standard.[31]

2. Double Celling

The placing of two or more prisoners in a cell built for single occupancy, known as "double celling," has led to many law suits.[32] While national studies and correctional standards mandate against double celling,[33] single occupancy is not a constitutional minimum.[34] Two recent Supreme Court cases provide effective guidance in double celling cases.[35] In *Bell v. Wolfish*,[36] several pretrial detainees brought a class action challenging the double celling practice of a New York short-term facility.[37] Placing much emphasis on the fact that prisoners were only required to sleep in the cell, with the freedom to come and go within prescribed areas during the day, the Court held that double celling was not under these facts violative of due process.[38] Similarly, in *Rhodes v. Chapman* the

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1981) (Winter, C.J., concurring in part and dissenting in part) (double celling, one form of overcrowding, could violate eighth amendment under *Rhodes* totality test).

29. 679 F.2d 1115 (5th Cir. 1982).

30. *See id.* at 1139.

31. *See* Rhodes v. Chapman, 452 U.S. 337, 363 n.10 (1981) (Brennan, J., concurring). Justice Brennan was of the opinion that the majority in *Rhodes* had adopted the totality test. *See id.* at 363 n.10. It is interesting to note, however, that the Ninth Circuit in a post-*Rhodes* decision has expressly disapproved of the totality approach. *See* Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982).

32. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981) (Supreme Court dismissal of prisoner's complaint alleging double celling violative of eighth amendment); Hutto v. Finney, 437 U.S. 678, 682, 685 (1978) (placement of up to 11 inmates in eight-by-ten-foot cell cruel and unusual punishment); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975) (double celling in five-by-ten-foot cell violative of due process where pretrial detainees involved).

33. *See* UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS § 2.02 (Dec. 16, 1980); UNITED STATES NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS § 2.5(1) (1973).

34. *See* Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981). The Supreme Court has stated that there is no " 'one man per cell' principal lurking in . . . the Constitution." Bell v. Wolfish, 441 U.S. 520, 542 (1979). Most modern correctional facilities, however, are designed to house one man per cell. *See* Singer, *The Wolfish Case, Has The Bell Tolled For Prisoner Litigation In The Federal Courts?*, in LEGAL RIGHTS OF PRISONERS 37 (G. Alpert ed. 1980).

35. *See* Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979).

36. 441 U.S. 520 (1979).

37. *See id.* at 523.

38. *See id.* at 542-43. The court noted the absence of any constitutional provision pro-

Court refused to find that double celling was unconstitutional. *Rhodes* dealt with a class action brought by inmates housed at a maximum security prison in Ohio.[39] The Court looked at the problem of prison overpopulation in light of the eighth amendment,[40] holding that the placing of more than one inmate within a single cell did not approach cruel and unusual punishment.[41]

Although under these two cases[42] a claim of double celling alone will not suffice as a cause of action, this does not mean that double celling is per se constitutional.[43] In both cases, the Court limited its opinions to the factual situations presented. Lower federal courts have read *Bell* and *Rhodes* as allowing a finding that double celling may in some cases warrant a holding of unconstitutionality.[44] While recognizing that the Constitution does not require single occupancy celling, courts do not deny that one man per cell is a highly desirable and appropriate goal.[45] At the same time, however, this aspiration is fairly unrealistic given the number of inmates and the state of our economy.[46]

3. The Effects of Overcrowding

The problems associated with prison overpopulation are well documented[47] in the frequent holdings that overcrowding is the one factor

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scribing multiple incarceration. *See id.* at 542.

39. *See* Rhodes v. Chapman, 452 U.S. 337, 339-40 (1981).

40. *See id.* at 344-45.

41. *See id.* at 348.

42. *See id.* at 348-49; Bell v. Wolfish, 441 U.S. 520, 524 (1979).

43. *See* Nelson v. Collins, 659 F.2d 420, 430 (4th Cir. 1981) (Winter, C.J., concurring in part and dissenting in part).

44. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir. 1982) (*Rhodes* implied approval of totality in double celling case); Nelson v. Collins, 659 F.2d 420, 428 (4th Cir. 1981) (Winter, C.J., concurring in part and dissenting in part) (*Rhodes* and *Wolfish* hold double celling not per se unconstitutional, but do not foreclose against all double celling claims); Lock v. Jenkins, 641 F.2d 488, 493 (7th Cir. 1981) (distinguished *Wolfish* because there inmates only double celled while sleeping whereas in *Lock* double celling was constant). Although the court refused to find a per se constitutional violation in the double celling of inmates in a 65 foot cell, the justices did state in dicta that the inevitable tensions caused by this practice would invariably present problems to inmates, as well as prison administrators. *See* Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979) (citing *Bell v. Wolfish* for this proposition).

45. *See* Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981) (Court notes double celling undesirable, but not below standards of decency standing alone); *see also* Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979) (double celling without question leads to prison problems).

46. *See* Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981); Johnson v. Levine, 450 F. Supp. 648, 654 (D. Md.), *aff'd in part and remanded per curiam*, 588 F.2d 1378 (4th Cir. 1978).

47. *See, e.g.*, Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978) (overcrowding

most responsible for the deplorable conditions found in many prisons.[48] The adverse effects of overcrowding directly affect both the inmate himself and other conditions of prison life.[49] The inmate suffers from idleness as a result of overcrowding[50] since congestion necessarily limits the availability of inmate jobs, programs, and opportunities for education.[51] This inactivity in turn breeds frustration and violence.[52]

Congestion also worsens other existing substandard prison conditions.[53] Where penal institutions house two or three times the number of inmates they were designed to accomodate,[54] it necessarily follows that conditions

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found to effect adversely sanitation, meals, and inmate protection; under totality test held cruel and unusual punishment); Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (overcrowding found to have caused riot due to direct correlation between congestion and violence); Pugh v. Locke, 406 F. Supp. 318, 322-23 (M.D. Ala. 1976) (overcrowding primarily responsible for unsanitary conditions in Alabama jails), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

48. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 424 (1980) (Blackmun, J., dissenting) (overcrowding and subsequent understaffing major contributing factors in inadequacy of penal system); Ruiz v. Estelle, 679 F.2d 1115, 1140 (5th Cir. 1982) (overcrowding permeates all areas of inmate society); Johnson v. Levine, 450 F. Supp. 648, 655 (D. Md.) (overcrowding affects prisoners in various ways), *aff'd in part and remanded per curiam*, 588 F.2d 1378 (4th Cir. 1978).

49. *See* Johnson v. Levine, 450 F. Supp. 648, 655 (D. Md.), *aff'd in part and remanded per curiam*, 588 F.2d 1378 (4th Cir. 1978). Prisoners immediately upon entering penal institutions feel the onerous effects of overcrowding, including adverse effects to the inmate's mental health, lack of privacy, and unsanitary conditions. *See* Anderson v. Redman, 429 F. Supp. 1105, 1112 (D. Del. 1977).

50. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982) (prisoner idleness found resulting in prison violence); Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980) (idleness and resulting adverse effects noted by court); Anderson v. Redman, 429 F. Supp. 1105, 1112 (D. Del. 1977) (inmate morale low because of idleness).

51. *See* Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982). The court noted the debilitating effects of idleness but could not find a constitutional violation from inactivity, without more. *See id.* at 1254-55.

52. *See* Anderson v. Redman, 429 F. Supp. 1105, 1112 (D. Del. 1977). In an effort to curb the effects of enforced idleness, the court in *Campbell v. Cauthron* mandated that inmates be given a minimum of one hour per day outside of their cells. *See* 623 F.2d 503, 507 (8th Cir. 1980).

53. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.) (overcrowding exacerbates existing problems with inmate diet and lack of recreation), *cert. dismissed*, 453 U.S. 950 (1981); Miller v. Carson, 563 F.2d 741, 745 (5th Cir. 1977) (overpopulation worsened already existing sanitation problems); Pugh v. Locke, 406 F. Supp. 318, 322-23 (M.D. Ala. 1976) (overcrowding blamed for all shortcomings of Alabama prisons), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

54. *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 679 (D. Mass. 1973) (jail originally designed to hold one inmate per cell practicing double celling), *aff'd*, 518 F.2d 1241 (1st Cir. 1975). States and agencies often rate the ideal maximum capacity of

such as sewage disposal, meal service, recreation, availability of medical treatment, and other services are adversely affected.[55] Under the previously discussed totality of the circumstances test, courts generally recognize that overcrowding, although perhaps not unconstitutional per se, can become so because of its amplifying effect upon other conditons of prison life.[56] The conditions worsened by overcrowding and the pertinent case law involved will be further examined in the following sections.

B. *Sanitary and Hygienic Conditions of Prisons*

An inmate's right to be incarcerated in a reasonably sanitary environment has been termed one of the "core areas" in an eighth amendment cause of action.[57] Although inmates necessarily lose many constitutional guarantees, they still retain the right to be housed in an environment that does not offend accepted standards of decency.[58] An application of this constitutional minimum has led one court to hold that the unsanitary conditions found at a state penitentiary created an environment unsuitable for human habitation.[59]

As in the overcrowding cases, two tests have been utilized in determining possible constitutional violations resulting from unsanitary condi-

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prisons; however, in most cases the inmate population far exceeds this number. *See* Hoptowit v. Ray, 682 F.2d 1237, 1248 (9th Cir. 1982); Ambrose v. Malcolm, 414 F. Supp. 485, 487 (S.D.N.Y. 1976).

55. *See, e.g.*, Johnson v. Levine, 588 F.2d 1378, 1380-81 (4th Cir. 1978) (per curiam) (under totality test, effect of overcrowding upon recreation, sewage disposal, and meal facilities combined to produce cruel and unusual punishment); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (270 inmate stabbings result of overcrowding); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975) (meal facilities, inmate protection, and loss of privacy because of overpopulation held unconstitutional as violative of due process for pretrial detainee).

56. *See* notes 26-31 *supra* and accompanying text for discussion of totality approach in overcrowding litigation.

57. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (cruel and unusual punishment includes inadequate sanitation, shelter, food, and health care), *cert. denied*, 450 U.S. 1041 (1981); Bolding v. Holshouser, 575 F.2d 461, 464 (4th Cir.) (claim of unsanitary conditions states cause of action), *cert. denied*, 439 U.S. 837 (1978); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977) (prison officials must provide prisoners with life's necessities, including sanitary conditions), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

58. *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981). In determining whether the eighth amendment has been violated, the court must look to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (cited with approval in *Rhodes*).

59. *See* Ramos v. Lamm, 639 F.2d 559, 569 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

tions.[60] Those courts that espouse the totality of circumstances test put much emphasis upon the sanitary environment[61] of the prison because of potential ill effects upon the health of inmates.[62] Other courts have found unwholesome environments to be so onerous as to warrant a per se approach.[63] Regardless of the particular test used, it is uniformly recognized that unsanitary conditions are a direct consequence of overcrowding.[64]

A large number of cases in this area have arisen in part, because of defective sewage and plumbing facilities.[65] In *Pugh v. Locke*,[66] the court found that the plumbing facilities were wholly inadequate to accommo-

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60. *Compare* Johnson v. Levine, 588 F.2d 1378, 1380-81 (4th Cir. 1978) (per curiam) (sanitation one element of totality test in finding of unconstitutional prison conditions) *with* Hoptowit v. Ray, 682 F.2d 1237, 1256 (9th Cir. 1982) (health risks because of unsanitary environment to be considered alone).

61. *See, e.g.*, Johnson v. Levine, 588 F.2d 1378, 1380-81 (4th Cir. 1978) (per curiam) (sanitation one element in totality test); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (health and sanitary conditions, combined with other factors, give rise to constitutional violation); Rhem v. Malcolm, 507 F.2d 333, 335-36 (2d Cir. 1974) (unlivable conditions due to heat, ventilation, and noise, when considered with other circumstances, constitute cruel and unusual punishment). *But see* Hoptowit v. Ray, 682 F.2d 1237, 1257 (9th Cir. 1982). The court reversed a holding of cruel and unusual punishment because the lower court had applied the totality test. The Ninth Circuit noted that unsanitary conditions could rise to the level of a constitutional deprivation but remanded the case for a determination based upon considerations of each allegation without regard to the combined effect of all conditions. *See id.* at 1256.

62. *See* Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). Unsanitary conditions present an impending danger to the general health and well-being of all inmates. *See id.* at 329.

63. *See* Hoptowit v. Ray, 682 F.2d 1237, 1256 (9th Cir. 1982). In reversing the district court's use of the totality test, the Ninth Circuit agreed with the lower court's finding that the problems of sanitation posed serious health problems, thus implying that sanitation could be cruel and unusual punishment per se. *See id.* at 1256.

64. *See, e.g.*, Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978) (per curiam) (sanitation problems result of overcrowding); Newman v. Alabama, 559 F.2d 283, 287-88 (5th Cir. 1977) (unsanitary conditions, as well as all other substandard aspects of Alabama penitentiaries, caused by overpopulation), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Anderson v. Redman, 429 F. Supp. 1105, 1113 (D. Del. 1977) (population problem overtaxed sewage disposal system leading to unsanitary conditions).

65. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 569 (10th Cir. 1980) (faulty plumbing responsible for accumulation of sewage and consequent health hazards), *cert. denied*, 450 U.S. 1041 (1981); Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (overtaxed waste disposal system produces unconstitutional health risks); Anderson v. Redman, 429 F. Supp. 1105, 1113 (D. Del. 1977) (sewage system inoperative from first day installed).

66. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

date the large number of inmates who were housed at an Alabama prison.[67] In one area of the facility, it was found that 200 inmates were forced to share one toilet because it was the only one functioning.[68] The court held that the unsanitary condition brought about by the overuse of the toilet, as well as other factors, presented an inescapable danger to the physical well being of the prisoners and, thus, amounted to cruel and unusual punishment.[69] Similar unsanitary conditions were found to exist in Mississippi prisons.[70] In *Gates v. Collier,* the Fifth Circuit held that unwholesome conditions fell below the constitutional minimum where the disrepair of a prison sewage system was proven to have caused the spread of infectious disease.[71] The condition had become so intolerable as to have compelled state health and pollution agencies to condemn the prison's methods of waste disposal.[72]

Other consequences of faulty sewage systems have been found as contributing factors to holdings of cruel and unusual punishment. The leaks from faulty overhead sewage pipes were shown to cause health problems where contaminated water had leaked onto food that was about to be served.[73] Defective sewage systems were also found to pose environmental problems where the overflow of prison sewage had polluted adjacent rivers and streams.[74] Further, the stench resulting from these conditions has been cited as contributing to unsuitable living conditions by a number of courts.[75] Finally, courts have noted the problems associated with insects drawn to areas with sewage problems.[76]

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67. *See id.* at 323.

68. *See id.* at 323.

69. *See id.* at 329.

70. *See* Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974).

71. *See id.* at 1300.

72. *See id.* at 1300.

73. *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 680 (D. Mass. 1973), *aff'd,* 518 F.2d 1241 (1st Cir. 1975). The court also mentioned the sewage system's non-compliance with public health codes. *See id.* at 680.

74. *See* Anderson v. Redman, 429 F. Supp. 1105, 1113 (D. Del. 1977).

75. *See, e.g.,* Laaman v. Helgemoe, 437 F. Supp. 269, 308-09 (D.N.H. 1977) (stench from faulty sanitation system contributed to unsuitable living conditions in violation of eighth amendment); Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976) (witness testified as to overpowering odor as result of sewage system), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 680 (D. Mass. 1973) (odor originating from toilets contributes to health hazards), *aff'd,* 518 F.2d 1241 (1st Cir. 1975). *But see* Adams v. Pate, 445 F.2d 105, 109 (7th Cir. 1971). In *Pate,* the court observed that the drinking facilities were in close proximity to the commode; however, this was not held to be violative of the eighth amendment. *See id.* at 109.

76. *See* Inmates Of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 680 (D. Mass.

A number of cases in the sanitation area stem from the conditions imposed upon prisoners while housed in strip cells,[77] a form of punitive isolation. Although isolation is an accepted form of inmate discipline,[78] unsanitary conditions, as well as the denial of hygienic considerations, may violate the eighth amendment,[79] regardless of the conduct of the inmate in bringing about the disciplinary proceedings.[80] In *Wycoff v. Brewer*,[81] the claimant, while in administrative segregation, had engaged in behavior that clearly merited discipline.[82] After transfer to a strip cell, the inmate was deprived of clothing and given neither bedding nor toiletries.[83] The court held that this deprivation violated the eighth amendment regardless of the inmate's contributory fault.[84] *Wycoff* is distinguishable from *Novak v. Beto*,[85] where providing inmates in solitary confinement with clothing and blankets to stay warm[86] was held to be within constitutional limits.[87] The Second Circuit had little difficulty in finding that sanitary conditions in a strip cell constituted cruel and unusual punishment in *LaReau v. MacDougall*.[88] The petitioner was placed in a cell which had neither a sink nor a commode[89] and was thus required to use a hole in the

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1973) (odor of human waste found to attract insects, contributing to already unsanitary environment), *aff'd*, 518 F.2d 1241 (1st Cir. 1975).

77. *See, e.g.*, Wycoff v. Brewer, 572 F.2d 1260, 1263 n.5 (8th Cir. 1978) (in modern times, placing inmate nude in cell with only sink and commode clearly cruel and unusual punishment); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (prisoner placed in isolation with neither sink nor commode held unconstitutional), *cert. denied*, 414 U.S. 878 (1973); Owens-El v. Robinson, 442 F. Supp. 1368, 1384 (W.D. Pa. 1978) (inhumane to strip inmate and confine in dark isolation cell with no furniture).

78. *See* Ford v. Board of Managers of N.J. State Prison, 407 F.2d 937, 940 (3d Cir. 1969) (isolation not cruel and unusual per se); Buszka v. Johnson, 351 F. Supp. 771, 773 (E.D. Pa. 1972) (noting correctness of *Ford*).

79. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 685-87 (1978) (punitive isolation for 30 days in overcrowded, filthy cell constituted eighth amendment violation); Maxwell v. Mason, 668 F.2d 361, 363 (8th Cir. 1981) (eighth amendment infringement established where inmate put in isolation without clothing or bedding); Wright v. McMann, 321 F. Supp. 127, 138-39 (N.D.N.Y. 1970) (conditions of strip cell, including deprivation of hygienic implements and bedding violative of eighth amendment), *aff'd in part and rev'd in part*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972).

80. *See* Wycoff v. Brewer, 572 F.2d 1260, 1263 n.5 (8th Cir. 1978).

81. 572 F.2d 1260 (8th Cir. 1978).

82. *See id.* at 1264. The plaintiff had threatened guards, destroyed property, and thrown human excrement on passing prison officials; the subsequent isolated confinement was for practical, as well as disciplinary, reasons. *See id.* at 1264.

83. *See id.* at 1263.

84. *See id.* at 1266.

85. 453 F.2d 661 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972).

86. *See id.* at 668.

87. *See id.* at 668.

88. 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973).

89. *See id.* at 977.

cell floor as the only means of disposing of his waste.[90] The court held this to be constitutionally impermissible,[91] relying upon the *Trop v. Dulles*[92] decency test.

Other conditions which also contribute to the overall unsanitary atmosphere have led courts to similar findings of cruel and unusual punishment.[93] Inadequate ventilation and the consequences thereof weighed heavily in the court's decision that the eighth amendment was violated in *Ramos v. Lamm*.[94] Denial of toiletries for personal hygiene have been held to be violative of the Constitution.[95] Courts have also considered rodent infestation in prisons as adding to the overall unsanitary conditions.[96]

C. *Diet*

Because prison administrators are not to deny them life's necessities,[97]

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90. *See id.* at 977.

91. *See id.* at 978.

92. 356 U.S. 86, 101 (1958).

93. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 569 (10th Cir. 1980) (faulty ventilation contributed to impermissible prison conditions), *cert. denied*, 450 U.S. 1041 (1981); Campbell v. McGruder, 580 F.2d 521, 544 (D.C. Cir. 1978) (ordered clean clothing, bedding, and towels given to inmates at least once a week); Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976) (prison officials ordered to provide toothpaste, toothbrushes, shaving cream, and razors to inmates), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

94. 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). The court found that heat, humidity, and fungus caused by inadequate ventilation presented an unbearable situation. *See id.* at 569; *see also* Rhem v. Malcolm, 507 F.2d 333, 338 (2d Cir. 1974) (faulty ventilation was considered important element in finding unfit living conditions).

95. *See* Scellato v. Department of Corrections, 438 F. Supp. 1206, 1207 (W.D. Va.) (failure to provide more than soap, towels, and toilet paper held constitutional), *dism'd sub nom.* Scellato v. Zahradnick, 565 F.2d 158 (4th Cir. 1977). *But see* Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). The court went beyond the constitutional minimum of soap, towels, and toilet paper in ordering that prisoners shall be supplied with such things as toothpaste, toothbrushes, razor blades, shaving cream and shampoo. *See id.* at 334.

96. *See* Miller v. Carson, 563 F.2d 741, 745 (5th Cir. 1977). The court found that the rats and mice were so abundant that many inmates passed the time trying to catch them. *See id.* at 745. *But see* Dailey v. Byrnes, 605 F.2d 858, 860 (5th Cir. 1979) (affirmed lower court's finding that although rats were undesirable, court could not fashion remedy).

97. *See* Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); *see also* Cunningham v. Jones, 567 F.2d 653, 656 (6th Cir. 1977) (distinguishing between those times necessary and those unnecessary but enjoyable).

inmates must be provided reasonably adequate food[98] as a constitutional minimum.[99] Although one court has held a bread and water diet to be per se cruel and unusual punishment,[100] courts usually find that inadequate meals are one element among many to be considered in holding that the eighth amendment has been violated.[101] The Supreme Court has never ruled upon this particular condition of prison life; thus, no consistent rules in prison diet litigation have been implemented.[102]

The amount of food served has been one subject of extensive litigation. The denial of food as a means of punishment was held constitutional in *Collins v. Schoonfield*,[103] so long as minimum nutritional needs were met.[104] In *Gates v. Collier*,[105] that minimum was held to be no less than 2,000 calories per day[106] while in *Laaman v. Helgemoe*,[107] the standard was three meals per day.[108] These cases show the variety of ways in which

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98. *See* Campbell v. Cauthron, 623 F.2d 503, 508 (8th Cir. 1980). Prisoners were provided with two sweet rolls and two frozen dinners per day. While noting the reasons of incarceration, the court nevertheless found this diet to be unconstitutional despite the argument of the state that prisons were not supposed to be "country clubs." *See id.* at 508-09.

99. *See* Cunningham v. Jones, 567 F.2d 653, 656 (6th Cir. 1977). The Sixth Circuit cited Holt v. Sarver, 300 F. Supp. 825, 832 (E.D. Ark. 1969), for the proposition that the line separating cruel and unusual punishment from permissive behavior is the difference between denying a prisoner necessities and denying him privileges. *See id.* at 656.

100. *See* Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971). In light of current standards of decency, the court had no trouble in holding that a diet consisting solely of bread and water was unconstitutional. *See id.* at 646. *But see* Ford v. Board of Managers of N.J. State Prison, 407 F.2d 937, 939-40 (3d Cir. 1969). The claimant received four slices of bread and a pint of water, with one full meal served every third day. The Sixth Circuit was unable to find that petitioner had alleged a cause of action. *See id.* at 939-40.

101. *See, e.g.*, Bolding v. Holshouser, 575 F.2d 461, 465 (4th Cir.) (allegations of inadequate food, unsanitary conditions, and other deficiencies stated sufficient cause of action), *cert. denied*, 439 U.S. 837 (1978); Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (many deficiencies found, including overtaxed and unsanitary kitchen); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (finding of unsanitary kitchen as part of totality of circumstances constituting cruel and unusual punishment).

102. *See* Cunningham v. Jones, 567 F.2d 653, 656 (6th Cir. 1977). The court recognized the absence of Supreme Court guidance but noted the abundance of lower federal court decisions in the prisoner diet area. *See id.* at 656-57.

103. 344 F. Supp. 257 (D. Md. 1972).

104. *See id.* at 278. The court noted that an expert's testimony at the trial had revealed that denial of food as a form of punishment was not desirable, but nevertheless ruled against the petitioner. *See id.* at 278.

105. 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

106. *See id.* at 900.

107. 437 F. Supp. 269 (D.N.H. 1977).

108. *See id.* at 326; *see also* Bolding v. Holshouser, 575 F.2d 461, 465 (4th Cir.), *cert. denied*, 439 U.S. 837 (1978). In *Holshouser*, the district court had dismissed the inmate's complaint, which included the denial of three meals a day, for failure to state a cause of action. *See id.* at 463. On appeal, however, the Fourth Circuit reversed, holding that the

courts have attempted to comply with the constitutional minimum of reasonableness and adequacy of meals. The general rule, however, is that if the food is of adequate nutritional value, the judiciary will not interefere.[109] Finally, it must be pointed out that the right to a special diet is not of constitutional magnitude[110] although some courts have required prison administrators to comply with requests for certain foods because of health and religious needs.[111]

Additionally, as part of the requirement of an overall healthy environment, prisoners must be served sanitary, as well as nutritionally adequate, food.[112] Allegations of cruel and unusual punishment stemming from prison food frequently arise from the unsanitary conditions of the kitchens, the food handlers, or both.[113] The court in *Battle v. Anderson*,[114] in finding constitutional violations in the sanitary condition of prison kitchen and dining facilities, noted that beyond prison walls, the facilities would immediately be shut down because of the health risks.[115] Public health standards were used by the court in *Ramos v. Lamm*[116] as persuasive authority for finding food service facilities to be unsanitary.[117]

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denial of three meals a day constituted a sufficient cause of action. *See id.* at 465.

109. *See* Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir.), *cert. dismissed*, 453 U.S. 950 (1981). A jailhouse diet containing mostly starch and carbohydrates, although dull and tasteless, was found constitutional as it contained reasonably adequate nutritional value. *See id.* at 1378.

110. *See* Cassidy v. Superintendent, City Prison Farm, 392 F. Supp. 330, 335 (W.D. Va.), *aff'd in part, rev'd in part, and remanded*, 529 F.2d 514 (4th Cir. 1975). Petitioner alleged that the food at a prison was inadequate and submitted a list of food, including Kool-Aid and brussel sprouts, that should be supplied. The court held that this failed to state a cause of action and cited Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968), for the proposition that prisoners are not given a constitutional right to be provided with a special diet. *See id.* at 335.

111. *See* Laaman v. Helgemoe, 437 F. Supp. 269, 326 (D.N.H. 1977). The *Laaman* court included in its order a provision requiring prison officials to accommodate any inmate desirous of a special diet for good cause, such as religious or health requirements. *See id.* at 326.

112. *See* Ramos v. Lamm, 639 F.2d 559, 571 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

113. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 571 (10th Cir. 1980) (kitchen facilities and employees were found to create unsanitary food), *cert. denied*, 450 U.S. 1041 (1981); Laaman v. Helgemoe, 437 F. Supp. 269, 309 (D.N.H. 1977) (citing cases for proposition that unsanitary food service presents health risks to inmate); Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976) (finding gross inadequacies in food service sanitation), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

114. 564 F.2d 388 (10th Cir. 1977).

115. *See id.* at 395.

116. 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

117. *See id.* at 571. The court observed that health codes and standards may require a higher quality of conditions than does the Constitution, but stated that they were relevant

Likewise, in *Laaman v. Helgemoe*,[118] the kitchen facilities and food handlers were found to present a serious threat to inmate health.[119] Consequently, the court ordered stringent food service and kitchen worker regulation in an attempt to mitigate the unhealthy conditions found at the New Hampshire prison.[120]

Given that overcrowding pervades all of the physical conditions of incarceration, *Pugh v. Locke* documents its effects on food service.[121] The court noted, among other things, that because of the overcrowding and understaffing, untrained inmates were given the responsibility of food service, the result being unappetizing and unwholesome food.[122] The court concluded that relief from overpopulation would rectify this, as well as several other substandard conditions.[123]

III. Inmate Health Care

A. *Generally*

Because the deprivation of liberty resulting from incarceration renders the prisoner totally dependent on the penal system,[124] prison administrations have an obligation to provide inmates with adequate medical treatment.[125] Courts utilize the eighth amendment as a basis for measuring constitutional violations where either the denial or inadequacy of medical treatment evidences "deliberate indifference" to the health needs of inmates.[126] Where he is unable to meet this burden, the prisoner still may

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as a consideration. *See id.* at 571; *see also* Smith v. Sullivan, 611 F.2d 1039, 1045 (5th Cir. 1980) (state health standards relevant consideration in determining standards of decency).

118. 437 F. Supp. 269 (D.N.H. 1977).

119. *See id.* at 309. Personnel, food storage, and dishwashing facilities were found particularly offensive to the court. *Id.* at 309.

120. *See id.* at 326.

121. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

122. *See id.* at 323.

123. *See id.* at 323.

124. *See* Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972). Regardless of the nature of the crime for which he is incarcerated, one does not have the freedom to provide for himself; consequently, if prison officials do not meet prisoner's basic needs, then those needs will not be met. *See id.* at 1076.

125. *See* Ramos v. Lamm, 639 F.2d 559, 574-75 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972).

126. *See* Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). Where prison administrators deny inmate's access to medical personnel or

be able to recover in tort,[127] but the focus of this section is on health care in relation to the cruel and unusual punishment clause of the eighth amendment.[128]

Having already been employed by several lower courts,[129] the deliberate indifference test became the constitutional standard for measuring inmate health care in 1976 with the Supreme Court's decision in *Estelle v. Gamble*.[130] In *Gamble*, the complainant had suffered a back injury while on a prison work detail.[131] During the ensuing three months, the plaintiff was examined on seventeen occasions and treated for his injured back but claimed the injury was inadequately diagnosed and treated.[132] The court of appeals found that the absence of an X-ray, in particular, evidenced substandard health care and ruled in favor of the petitioner.[133] The Supreme Court could not find deliberate indifference to the inmate's health needs and thus held for the prison administrators.[134] The Court in *Gamble* added a second requirement to a valid constitutional challenge in health care cases: the deliberate indifference must be to a "serious" medical problem.[135] *Gamble* also stands for the propositions that medical mal-

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where recommended treatment is ignored by officials, deliberate indifference is shown. *See id.* at 575; Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976). The test is not whether the medical treatment given is the best available, but whether deliberate indifference is the underlying motive behind the denial or inadequacy of health care. *See* Ruiz v. Estelle, 679 F.2d 1115, 1149 (5th Cir. 1982).

127. *See* Plummer v. United States, 580 F.2d 72, 73-74, 77 (3d Cir. 1978) (eight inmates pursued successful claim under Federal Torts Claims Act after exposure to tuberculosis).

128. *See* Estelle v. Gamble, 429 U.S. 97, 101 (1976). *Gamble* brought inmate health care within the protection of the eighth amendment after a lengthy discussion of cruel and unusual punishment. *See id.* at 101-03.

129. *See, e.g.*, Westlake v. Lucas, 537 F.2d 857, 858, 860 (6th Cir. 1976) (denial of treatment for bleeding ulcer stated cause of action in pre-*Gamble* deliberate indifference test); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (two years prior to decision in *Gamble*, Second Circuit applied deliberate indifference test where prison doctor did not attempt to reattach amputated ear after inmate request); Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974) (use of "callous" indifference test to determine health care impropriety), *cert. denied*, 421 U.S. 948 (1975).

130. 429 U.S. 97, 106 n.14 (1976). The Court approved of several earlier cases in which lower federal courts had utilized a deliberate indifference test or a functional equivalent in the health care area. *See id.* at 106 n.14.

131. *See id.* at 99.

132. *See id.* at 107.

133. *See* Gamble v. Estelle, 516 F.2d 937, 941 (5th Cir. 1975), *rev'd*, 429 U.S. 97 (1976).

134. *See* Estelle v. Gamble, 429 U.S. 97, 107-08 (1976).

135. *See id.* at 105. Lower courts have subsequently read the "serious" medical problem requirement to mean a health need for which a doctor has ordered treatment or which a layman would recognize as requiring the treatment of a physician. *See* Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977). The *Gamble* Court found that only deprivation of serious medical needs would offend the *Trop v. Dulles* decency standard in determining cruel and

practice,[136] a mistaken denial of health care,[137] or simple negligence[138] will not warrant a holding of a cruel and unusual punishment. It, thus, appears that only conscious unconcern or callousness to a serious medical problem of an inmate violates the eighth amendment.[139]

B. *Denial of Health Care*

Where an inmate is denied medical care, the successful claimant must show that the underlying motive behind such denial was deliberate indifference and that his health problem was serious.[140] The Constitution does not require that the inmate be given the health care that judges may find desirable;[141] rather, the prisoner must not be denied access to adequate health care when such deprivation displays a blatant and knowing unconcern toward his medical needs.[142] Claims in this area include denial of access to physicians and/or hospitals,[143] delay in treatment after an injury or illness,[144] and failure to allow prescribed treatment.[145]

Courts have consistently held that the Constitution does not mandate that a prisoner be afforded all requested medical treatment.[146] In order to

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unusual punishment. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

136. *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976). In regard to failing to X-ray a prisoner, the Supreme Court stated that at the worst this amounted to malpractice actionable under the Texas Torts Claims Act, but not under the Constitution. *See id.* at 107.

137. *See id.* at 105.

138. *See id.* at 106. The negligence of a physician does not insult the eighth amendment, regardless of whether or not the injured party happens to be a prisoner. *See id.* at 106.

139. *See id.* at 106.

140. *Cf.* Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1981). In cases of nonconduct, the defendant's state of mind is the central issue; what others might have done in a similar situation is immaterial. *See id.* at 471. Where the prison official is notified of an inmate's health needs and fails to act thereon, this inaction may be found unconstitutional. *See id.* at 471; Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972).

141. *See* Ruiz v. Estelle, 679 F.2d 1115, 1149 (5th Cir. 1982). Necessity of health care is the test; desirability is irrelevant. *See* Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981).

142. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (petitioner must show act or omission evidencing deliberate indifference); Williams v. Treen, 671 F.2d 892, 901 (5th Cir. 1982) (malicious or knowing failure to allow inmate access to necessary health care states constitutional violation); Fielder v. Bosshard, 590 F.2d 105, 109-10 (5th Cir. 1979) (successful plaintiff must show officials acted with "malicious intention" in denial of medical care).

143. *See* Williams v. Treen, 671 F.2d 892, 901 (5th Cir. 1982).

144. *See* Feazell v. Augusta County Jail, 401 F. Supp. 405, 407 (W.D. Va. 1975).

145. *See* Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980).

146. *See, e.g.*, Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 761 (3d Cir. 1979) (request of methodone for indefinite period of time properly denied); Arroyo v. Schaefer, 548 F.2d 47, 51 (2d Cir. 1977) (request and denial of medical treatment for slight tear gas effects did not warrant holding of cruel and unusual punishment); Westlake v. Lucas,

establish that the denial of access to hospitals and physicians constitutes cruel and unusual punishment, the petitioner must show a serious injury.[147] The rationale for such a requirement is the judiciary's general deference to prison administrative decisions and resulting reluctance to interfere therewith.[148] An example of one such disregard of a serious injury sufficient to warrant judicial intervention is found in *West v. Keve,*[149] wherein the claimant suffered severe pain as a result of a chronic venous stasis in the lower leg.[150] After repeated requests for corrective treatment,[151] surgery was finally performed approximately one month after the inmate brought an action against the prison and seventeen months after his initial request for the surgery;[152] however, the inmate was denied postoperative health care.[153] The trial court dismissed the claim as moot since the operation had been performed, but this holding was remanded in order to determine whether deliberate indifference could be shown in the deprivation of postoperative care.[154] At the other extreme, the common cold is not a serious injury for which refusal of medical attention is a constitutional violation.[155]

Many suits arise in the denial area where physicians have prescribed treatment for inmates and prison administrators have denied prisoners access to such treatment.[156] The leading case is *Martinez v. Mancusi*[157]

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537 F.2d 857, 860 (6th Cir. 1976) (prison officials need not honor every request for treatment by inmates, but reasonable requests and obvious needs must be met).

147. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976). In order to prevent friviolous claims, the threshold question in the denial of medical care area must necessarily be whether the injury was serious. *Compare* Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (denial of medical attention for 22 hours after breaking arm met "serious" injury requirement), *cert. denied,* 446 U.S. 928 (1980) *with* Feazell v. Augusta County Jail, 401 F. Supp. 405, 407 (W.D. Va. 1975) (three-week denial of access to physician for ear infection failed to state cause of action).

148. *See* Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976). The courts are not empowered to question every medical decision made by prison adminstrators. *See id.* at 860.

149. 571 F.2d 158 (3d Cir. 1978).

150. *See id.* at 160.

151. *See id.* at 160. The facilities necessary for the surgery were not available within the prison infirmary, and prison officials refused to allow the claimant to procure the treatment at a private hospital. *See id.* at 152.

152. *See id.* at 161. The plaintiff's original petition prayed for monetary damages, as well as an order directing the defendants to allow the operation. Before the trial, the defendants allowed the petitioner to have the surgery, thus rendering the prayer for an order of surgery moot. *See id.* at 161.

153. *See id.* at 162. The inmate was allegedly denied post-operative access to the surgeon and proper pain medication. *See id.* at 162.

154. *See id.* at 162-63.

155. *See* Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980).

156. *See, e.g.,* Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (denial of access to prescribed treatment for three days stated constitutional violation if proven); Mur-

where an inmate was operated on at a private hospital to correct infantile paralysis of his leg. The operating physician told the prisoner to remain off the leg in order to facilitate the recovery process; but after his transfer back to the prison, the guards paid no heed to the doctor's orders and forced the claimant to walk, as well as refused him prescribed medication.[158] The district court's dismissal of the prisoner's subsequent suit was reversed on appeal.[159] The appellate court held that if the allegations were proven, the conduct complained of would constitute deliberate indifference, and thus a violation of the eighth amendment.[160]

Where medical treatment is not completely denied, but delayed, some courts have found constitutional violations.[161] Once again, the inmate must show that such delay was the result of deliberate indifference. In *Murrell v. Bennet*,[162] an inmate was left unattended for one hour after entering a prison clinic for dizziness and nausea, during which time he suffered the severe symptoms of a bleeding ulcer and lost two pints of blood.[163] The court stated that genuine issues of fact had been raised and were to be answered on remand to determine if the claimant could prove deliberate indifference, thus implying that a one-hour delay could warrant a holding of cruel and unusual punishment.[164]

A more obvious case of deliberate indifference in the delay of medical treatment is *Loe v. Armistead*[165] where an inmate suffered a broken arm. After the claimant reported the injury, twenty-two hours passed before he

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rell v. Bennett, 615 F.2d 306, 308, 310 (5th Cir. 1980) (denial of special diet prescribed for inmate's ulcer could be deliberate indifference); Martinez v. Mancusi, 443 F.2d 921, 925 (2d Cir. 1970) (deliberate disregard of prescribed treatment to remain off injured leg stated constitutional cause of action).

157. 443 F.2d 921 (2d Cir. 1970).

158. *See id.* at 923.

159. *See id.* at 924-25.

160. *See id.* at 925. The court refused to express a view on whether the inmate would ultimately win, but held that the allegations were sufficient to state a claim of unconstitutionality. *See id.* at 925.

161. *See, e.g.*, Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam) (six days between diagnosis of hepatitis and treatment thereof gives rise to possible cause of action; remanded to procure more facts); Murrell v. Bennett, 615 F.2d 306, 307-08 (5th Cir. 1980) (one-hour delay in treatment for bleeding ulcer held actionable); Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (twenty-two hour delay in treatment for broken arm evidenced deliberate indifference), *cert. denied*, 446 U.S. 928 (1979). *But see* May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980) (three-day delay between accident and hospitalization held not actionable). In *May* the inmate was injured while working on a prison farm and was immediately discharged from labor, returning to the prison three days later and receiving immediate medical care. *See id.* at 167.

162. 615 F.2d 306 (5th Cir. 1980).

163. *See id.* at 307-08.

164. *See id.* at 310.

165. 582 F.2d 1291 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1979).

received treatment.[166] This unreasonable delay, according to the court, warranted an inference of conscious disregard on the part of prison administrators.[167] The *Gamble* standard, although appearing to be even-handed and easy to utilize, has been inconsistently applied by at least one lower federal court.[168] "Deliberate indifference" does, however, provide a workable standard for lawyers and judges in the area of inmate health care.

C. *Inadequate Health Care*

In cases where the claimant has been provided health care but alleges inadequacy thereof, deliberate indifference is harder to assess than in instances of complete denial.[169] The *Gamble* Court made clear that malpractice[170] and differing medical opinions[171] do not violate the Constitution. Beyond this, however, the Court did not offer effective guidelines for determining inadequacy of medical care.[172]

Prior to *Gamble*, several lower federal courts had utilized standards similar to deliberate indifference in inmate health care cases.[173] The reasoning of those courts was very similar to that of the Supreme Court in *Gamble*.[174] For this reason, those older cases may serve to fill in the gaps

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166. *See id.* at 1292-93.

167. *See id.* at 1296.

168. *Compare* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (proper test in inmate health care is deliberate indifference to serious medical needs) *with* Bass v. Sullivan, 550 F.2d 229, 231 (5th Cir.) (court preferred *Gamble* standard but in dicta noted that "barbarous/shocks the conscience" test could also be used), *cert. denied*, 434 U.S. 864 (1977).

169. *Compare* Redwood v. Council of the District of Columbia, 679 F.2d 931, 933 (D.C. Cir. 1982) (per curiam) (suit involving inadequate insulin treatment dismissed; malpractice not violative of Constitution) *with* Cummings v. Roberts, 628 F.2d 1065, 1068-69 (8th Cir. 1980) (three-day denial of health care after suffering severe back injury states eighth amendment cause of action).

170. *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976). Allegations of medical malpractice sound in tort, not constitutional law. *See id.* at 107.

171. *See id.* at 107. The inmate's claim in *Gamble* that he should have been X-rayed evidenced an example of medical judgment which, even if found incorrect, is not violative of the Constitution. *See id.* at 107.

172. *See id.* at 106. The Court in *Gamble* mandated that the successful claimant must prove conduct or omissions of such nature as to evidence deliberate indifference, but the Court did not clarify what acts would meet this test. *See id.* at 106.

173. *See, e.g.*, Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976) (term "deliberate indifference" used by court in setting standard for health care litigation); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (prison doctor's refusal to attempt to reattach inmate's amputated ear evidence of deliberate indifference); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970) (physically requiring prisoner to stand despite instructions from operating surgeon to stay off leg evidence of deliberate indifference.).

174. *See* Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976). The Supreme Court approved of several older cases where the lower federal courts had utilized a deliberate indifference

left by *Gamble* regarding fact patterns which give rise to holdings of deliberate indifference in the area of inadequate medical treatment. In *Williams v. Vincent*,[176] part of the plaintiff's ear was cut off during an assualt by another inmate. When taken to the infirmary, the petitioner requested that the doctor try to reattach the loose part of the ear.[176] The physician told him he did not need that part of his ear, threw it into the trash can, and sutured the remaining portion of the ear without attempting repair.[177] The Second Circuit found such action constituted deliberate indifference to the prisoner's medical needs, rejecting the defendant's "difference of medical opinion" argument.[178]

Similarly, in *Freeman v. Lockhart*,[179] an inmate who had contracted tuberculosis, which settled in his eyes, was advised by an optometrist to have surgery. Despite repeated requests for an operation, he received only eye drops administered by a prison paramedic.[180] The court held that the denial of the needed operation exceeded mere negligence and was therefore actionable as deliberate indifference.[181]

A cursory examination of a claimant complaining of a hernia was held actionable under the deliberate indifference test in *Cotton v. Hutto*.[182] The claimant had received a beating by prison guards, which resulted in a hernia.[183] After a disciplinary hearing, the claimant was given a fifteen-second examination wherein the doctor declared him perfectly fit, and the inmate was made to resume prison field labor. The court found this examination evidenced deliberate indifference and reversed a trial court's dismissal of the inmate's claim.[184]

Post-*Gamble* cases have also recognized that inadequate medical treat-

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approach or the functional equivalent thereof. *See id.* at 106.

175. 508 F.2d 541 (2d Cir. 1974).

176. *See id.* at 543.

177. *See id.* at 543.

178. *See id.* at 544. The court recognized that the reattachment of the ear may not have been possible, but held that the physician's cursory refusal of a seemingly reasonable request was constitutionally infirm. *See id.* at 544.

179. 503 F.2d 1016 (8th Cir. 1974) (per curiam).

180. *See id.* at 1017.

181. *See id.* at 1017-18; *cf.* Jones v. Lockhart, 484 F.2d 1192, 1193 (8th Cir. 1973) (malpractice in regard to inmate health care does not raise constitutional issue); Cates v. Ciccone, 422 F.2d 926, 928-29 (8th Cir. 1970) (noted with approval in *Freeman*); Buszka v. Johnson, 351 F. Supp. 771, 774 (E.D. Pa. 1972) (terming rule "well settled," court noted as matter of law that medical mistreatment of inmates could never rise to constitutional proportions).

182. 540 F.2d 412 (8th Cir. 1976).

183. *See id.* at 414-15. State-employed doctors on two separate occasions examined the petitioner, both finding that the prisoner was suffering from a herniatic condition. *See id.* at 414-15.

184. *See id.* at 415.

ment could be of such a nature as to violate the eighth amendment. The court in *Ramos v. Lamm*[185] stated that inadequacy could be shown by evidence of negligent acts of such frequency as to disclose a pattern of deliberate indifference.[186] In *Green v. Carlson,*[187] the court found the treatment given to an inmate was so inadequate as to evidence malicious disregard.[188] The inmate, an asthma sufferer, had an attack. After the passage of eight hours without his receiving medical attention, a non-licensed nurse, who at the time was in charge of the hospital,[189] put the inmate on a respirator known to be defective.[190] The nurse then injected the inmate with a drug which worsened his symptoms, and the prisoner subsequently died.[191] The court found this treatment to go beyond mere negligence and held that the *Gamble* standard had been met.[192]

The Eighth Circuit in *Kelsey v. Ewing*[193] used a combination of all the health inadequacies alleged in finding a constitutional claim.[194] Among other things, the petitioner alleged the following: (1) he was returned to his cell while still bleeding following an operation; (2) he had been given inaccurate information regarding a disease of his spine; and (3) he was denied a requested examination of his swollen leg following surgery.[195] Relying upon *Gamble,* the court found a constitutional cause of action, taking into consideration all of the allegations.[196] The approach used in *Kelsey* exhibits a willingness on the part of at least one court to apply the totality of circumstances approach previously mentioned to the area of inmate health care.[197] In determining adequacy of medical treatment, however, deliberate indifference has been the test uniformly applied by

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185. 639 F.2d 559 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981).

186. *See id.* at 575.

187. 581 F.2d 669 (7th Cir. 1978), *aff'd,* 446 U.S. 14 (1980).

188. *See id.* at 675.

189. *See id.* at 671. The record revealed that there was no licensed medical practitioner on duty at the time of the decedent's asthma attack nor was one ever called in. *See id.* at 671.

190. *See id.* at 671. The non-licensed nurse involved in this tragedy had become aware of the inoperative condition of the respirator some two weeks earlier. Furthermore, use of the faulty machine worsened rather than improved the prisoner's condition. *See id.* at 671.

191. *See id.* at 671. The inmate was removed to a non-medical facility after vain attempts by the nurse to revive him; but he was declared dead upon arrival, the cause of death being respiratory arrest. *See id.* at 671.

192. *See id.* at 675. The court, after quoting extensively from *Gamble,* agreed with the trial court's holding that the medical treatment supplied the inmate was so wanting as to reach constitutional proportions. *See id.* at 675.

193. 652 F.2d 4 (8th Cir. 1981).

194. *See id.* at 6.

195. *See id.* at 5-6.

196. *See id.* at 6.

197. *See* notes 28-31 *supra* and accompanying text for a discussion of the totality test.

the lower federal courts despite the large burden placed upon the inmate.[198]

D. *Psychiatric Care in the Prison*

The latest trend in inmate health care is the movement toward requiring prison officials to provide adequate mental health treatment.[199] This stems in part from the judiciary's acceptance of modern scientific thought which recognizes that mental illness is treatable.[200] Since it is a relatively recent development, the case law is not voluminous; but there are a few cases representative of this developing area of the law. In *Woodall v. Foti,*[201] an inmate, prior to his incarceration had been diagnosed as manic depressive with inclinations toward suicide.[202] The claimant made repeated requests for psychiatric treatment once imprisoned, but was denied counseling. In holding that the petitioner had stated a valid claim,[203] the court mandated that in order to be successful, a claimant in this area must show a reasonable need for psychiatric care and a denial thereof.[204]

A three-pronged test in determining whether a prisoner is entitled to psychiatric treatment was set out in *Bowring v. Godwin.*[205] The prisoner here sought a court order directing prison officials to provide him with

198. *See* Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982); Redwood v. Council of the District of Columbia, 679 F.2d 931, 933 (D.C. Cir. 1982); Kelsey v. Ewing, 652 F.2d 4, 6 (8th Cir. 1981); LaReau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981); Hamilton v. Roth, 624 F.2d 1204, 1207 (3d Cir. 1980); Ferranti v. Moran, 618 F.2d 888, 890-91 (1st Cir. 1980); Boyce v. Alizaduh, 595 F.2d 948, 953 (4th Cir. 1979); McMahon v. Beard, 583 F.2d 172, 174 (5th Cir. 1978); McCracken v. Jones, 562 F.2d 22, 24-25 (10th Cir. 1977), *cert. denied,* 435 U.S. 917 (1978). The above represents but a sampling of cases that have utilized the *Gamble* test of deliberate indifference.

199. *See, e.g.,* Woodall v. Foti, 648 F.2d 268, 273 (5th Cir. 1981) (strong allegations of unconstitutional denial of psychiatric treatment states legitimate cause of action); Cruz v. Ward, 558 F.2d 658, 662 (2d Cir. 1977) (denial of psychiatric care for punitive reasons clearly cruel and unusual), *cert. denied,* 434 U.S. 1018 (1978); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (prisoner entitled to psychiatric care if proves necessity).

200. *See* Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977). Inmates are entitled to psychiatric care just as they are entitled to care for physical illness or injury; there is no distinction between providing for mental and physical inmate health. *See id.* at 47.

201. 648 F.2d 268 (5th Cir. 1981).

202. *See id.* at 270. The record also revealed that the inmate was suffering from pedophilia and had received treatment for this condition at a mental health facility prior to his incarceration. *See id.* at 270.

203. *See id.* at 273.

204. *See id.* at 272-73. The court found that the prisoner's allegations of prior hospitalization, a diagnosis of mental illness by a doctor, and a confirmation of such diagnosis by a prison psychiatrist was sufficient to state a cause of action for denial. *See id.* at 273.

205. 551 F.2d 44 (4th Cir. 1977).

psychiatric care.[206] The court held that an inmate was entitled to psychiatric care if he could show that: (1) his symptoms were proof of mental illness; (2) that the mental illness could be cured; and (3) that a delay in treatment would worsen the condition.[207]

While psychiatric care may sometimes be necessary, in *Fielding v. LeFevre*,[208] the court stated that the Constitution does not require the same scope and quality of prison psychiatric care as that of the outside world.[209] The court, thus, used the "differing medical opinion" rationale in finding no constitutional issue where a prisoner alleged that his progress toward recovery from pedophilia had been retarded by the lower quality of psychiatric care provided by the prison, as compared to that received before incarceration.[210]

IV. Quality of Inmate Life

A. *Denial of Exercise*

Although Chief Justice Warren E. Burger has stated that exercise is a necessary component of an inmate's well-being,[211] the United States Supreme Court has never determined the applicability of the eighth amendment to the denial of inmate recreation and outdoor exercise. Lower federal courts have considered denial of exercise in light of the eighth amendment;[212] however, because of the absence of Supreme Court guid-

206. *See id.* at 46.

207. *See id.* at 47-48. The court reversed and remanded for a determination of the inmate's claim in light of the three-pronged test. *See id.* at 48; *see also* Laaman v. Helgemoe, 437 F. Supp. 269, 313 (D.N.H. 1977) (noting correctness of *Bowring*).

208. 548 F.2d 1102 (2d Cir. 1977).

209. *See id.* at 1108.

210. *See id.* at 1108. Although the psychiatric care was different in prison, this was viewed as sound medical judgment not violative of the eighth amendment. *See id.* at 1108.

211. See Address by Chief Justice Warren E. Burger, *National Conference on Corrections* (Dec. 7, 1971), where after noting the necessity of exercise and education in the prison system, the Justice stated: "Playing cards, watching television or an occasional movie, with nothing more, is building up to an expensive accounting when these men are released—if not before. Such crude recreation may keep men quiet, but it is a quiet that is ominous for the society they will try to re-enter." *Id.*

212. *See, e.g.*, Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (court affirmed lower court's minimum exercise requirement finding cruel and unusual punishment in denial of recreation); Miller v. Carson, 563 F.2d 741, 751 n.12 (5th Cir. 1977) (lack of exercise not cruel and unusual per se, but may rise to constitutional level when inmates' health is adversely affected thereby); Frazier v. Ward, 426 F. Supp. 1354, 1369 (N.D.N.Y. 1977) (deprivation of outside recreation creates inhumane conditions constituting cruel and unusual punishment).

ance in this area, the decisions are far from uniform.[213] One line of authority states that deprivation of recreation and exercise constitutes cruel and unusual punishment per se.[214] The leading case in support of this view is *Sinclair v. Henderson*,[215] where the court concluded that incarceration over extended periods of time without recreational opportunities constituted cruel and unusual punishment in and of itself.[216] Although few courts are willing to follow such a strict per se rule,[217] *Sinclair* has been cited in many cases.[218]

The courts are in substantial agreement, however, that the deprivation of exercise has an adverse effect upon the physical and psychological health of prisoners.[219] Because of this, many courts have ordered prison administrators to provide inmates with a minimum amount of exercise

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213. *Compare* Sinclair v. Henderson, 331 F. Supp. 1123, 1131 (E.D. La. 1971) (lack of exercise for prisoners is cruel and unusual punishment as matter of law) *with* Hundley v. Sielaff, 407 F. Supp. 543, 546 (N.D. Ill. 1975) (claim of inadequate recreation does not state cause of action for cruel and unusual punishment).

214. *See, e.g.*, Parnell v. Waldrep, 511 F. Supp. 764, 770 (W.D.N.C. 1981) (obvious adverse effects upon inmate health render denial of recreation violative of Constitution without more); Feliciano v. Barcelo, 497 F. Supp. 14, 34 (D.P.R. 1979) (long period of isolation without outdoor exercise violates eighth amendment); Sinclair v. Henderson, 331 F. Supp. 1123, 1131 (E.D. La. 1971) (denial of outdoor exercise cruel and unusual per se). While finding that the prison in question comported with the Constitution in allowing inmates two hours of physical recreation per day, the court in *Lock v. Jenkins* noted that numerous courts had held that deprivation of exercise was cruel and unusual punishment as a matter of law. *See* Lock v. Jenkins, 464 F. Supp. 541, 551 (N.D. Ind. 1978), *aff'd in part and rev'd in part*, 641 F.2d 488 (7th Cir. 1981).

215. 331 F. Supp. 1123 (E.D. La. 1971).

216. *See id.* at 1131. Although this case deals with the opportunity of exercise for prisoners on death row, the court did not see this as a distinguishing feature in reaching their conclusion. *See id.* at 1130.

217. *See, e.g.*, Dorrough v. Hogan, 563 F.2d 1259, 1263 (5th Cir. 1977) (when other conditions of prison life are found lacking, requirement of daily exercise may be proper but not cruel and unusual punishment per se), *cert. denied*, 439 U.S. 850 (1978); Miller v. Carson, 563 F.2d 741, 751 n.12 (5th Cir. 1977) (deprivation of exercise program not unconstitutional as matter of law); Hundley v. Sielaff, 407 F. Supp. 543, 546 (N.D. Ill. 1975) (allegation of denial of exercise not enough to justify holding of cruel and unusual punishment).

218. *See, e.g.*, Smith v. Sullivan, 553 F.2d 373, 379 (5th Cir. 1977) (citing *Sinclair* with approval); Lock v. Jenkins, 464 F. Supp. 541, 551 (N.D. Ind. 1978) (distinguishing *Sinclair* because inmates were provided with two hours of exercise per day), *aff'd in part and rev'd in part*, 641 F.2d 488 (7th Cir. 1981); Jordan v. Arnold, 408 F. Supp. 869, 877 (M.D. Pa. 1976) (explaining and distinguishing *Sinclair* because complainants were not long-term detainees).

219. *See* Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979); Campbell v. McGruder, 580 F.2d 521, 545-46 (D.C. Cir. 1978); Frazier v. Ward, 426 F. Supp. 1354, 1367-69 (N.D.N.Y. 1977); Taylor v. Sterrett, 344 F. Supp. 411, 420 (N.D. Tex. 1972), *aff'd in part, vacated in part, and remanded*, 499 F.2d 367 (5th Cir. 1974); Conklin v. Hancock, 334 F. Supp. 1119, 1122 (D.N.H. 1971); Sinclair v. Henderson, 331 F. Supp. 1123, 1129-31 (E.D. La. 1971).

and/or recreation.[220] In *Smith v. Sullivan*,[221] the appellate court affirmed a district court order requiring daily periods of exercise for all inmates. This decision, however, was not based solely upon the eighth amendment[222] since a Texas commission on prison standards had promulgated rules which mandated outdoor recreation for prisoners.[223] The court in *Miller v. Carson*[224] required daily exercise periods for all inmates;[225] however, certain contingencies such as bad weather, prison violence, or other emergencies could excuse prison officials from providing the ordered periods of exercise.[226]

Going further than most courts, the court in *Pugh v. Locke*[227] not only ordered regular periods of exercise, but also instructed the prison administrators to employ full-time recreation directors. The order in *Pugh* also

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220. *See, e.g.*, Campbell v. Cauthron, 623 F.2d 503, 507 (8th Cir. 1980) (inmates must be given at least one hour exercise per day); Campbell v. McGruder, 580 F.2d 521, 546 (D.C. Cir. 1978) (remanded lower court decision to determine appropriate minimum amount of exercise in regard to administrative complexities); Miller v. Carson, 563 F.2d 741, 750 (5th Cir. 1977) (daily outdoor exercise period appropriate and should be provided wherever possible). *But see, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1376 (5th Cir.) (court affirmation of lower court denial of exercise requirement in county jail), *cert. dismissed*, 453 U.S. 950 (1981); Dorrough v. Hogan, 563 F.2d 1259, 1263 (5th Cir. 1977) (requiring prison officials to change exercise program unnecessary interference with prison administration's discretion), *cert. denied*, 439 U.S. 850 (1978); Cassidy v. Superintendent, City Prison Farm, 392 F. Supp. 330, 334 (W.D. Va. 1975) (provision for outside exercise discretionary with prison officials), *aff'd in part, rev'd in part, and remanded*, 529 F.2d 514 (4th Cir. 1975).

221. 553 F.2d 373 (5th Cir. 1977).

222. *See id.* at 379. The court did not reach the question of whether recreation and exercise for prisoners was required by the eighth amendment alone but did note Sinclair v. Henderson, 331 F. Supp. 1123, 1131 (E.D. La. 1971), where that court held that a denial of exercise was per se violative of the Constitution. *See id.* at 379.

223. *See* TEX. REV. CIV. STAT. ANN. art. 5115.1 (Vernon Supp. 1982-1983). Article 5115.1 creates a commission on jail standards with the power to establish minimum requirements for Texas penitentiaries. *See id.* In 1977, the Commission promulgated section 285.1, which requires county jail officials to allow inmates one hour of physical exercise at least three times per week. *See* Tex. Comm'n on Jail Standards, 37 TEX. ADMIN. CODE § 285.1 (Shephard's Sept. 1, 1982). The court in *Smith v. Sullivan* found this to be controlling and enforced the rule after a brief discussion of the eighth amendment. *See* Smith v. Sullivan, 553 F.2d 373, 379 (5th Cir. 1977).

224. 563 F.2d 741 (5th Cir. 1977).

225. *See id.* at 750.

226. *See id.* at 750. The court recognized the difficulty in ordering a minimum requirement of exercise due to unexpected contingencies which could render compliance with the order impossible, but did hold that the Constitution required recreational opportunities for inmates and considered the daily minimum a highly desirable goal. *See id.* at 749-50.

227. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

required provisions for adequate recreational facilities and equipment.[228] On appeal, the Fifth Circuit did not disturb the exercise provisions of the lower court's order.[229] Other courts have taken a different view of the deprivation of exercise problem and have refused to order recreational minimums.[230] *Hundley v. Sielaff*[231] stands for the proposition that the denial of exercise does not approach constitutional proportions.[232] In that case a complete denial of recreational opportunities was found not to give rise to a cause of action for the imposition of cruel and unusual punishment.[233]

It should be noted that at least one court has applied the aforementioned deliberate indifference test,[234] usually applied in medical cases, to inmate exercise deprivation.[235] In *Nadeau v. Helgemoe*, the First Circuit reversed a lower court's holding that the denial of a recreation program constituted cruel and unusual punishment.[236] The *Nadeau* court, in a well reasoned opinion, held that in some cases the adverse effects on inmate health due to a lack of exercise could warrant a finding of deliberate indifference and, thus, an unconstitutional imposition of cruel and unusual punishment.[237] The court, however, did not feel that this was the case in

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228. *See id.* at 335. The *Pugh* court required that the recreational directors hired must have earned at least an undergraduate degree in physical education or recreation and that the recreation facilities must be available to all inmates desirous of exercising or engaging in hobbies. *See id.* at 335.

229. *See* Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). The court in *Newman* held that recreational opportunities and facilities would help to mitigate the effects of other substandard conditions found in the Alabama penal institutions. *See id.* at 291; *see also* Miller v. Carson, 563 F.2d 741, 751 (5th Cir. 1977) (*Newman* quoted with approval).

230. *See, e.g.*, Campbell v. McGruder, 580 F.2d 521, 544-46 (D.C. Cir. 1978) (daily exercise minimum mandated by lower court remanded because no evidence of necessity); Dorrough v. Hogan, 563 F.2d 1259, 1263 (5th Cir. 1977) (lower court's order setting exercise minimum reversed on appeal as unwarranted interference with prison administrators' discretion), *cert. denied*, 439 U.S. 850 (1978); Cassidy v. Superintendent, City Prison Farm, 392 F. Supp. 330, 334 (W.D. Va. 1975) (prison administrators have discretion in deciding propriety of outdoor recreation), *aff'd in part, rev'd in part, and remanded*, 529 F.2d 514 (4th Cir. 1975).

231. 407 F. Supp. 543 (N.D. Ill. 1975).

232. *See id.* at 546. In order to be classified as cruel and unusual, a punishment must fall below ordinary standards of decency; however, the deprivation of exercise does not. *See id.* at 546.

233. *See id.* at 546, 548.

234. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976). Deliberate indifference to prisoner health needs creates a violation of the eighth amendment. *See id.* at 104.

235. *See* Nadeau v. Helgemoe, 561 F.2d 411, 420 (1st Cir. 1977).

236. *See id.* at 420.

237. *See id.* at 420. The First Circuit found that the lower court had not ruled in light

Nadeau because of a lack of medical evidence necessary to a finding of deliberate indifference.[238]

With the lack of a Supreme Court decision in this area, there are no clear cut answers. The deprivation of exercise and/or recreation may be held as violative of the eighth amendment in some cases; the decision being reached, however, depends upon the particular court and the circumstances surrounding the case.[239]

B. *Protection from Assault by Fellow Inmates*

Prison environments inevitably breed the constant threat of violence[240] because of such factors as overcrowding,[241] inmate idleness,[242] and the failure of prison administrators to implement effective classification systems.[243] Although it is impossible to prevent all inmate violence,[244] there

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of the adverse effects upon the prisoner's physical and psychological well-being and remanded the case to determine the possible existence of deliberate indifference. *See id.* at 420.

238. *See id.* at 420.

239. *Compare* Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974) (only 50 minutes exercise per week constitutes cruel and unusual punishment), *aff'd in part, and remanded,* 507 F.2d 333 (2d Cir. 1974) *with* Cassidy v. Superintendent, City Prison Farm, 392 F. Supp. 330, 334 (W.D. Va. 1975) (court held that deprivation of exercise was discretionary with prison officials), *aff'd in part, rev'd in part, and remanded,* 529 F.2d 514 (1975) *and* Hundley v. Sielaff, 407 F. Supp. 543, 546 (N.D. Ill. 1975) (deprivation of recreational opportunities held not to state claim for imposition of cruel and unusual punishment).

240. *See* Marchesani v. McCune, 531 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 846 (1976). The court used terms such as "tense" and "explosive" to characterize the environment of penitentiaries and noted that the potential for violence was ever present. *See id.* at 462; *see also* Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980) (quoting *Marchesani* with approval), *cert. denied,* 450 U.S. 1041 (1981).

241. *See, e.g.,* Hoptowit v. Ray, 682 F.2d 1237, 1249-50 (9th Cir. 1982) (high level of violence found in Washington State Penitentiary caused in part by overcrowded conditions); Madyun v. Thompson, 657 F.2d 868, 875 (7th Cir. 1981) (prison overpopulation found to result in prisoner violence); Campbell v. McGruder, 580 F.2d 521, 536 n.27 (D.C. Cir. 1978) (inmate assaults recognized as consequence of overcrowding).

242. *See* Hotpowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982) (inmates forced to remain idle due to lack of facilities; led to tense prison atmosphere).

243. *See* Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981) (lack of classification system and resulting high level of violence can constitute violation of eighth amendment); Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.) (prison administrators should separate violent inmates from other prisoners in order to prevent imposition of cruel and unusual punishment resulting from prisoner attacks), *cert. dismissed,* 453 U.S. 950 (1981); Goldsby v. Carnes, 365 F. Supp. 395, 402 (W.D. Mo. 1973) (court ordered classification system separating certain types of prisoners according to such criteria as aggressiveness, age, and nature of offense). The failure to properly classify inmates leads to frequent attacks by violent inmates against weaker, more passive inmates. *See* Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

244. *See* Jones v. United States, 534 F.2d 53, 54 (5th Cir.), *cert. denied,* 429 U.S. 978 (1976) (government could not possibly insure safety of all prisoners).

is a recognized duty imposed upon prison administrators to protect their inmates.[245] A breach of this duty may oftentimes warrant a holding of cruel and unusual punishment.[246]

Woodhous v. Virginia[247] is the leading case in the area of prisoner protection in light of the eighth amendment.[248] Alleging a violation of his constitutional right to be free from the imposition of cruel and unusual punishment, a state prisoner complained of constant violent sexual attacks by fellow inmates.[249] The Fourth Circuit held that inmates were constitutionally guaranteed reasonable protection from violence inflicted upon them by other prisoners.[250] *Woodhous* also stands for the proposi-

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245. *See, e.g.*, Brady v. Smith, 656 F.2d 466, 468 (9th Cir. 1981) (court noted government's established duty to safeguard inmates); Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980) (states have affirmative duty to protect prisoners from violent attack); Withers v. Levine, 615 F.2d 158, 161 (4th Cir.) (prisoners guaranteed protection from constant violent attacks), *cert. denied*, 449 U.S. 849 (1980).

246. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982) (affirmation of trial court's holding that level of violence at penitentiary, where eight inmates and two guards killed, constituted cruel and unusual punishment); Gullatte v. Potts, 654 F.2d 1007, 1012-13 (5th Cir. 1981) (where "snitch" killed by fellow inmates, court remanded to determine whether prison officials knew or should have known of danger to snitch; if so, violative of eighth amendment); Little v. Walker, 552 F.2d 193, 197-98 (7th Cir. 1977) (repeated assaults and threats of violence stated claim for imposition of cruel and unusual punishment), *cert. denied*, 435 U.S. 932 (1978).

247. 487 F.2d 889 (4th Cir. 1973) (per curiam).

248. *Accord* Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971). *Holt* is an earlier case finding a violation of the eighth amendment in the lack of protection afforded inmates. *See id.* at 308. In *Holt*, the court applied a test for determining cruel and unusual punishment which required a claimant to show that the complained of conduct was "barbarous" or "shocking to the conscience"; the test was satisfied by a showing of a lack of inmate protection. *See id.* at 308-09 (citing Sostre v. McGinnis, 442 F.2d 178, 183-85 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), for the "barbarous" and "shocking the conscience" tests). *Woodhous*, however, is the case most cited as precedent for holding that a lack of protection may violate the Constitution. *See* Cannon v. United States, 645 F.2d 1128, 1129 (D.C. Cir. 1981); Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981); Withers v. Levine, 615 F.2d 158, 161 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Burr v. Duckworth, 547 F. Supp. 192, 196 n.2 (N.D. Ind. 1982); Dawson v. Kendrick, 527 F. Supp. 1252, 1289-90 (S.D. W. Va. 1981); Snyder v. Blankenship, 473 F. Supp. 1208, 1212 (W.D. Va. 1979), *aff'd*, 618 F.2d 104 (1980).

249. *See* Woodhous v. Virginia, 487 F.2d 889, 889-90 (4th Cir. 1973).

250. *See id.* at 890; *see also* Hoptowit v. Ray, 682 F.2d 1237, 1249-50 (9th Cir. 1982) (evidence of eight prison killings in previous two years held to justify finding of unconstitutional level of violence); Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980) (transfer to another facility of two inmates whose lives had been threatened was adequate remedy to protect safety of prisoners); Withers v. Levine, 615 F.2d 158, 161 (4th Cir.) (citing with approval *Woodhous*), *cert. denied*, 449 U.S. 849 (1980).

tion that singular instances of inmate violence are not sufficient justification for holdings of eighth amendment violations; rather, the petitioner must show some pattern or consistently violent atmosphere in order to prove cruel and unusual punishment.[251] Furthermore, *Woodhous* illustrated that an inmate does not have to wait until an actual assault has taken place; the threat of violence will suffice as justification for seeking judicial relief.[252]

The deliberate indifference standard[253] applied by the Supreme Court to inmate health care litigation[254] is now being used by a number of the federal circuit courts in determining whether a lack of protection violates the eighth amendment.[255] *Murphy v. United States*[256] is a key case illustrating the burden placed upon prisoners in proving deliberate indifference as a prerequisite to stating a successful claim of imposition of cruel and unusual punishment.[257] In *Murphy*, a gang of detainees severely beat the complainant, resulting in permanent paralysis of his leg.[258] The petitioner alleged that his eighth amendment rights had been violated by the District of Columbia when he was placed in a detention center known to contain a number of violent inmates.[259] The court held that negligence

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251. *See, e.g.*, Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981) (Constitution does not require attack-free prison; but where administrators know or should know of violent situation, required to prevent attack when possible); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (allegation that prison guard allowed inmate attack not sufficient as constitutional claim because single incident), *cert. denied*, 450 U.S. 929 (1981); Hite v. Leeke, 564 F.2d 670, 673 (4th Cir. 1977) (rumor that other inmate had been threatened not grounds for claim under eighth amendment); *see also* Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973). *But see* Snyder v. Blankenship, 473 F. Supp. 1208, 1212 (W.D. Va. 1979) (court read *Woodhous* to mean that one act of negligence would suffice in evidencing cruel and unusual punishment), *aff'd*, 618 F.2d 104 (4th Cir. 1980).

252. *See* Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973); *see also* Ramos v. Lamm, 639 F.2d 559, 573-74 (10th Cir. 1980) (fear of attack sufficient for holding of cruel and unusual punishment), *cert. denied*, 450 U.S. 1041 (1981).

253. *See* notes 126-198 *supra* and accompanying text.

254. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976).

255. *See, e.g.*, Murphy v. United States, 653 F.2d 637, 644 (D.C. Cir. 1981) (no holding of cruel and unusual punishment absent deliberate indifference, as distinguished from mere negligence); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (where guards acquiesced in beating of inmates by other prisoners court found no deliberate indifference, thus no constitutional violation), *cert. denied*, 450 U.S. 929 (1981); Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974) (allegations that prison guard watched while inmate beaten not sufficient to state constitutional claim as no deliberate indifference shown).

256. 653 F.2d 637 (D.C. Cir. 1981).

257. *See id.* at 644-45. Although this case deals with a youth detention center, the principles apply to ordinary prisons as well, as illustrated by the court's reliance upon other prison cases. *See id.* at 644.

258. *See id.* at 639.

259. *See id.* at 644.

was not a sufficient allegation on which to base a constitutional claim,[260] but rather proof of deliberate indifference to the safety of an inmate was necessary in order to warrant a holding of cruel and unusual punishment.[261] Since this was not shown, the court could not find that the plaintiff had been deprived of his constitutional rights.[262]

The holding in *Murphy* appears to be fairly representative of the present state of inmate protection law in that deliberate indifference to the safety of prisoners is the test most often used to determine possible constitutional deprivations.[263] Courts have held that the test can be met by showing callousness on the part of prison officials after the receipt of knowledge that a prisoner's safety is being threatened[264] or by proving a level of intra-prison violence of such magnitude as could only be explained by a deliberate indifference upon the part of administrators.[265]

V. Prison Conditions Litigation Under the First Amendment

Since there is "no iron curtain drawn between the Constitution and the prisons of this country,"[266] first amendment rights of free speech and religion do not disappear when one enters the gates of a penal institution.[267] The standard for analyzing first amendment claims established by the

260. *See id.* at 644. The court cited Estelle v. Gamble, 429 U.S. 97, 105-06 (1976) and noted the emphasis by the Supreme Court that negligence would not state a constitutional claim. *See* Murphy v. United States, 653 F.2d 637, 644 (D.C. Cir. 1981).

261. *See id.* at 644. The court read *Gamble* as establishing deliberate indifference as a test for finding cruel and unusual punishment in all prison cases and not to be used solely in medical care litigation. *See id.* at 644.

262. *See id.* at 645.

263. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1249-50 (9th Cir. 1982) (eight violent deaths evidenced deliberate indifference to inmate safety and therefore cruel and unusual punishment); Gullatte v. Potts, 654 F.2d 1007, 1013 (5th Cir. 1981) (where officials know or should know of safety risks and do not act thereon, cruel and unusual punishment results); Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974) (evidence establishing prison guard saw attacker approaching claimant and reflexively jumped back not sufficient to establish cause of action absent showing deliberate indifference).

264. *See* Gullatte v. Potts, 654 F.2d 1007, 1013 (5th Cir. 1981) (knowledge of danger and failure to act states cause of action for deprivation of constitutional rights).

265. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982) (two-year span in which eight inmates and two guards brutally slain was level of violence so high as to evidence deliberate indifference); Murphy v. United States, 653 F.2d 637, 644-45 (D.C. Cir. 1981) (deliberate indifference may be inferred from high level of violence, but here number of assaults did not meet test); Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972) (pattern of violence and official inaction justifies holding of cruel and unusual punishment but single attack insufficient).

266. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

267. *See id.* at 580 (Marshall, J., concurring in part and dissenting in part).

Supreme Court in *Pell v. Procunier*[268] is that prison inmates possess all first amendment guarantees not incompatible either with their position as prisners or with valid penal objectives of the state.[269] The following are some areas of prison life which present first amendment concerns.

A. *Censorship and Access to Mail*

The freedom of communication expressed in the first amendment has been applied by the courts in prisoner mail deprivation and censorship cases.[270] The United States Supreme Court, however, has never directly addressed the question of the first amendment's applicability to prisoner's rights in this area.[271] The Court instead has held that unreasonable censorship of inmate mail infringes upon the right of correspondence of those who are sending mail to and receiving mail from the inmate, rather than on the inmate's personal right.[272] In *Procunier v. Martinez*, the Supreme Court established the following two-pronged test by which to determine the constitutionality of mail deprivation and censorship:[273] (1) the prison regulation or procedure must be in furtherance of an essential government interest;[274] and (2) the abridgment of free speech must not be greater than is necessary to protect the government's interest.[275]

In *Procunier*, the Court struck down the censorship policy of the California Department of Corrections which disallowed delivery of mail con-

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268. 417 U.S. 817 (1974).

269. *See id.* at 822. The Court stated that "challenge to prison restrictions that are asserted to inhibit first amendment interests must be analyzed in terms of the legitimate policies and goals of the correction system, to whose custody and care the prisoner has been committed in accordance with due process law." *Id.* at 822.

270. *See, e.g.*, Guajardo v. Estelle, 580 F.2d 748, 755 (5th Cir. 1978) (discretionary censorship of mail violates prisoner's first amendment rights); Nickens v. White, 536 F.2d 802, 804 (8th Cir. 1976) (confiscation of prisoner's mail states first amendment claim); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 211 (8th Cir. 1974) (although modified in accordance with status, prisoner does not lose his first amendment rights).

271. *See* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (Court noted that although first amendment could well prohibit mail censorship in prisons, issue had not yet been resolved); McNamara v. Moody, 606 F.2d 621, 623 n.3 (5th Cir. 1979) (court notes that although *Procunier v. Martinez* dealt with right of correspondence, Supreme Court viewed this in light of non-prisoner's right to communicate with inmate), *cert. denied*, 447 U.S. 929 (1980).

272. *See* Procunier v. Martinez, 416 U.S. 396, 409 (1974).

273. *See id.* at 413.

274. *See id.* at 413. The *Procunier* Court held that the interests of furthering security, order, or rehabilitation were the only possible justifications under the first prong of the test. *See id.* at 413.

275. *See id.* at 413-14. Even though the first step of the test is met, according to *Procunier*, an overbroad procedure of mail censorship will be invalidated as an unconstitutional denial of freedom of speech. *See id.* at 413-14. For an example of acceptable censorship, see *id.* at 416-17 n.15.

taining prisoner complaints and grievances or which expressed "inflammatory" views regarding race, religion, or politics.[276] A legitimate governmental interest could not be found by the Court which would justify this broad censorship provision; thus, pursuant to the aforementioned test, the prison's policy was held unconstitutional.[277] Additionally, *Procunier* affirmed a district court's holding that due process required procedural safeguards when the decision to withhold or censor mail was made.[278] Among the safeguards approved by the Supreme Court were notification of the decision, the right of the author to protest, and a guarantee that those administrators hearing the author's complaint were not the same people who had censored or withheld the mail.[279] The Supreme Court has therefore established in *Procunier* effective guidelines in this area for the lower courts to follow.[280] The only real issues presented to the federal courts now are whether the censorship or withholding of mail furthers one of the recognized governmental interests of security, order, or rehabilitation; and, if so, whether the necessary censorship is carried out in the least restrictive way.[281]

Courts following *Procunier* have held certain forms of censorship and deprivation to be constitutional.[282] An illustrative case is *Vodicka v.*

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276. *See id.* at 399.

277. *See id.* at 415. The Supreme Court was particularly disturbed by the broad discretion given prison officials in censoring mail, noting that some administrators had disallowed correspondence simply to avoid personal criticism. *See id.* at 415.

278. *See id.* at 417-18. The Supreme Court held that the right of communication was a liberty within the ambit of fourteenth amendment due process protection and found the district court's procedural plan as a workable safeguard against arbitrary infringement of constitutional rights. *See id.* at 417-18.

279. *See id.* at 417-19.

280. *See* Wheeler v. United States, 640 F.2d 1116, 1125-26 (9th Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 581 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Feeley v. Sampson, 570 F.2d 364, 374 (1st Cir. 1978); Carpenter v. South Dakota, 536 F.2d 759, 762 (8th Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); Allen v. Aytch, 535 F.2d 817, 819 n.5 (3d Cir. 1976); Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 860 (4th Cir. 1975). The circuit courts have uniformly embraced the two-step *Procunier* test as the constitutional barrier in prisoner correspondence litigation.

281. *See* Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

282. *See, e.g.*, Vodicka v. Phelps, 624 F.2d 569, 575 (5th Cir. 1980) (inflammatory newsletter written by lobby for prison reform dealing with prison work stoppage properly withheld from inmates because constituted immediate threat to prison security; was least restrictive means of censorship); Trapnell v. Riggsby, 622 F.2d 290, 293 (7th Cir. 1980) (nude photo censorship held constitutional as substantial interest in preventing inmate violence); Woods v. Daggett, 541 F.2d 237, 240 (10th Cir. 1976) (ban on receipt of books not mailed from publisher not unconstitutional at maximum security prison because of proof of past improprieties relating to escape aids hidden in books).

Phelps,[283] where the author of a prisoner newsletter challenged the censorship practices at a prison.[284] The newsletter in question contained a lead article dealing with an inmate protest and refusal to work at the penitentiary.[285] The court upheld the censorship stating that the procedures had passed the constitutional standard set in *Procunier v. Martinez*.[286] First, it was found that the government's interest in preventing another work strike was substantial since the prison environment was still tense after a protest; thus, the first prong of the *Procunier* test was satisfied.[287] As to the second part of the test, it was found that only the one questionable article was censored.[288] Inmates retained free access to other newspapers and correspondences, evidencing a good faith effort by prison administrators in furthering the governmental interest of security in the least restrictive method.[289] Unlike *Procunier*, however, the court in *Vodicka* did not require notice of the censorship[290] because under the circumstances, notice itself was likely to rekindle the uprising.[291]

Conversely, many prison mail censorship and deprivation practices have been invalidated by courts as unconstitutional.[292] The court could

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283. 624 F.2d 569 (5th Cir. 1980).

284. *See id.* at 570. The correspondence regulation stated in pertinent part: "If it is determined that a publication passed through the mails illegally or that it presents an immediate threat to the security of the institution, it may be withheld from the inmates. Inmates shall be notified in writing of this action and shall have the opportunity to appeal this decision to the warden or superintendent and then to the Secretary." *Id.* at 570.

285. *See id.* at 571.

286. *See id.* at 571 (citing Procunier v. Martinez, 416 U.S. 396, 413-14 (1976)).

287. *See* Vodicka v. Phelps, 624 F.2d 569, 574 (5th Cir. 1980). After the prior work strike, prisoners were relocated within the prison, causing animosity due to the breaking up of friendships. The court found sufficient justification for mail deprivation because had the article been allowed into the prison, it could have easily led to an explosive situation. *See id.* at 574.

288. *See id.* at 571. The prison administrators had told the complainant that if he would delete the one article about the protest, the newsletter could be distributed to the prisoners. *See id.* at 571.

289. *See id.* at 575.

290. *See id.* at 575. The lack of notification to the deprived inmates was clearly in violation of the prison regulation. *See id.* at 570, 575. The requirement of notice, however, was not mandated in *Procunier v. Martinez* as a constitutional necessity, but merely an acceptable procedure. The *Procunier* Court only approved of a lower court's requirement of notice; it did not hold that notice was an unyielding constitutional necessity. *See* Procunier v. Martinez, 416 U.S. 396, 417-19 (1974).

291. *See* Vodicka v. Phelps, 624 F.2d 569, 575 (5th Cir. 1980).

292. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 581 (10th Cir. 1980) (refusal of prison officials to deliver mail in foreign language held violative of first amendment), *cert. denied*, 450 U.S. 1041 (1981); Guajardo v. Estelle, 580 F.2d 748, 754-55 (5th Cir. 1978) (prison regulation requiring inmates to procure official prison approval of persons sought to be corresponded with held unconstitutional as based upon speculation); Aikens v. Jenkins, 534 F.2d 751, 756-57 (7th Cir. 1976) (denial of mail containing "material that seriously degrades race

not find a furtherance of a governmental interest in *McNamara v. Moody*,[293] where an inmate's outgoing mail was censored.[294] The letter in question, written by a prisoner to his girlfriend, was severely critical of the prison's practice of mail censorship and of the official in charge of the procedure.[295] The prison official found the letter to be in "poor taste" and returned it to the complainant, threatening discipline if similar letters were written.[296] The court held this practice to be the type condemned in *Procunier* as unconstitutional censorship based upon prison officials' desire to avoid criticism.[297] Prison mail censorship is effectively curtailed in *Procunier v. Martinez*. The issue is extremely important, especially in the situation where the correspondence is between a prisoner and his attorney, government officials, or the courts.[298]

B. *Inmate's Right to Practice of Religion*

The right to hold whatever religious belief desired, as guaranteed by the free exercise clause of the first amendment,[299] is not forfeited when one enters a prison.[300] As the courts uniformly follow this doctrine, problems do not arise solely from the religious belief held by an inmate.[301] Litigation instead stems from physical manifestations of religion and the

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or religion" held constitutionally infirm).

293. 606 F.2d 621 (5th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

294. *See id.* at 622.

295. *See id.* at 623. The letter, among other things, accused the official in charge of censorship with certain sexual perversities, such as having sexual relations with cats. *See id.* at 623 n.2 (letter reproduced in part).

296. *See id.* at 623 n.2. The official in charge wrote a very threatening note to the complainant stating that he would discipline the prisoner if another letter of similar content were written. *See id.* at 623 n.2.

297. *See id.* at 625-26. The lower court's ruling was affirmed, awarding nominal damages, as well as injunctive relief. *See id.* at 623, 627.

298. See Wolff v. McDonnell, 418 U.S. 539 (1974), for Supreme Court treatment of the issue of mail censorship and deprivation as it relates to a prisoner's right of access to courts. *See generally* Comment, *An Overview Of Prisoner's Rights: Part I, Access To Courts Under Section 1983*, 14 ST. MARY'S L.J. 957 (1983) (analytical approach to access to courts and effects of mail censorship).

299. *See* U.S. CONST. amend. I. The first amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

300. *See* Cruz v. Beto, 405 U.S. 319, 322 (1972).

301. *See, e.g.*, Native Am. Council of Tribes v. Solem, 691 F.2d 382, 384 (8th Cir. 1982) (religious belief of inmate held constitutionally guaranteed); Masjid Muhammad-D.C.C. v. Keve, 479 F. Supp. 1311, 1318 (D. Del. 1979) (freedom of religious belief absolute whether in or out of prison); United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968) (Constitution affords prisoner right to hold and express religious beliefs).

extent to which prison administration may curtail these activities.[302]

The right of an inmate to act upon his chosen beliefs is not absolute, but is subject to certain restrictions imposed by prison administrators.[303] The federal courts have espoused a balancing test under which the proffered first amendment rights of the inmate are weighed against the state interest to be furthered by the restraint upon the activity.[304] Under the test, in order for the state to prevail, the asserted interest must "reasonably and substantially" justify the infringement of the prisoner's right to exercise his first amendment privileges.[305]

An example of a state interest outweighing an asserted right of religious freedom is found in *Sweet v. South Carolina Department of Corrections*.[306] In that case a repeat sex offender, who had been placed in protective segregation, challenged the prison's refusal to let him attend

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302. *See, e.g.*, Otey v. Best, 680 F.2d 1231, 1234 (8th Cir. 1982) (prison official's refusal to allow death row inmate to attend religious services with general prison population held constitutional); Gallahan v. Hollyfield, 670 F.2d 1345, 1346 (4th Cir. 1982) (per curiam) (regulation requiring inmate to cut hair against tenets of religion held unconstitutional); Younger v. Reed, 495 F. Supp. 68, 70 (N.D. Miss. 1980) (claim by inmate of constitutional violation in prison officials making him eat pork against religious beliefs dismissed).

303. *See, e.g.*, Jihaad v. O'Brien, 645 F.2d 556, 564 (6th Cir. 1981) (refusal to strike down prison regulation requiring inmate to shave beard against challenge of religious freedom; right to practice religion not absolute); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 863-64 (4th Cir. 1975) (restriction on sex offender attending congregational service with general inmate population upheld as justifiable because of security risk); Teterud v. Burns, 522 F.2d 357, 362 (8th Cir. 1975) (although stating that right to act pursuant to religion not absolute, court struck down as overbroad prison regulation requiring inmate to cut hair).

304. *See, e.g.*, Otey v. Best, 680 F.2d 1231, 1234 (8th Cir. 1982) (pursuant to balancing test, state's interest in preserving security outweighed death row inmates' right to exercise religion as evidence revealed inmates sentenced to die consistently attempted escape); Weaver v. Jago, 675 F.2d 116, 118-19 (6th Cir. 1982) (per curiam) (court remanded summary judgment against inmate, instructing lower court to balance religious tenet of long hair against state's interest in running prison); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (in balancing religious diet asserted by Jewish inmates against state interest in orderly prison meals court held for inmate).

305. *See, e.g.*, Barrett v. Virginia, 689 F.2d 498, 501-02 (4th Cir. 1982) (court held prison official's refusal to change records in order to comply with complainant's new religious name was reasonable); Gallahan v. Hollyfield, 670 F.2d 1345, 1346 (4th Cir. 1982) (per curiam) (haircut regulation struck down as unreasonable restraint upon inmates' first amendment rights); Native Am. Council of Tribes v. Solem, 691 F.2d 382, 384-85 (8th Cir. 1982) (denial of claimant's request for family and friends to join him in prison for worship service stated cause of action). *But see* St. Claire v. Cuyler, 634 F.2d 109, 114 (3d Cir. 1980) (lower court's standard of "reasonableness" as test for determining justifiable denial of religious freedom struck down on appeal as too rigid and burdensome upon prison administrators).

306. 529 F.2d 854 (4th Cir. 1975).

church services with the general inmate population.[307] As an alternative, the complainant had been provided with individual religious counseling.[308] The court held that the state's interests in maintaining security and order constituted reasonable justification for the denial of the petitioner's right to exercise his religious beliefs.[309] Similarly, *Otey v. Best*[310] upheld a refusal to allow death row inmates to attend general population religious assemblies as a justifiable furtherance of a state security interest.[311] On the other hand, the court in *Weaver v. Jago*[312] supported inmates' rights to wear long hair as a tenet of their religion.[313] The government's interests of identification of prisoners, sanitation, and safety were held insufficient and the case was remanded in order that the conflicting interests of the state and the prisoner could be weighed.[314]

As a prerequisite to balancing the interests of inmates and prison administration, the court must find that a bonafide religious belief is being asserted.[315] Although the Supreme Court has never defined "religion" per se, it is apparent that a wholly theistic construction of that word is not required.[316] In *United States v. Seeger*,[317] the Supreme Court held that religious belief for purpose of the Universal Military Service and Training Act meant a belief "based upon a power or being or upon a faith, to which all else is subordinate or upon which all else is ultimately depen-

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307. *See id.* at 857. While doing yard work in the prison compound, the complainant was accosted by two knife-wielding prisoners. After guards had disciplined the two inmates, angry prisoners rioted and made repeated threats upon the petitioner's life, leading to his segregation and denial of congregate worship. *See id.* at 857.

308. *See id.* at 864. The plaintiff was provided with religious counseling every time he requested it. *See id.* at 864.

309. *See id.* at 864.

310. 680 F.2d 1231 (8th Cir. 1982).

311. *See id.* at 1234.

312. 675 F.2d 116 (6th Cir. 1982).

313. *See id.* at 117-18. The petitioner, who was a Cherokee Indian, asserted that short hair indicated "disgrace, humiliation or death in his family" according to his religion. *See id.* at 117-18.

314. *See id.* at 118.

315. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (prisoner organization called "MOVE" held not a religion; thus, not protected under first and fourteenth amendments); Ron v. Lennane, 445 F. Supp. 98, 100 (D. Conn. 1977) (Orthodox Yemenite Jew met burden of showing deep religious belief in claim that he be allowed special privileges in order that he might say prayers); Lipp v. Procunier, 395 F. Supp. 871, 876 (N.D. Cal. 1975) (homosexual "religious" organization held protected by first amendment free exercise clause).

316. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981). Nearly a century ago the Supreme Court spoke of religion in terms of a "Creator" and relationships therewith. *See* Davis v. Beason, 133 U.S. 333, 342 (1890).

317. 380 U.S. 163 (1965).

dent."[318] Similarly, in *Welsh v. United States*,[319] the Court bestowed conscientious objector status upon one who refused to recognize a Creator or Ultimate Being.[320]

There is only one recent Supreme Court decision dealing with the first amendment right of free exercise of religion as applicable to prision inmates. In *Cruz v. Beto*,[321] an inmate alleged that he had been deprived of certain privileges and access to religious publications because of his religious beliefs.[322] The Court held that if the allegations could be proven, then a valid first amendment cause of action had been stated.[323] In a footnote, the Court stated that prisoners must be provided reasonable opportunities to carry out their religious freedoms.[324] The Court also determined that state laws inhibiting the free exercise of religion were unconstitutional.[325] Beyond this, however, the case gives very little concrete guidance. In summation, a balancing test, much like the inmate mail standard found in *Procunier v. Martinez*,[326] will most likely be used by the courts in determining the right of free exercise of religion by inmates.[327]

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318. *See id.* at 176.

319. 398 U.S. 333 (1970).

320. *See id.* at 343-44. Lower federal courts have also applied this non-theistic approach in determining the validity of some claims of religious belief. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981) (court applied non-theistic approach, but still could find no religious belief asserted by members of "MOVE"); Theriault v. Silber, 547 F.2d 1279, 1280-81 (5th Cir. 1977) (per curiam) (court rejected lower court's reliance on test requiring belief in Supreme Being as too narrow in reversing holding that "Church of the New Song" was not a religion), *cert. denied*, 434 U.S. 871 (1977); Kennedy v. Meacham, 540 F.2d 1057, 1061 (10th Cir. 1976) (lower court erred in dismissing satanist's claim without a finding of fact).

321. 405 U.S. 319 (1972) (per curiam).

322. *See id.* at 322.

323. *See id.* at 322.

324. *See id.* at 322 n.2.

325. *See id.* at 322.

326. *See* notes 272-277 *supra* and accompanying text.

327. *See, e.g.*, Otey v. Best, 680 F.2d 1231, 1233 (8th Cir. 1982) (*Procunier* test in finding governmental interest outweighed death row inmates' right to congregate in worship); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 864 (4th Cir. 1975) (*Procunier* test used in balancing inmates' right to worship with general population and governmental interest of preserving security and order; held for prison); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (court applied *Procunier* standard in finding constitutional violation in refusal to provide Jewish inmates with kosher food). *See generally* Comment, *The Religious Rights Of The Incarcerated*, 125 U. PA. L. REV. 812 (1977) (thorough treatment of rights of prisoners in free exercise of religion).

C. *Visitation Rights of Inmates*

Although one court has implicitly held that extended denial of visitation periods may violate the Constitution where impairment of physical or mental health results therefrom,[328] the generally accepted view is that inmates do not have an absolute right to receive visitors.[329] The courts pay great deference to the prison administrator's judgment in this area;[330] however, capricious deprivations of visitation privileges have been struck down by the judiciary.[331]

Guidance in this area is provided by *Pell v. Procunier*[332] where inmates alleged a denial of first amendment freedom of speech rights pursuant to a prison regulation providing only for limited visits from family, friends, prior acquaintances, and the clergy.[333] In affirming a dismissal of the complaint, the Supreme Court held that as long as the regulation was even-handed and there were alternative forms of communication available to inmates,[334] it would pass constitutional scrutiny.[335] The state's interest in limiting visitors to a manageable number was sufficient justification for the regulation.[336]

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328. *See* Campbell v. McGruder, 580 F.2d 521, 548 (D.C. Cir. 1978).

329. *See* Pell v. Procunier, 417 U.S. 817, 826 (1974). The United States Supreme Court held in pertinent part:

> When . . . the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself require that some limitation be placed on such visitations.

Id. at 826; *see also* Lynott v. Henderson, 610 F.2d 340, 342 (5th Cir. 1980) (no unyielding right to visitation held in case denying inmate visitation with married woman); Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980) (although visitation restriction more severe than found in other prisons, not unconstitutional).

330. *See* Pell v. Procunier, 417 U.S. 817, 826 (1974); Rogers v. Scurr, 676 F.2d 1211, 1216 (8th Cir. 1982) (denial of visitation during lockdown held within discretion of prison officials).

331. *See, e.g.*, Feeley v. Sampson, 570 F.2d 364, 372 (1st Cir. 1978) (visitation regulation allowing sheriff unfettered discretion struck down because no justifiable state interest); Martin v. Wainwright, 525 F.2d 983, 985 (5th Cir. 1976) (per curiam) (denial of visitation privilege found unconstitutional where based upon race of inmate and his visitee); Henry v. Van Cleve, 469 F.2d 687, 687-88 (5th Cir. 1972) (per curiam) (unconstitutional deprivation of visitation found when based upon race).

332. 417 U.S. 817 (1974).

333. *See id.* at 824-25.

334. *See id.* at 824. The Supreme Court held that alternative forms of communication, such as mail privileges, were factors to be considered in balancing constitutional free speech against asserted state interests. *See id.* at 824.

335. *See id.* at 827-28.

336. *See id.* at 827. The Court found that in the absence of a showing of abuse of discretion, the decision to limit visitation was a proper way in which to protect valid state

Complaints in this area frequently arise from the denial of contact visitation with non-prisoners,[337] that is, visitation where there is no partition between the inmate and visitor.[338] Because of the high risk of the passing of contraband, drugs, and weapons between the visitor and prisoner inherent in contact visitation, the courts pay even greater deference to administrative discretion here.[339] *Inmates of Allegheny County Jail v. Pierce*[340] illustrates the rationale for hesitancy in requiring prison administrators to provide for contact visits.[341] The court discussed alternatives to the ban against contact visitation, such as installation of metal detectors, construction of rooms in which to strip search inmates, and facilities for administering urinalysis in order to detect drug use.[342] It was held, however, that the choice to prohibit contact visitation was a reasonable and constitutional decision within the sound discretion of administrators.[343] It, thus, appears that the claimant in visitation cases has a heavy burden of proof in order to overcome the need for administrative discretion.[344] The constitutional standards are less than clear in this area[345] and the best way for the inmate to succeed in challenging the constitutional-

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interests of prison order and manageability. *See id.* at 827.

337. *See* Ramos v. Lamm, 639 F.2d 559, 580 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Jordan v. Wolke, 615 F.2d 749, 751-52 (7th Cir. 1980); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 761 (3d Cir. 1979); Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978).

338. *See* Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980).

339. *See, e.g., id.* at 753 (denial of contact visits held reasonably related to interest in preserving security); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 761 (3d Cir. 1979) (of possible alternatives in preserving prison security, ban against contact visits held constitutional choice); Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978) (because of ease of passing contraband to prisoners, contact visits properly denied). "The government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." Bell v. Wolfish, 441 U.S. 520, 540 (1979) (visits properly denied).

340. 612 F.2d 754 (3d Cir. 1979).

341. *See id.* at 759-60.

342. *See id.* at 760.

343. *See id.* at 760. Contact visitation denial was found to be the least burdensome and inexpensive way to prevent security problems and was thus upheld as constitutional. *See id.* at 760.

344. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1376-78 (5th Cir.) (court remanded to determine whether denial of visitation justified; reserved question of whether absolute ban on visitation constitutional), *cert. dismissed*, 453 U.S. 950 (1981); Lynott v. Henderson, 610 F.2d 340, 343 (5th Cir. 1980) (evidence showing possible security risk in inmate visiting with married woman and resulting threats of visitor's husband justified denial of such); Martin v. Wainwright, 525 F.2d 983, 985 (5th Cir. 1976) (inmate met burden of proof in showing denial of visitation based on race and thus violative of Constitution).

345. *See* Hamilton v. Saxbe, 428 F. Supp. 1101, 1109 (N.D. Ga. 1976) (court recognition of unclear standards for judicial review in visitation area), *aff'd sub nom.* Howard v. Bell, 551 F.2d 1056 (5th Cir. 1977) (per curiam).

ity of visitation limitations is to show an unreasonable or capricious denial not related to a substantial state interest.[346]

D. *Right of Association*

The Supreme Court has stated that the right of association is one of the "most obvious" first amendment guarantees that is limited because of incarceration.[347] An inmate's status as a prisoner, in and of itself, prohibits him from free association with those outside prison;[348] furthermore, "operational realities" necessitate the curtailment of absolute free association between prisoners.[349] In *Jones v. North Carolina Prisoners' Union*, a prisoners' labor union alleged that the attempt by the prison to prevent unionization was violative of the first amendment right of freedom of association.[350] Relying on the often cited rationale that an inmate loses first amendment rights "inconsistent with his status,"[351] the Court found the prohibition against unionization to be a justifiable administrative decision in light of the detrimental effect of such an organization upon prison order and security.[352]

VI. CONCLUSION

Although necessarily limited, prisoners do not leave behind their constitutional rights when incarcerated.[353] The guarantees of freedom of speech and of religion, as well as the right to be free from cruel and unusual punishment, follow the inmate into the penitentiary.[354] The United States Supreme Court, although recognizing the propriety of judicial restraint in prison reform, will not allow the "hands off"[355] approach to pre-

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346. *Cf.* Procunier v. Martinez, 416 U.S. 396, 413 (1974) (deprivation of first amendment rights must be justified by furtherance of substantial government interest).

347. *See* Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 125 (1977).

348. *See id.* at 119; Dreher v. Sielaff, 636 F.2d 1141, 1145 (7th Cir. 1980) (quoting *Jones* with approval).

349. *See* Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126 (1977).

350. *See id.* at 122. The union also challenged the denial of unionization on equal protection grounds because other organizations had been allowed at the prison. *See id.* at 121.

351. *Id.* at 125 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).

352. *See id.* at 132-33.

353. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1368 (5th Cir. 1981) (constitutional protection extended to all inmates), *cert. dismissed*, 453 U.S. 950 (1981); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 859 (4th Cir. 1975) (courts may intervene in prisoner cases in order to protect constitutional rights of inmates); United States v. Smith, 464 F.2d 194, 196 (10th Cir. 1972) (noted with approval in *Sweet*), *cert. denied*, 409 U.S. 1066 (1972).

354. *See* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

355. See Comment, *An Overview Of Prisoner's Rights: Part I, Access To Courts Under Section 1983*, 14 ST. MARY'S L.J. 957, 959-60 (1983) for a discussion of the "hands off"

clude the mitigation of prison conditions which violate the constitutional rights of inmates.[356] The foregoing discussion of lawsuits arising from prison conditions summarizes the state of the law in areas where litigation appears to be most prevalent; however, inmate complaints as to the quality of prison life stem from many areas not included herein.[357]

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approach.

356. *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

357. For areas not within the scope of this paper, see generally Richardson v. Ramirez, 418 U.S. 24, 26, 56 (1974) (prisoners constitutionally denied right to vote); Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (media has right to interview prisoners, but cannot choose whom they want); Pittman v. Hutto, 594 F.2d 407, 409, 411-12 (4th Cir. 1979) (no constitutional right to publish prison newspaper); Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975) (per curiam) (confiscation of prisoner property alleges cause of action); Fowler v. Graham, 478 F. Supp. 90, 93 (D.S.C. 1979) (no absolute right to telephone use).