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Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard

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I. INTRODUCTION

Most Americans have little knowledge or concern about what happens inside this Nation's prisons.[1] Unless prisoners riot, they generally are far removed from the popular consciousness.[2] Members of society beyond prison walls hear about only the most severe and exceptional cases of prisoner suffering.[3] When prisoners do not receive adequate

1. See Robert Dvorchak, *Medicine Behind Bars: Quality Care Is Elusive, Despite Lawsuits; Hostile Public, Shortage of Good Doctors and Nurses Worsen Prison Problem*, L.A. Times 2 (June 18, 1989).

2. Lois G. Forer, *The Prisoner and the Psychiatrist*, 31 Emory L. J. 61 (1982).

3. *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan concurring).

medical treatment, however, they may suffer harm beyond the segregation from society and loss of liberty contemplated by incarceration.[4] A discussion of the medical care that prisoners receive must begin, therefore, with a recognition of the paradox of taking care of individuals about whom very few people in society care.[5]

The issue of the adequacy of prison health care is very important today. The deprivation of adequate medical care frequently is a basis for lawsuits filed by prisoners in the United States.[6] Prison health care delivery today fails to measure up to acceptable standards.[7] While commentators agree that reform of health care delivery systems in this Nation's prisons remains necessary,[8] the problem of inadequate prison health care is considerably more difficult to remedy than it is to acknowledge.[9] The quality, quantity, accessibility, continuity, and efficiency of prison medical services all draw criticism.[10] Furthermore, direct and unequivocal statements from courts and commentators concerning prison health care are very rare.[11] This vagueness produces inaction and indecision that, combined with public apathy and the political powerlessness of prisoners, has served only to exacerbate problems in the delivery of prison health care.[12]

The text of the Constitution imposes no express duty to provide medical care.[13] In *Estelle v. Gamble*, however, the Supreme Court acknowledged that state and federal governments have an obligation to

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4. See *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972) (stating that "[d]enial of necessary medical attention may well result in disabilities beyond that contemplated by the incarceration itself"). See also *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 215 (8th Cir. 1974) (stating that "[s]egregation from society and loss of one's liberty are the only punishment the law allows").

5. Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1).

6. Id.

7. See, for example, Jim Doyle, *Judge Holds SF in Contempt*, San Fran. Chronicle A8 (Jan. 25, 1991); Elizabeth Levitan Spaid, *Advocates Urge Better Conditions For Women Inmates*, Christian Science Monitor 9 (May 29, 1991); Ann Bancroft, *Testimony on Deaths in Vacaville Jail*, San Fran. Chronicle A14 (Aug. 20, 1991); Tom Coakley and Jack Sullivan, *R.I. Inmates, Police in Fiery, 4½-hour Standoff*, Boston Globe 19 (Oct. 1, 1991).

8. See, for example, Phil Gunby, *Health Care Reforms Still Needed in the Nation's Prisons*, 245 JAMA 211 (1981).

9. *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1576 (D. Idaho 1984) (stating that "pointing out constitutional deprivations is easier than fashioning a remedy"), rev'd in part, 869 F.2d 461 (9th Cir. 1989).

10. See generally, Office of Development, Testing, and Dissemination, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, and United States Department of Justice, *Health Care in Correctional Institutions - MANUAL* 4 (1979) ("*MANUAL*").

11. B. Jaye Anno, *Standards for Health Care in Correctional Institutions, MANUAL* at 31 (cited in note 10).

12. *Rhodes*, 452 U.S. at 358 (Brennan concurring).

13. See, for example, *Maher v. Roe*, 432 U.S. 464, 469 (1977).

provide health care to the individuals whom they incarcerate.[14] The Court held that the government's custody and control of prisoners denies those prisoners the opportunity to care for themselves and, therefore, places on the government an obligation to care for them.[15] Indeed, *Gamble* makes the incarcerated the only Americans who enjoy a constitutional guarantee of medical care at government expense.[16]

Prisoners do not forfeit all the traditional rights of citizenry upon incarceration and, among other rights, retain access to the judicial system.[17] In addition to traditional tort actions for mistreatment,[18] inmates may file actions in federal district court under the Civil Rights Act of 1871[19] alleging violations of the Eighth Amendment's proscription of cruel and unusual punishment,[20] applicable to the states through the due process clause of the Fourteenth Amendment.[21] Prisoners most fre-

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14. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (recognizing "the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.") See also *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (stating that "a duty to provide certain services and care does not exist"); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989) (stating that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"); *Fitzke*, 468 F.2d at 1076 (stating that "[a]n individual incarcerated, whether for a term of life for the commission of some heinous crime, or merely for the night to 'dry out' in the local drunk tank, becomes both vulnerable *and* dependent upon the state to provide certain simple and basic human needs"); *Ramsey v. Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970) (stating that "there is a constitutional duty to provide needed medical treatment to a prisoner").

15. See, for example, *Ramsey*, 310 F. Supp. at 604-05; Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 Va. L. Rev. 921, 938-39 (1977).

16. See Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1).

17. See *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (stating that, "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country"); *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968); Note, *Inmates' Rights and the Privatization of Prisons*, 86 Colum. L. Rev. 1475, 1481 (1986).

18. A cause of action under 42 U.S.C. § 1983 (1988) is permissible regardless of the availability of state remedies. *Daniels v. Williams*, 474 U.S. 327, 338 (1986) (Stevens concurring). For a discussion of tort remedies available to prisoners, see *United States v. Muniz*, 374 U.S. 150 (1963); James J. Gobert and Neil P. Cohen, *Rights of Prisoners* 63-64 (Shepard's/McGraw-Hill, Inc., 1981); William P. Isele, *Constitutional Issues of the Prisoner's Right to Health Care*, *MANUAL* at 15 (cited in note 10). For a discussion of related issues of immunity, see *Lawyer v. Kernodle*, 721 F.2d 632, 635-36 (8th Cir. 1983); Gobert and Cohen, *Rights of Prisoners* at 64-66; Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. Richmond L. Rev. 803, 900-22 (1977); Comment, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?* 27 Am. U. L. Rev. 92, 116-19 (1977).

19. See 42 U.S.C. § 1983 (1988).

20. *Martinez v. Mancusi*, 443 F.2d 921, 923 (2d Cir. 1970).

21. *Robinson v. California*, 370 U.S. 660, 666 (1962); *Jackson*, 404 F.2d at 576.

quently seek remedies for alleged violations of their constitutional rights under Section 1983 of Title 42 of the United States Code.[22] Inmates' frequent availment of this cause of action raises serious concerns that malpractice will become a constitutional tort[23] or that doctors in prisons will be encouraged to practice defensive medicine.[24]

In *Gamble* the Supreme Court announced that inadequate health care for prisoners does not violate the Eighth Amendment unless prison authorities are deliberately indifferent to serious medical needs.[25] This Note argues that the *Gamble* Court's choice of standard was inappropriate. In 1991, in *Wilson v. Seiter*, the Court extended the deliberate indifference standard to apply to cruel and unusual punishment claims regarding all conditions of incarceration.[26] The *Wilson* decision affirmed and extended the already-inappropriate deliberate indifference medical care standard, which, because of developing community standards, had become even more inappropriate by 1991.

This Note explores the appropriateness of the deliberate indifference standard as it applies to claims that inadequate prison health care inflicts cruel and unusual punishment under the Eighth Amendment. Part II examines the roots and relevant applications of the proscription of cruel and unusual punishment. Part III focuses on the deliberate indifference standard of *Gamble* and *Wilson* and considers factors that must play a role in the selection of an appropriate standard. Part IV discusses the growth and application of the deliberate indifference standard. Part V examines aspects of imprisonment that affect health care delivery and the determination of an appropriate standard. Part VI explores the inadequacies of the deliberate indifference standard today. Finally, Part VII proposes that a gross negligence standard would provide a more appropriate means of evaluating whether prisoner health

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22. See Note, 86 Colum. L. Rev. at 1499 (cited in note 17). The Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

23. See Neisser, 63 Va. L. Rev. at 922, 926 (cited in note 15) (citing "[j]udicial concern lest an expanding constitutional doctrine dissolve into a common-law tort"); id. at 927 n.29 (postulating that "some evidence suggests that the judicial fear of a flood of individual malpractice claims may be exaggerated").

24. For a discussion of litigation-caused defensive medicine, see Edward M. Brecher and Richard D. Della Penna, *Health Care in Correctional Institutions* 2 (Nat. Inst. of Law Enforcement and Criminal Justice, Law Enforcement Assistance Admin., U.S. Dep't of Justice, 1975).

25. *Gamble*, 429 U.S. at 97.

26. *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

care violates the Eighth Amendment.

II. The Proscription of Cruel and Unusual Punishment

The definition of cruel and unusual punishment has changed markedly since this phrase came into use. Recent changes, as well as increased judicial involvement, have improved the calibre of health care available to prisoners in this country.

A. Interpretations of the Eighth Amendment

The general principle of the Eighth Amendment's ban on cruel and unusual punishment[27] extends back to the Magna Carta.[28] The express proscription of cruel and unusual punishments emerged in the English Bill of Rights of 1689, drafted upon the accession of William and Mary.[29] The exact language of the Eighth Amendment first appeared in the United States on June 12, 1776, as part of Virginia's Declaration of Rights.[30] Throughout the years, however, the definition of cruel and unusual punishment has been varied and imprecise.[31]

The range and severity of punishments at early common law bore little resemblance to those of more recent eras.[32] At one time, sanctions such as dunking, hanging, drawing, quartering, live disemboweling, beheading, dissecting, branding, slitting, dismembering, and mutilating all were permitted for certain offenses.[33]

Today, however, the Eighth Amendment proscription of cruel and unusual punishment bans more than just barbarous physical punish-

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27. The Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII.

28. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). For an interesting discussion of the history of the language of the Eighth Amendment, see Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Cal. L. Rev. 839 (1969).

29. See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

30. See *Furman v. Georgia*, 408 U.S. 238, 319 (1972) (Marshall concurring). For a general discussion of the history of cruel and unusual punishment, see David Rudovsky, *The Rights of Prisoners* 29-40 (Richard W. Baron, 1973).

31. See *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) (stating that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted"); *Weems v. United States*, 217 U.S. 349, 368 (1910) (stating that "[w]hat constitutes cruel and unusual punishment has not been exactly decided"); *Furman*, 408 U.S. at 258 (Brennan concurring) (stating that "[t]he Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition"). For a discussion of early Eighth Amendment jurisprudence, see Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838 (1972).

32. See Ira P. Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights*, 26 U. Kan. L. Rev. 551, 553-54 (1978).

33. Id.; Isele, *Constitutional Issues*, *MANUAL* at 9 (cited in note 18).

ments.[34] Courts have stated a wide variety of tests for determining what constitutes cruel and unusual punishment and often examine tests cumulatively.[35] Some courts have banned barbarous acts.[36] Others have proscribed punishments that shock the general conscience or are intolerable to notions of fundamental fairness.[37] Similarly, courts sometimes have invalidated punishments that are shocking or disgusting to individuals of reasonable sensitivity.[38] Some courts have banned punishments that satisfy the vague standard of doing something more than simply offending fastidious squeamishness or private sentimentalism.[39] Still others have merely declared that a punishment may not be excessive or unnecessary,[40] or that it may not be arbitrary or at odds with the principles of contemporary society.[41] Indeed, courts have held that the emphasis is on basic dignity,[42] and that tests to determine cruel and unusual punishment are not static.[43] Judicial analysis of the Eighth Amendment is flexible and dynamic[44] and must draw its meaning from public attitudes[45] and the evolving standards of decency that reflect the growth of a maturing society.[46]

Courts examining prisoners' Eighth Amendment claims of inadequate medical care before *Gamble* used a number of these definitions of

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34. See *Gamble*, 429 U.S. at 102; *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

35. *Furman*, 408 U.S. at 282 (Brennan concurring) (stating that "[t]he test . . . will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.")

36. See, for example, *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas concurring).

37. See, for example, *Rochin v. California*, 342 U.S. 165, 172 (1952); *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965); *Gittlemacker v. Prasse*, 428 F.2d 1, 6 (3rd Cir. 1970).

38. See, for example, *Holt v. Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971).

39. See, for example, *Rochin*, 342 U.S. at 172.

40. See, for example, *Furman*, 408 U.S. at 279 (Brennan concurring).

41. See, for example, *Furman*, 408 U.S. at 282 (Brennan concurring); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

42. See, for example, *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

43. See, for example, *Weems*, 217 U.S. at 378 (stating that "[t]he clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"); *Furman*, 408 U.S. at 329 (Marshall concurring) (stating that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today"); *Gregg*, 428 U.S. at 173 (stating that the "Eighth Amendment has not been regarded as a static concept"); *Rhodes*, 452 U.S. at 346 (stating that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual").

44. See, for example, *Gregg*, 428 U.S. at 171.

45. See, for example, id. at 173; *Furman*, 408 U.S. at 277 (Brennan concurring).

46. See, for example, *Trop*, 356 U.S. at 101 (stating that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *Gregg*, 428 U.S. at 175; *Hudson v. McMillian*, 1992 U.S. LEXIS 1372, *13 (Feb. 25, 1992).

cruel and unusual punishment.[47] Courts held, for example, that prison medical care may not shock the conscience,[48] be obviously neglectful,[49] constitute deliberate indifference,[50] amount to continuing denial of needed medical treatment,[51] or constitute a willful refusal to treat a known ailment.[52]

B. The Role of the Court

Since the erosion of the so-called "hands-off" doctrine,[53] under which courts deferred virtually without exception to internal actions and decisions of prison administrators, court involvement has improved the provision of health care in prisons.[54] Because they are insulated from the political process and committed to enforcing the Constitution, courts are in a strong position to identify and rectify unconstitutional prison conditions.[55] Furthermore, recognizing the potential inadequacies of prisoners' pro se complaints, courts generally hold such complaints to less stringent standards than they do formal, lawyer-drafted pleadings.[56]

Before the 1960s, courts generally employed the hands-off doctrine, deferring to decisions made by prison administrators.[57] In the subsequent decades, however, courts have eroded this doctrine and no longer view prisoners as slaves of the state.[58] Still, courts are reluctant to in-

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47. For an examination of pre-*Gamble* Eighth Amendment medical care, see Note, *Eighth Amendment Rights of Prisoners: Adequate Medical Care and Protection from the Violence of Fellow Inmates*, 49 Notre Dame Law. 454 (1973).

48. See, for example, *Blakey v. Sheriff of Albemarle County*, 370 F. Supp. 814, 816 (W.D. Va. 1974).

49. See, for example, *Cates v. Ciccone*, 422 F.2d 926, 928 (8th Cir. 1970).

50. See, for example, *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir. 1974).

51. See, for example, *Ramsey*, 310 F. Supp. at 604.

52. See, for example, *Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir. 1970).

53. Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1).

54. For a discussion of the erosion of the "hands-off" doctrine, see Comment, Am. U. L. Rev. at 99-104 (cited in note 18).

55. *Rhodes*, 452 U.S. at 359 (Brennan concurring) (stating that "[i]nsulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost").

56. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Corby v. Conboy*, 457 F.2d 251, 253 (2d Cir. 1972).

57. See, for example, *Wagner v. Ragen*, 213 F.2d 294, 295 (7th Cir. 1954) (stating that "[t]he federal courts have held that they do not have the power to control or regulate the ordinary internal management and discipline of prisons operated by the states," and that "[t]his same principle has also been followed where the prisoner was incarcerated in a federal penitentiary"); *Coppinger v. Townsend*, 398 F.2d 392, 393 (10th Cir. 1968) (stating that "[t]he internal affairs of prisons, including the discipline, treatment, and care of prisoners are ordinarily the responsibility of the prison administrators and not subject to judicial review"); Note, 11 U. Richmond L. Rev. at 805 (cited in note 18).

58. Only in recent decades have prisoners effectively attained the legal status of citizens.

terfere with the internal affairs of a prison, and deference to the policies and practices of prison administrators survives to some degree.[59] The difficulty and complexity of the ordinary problems of operating a correctional facility make courts openly wary of encumbering the administration of prison affairs.[60] Since the erosion of the hands-off doctrine, however, courts have shown much less deference to prison administrators in matters unrelated to prison discipline or security.[61] Courts today do not hesitate to intervene to protect prisoners' fundamental constitutional rights.[62]

Similarly, courts in the past were slow to intervene in the area of medical care, often holding that medical issues were beyond judicial review.[63] Courts afforded prison physicians wide discretion in their judgments and choice of treatments,[64] reasoning that the factual specificity of prison health care decisions rendered them inappropriate for review.[65] Such deference to the determinations of prison physicians exemplified the hands-off doctrine.[66]

In recent years, court involvement in the realm of prison medical matters has increased, because while courts clearly cannot make an occupation of second-guessing prison physicians, it is equally clear that the judiciary can no longer ignore severe medical misconduct.[67] The resulting decreased deference to prison health care providers has allevi-

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Note, 11 U. Richmond L. Rev. at 805 (cited in note 18).

59. See, for example, *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (citing "a natural reluctance to interfere with a prison's internal discipline").

60. See *Bell*, 441 U.S. at 547 (stating that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"); *Newman v. Alabama*, 503 F.2d 1320, 1328 (5th Cir. 1974) (stating that "courts must be wary to avoid obtrusively monitoring the conduct of prison officials").

61. See, for example, *Todaro v. Ward*, 565 F.2d 48, 54 (2d Cir. 1977).

62. *Martinez v. Mancusi*, 443 F.2d 921, 923 (2d Cir. 1970).

63. See Note, 11 U. Richmond L. Rev. at 877 (cited in note 18).

64. See, for example, *Flint v. Wainwright*, 433 F.2d 961, 962 (5th Cir. 1970) (stating that "courts will not inquire into the adequacy of medical care provided to inmates by state prisons unless there appears an abuse of the broad discretion which prison officials possess"); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), vacated and remanded on other grounds, 419 U.S. 813 (1974), *Cannon v. Thomas*, 419 U.S. 813 (1974) (stating that "[c]ourts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient"); *Robinson v. Jordan*, 494 F.2d 793, 794 (5th Cir. 1974) (stating that "in the area of medical treatment prison officials have a 'broad discretion' "); Isele, *Constitutional Issues, MANUAL* at 17 (cited in note 18).

65. Isele, *Constitutional Issues, MANUAL* at 22 (cited in note 18).

66. See Comment, 63 Am. U. L. Rev. at 122-23 (cited in note 18).

67. See *Martinez*, 443 F.2d at 924 (stating that "[o]bviously, courts cannot go around second-guessing doctors. But neither can they ignore gross misconduct by a doctor, especially when it violates specific orders by the specialists in charge of the case").

ated some of the criticism of judicial inactivity[68] and has immersed the courts further in the struggle for constitutional standards for prison health care provision.[69]

III. The Deliberate Indifference Standard

The Court established deliberate indifference as the standard for Eighth Amendment claims of unconstitutional prison health care in 1976, and reaffirmed this standard in 1991. In examining the deliberate indifference standard, it is important to consider the level and type of care to which prisoners are entitled, the cost of such care, and the societal concern that prisoners may in some way be receiving rewards for their crimes.

A. Estelle v. Gamble

The Supreme Court entered the debate regarding constitutional standards for prison health care in *Estelle v. Gamble*.[70] In this landmark case, the Court held that the Eighth Amendment bans treatment that shows deliberate indifference to prisoners' serious medical needs.[71] The Court made clear that the standard includes dual requirements: the treatment given must show deliberate indifference, and such treatment must be in response to medical needs that are serious.[72] The Court provided several examples of deliberate indifference, including inadequate responses to prisoners' needs, intentional delays in treatment or in access to treatment, and intentional interference with prescribed treatment.[73]

The majority opined that the Eighth Amendment does not protect prisoners against mistreatment that is accidental or unintentional in nature.[74] In *Gamble*, the Court for the first time acknowledged that the prohibition of cruel and unusual punishment can apply to deprivations that occur in prison, but that are not explicitly meted out as part of a sentence.[75] *Gamble* made clear that medical malpractice and negligence

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68. See, for example, Comment, 27 Am. U. L. Rev. at 122 (cited in note 18).

69. Neisser, 63 Va. L. Rev. at 922 (cited in note 15).

70. 429 U.S. 97 (1976).

71. Id. at 104. For an argument that the *Gamble* standard can extend to the treatment needs of the civilly committed, see Thomas D. Roberts, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. Chi. L. Rev. 731 (1978).

72. *Gamble*, 429 U.S. at 104.

73. Id. at 104-05; *MANUAL* at 5 (cited in note 10).

74. *Gamble*, 429 U.S. at 105 (stating that "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain," and citing *Francis v. Resweber*, 329 U.S. 459 (1947), which held constitutional a second attempt of the execution of a prisoner after the first attempt failed due to an unforeseeable accident).

75. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2323 (1991); *Hudson v. McMillian*, 1992 U.S.

are not sufficient to establish deliberate indifference.[76] In its holding, the Court expressed clearly its intention that the standard not be so expansive as to create a constitutional tort.[77] In *Gamble* the Court stressed that medical decisions such as treatment choices are beyond the scope of Eighth Amendment claims,[78] and emphasized that most claims do not rise to the constitutional level.[79]

B. Wilson v. Seiter

In 1991, the Supreme Court revisited the deliberate indifference standard in *Wilson v. Seiter*.[80] In that case, the Court extended *Gamble*'s deliberate indifference standard for prison health care to claims of cruel and unusual punishment regarding all conditions of confinement.[81] The Court opined that the same constitutional standard should apply to all prison conditions, reasoning that medical care is no more a condition of confinement than are, for example, prison food, temperature, and clothing.[82] The Court expressly acknowledged the two-tiered requirement of *Gamble*: first, the seriousness of the deprivation or condition; and second, the subjective state of mind of the prison official allegedly responsible for such deprivation or condition.[83] In *Wilson* the Court stressed that the intent requirement derives from the Eighth Amendment itself, and that, if the alleged injury at issue was not specifically meted out formally as punishment, then either intent or wantonness is necessary to violate the Eighth Amendment.[84] Thus, the

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LEXIS 1372, *17 (Feb. 25, 1992).

76. *Gamble*, 429 U.S. at 105-06. The Court stated:

> [i]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference tbat can offend "evolving standards of decency" in violation of the Eighth Amendment.

77. Id.; Neisser, 63 Va. L. Rev. at 926 (cited in note 15).

78. *Gamble*, 429 U.S. at 107.

79. Id. at 105.

80. 111 S. Ct. 2321 (1991).

81. Id. at 2326-27.

82. Id.

83. Id. at 2324.

84. Id. at 2325-26 (stating that "[t]he source of the intent requirement is not tbe predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify," and that "in this context wantonness does not have a fixed meaning") (empbasis in original).

Court made clear that intent is needed for a finding of cruel and unusual punishment in a case in which the object of the complaint was not an expressly stated and prescribed aspect of punishment.

C. To What Care Are Prisoners Entitled?

The deliberate indifference standard raises questions regarding the types and levels of care to which prisoners are entitled.[85] Determining what health care is reasonable or adequate is fundamental to the resolution of Eighth Amendment prisoner health care cases.[86] Courts and professional organizations have suggested a number of definitions, but the most significant common aspect of such proposals is their ambiguity.[87] Proposed standards advocating the provision of "acceptable" or "adequate" health care are challenging to interpret and apply.[88] As a result, attempts at specifying the required care often approach the issue negatively, focusing on what constitutes unreasonable or inadequate medical care rather then on what care is required.[89] In response to the general ambiguity of proposals, a small number of very specific and detailed proposals for prison health care standards exist.[90] The promulgation of uniform health care standards or guidelines would have a tremendous beneficial effect on both the provision and litigation of prison health care.

Courts have held that prisoners have a right to reasonable health care[91] or to care that is reasonably designed to meet their routine and emergency medical needs.[92] Such a right appears to encompass all as-

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85. See, for example, *Ricketts v. Ciccone*, 371 F. Supp. 1249, 1256 (W.D. Mo. 1974).

86. See, for example, *MANUAL* at 4 (cited in note 10).

87. See Anno, *Standards for Health Care, MANUAL* at 33 (cited in note 11).

88. Id.

89. See Isele, *Constitutional Issues, MANUAL* at 11 (cited in note 18).

90. See, for example, Nancy Neveloff Dubler, ed., *Standards for Health Services in Correctional Institutions* (Am. Pub. Health Ass'n, 2d. ed. 1986) (setting forth very comprehensive and extensive standards for health care delivery from vision care to syphilis); Am. Med. Ass'n, *Standards for Health Services in Jails* (Program to Improve Medical Care and Health Services in Correctional Institutions, 1981); Anno, *Standards for Health Care, MANUAL* (cited in note 11); Brecher and Della Penna, *Correctional Institutions* at 8-11 (cited in note 24) (proposing a medical evaluation system consisting of: preliminary screening for admission; medical history; physical examination; and additional prediagnostic studies). For information about other proposed standards, see Anno, *Standards for Health Care, MANUAL* at 27-37; Office of Development, Testing, and Dissemination, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, and United States Department of Justice, *Health Care in Correctional Institutions - Participant's Handbook* 30 (University Research Corp., 1977) ("*Handbook*").

91. See, for example, *Blakey v. Sheriff of Albemarle County*, 370 F. Supp. 814, 816 (N.D. Va. 1974).

92. See, for example, *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980); *Battle v. Anderson*, 376 F. Supp. 402, 424 (E.D. Okla. 1974).

pects of health care, from preventive services and diagnosis,[93] to treatment and rehabilitation.[94] Around-the-clock access to medical services is also of vital importance.[95] The violence that prisoners often inflict on each other or on themselves amplifies the need for emergency care,[96] and such emergency treatment must be available at all times.[97]

Commentators emphasize the need for provision of a range of services.[98] Sick call, for example, is a crucial aspect of prison health care.[99] In addition, prisoners are entitled to dental care,[100] which is a vital component of inmate medical care,[101] especially since the dental problems of inmates generally are more extensive than those of the average citizen.[102] Furthermore, prisoners are entitled to psychological and psychiatric services,[103] and deliberate indifference to the mental health needs of prisoners is actionable under the Eighth Amendment.[104]

Courts and professional organizations agree that health care within prisons is generally inferior to that in outside society, and that the disparity between levels of care inside and outside prisons must narrow.[105] Some authorities urge that the level and quality of health care available to prisoners must be the same as is available to society at large.[106] Other authorities, however, reason that the circumstances of incarceration justify that prison medical services not mirror or equal those available to

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93. See, for example, *Laaman v. Helgemoe*, 437 F. Supp. 269, 312 (D.N.H. 1977). The court stated:

> An inmate's dependency upon the prison's medical system includes, of necessity, the diagnostic stage of medical treatment. The failure to discover and/or diagnose serious medical problems can lead to the same evils as does the lack of therapeutic attention once an illness or injury is known. If one is to be considered as a shocking failure on the part of the government to fulfill its duty to provide adequate medical care, so must the initial failure of the system to provide for discovery of latent and incubating diseases and medical problems.

94. See *Handbook* at 122-23 (cited in note 90).

95. *Laaman*, 437 F. Supp. at 312-13; Neisser 63 Va. L. Rev. at 963 (cited in note 15).

96. Chris Coste, *Prison Health Care: Part of the Punishment?*, 25(4) New Physician 29, 32 (April, 1976) (stating that "[e]mergency care is one of the prisoners' chief concerns. Stabbings and beatings are common . . . as are suicide attempts.")

97. Dubler, *Standards for Health Services* at 15 (cited in note 90).

98. See, for example, id. at 25.

99. Brecher and Della Penna, *Correctional Institutions* at 11 (cited in note 24).

100. *Laaman*, 437 F. Supp. at 313; *MANUAL* at 147 (cited in note 10).

101. See Brecher and Della Penna, *Correctional Institutions* at 73.

102. See *Ramos*, 639 F.2d at 576.

103. Id. at 574. See also G. Thomas Peters, *Mental Health Care in Jails*, in *MANUAL* at 139; Forer, 31 Emory L. J. at 61 (cited in note 2).

104. *Greason v. Kemp*, 891 F.2d 829, 834-35 (11th Cir. 1990); *Laaman*, 437 F. Supp. at 313.

105. See *MANUAL* at 39 (stating that "[t]he courts as well as the professional organizations drafting standards for delivering health care in prisons and jails are essentially demanding that correctional administrators close the gap between the level of care available on the outside and that available to the incarcerated population").

106. See, for example, *Schmidt v. Wingo*, 499 F.2d 70, 75-76 (6th Cir. 1974) (Phillips concurring); *MANUAL* at 40.

the outside community.[107]

Commentators agree that inmates have a right to be treated by qualified health personnel.[108] Proper training, licensing, and experience are vital in this regard.[109] Also, some commentators insist that inmates have a right to adequate facilities and equipment.[110] Similarly, some courts and commentators assert that prison health care providers must make sufficient medication available,[111] must maintain accurate medical records,[112] and must ensure privacy in the provision of treatment.[113]

Amid the ambiguity regarding what prison health care must include, courts and commentators have made clear that inmates have no right to perfect or optimal health care,[114] or to treatment from preeminent medical providers.[115] Nor do prisoners have a right to absolutely every potentially beneficial medical procedure, regardless of how rare or

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107. See, for example, Gobert and Cohen, *Rights of Prisoners* at 341 (cited in note 18) (stating that "[p]risons cannot be expected to duplicate the range of medical services available outside of prison. In particular, prisoners might be denied their physician of choice, second opinions, access to specialists, and the right to select from alternative treatment modalities as long as the medical care actually provided meets constitutional requirements"); John W. Palmer, *Constitutional Rights of Prisoners* at 159 (Anderson, 2d ed. 1977) (stating that "[w]hat is required is that he be afforded such medical care, in the form of diagnosis and treatment, as is reasonably available under the circumstances of his confinement and medical condition. Just as prison officials can not deny all medical aid, inmates can not expect a fiawless medical services system").

108. See Dubler, *Standards for Health Services* at 2 (cited in note 90); Neisser, 63 Va. L. Rev. at 958 (cited in note 15); Brecher and Della Penna, *Correctional Institutions* at 17-26 (cited in note 24).

109. Neisser, 63 Va. L. Rev. at 957, 963 (cited in note 15).

110. See, for example, *Laaman*, 437 F. Supp. at 314 (stating that "sufficient physical space and equipment for emergency and routine medical treatment, a ward for inmates with contagious diseases not mandating hospitalization or for other inmates who simply need to he monitored, adequate medications to satisfy the in-house needs of the inmates, and, finally, a dietary service for inmates requiring special foods are all required if the health and welfare of the prison community are to be protected"); Neisser, 63 Va. L. Rev. at 958.

111. See, for example, *Newman*, 503 F.2d at 1331.

112. See, for example, id. at 1323 n.4; *Laaman*, 437 F. Supp. at 313 (stating that "[i]nadequate records in an institution, which relies upon transfers to outside medical facilities for extended or extensive medical care, are a hazard to the health of the patient inmates"); Brecher and Della Penna, *Correctional Institutions* at 13-15; Dubler, *Standards for Health Services* at 99 (cited in note 90).

113. See, for example, Brecher and Della Penna, *Correctional Institutions* at 11.

114. *Brown v. Beck*, 481 F. Supp. 723, 726 (S.D. Ga. 1980) (stating that "[i]t is not required that the medical care provided to a prisoner be perfect, the best obtainable, or even very good"); *Hudson v. McMillian*, 1992 U.S. LEXIS 1372, *14 (Feb. 25, 1992) (stating that "society does not expect that prisoners will have unqualified access to health care"); Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1) (stating that "[h]aving the right to care does not guarantee Mayo Clinic-style treatment"); Isele, *Constitutional Issues, MANUAL* at 13, 15 (cited in note 18).

115. *Schmidt*, 499 F.2d at 76 (Phillips concurring) (stating: "Nor is it intended to imply that a prisoner injured with a heart wound, for example, would be entitled to the services of the foremost heart surgeon in the nation. A rule of reason, applied on a case by case basis, must determine the adequacy of medical care provided").

experimental.[116] Whether inmates have a right to certain elective or cosmetic medical procedures remains subject to debate.[117] It is clear, however, that prisoners themselves may not determine what treatments are necessary,[118] and that differences of opinion between inmates and physicians do not by themselves give rise to constitutional claims.[119]

D. Cost

Issues of cost are vitally important in considering prison health care.[120] Frequently, prison budgets do not provide sufficient funds for compliance with constitutional standards.[121] Despite this crippling funding problem, however, many courts refuse to consider cost as a factor in determining the adequacy of prison health care.[122] Indeed, courts have consistently stated that a lack of funds cannot justify unconstitutional medical care for inmates.[123]

Obtaining funds for prison health care is a monumental challenge,[124] and the low priority that budget planners assign to correctional facilities worsens the problem.[125] Legislative pressures to reduce spending[126] and voter reluctance to pay for prisons compound the cost diffi-

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116. See *Hampe v. Hogan*, 388 F. Supp. 13, 14-15 (M.D. Pa. 1974).

117. See Isele, *Constitutional Issues*, *MANUAL* at 11 (cited in note 18).

118. *Hampe*, 388 F. Supp. at 14 (stating that "the prisoner cannot be the judge of what treatment need be rendered to him").

119. *Coppinger*, 398 F.2d at 394 (stating that "[t]he prisoner's right is to medical care—not to the type or scope of medical care which he personally desires. A difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under Section 1983.")

120. See Neisser, 63 Va. L. Rev. at 936 (cited in note 15).

121. *Rhodes v. Chapman*, U.S. 337, 357 (1981) (Brennan concurring).

122. See Isele, *Constitutional Issues*, *MANUAL* at 18 (cited in note 18).

123. See, for example, *Jackson*, 404 F.2d at 580 (stating that "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations"); *Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974) (stating that "[l]ack of funds is not an acceptable excuse for unconstitutional conditions of incarceration" and that "we again cannot agree that lack of funds or facilities justify lack of competent medical care"); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (stating that "[l]ack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates"); Isele, *Constitutional Issues*, *MANUAL* at 18 (cited in note 18) (explaining that this "principle, that limited budget will not justify insufficient care, has been clearly acknowledged by numerous Courts").

124. See Candice Carponter, *Potential Federal Resources*, in *MANUAL* at 99-117 (cited in note 10) (outlining the problem and examining various possible sources for prison health care funding).

125. See Neisser, 63 Va. L. Rev. at 936-37; Norval Morris, *Minimum Standards for Medical Services in Prisons and Jails*, in Ciba Foundation Symposium 16, *Medical Care of Prisoners and Detainees* 37, 40 (Associated Scientific Publishers, 1973) (stating that "[t]he prison stands as a relatively low claimant for the community's resources").

126. See *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan concurring); *MANUAL* at 97 (cited in note 10).

culty.[127] Furthermore, within prison budgets themselves, medical services, like other nonsecurity functions, often are low priorities.[128]

The amount spent on health care in society as a whole provides an indication of the resources that funding acceptable prison health care will require;[129] adequate inmate medical care will necessitate expenditure of much additional money.[130] The unavailability of Medicaid to prisoners further compounds the financial dilemma.[131] Nevertheless, increases in the funds dedicated to prison health care in recent years[132] provide hope that the problem of cost will not prove insurmountable.

E. Rewarding Crime?

Substantial segments of the American population receive either inadequate medical treatment or no treatment at all.[133] There is a common perception that society's criminals should not be treated more favorably than this country's worst-off noncriminals, and that criminals are somehow receiving rewards when they receive free medical care.[134] Many citizens feel that we coddle, rather than punish, convicts.[135] Clearly, inequities between medical care provided to prisoners and the care available to some citizens do exist.[136] The solution to this dilemma, however, is not to lower inmate health care to the level available to society's least fortunate. Instead, improving the situation of society's worst-off members must be a vital goal, and it is counterproductive to use these individuals' plight as a ceiling for quality of treatment of prisoners.

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127. Gail DeGeorge, *Wackenhut is Out to Prove That Crime Does Pay*, Bus. Week 95 (Dec. 17, 1990).

128. See Neisser, 63 Va. L. Rev. at 937.

129. See *MANUAL* at 97 (cited in note 10).

130. See Ann Bancroft, *No Relief in Sight For Overcrowded California Prisons*, San Fran. Chronicle A13 (April 22, 1991) (stating that the average cost per year per prisoner in California is $23,000); Charles M. Harris, Jr., *Prison Overcrowding—The Time for Policy Change Has Come!*, 18 Fla. St. U. L. Rev. 489, 493 (1991) (estimating that it costs $15,000 per year to guard and support an inmate); Isele, *Constitutional Issues*, *MANUAL* at 19 (cited in note 18); Brecher and Della Penna, *Correctional Institutions* at 61 (cited in note 24).

131. Medicaid benefits are not available to prisoners. See Neisser, 63 Va. L. Rev. at 936 (cited in note 15). 42 U.S.C. § 1396d(a)(21)(A) (1988) excludes from coverage "payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)."

132. See Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1) (stating that "[t]he states spent $80 million on prison health care in 1975 and $215 million in 1980, according to a survey conducted by the Associated Press").

133. See Morris, *Minimum Standards* at 37 (cited in note 125).

134. See Isele, *Constitutional Issues*, *MANUAL* at 21. The same argument applies to prisoners' receipt of housing and food—commodities which society's worst-off noncriminals also lack.

135. See *MANUAL* at 1 (cited in note 10).

136. See Isele, *Constitutional Issues*, *MANUAL* at 21.

IV. Judicial Interpretations of Deliberate Indifference

Courts have struggled in applying the *Gamble* standard of deliberate indifference to serious medical needs.[137] Under this standard, courts have found violations of the Eighth Amendment in acts or omissions constituting denial of treatment, failure to provide prescribed treatment, failure to allow treatment, delay in providing or allowing treatment, and provision of inadequate treatment.[138] Common to all Eighth Amendment claims, however, is the requirement of a causal connection between the acts or omissions of the physician or official and the alleged constitutional deprivation.[139]

Courts have held without exception that knowledge of the need for care, and intentional refusal or failure to provide such care, constitutes deliberate indifference.[140] Some courts, however, have applied the standard strictly and have found deliberate indifference only in cases where an official deliberately and clearly intended to cause harm.[141] Similarly, other courts require intent or culpability in the criminal law sense.[142] Whether courts require actual intent or somewhat less culpability, it remains clear that the *Gamble* standard is not the most liberal alternative.[143]

More typically, courts stray from the traditional intent requirement of deliberate indifference and hold that an express intent to inflict unnecessary pain is not crucial to a finding of deliberate indifference.[144] Many courts have asserted that specific willfulness or intent are not

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137. *Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990). For a brief overview of what some courts have done in reaction to *Gamble*, see Dubler, *Standards for Health Services* at v-ix (cited in note 90).

138. See *Howell v. Evans*, 922 F.2d 712, 720 (11th Cir. 1991), vacated, 931 F.2d 711; *Handbook* at 29 (cited in note 90).

139. See *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). One way in which a plaintiff may establish such a causal connection is by "proving that the official was personally involved in the acts that resulted in the constitutional deprivation." Id.

140. See, for example, *Robinson v. Moreland*, 655 F.2d 887, 890 (8th Cir. 1981); *Ancata*, 769 F.2d at 704; *Mandel v. Doe*, 888 F.2d 783, 788 (11th Cir. 1989).

141. See, for example, *Parratt v. Taylor*, 451 U.S. 527, 547-48 n.3 (1981) (Powell concurring, overruled by *Daniels v. Williams*, 474 U.S. 327 (1986).

142. See, for example, *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985) (stating that "the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough. Unlike criminal recklessness it does not import danger so great that knowledge of the danger can be inferred;" and that "[p]unishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it").

143. See Stuart B. Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause*, 7 Fordham Urban L. J. 1, 14 (1978).

144. See, for example, *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

requirements,[145] and that conscious or reckless disregard, callous inattention, or gross negligence may be equally violative of prisoners' Eighth Amendment rights.[146] Risking harm, without necessarily intending it, may be sufficient for a finding of cruel and unusual punishment.[147] Likewise, heinous or obvious neglect may be the constitutional equivalent of intentional misconduct.[148] Also, health care that is grossly incompetent, inappropriate, excessive, or inadequate may support an Eighth Amendment claim.[149] Commentators have suggested that courts departing from the intent requirement—regardless of the particular labels they have selected—have found cruel and unusual punishment in cases where officials demonstrate serious disregard for the needs of the prisoners for whom they must care.[150]

The Eighth Amendment proscribes obduracy and wantonness, not good faith error and inadvertence.[151] Thus, courts have consistently held that a finding of deliberate indifference requires more than lack of due care.[152] Courts will not acknowledge accidental or inadvertent misdiagnosis or mistreatment as an actionable Eighth Amendment claim.[153] Also, courts hold that the Constitution does not protect prisoners against injuries, medical or otherwise, resulting from negligence.[154] Clearly, negligence will not suffice to prove an Eighth Amendment violation.[155] In considering negligence, however, courts typically refer to simple negligence, overlooking the possibility of Eighth Amendment liability for cruel and unusual punishment inflicted through gross negligence.[156] In Eighth Amendment prison medical care cases, gross negligence would be a more appropriate standard for measuring cruel

145. See, for example, *Church v. Hegstrom*, 416 F.2d 449, 450 (2d Cir. 1969).

146. See, for example, *Wright v. El Paso County Jail*, 642 F.2d 134, 136 (5th Cir. 1981); *Ramsey v. Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

147. *Redmond v. Baxley*, 475 F. Supp. 1111, 1118 (E.D. Mich. 1979).

148. *Freeman v. Lockhart*, 503 F.2d 1016, 1017 (8th Cir. 1974).

149. See *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986).

150. See, for example, Michael Wells and Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201, 242 (1984).

151. *Whitley*, 475 U.S. at 319.

152. See, for example, *Berry*, 900 F.2d at 1495.

153. See, for example, *Francis v. Resweber*, 329 U.S. 459, 464 (1947) (stating that, as the result of an unforeseeable accident which injured a prisoner in a failed execution attempt, "[t]he situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block"); *Ramos v. Lamm*, 639 F.2d 559, 575 (8th Cir. 1980).

154. See, for example, *Mayfield v. Craven*, 299 F. Supp. 1111, 1113 (E.D. Cal. 1969) aff'd, 433 F.2d 873 (9th Cir. 1970); *Ramsey*, 310 F. Supp. at 605. See also note 17.

155. See, for example, *Daniels*, 474 U.S. at 327; *Whitley*, 475 U.S. at 319; *Church*, 416 F.2d at 451; *Tolbert v. Eyman*, 434 F.2d at 625, 626 (9th Cir. 1970); Isele, *Constitutional Issues, MANUAL* at 15 (cited in note 18).

156. See, for example, *Gamble*, 429 U.S. at 106.

and unusual punishment. Gross negligence provides a heightened standard, while eliminating the inappropriate focus on the subjective intent of the prison official or physician, and looking instead at the harm that the prisoner suffers.

Prisoners can attempt to prove deliberate indifference by showing through expert testimony, by published judgments, or by published standards for health care, that the treatment they received was grossly contrary to accepted medical practice.[157] Plaintiffs may also attempt to prove deliberate indifference on the part of prison doctors or physicians by showing that they received no medical care whatsoever.[158] Similarly, prisoners who receive cursory health care in response to obvious medical needs may rely on these circumstances in proving deliberate indifference.[159] Courts also have recognized constitutional violations in cases where prison doctors manifested indifference by selecting easy and less efficacious treatment methods,[160] or by denying or delaying needed treatment.[161] In addition, denial of access to physicians may create a constitutional claim.[162] Thus, officials who prevent inmates from relating their health concerns to the medical staff may demonstrate deliberate indifference to the inmates' needs.[163] Deficiencies in prison medical staffing also may themselves support claims of cruel and unusual punishment.[164] Some courts, however, have balanced the availability and expense of providing treatment against a number of factors, such as the seriousness of the inmate's illness, the immediacy of the medical need, the duration of incarceration, the likelihood of harm resulting from postponed treatment, and the danger posed to other prisoners.[165]

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157. See *Howell*, 922 F.2d at 720; *Palmigiano v. Garrahy*, 443 F. Supp. 956, 988 (D.R.I. 1977); Comment, *Use of Published Minimum Standards to Determine When Inadequate Prison Medical Care Constitutes Cruel and Unusual Punishment*, 13 Suffolk U. L. Rev. 603, 614 (1979).

158. See, for example, *Rogers*, 792 F.2d at 1058 (stating that "a complete lack of medical care raised an inference of rampant deficiencies due to callous indifference to the prisoner's need for medical care").

159. *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978) (stating that "[a]lthough the plaintiff has been provided with aspirin, this may not constitute adequate medical care"); *Mandel*, 888 F.2d at 789 (stating that "medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference").

160. See, for example, *Williams*, 508 F.2d at 544 (finding deliberate indifference where a doctor threw away a severed ear and stitched up the stump, instead of attempting to save the ear by sewing it back on); *Rogers*, 792 F.2d at 1058.

161. See, for example, *Ancata v. Prison Health Services*, 769 F.2d 700, 704 (11th Cir. 1985); *Howell*, 922 F.2d at 720.

162. See, for example, *West*, 571 F.2d at 162; *Ramos*, 639 F.2d at 575.

163. *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (stating that "[t]he Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff").

164. *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985).

165. See, for example, *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (stating that "[i]n

Courts also have found deliberate indifference in repeated examples of individual negligent acts, when such individual acts singularly would be insufficient to state constitutional claims.[166] Systemic deficiencies also may provide the basis for a finding of deliberate indifference.[167] In such cases, prisoners need not wait until the harm they suffer is sufficient to shock the conscience.[168] Courts remain consistent, however, in holding that differences of opinion between inmates and physicians do not state claims of cruel and unusual punishment.[169]

Courts also have recognized that the *Gamble* standard is two-pronged, requiring deliberate indifference by prison officials to the serious medical needs of inmates.[170] The issue of seriousness remains unresolved; some courts, for example, have defined serious medical needs as those which a physician diagnoses as mandating treatment, or which are so self-evident that anyone would recognize the need for medical attention.[171] Clearly, serious needs may be less than life-threatening.[172]

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assessing the merits of a prisoner's claim for unconstitutional denial of psychiatric care, the district court should take into account a number of competing considerations in order to decide whether that denial amounts to deliberate indifference to his serious medical needs. On the one hand, it should consider the seriousness of the prisoner's illness, the need for immediate treatment, the likely duration of his incarceration, the possibility of substantial harm caused by postponed treatment, the prospects of some cure or substantial improvement in his condition, and the extent to which the prisoner presents a risk of danger to himself or other inmates. On the other hand, the court should consider the availability and expense of providing psychiatric treatment and the effect of such unusual care on ordinary jail administration. In balancing the needs of the prisoner against the burden on the penal system, the district court should be mindful that the essential test is one of medical necessity and not one simply of desirability.")

166. See, for example, *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974) (stating that "[a] series of incidents closely related in time, within several months as these are, may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners"); *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (stating that "while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures"); *Ramos*, 639 F.2d at 575 (stating that "deliberate indifference to inmates' health needs may be shown by proving repeated examples of negligent acts").

167. See, for example, *Ramos*, 639 F.2d at 575; *Rogers*, 792 F.2d at 1058.

168. *Laaman v. Helgemoe*, 437 F. Supp. 269, 312 (D.N.H. 1977) (stating that "[n]or need prison inmates wait until the harm they suffer from the lack of medical attention is so egregious as to independently 'shock the conscience.' If the medical system provided inmates by the state presents 'a grave and immediate health danger to the physical well-being,' the state's failure to fulfill its affirmative duty violates the Eighth Amendment and prisoners need not await the inevitable harm" (citations omitted)).

169. See, for example, *Hyde v. McGinnis*, 429 F.2d 864, 867-68 (2d Cir. 1970); *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972); *Jones v. Lockhart*, 484 F.2d 1192, 1193 (8th Cir. 1973); *Ramos*, 639 F.2d at 575.

170. See, for example, *West*, 571 F.2d at 161; *Mandel v. Doe*, 888 F.2d 783, 788 (11th Cir. 1989).

171. See, for example, *Laaman*, 437 F. Supp. at 311.

172. *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1989) (stating that, to be serious under the *Gamble* standard, "the medical need of the prisoner need not be life threatening").

For instance, courts may deem basic mental health care needs[173] or a broken hand to be serious.[174]

V. Aspects Of Imprisonment Affecting Medical Care

Prison health care is difficult, both to provide and to evaluate. Prison overcrowding, staffing problems, extensive availment of prison health services, competing nonmedical institutional concerns, and issues of privatization all complicate inmate medical services.

A. Overcrowding

Prison overcrowding does not by itself violate the Eighth Amendment.[175] The effects of overcrowding, however, often may justify constitutional claims.[176] Indeed, courts have held environments created by overcrowding unconstitutional,[177] and prison overpopulation is the cause of many allegations of cruel and unusual punishment.[178]

Prisoners have a right not only to health care, but also to a reasonably safe environment,[179] for in the absence of a sanitary and safe environment, even the world's finest medical care will not produce healthy inmates.[180] Evidence indicates that prison overcrowding increases the rate and severity of illness,[181] and further aggravates the dangers that institutional environments pose.[182]

Overcrowding is rampant: nationwide, prison populations increased by ninety percent between 1980 and 1988.[183] The federal prison system currently is operating at an estimated 172 percent of its capacity.[184]

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173. See, for example, *Rogers*, 792 F.2d at 1058 (stating tbat "[f]ailure to provide basic psychiatric and mental health care states a claim of deliberate indifference to the serious medical needs of prisoners").

174. *Robinson*, 655 F.2d at 890 (stating that "[a] broken hand can be considered by the jury to be a serious injury").

175. *Hoptowit*, 682 F.2d at 1249.

176. Id.

177. See Recent Development, *Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977)*, 47 U. Cin. L. Rev. 155, 161 (1978) (stating that "[s]everal courts have held that overcrowding alone may render a system unconstitutional by creating an environment in which prisoners are constantly subjected to threats of violence").

178. *Hoptowit*, 682 F.2d at 1248 (stating that "[o]vercrowding is often the root cause of many of the complaints made by prisoners").

179. See Isele, *Constitutional Issues, MANUAL* at 19 (cited in note 18).

180. Id. at 20.

181. See Terence P. Thornberry and Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 Hastings L. J. 313, 336 (1983).

182. See generally Gobert and Cohen, *Rights of Prisoners* at 334 (cited in note 18).

183. Bancroft, San Fran. Chronicle A13 (April 22, 1991) (cited in note 130).

184. Bureau of National Affairs *GAO Advises Bureau of Prisons to Seek Legislation Authorizing Test to Determine Feasibility of Privatization*, 29 Government Employee Relations Report, No. 1407 at 351 (March 25, 1991) ("*Relations Report*").

Furthermore, most states are under court orders to eradicate overcrowding.[185] California's prisons reflect typical overcrowding, operating at 180 percent of capacity, and have been severely overcrowded for more than a decade.[186] Prison populations continue to outpace increases in prison capacities, in part because of recent increases in drug arrests, and more stringent sentencing guidelines.[187]

Reducing overcrowding is a formidable task; it costs an estimated $50,000 per inmate to construct, and a reported $25,000 per prisoner per year to operate, a prison.[188] There is much discussion today about accelerated prison construction, early release programs,[189] and alternatives to imprisonment for nonviolent offenders and parole violators.[190] Today's crime rates have created a hardened political climate toward crime and criminals, however, in which there is skepticism as to whether legislators care a great deal about prison overcrowding.[191]

B. Problems with Staffing

Deficiencies in prison medical staffing may lead to Eighth Amendment violations,[192] and it is uncertain precisely to what extent the quality of medical care available to prisoners is inferior to that in the outside community.[193] The right to health care is meaningless if a prison health care staff is not competent to satisfy inmates' needs.[194]

Ideally, correctional health service staffs should include sufficient numbers and types of qualified and trained medical professionals to provide services deemed satisfactory according to national standards of care.[195] Prison medical personnel should meet training, licensing, and experience standards, and only qualified medical personnel should make medical decisions.[196]

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185. Id. See also DeGeorge, Bus. Week at 95 (Dec. 17, 1990) (cited in note 127).

186. Bancroft, San Fran. Chron. A13 (April 22, 1991) (cited in note 130).

187. See DeGeorge, Bus. Week at 95 (Dec. 17, 1990) (cited in note 127).

188. *Relations Report* (cited in note 183).

189. See, for example, Harris, 18 Fla. St. U. L. Rev. at 493 (cited in note 130).

190. Bancroft, San Fran. Chron. A13 (April 22, 1991) (cited in note 130).

191. This view was clear in *Rhodes v. Chapman*, 452 U.S. 337, 377 (1981) (Marshall dissenting) (stating that "[i]n the current climate [of rising crime rates], it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health"), and it has only been strengthened in the last ten years.

192. See, for example, *Laaman v. Helgemoe*, 437 F. Supp. 269, 312 (D.N.H. 1977) (stating that "[s]taff shortages render medical services below constitutional muster if the shortage is such that it endangers the health of the inmate population by either a lack of medical coverage or by use of unqualified persons to staff the facility"); *Battle v. Anderson*, 376 F. Supp. 402, 424 (E.D. Okla. 1974).

193. See Isele, *Constitutional Issues, MANUAL* at 16 (cited in note 18).

194. *Hoptowit*, 682 F.2d at 1253.

195. See Dubler, *Standards for Health Services* at 103 (cited in note 90).

196. See Gobert and Cohen, *Rights of Prisoners* at 340 (cited in note 18).

In reality, however, nonmedical or unlicensed personnel sometimes provide prison health care services.[197] Unlicensed doctors,[198] medical students,[199] graduates of foreign medical schools, and doctors with drinking or drug problems frequently work for correctional medical services.[200] Furthermore, licensed and qualified doctors may treat ailments for which they lack training or expertise.[201]

Prison health care systems are not attractive employment prospects for most doctors.[202] The social stigma of association with prisons[203] and the difficulty of establishing a professional reputation through such employment contribute to the lack of appeal of prison medical positions.[204] Another tremendous barrier to adequate staffing of correctional health services is low salary.[205] Prison medical personnel are paid less than other health care workers in the community,[206] and lagging pay scales may attract only physicians who are either unlicensed or for other reasons unemployable in the outside medical community.[207] The Reagan administration's dismantling of the National Health Service Corps, which allowed doctors to pay off their educational loans through work in prisons, has served further to discourage physicians from treating inmates.[208]

Working conditions for prison doctors are also unattractive.[209] Prison health facilities typically are poorly equipped, poorly ventilated, poorly lit, and run-down.[210] Furthermore, medical personnel in correctional facilities frequently work in fear that inmates will assault them

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197. See Brecher and Della Penna, *Correctional Institutions* at 65 (cited in note 24); Isele *Constitutional Issues, MANUAL* at 15.

198. See Neisser, 63 Va. L. Rev. at 937 (cited in note 15).

199. See Isele *Constitutional Issues, MANUAL* at 16.

200. See Coste, 25(4) New Physician at 33 (cited in note 96).

201. See Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1) (describing a gynecologist who performed prison dental exams, a pathologist who practiced general medicine, and a pediatrician who practiced internal medicine).

202. Isele, *Constitutional Issues, MANUAL* at 15 (cited in note 18).

203. Neisser, 63 Va. L. Rev. at 937 (cited in note 15).

204. See *Medical Care of Prisoners and Detainees* at 40 (cited in note 125); Brecher and Della Penna, *Correctional Institutions* at 53 (cited in note 24).

205. Dvorchak, L.A Times 2 (June 19, 1989) (cited in note 1). For example, in Hawaii, prison doctors earn $35,000 per year. Id.

206. See Neisser, 63 Va. L. Rev. at 926 n.29.

207. See Brecher and Della Penna, *Correctional Institutions* at 53 (cited in note 24).

208. See Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1) (stating that "[d]octors and nurses, in great demand in the outside world, must be recruited to work for civil service wages in steel-barred surroundings," and that the Reagan Administration "dismantled the National Health Services Corps, which was a federal program that allowed doctors to pay off educational loans by working in prisons").

209. See Coste, 25(4) New Physician at 33 (cited in note 96).

210. See generally Brecher and Della Penna, *Correctional Institutions* at 53-54.

or take them hostage.[211] Institutional physicians frequently "burn out" as a result of practicing in prisons.[212] In addition, some prison physicians also practice privately in order to supplement their incomes, and, as a result, sometimes cease complete and thorough performance of their inmate services.[213]

C. *Availment of Prison Health Services*

Generally, inmates avail themselves of prison medical services very frequently.[214] There are two reasons for the high utilization of institutional health care services: first, prisoners suffer above-average incidence of most illnesses; and second, hypochondria and malingering are very common among inmates.[215] Commentators suggest that prisoners have a greater frequency of genuine health problems than do other citizens, that they have more general concern for their bodily well-being, and that they also avail themselves of prison health services because they are bored, they are lonely, they seek excuses from assigned work, or they simply seek numbing medication.[216] In addition, prison administrators use medical personnel to perform nonmedical functions, such as various bodily searches and tests.[217] In an environment of such heavy and diverse use of medical resources, it is a challenge for prison medical personnel to recognize and meet genuine medical needs.[218]

D. *Competing Nonmedical Institutional Concerns*

The institutional goal of internal security is central to all prison concerns.[219] Indeed, most aspects of prison life, including decisions about housing, work, diet, recreation, movement, and communication revolve around the overriding concern for security.[220] The correctional personnel who control these various aspects of institutional life concern themselves primarily with security, and only secondarily with prisoners'

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211. See Coste, 25(4) New Physician at 33.

212. See generally Brecher and Della Penna, *Correctional Institutions* at 8. Brecher and Della Penna suggest that opportunities for continued education and advancement may help prevent burn-out. Id. at 54.

213. See Neisser, 63 Va. L. Rev. at 937.

214. For an interesting study of prisoner health care utilization patterns, see Lucretia A. Bolin, *Utilization of Health Care Services by a Prison Population* (Vanderbilt University School of Nursing, 1985) (Thesis toward Degree of Master of Science in Nursing, focusing on a maximum security prison in Middle Tennessee).

215. See Morris, *Minimum Standards* at 39 (cited in note 125).

216. See, for example, Brecher and Della Penna, *Correctional Institutions* at 8 (cited in note 24); Neisser, 63 Va. L. Rev. at 942-46.

217. See generally Neisser, 63 Va. L. Rev. at 945-46.

218. See Morris, *Minimum Standards* at 39.

219. *Pell v. Procunier*, 417 U.S. 817, 823 (1974).

220. See Neisser, 63 Va. L. Rev. at 940-42.

medical well-being.[221] Courts have recognized the legitimacy of penological and security interests, and, to some degree, have deferred to prison administrators' decisions.[222] While these prison goals and policies are valid and essential, there must be some mutual accommodation between security considerations and the constitutional right to medical care.[223] Accordingly, courts have held that inmates' rights to medical care may not be obliterated by institutional security concerns.[224] Fortunately, security and medical needs do not routinely clash,[225] and commentators suggest that a sophisticated health care program may in fact enhance prison security.[226]

E. Privatization of Prison Health Care

Some commentators see the privatization of entire prisons as a viable and desirable means of relieving the tremendous pressures on the public prison system.[227] Courts, however, long have viewed prison operation and management as an essential aspect of the administration of the law, and therefore as an exclusively governmental duty.[228] In addition, there is little evidence that the privatization of entire prisons

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221. See id. at 938.

222. See, for example, *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (stating that "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights"); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

223. See *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

224. See *MANUAL* at 39 (cited in note 10) (stating that "correctional administrators cannot lose sight of the fact that the courts have consistently said that health care must take precedence over security and the right of inmates to health care cannot be subjugated to security requirements").

225. See *Whitley v. Albers*, 475 U.S. 312, 320 (1986); *Hudson v. McMillian*, 1992 U.S. LEXIS 1372, *9 (Feb. 25, 1992) (stating that "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns").

226. See, for example, *MANUAL* at 40 (cited in note 10).

227. See, for example, Note, 86 Colum. L. Rev. at 1476 (cited in note 17) (stating that "[t]he utilization of private prisons today appears to offer a means of relieving pressures on a public prison system strained to the breaking point"); The National Underwriter Company, *U.S. Risk Ins. Agency Develops New Program*, Property & Casualty/Employee Benefits Ed. 32 (March 5, 1990) (stating that "[t]he privatization of detention facilities is a trend that is expected to continue into the 1990s").

228. See, for example, *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977) (stating that "[a] state has no higher duty than the preservation of its governmental integrity by the enforcement of its own laws, which inescapably includes the maintenance of an effective state prison system"); *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 106 A. 274, 281 (1919) (stating that "it is the duty of the state, in the exercise of its police power, to provide for tbe custody and maintenance of convicts as an essential part of the administration of criminal laws enacted for the protection of the public"). See also Jonathan Marshall, *Privatization—Old Idea Whose Time Has Come*, San Fran. Chronicle A6 (June 3, 1991); Note, 86 Colum. L. Rev. at 1479 (cited in note 17).

saves the public money.[229]

The provision of health care itself, however, is not exclusively a governmental function,[230] and governments in more than half of American prison systems appropriately contract for some types of services with private health care providers.[231] It seems disturbing, however, that under the deliberate indifference standard, individuals who are liable to unincarcerated patients for negligent treatment can enter an institutional arena and create liability for cruel and unusual punishment only for harm that they inflict intentionally. Some higher standard of care is necessary.

The two key considerations regarding the privatization of prison health care are quality of care and cost.[232] Academic studies and public reviews indicate that privately contracted medical services both improve quality and reduce cost.[233] Commentators also contend that privatized prison health care may help reduce the friction caused by inmates' distrust of health care providers who are also prison officials.[234] Inmates often fear that they receive health care services that aim not to help them, but rather to keep them tranquil.[235] Medical care suffers as conflict and hostility displace trust.[236] Commentators also suggest that separating health care from the rest of prison affairs may help to secure funds.[237]

A state does not relinquish its constitutional duty to provide medical care to inmates by contracting out for private health care services and remains liable for cruel and unusual punishment resulting from private contractors' deliberate indifference in providing medical care.[238] An

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229. Robert Kuttner, *False Profits: The Perils of Privatization*, New Republic 21, 23 (Feb. 6, 1989) (stating that "[p]risons also turn out to be disappointing candidates for privatization. Even aside from the issue of whether something as inherently public as prisons produce durable savings to the public purse.")

230. See note 13 and accompanying text.

231. Dvorchak, L.A. Times 2 (June 18, 1989) (cited in note 1); *Relations Report* (cited in note 184) (identifying Corrections Corporation of America and Wackenhut Corrections Corporation as leaders in the field of private health care provision in prisons). For examples of contracts between prisons and private medical providers, see Brecher and Della Penna, *Correctional Institutions* at 91-95 (cited in note 24).

232. See Brecher and Della Penna, *Correctional Institutions* at 66.

233. Marshall, San Fran. Chronicle A6 (cited in note 228).

234. See, for example, Brecher and Della Penna, *Correctional Institutions* at 8; Neisser, 63 Va. L. Rev. at 941 n.85 (cited in note 15).

235. See G.O.W. Mueller, *Medical Services in Prison: Lessons From Two Surveys*, in *Medical Care of Prisoners and Detainees* at 17 (cited in note 125).

236. See Morris, *Minimum Standards* at 40 (cited in note 125).

237. See Coste, 25(4) New Physician at 33 (cited in note 96).

238. *West v. Atkins*, 487 U.S. 42, 56 (1988) (stating that "the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth

actionable claim under 42 U.S.C. Section 1983 requires the violation of a constitutional right by a person acting under color of state law.[239] In *West v. Atkins* the Supreme Court held that a private doctor under contract to provide medical care to prisoners acts under color of state law.[240]

VI. Inadequacies of The Deliberate Indifference Standard Today

This Note proposes that the deliberate indifference standard is today an inappropriate measure of the constitutionality of prison health care provision. The traditional intent requirement, the amorphousness of the deliberate indifference standard, and evolving standards of decency all mandate that courts apply a more appropriate standard in determining whether the medical care that inmates receive violates the Eighth Amendment. The first two of these reasons were as valid at the time of *Gamble* as they are today; the third has become more relevant with medical advances over the years, and will continue to become increasingly compelling as medical technology and resulting societal expectations of health care quality continue to move forward and improve in the years to come.

A. The Traditional Intent Requirement

The deliberate indifference standard for cruel and unusual punishment in prisoner health care has traditionally required a finding of intent to harm on the part of the individual who allegedly deprives inmates of their constitutional rights.[241] It is inappropriate, however, to hinge a finding of cruel and unusual punishment upon the intent of a prison official or physician.[242] In evaluating an Eighth Amendment claim, what should be relevant is the nature of the treatment rather than the subjective state of mind of the individual responsible for such treatment. Courts focus improperly on the motivation of defendants, and instead should examine the harm that inmates actually suffer.

Amendment rights.") See also *Ancata v Prison Health Services*, 769 F.2d 700, 705 (11th Cir. 1985); Note, 86 Colum. L. Rev. at 1481 (cited in note 17).

239. *West*, 487 U.S. at 48. See note 22 and accompanying text.

240. *West*, 487 U.S. at 54 (stating that "[r]espondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State"). See also *United States v. Classic*, 313 U.S. 299, 326 (1941); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); *Ort v. Pinchback*, 786 F.2d 1105, 1107 (11th Cir. 1986).

241. See notes 139-56 and accompanying text.

242. The dissent in *Gamble* stated that "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle v. Gamble*, 429 U.S. 97, 116 (1967) (Stevens dissenting).

Prisoners must attempt to satisfy a prohibitively high burden of proof. As a practical matter, it is virtually impossible for inmate plaintiffs to prove the intent of prison officials or medical personnel.[243] In addition, the all-encompassing nature of the prison environment complicates attempts to determine intent, because it is often difficult to pinpoint exactly whose intent is relevant. This difficulty is aggravated by the deference that courts afford to prison health care providers, and, in the absence of contrary evidence, courts generally must accept these individuals' own statements regarding their subjective motivation. An appropriate standard for evaluating cruel and unusual punishment in prison health care claims must, therefore, eliminate the intent requirement.

B. The Standard is Amorphous and Difficult to Apply

As evidenced by the range of court interpretations, the deliberate indifference standard is very difficult to apply. The difficulty begins with the contradictory nature of the terms "deliberate" and "indifference," the former suggesting conduct that is considered, planned, or premeditated, and the latter suggesting the absence of concern or attention.[244]

The deliberate indifference standard has replaced amorphous and unworkable standards of cruel and unusual punishment[245] with a similarly deficient standard. It is not surprising, therefore, that courts employing the deliberate indifference standard have produced results as inconsistent as those that emerged from courts applying the supplanted standards. While a bright-line standard would not be satisfactory in evaluating constitutional claims of inadequate prison health care, courts must adopt a standard that is less amorphous than deliberate indifference.

C. Evolving Standards of Decency

Courts have for many years emphasized that the Eighth Amendment is not static, but rather is evolving and progressive. The standards of a progressing and maturing society are therefore the key indicators of

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243. The "intent requirement . . . likely will prove impossible to apply in many cases. . . . [I]ntent simply is not very meaningful when considering a challenge to an institution, such as a prison system." *Wilson v. Seiter*, 111 S. Ct. 2321, 2330 (1991) (White concurring).

244. "The distinction between deliberate indifference and negligence is conceptually vague because 'indifference' generally implies a lack of attention by the actor similar to what the law often calls negligence. The modifier 'deliberate,' however, requires that the actor recklessly ignore the medical situation in the face of information that a reasonable person would know requires action." *Howell v. Evans*, 922 F.2d 712, 720 n.7 (11th Cir. 1991).

245. See notes 28-52 and accompanying text.

whether or not challenged prison health care qualifies as cruel and unusual punishment.[246] Consideration of flexible and developing public attitudes toward medical care is essential to a judgment of a constitutional violation.

Because of improvements in medical care delivery and the resulting heightened public expectations of adequate health care, the deliberate indifference standard is not the appropriate measure of Eighth Amendment requirements today. Many improvements and advancements have occurred in medical care in recent years. The American public expects higher quality health care today than it did even at the time of *Gamble*, and the rising number of lawsuits alleging medical malpractice[247] is evidence of these heightened expectations of superior health care. Such public attitudes are precisely what courts must assess in evaluating the evolving perception of society and standards of decency. Prisoners have a right, therefore, to health care that is better than that which is simply not deliberately indifferent to their serious needs.

VII. Conclusion

In *Wilson v. Seiter*, the Supreme Court announced that medical treatment is like other conditions of imprisonment, and extended the deliberate indifference standard from health care claims to claims of cruel and unusual punishment involving all prison conditions. In so doing, the Court affirmed and extended the inappropriate standard of deliberate indifference.[248] This standard was inappropriate when first announced in *Gamble* because it improperly focused on the subjective intent of the prison official or physician, rather than on the nature of the treatment, and presented prisoners with a prohibitively high burden of proof. The standard was also inappropriate because it was amorphous and exceptionally difficult to apply. These shortcomings survive today. The standard is today even less appropriate because societal expectations of medical care, which are a key consideration in the evaluation of Eighth Amendment claims, are heightened as a result of continuing advancements in medical technologies.

A higher standard of care is necessary to allow inmates relief for injuries they may suffer from cruel and unusual punishment in prison medical care provision.[249] This Note does not suggest, however, that a simple negligence standard is proper; certainly, factors such as over-

246. See notes 41-46 and accompanying text.
247. See Comment, 27 Am. U. L. Rev. at 108 (cited in note 18).
248. See notes 81-82 and accompanying text.
249. See note 26 and accompanying text.

crowding,[250] problems with staffing,[251] facilities,[252] and equipment,[253] heavy use of prison health care services,[254] competing nonmedical institutional priorities,[255] and public unwillingness to "reward" prisoners[256] mandate that a simple negligence standard not apply.

What should replace the deliberate indifference standard for prison health care, however, is a heightened standard of gross negligence. This standard would eliminate the misplaced intent requirement, which many courts already skirt.[257] In addition, a standard of gross negligence would avoid the creation of a constitutional tort,[258] while providing relief for prisoners who suffer effects of medical treatment that constitute proscribed cruel and unusual punishment. And, while a gross negligence standard would not completely cure the old standard's problem of amorphousness, it would both eliminate much of the definitional ambiguity of the deliberate indifference standard, and eradicate the inappropriate subjective intent requirement. In addition, the proposed standard also would be easier to apply in conjunction with published sets of standards for constitutional inmate health care provision. Thus, the gross negligence standard would better serve the purposes of the Eighth Amendment and would provide a viable cause of action for cruel and unusual punishment in prison health care.

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250. See part V.A.
251. See part V.B.
252. See note 209 and accompanying text.
253. Id.
254. See part V.C.
255. See part V.D.
256. See part III.E.
257. See notes 144-50 and accompanying text.
258. See note 77 and accompanying text.