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Prisoners' Rights

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PRISONERS' RIGHTS

INTRODUCTION

Most Americans have limited, if any, knowledge or concern about what happens inside of prisons.[1] Individuals outside prison walls hear only the most severe and exceptional cases involving inmates' suffering.[2] Prisoners often suffer harm beyond segregation from society and loss of liberty.[3] For the many prisoners who are forced to endure harsh prison conditions or treatment, their only relief is the judicial system.[4] During the 1996-97 survey period,[5] the Tenth Circuit decided several cases involving prisoners' rights. This survey focuses on five significant cases, dividing them into two distinct categories. Part I provides a brief background of prisoners' rights. Part II addresses three cases concerning the Eighth Amendment's prohibition against cruel and unusual punishment. Part III discusses Fourth Amendment claims of unreasonable searches and seizures.

I. GENERAL BACKGROUND

Courts have unequivocally upheld the notion that incarceration for a crime does not force a prisoner to entirely sacrifice his constitutional protections.[6] The prisoner, however, will have fewer rights than he had prior to his imprisonment.[7] Courts tend to justify this position based on

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1. Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 921 (1992).

2. *See id.* at 921.

3. Jason D. Sanabria, Note and Comment, Farmer v. Brennan*: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1113 (1995).

4. *See* James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 101-02 (1987).

5. The survey period extended from September 1, 1996 through August 31, 1997.

6. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Prison inmates also retain other rights. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (finding right to be free from cruel and unusual punishment); Cruz v. Beto, 405 U.S. 319, 321-23 (1972) (per curiam) (reaffirming right to freedom of religion); Johnson v. Avery, 393 U.S. 483, 485 (1969) (finding a right to petition the government for redress of grievance and the right of access to the courts); *Ex parte* Hull, 312 U.S. 546, 642 (1941) (holding that incarceration does not deprive prisoners of their right of access to courts).

7. Tracy McMath, Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection From Body Cavity Searches?*, 56 U. CIN. L. REV. 739, 739 (1987). *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95-97 (1987) (holding that although prisoners retain the fundamental right to marriage, this right is subject to limitations as a result of incarceration); *Wolff*, 418 U.S. at 555-56 (restating that prisoners' due process rights are not stripped with incarceration, subject to restrictions consistent with the legitimate administration of prisons); Pell v. Procunier, 417 U.S. 817, 827-28 (1974) (determining that regulation preventing media representatives from selecting particular inmates to interview and forbidding prisoners from initiating interviews did not unconstitutionally infringe prisoners' First Amendment rights); Lee v. Washington, 390 U.S. 333, 334 (1968) (holding that prisoners only retain rights that do not interfere with penal interests).

the conventional wisdom that this diminution of constitutional rights is part of a prisoner's punishment for criminal activity.

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. . . . [A] corollary of this principle is that a prison inmate retains those . . . rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[8]

Despite prisoners' retention of certain constitutional rights, federal courts have been hesitant to interfere with the administration of prisons.[9]

A prison regulation unreasonably encroaches upon a prisoner's constitutional rights if it is not reasonably related to the legitimate administration of the prison.[10] In *Turner v. Safley*,[11] the U.S. Supreme Court articulated a formula to evaluate the reasonableness of penological interests.[12] According to the *Turner* test, four factors are relevant in this determination, including (1) whether a rational connection exists between the prison regulation and the legitimate state interest; (2) whether alternative means are available for the prisoners to exercise their rights;[13] (3) the impact of accommodating the prisoner's exercise of these rights on other prisoners, guards, and the allocation of prison resources generally; and (4) the existence of alternate means of achieving the penal interest.[14]

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8. *Pell*, 417 U.S. at 822 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

9. Lawrence M. Reich & Ethan E. Litwin, *Substantive Rights Retained by Prisoners*, 85 GEO. L.J. 1561, 1561 (1997); *see* Sandin v. Conner, 115 S. Ct. 2293, 2299 (1995) (asserting "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Turner*, 482 U.S. at 85 (stating that the separation of powers doctrine should caution judicial intervention in prison administration, an area traditionally governed by the state legislative and executive branches); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (holding that courts should exercise judicial discretion rather than assuming that prison administrators are insensitive to prisoners' constitutional rights).

10. *Turner*, 482 U.S. at 89; *see also* Reich & Litwin, *supra* note 9.

11. 482 U.S. 78 (1987).

12. *Turner*, 482 U.S. at 89-91; *see also* Reich & Litwin, *supra* note 9.

13. The Court rejected a "least restrictive alternative" test where prison officials would be required to "set up and then shoot down every conceivable alternative method of accommodating" the prisoner's asserted right. *Turner*, 482 U.S. at 90-91; *accord* Thornburgh v. Abbott, 490 U.S. 401, 401-14 (1989) (adopting the *Turner* reasonableness standard, as opposed to the least restrictive alternative test, for regulations restricting inmates' receipt of publications).

14. *Turner*, 482 U.S. at 89-90.

II. CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT[15]

A. *Background*

Alexis de Tocqueville toured an American prison in the late 1800s and "found half of the prisoners chained in irons, and the rest plunged into an infectious dungeon."[16] De Tocqueville's observations are a vivid example of the history of brutality in American prisons.[17] Judicial intervention began a new era of refining Eighth Amendment rights.[18]

The Supreme Court has yet to articulate a precise test by which conditions of confinement are cruel and unusual.[19] The Court, however, has indicated that "the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime. . . . Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'"[20] The Eighth Amendment, drawing its meaning from "the evolving standards of decency that mark the progress of a maturing society,"[21] dictates that conditions of confinement must not result in a serious deprivation of basic human needs.[22] Unfortunately, the Supreme Court never clearly indicated which needs are identifiable human needs.[23]

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15. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

16. Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175 (1997).

17. *Id.*

18. *Id.* at 1178-80.

19. *See* Rhodes v. Chapman, 452 U.S. 337, 377 (1981).

20. *Id.* at 346 (quoting Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976), Coker v. Georgia, 433 U.S. 584, 592 (1977), and Weems v. United States, 217 U.S. 349 (1910), respectively); *see also* Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (quoting Battle v. Anderson, 564 F.2d 388, 393 (10th Cir. 1977)). The court in *Ramos* stated:

> [T]he Eighth Amendment . . . is, inter alia, intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental . . . . [W]hile an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being.

Ramos, 639 F.2d at 566 (quoting *Battle*, 564 F.2d at 393).

21. *Rhodes*, 452 U.S. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

22. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

23. Nasheri, *supra* note 16, at 1181-82. The Supreme Court has explained that the Constitution does not mandate comfortable prisons. *Wilson*, 501 U.S. at 298; *see also* Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 434 (1995). The Court has further explained that only those deprivations which deny the minimal civilized measure of life's necessities are sufficiently grave to support an Eighth Amendment claim. *Wilson*, 501 U.S. at 298; *Rhodes*, 452 U.S. at 347; *see also* Bukowski, *supra*. Identifiable human needs include food, warmth, and exercise. *Wilson*, 501 U.S. at 298; *see also* Bukowski, *supra*. However, because prison conditions are allowed to be unpleasant and even

Prior to the 1960s, courts followed the "hands-off" approach when addressing problems within prisons and jails.[24] The "hands-off" doctrine provided that the administration of prisons should be left entirely up to the unrestrained authority of correctional facilities' administrators and staff.[25] The "hands off" doctrine was not so much a rule of law as it was a policy of judicial hesitation to interfere in the internal administration of prisons.[26] Eventually, however, courts began to crack down on prison officials by identifying and protecting inmates' constitutional rights.[27] Through judicial intervention in the 1960s and 1970s, the courts re-established control over the prisons and jails.[28] This period between the 1960s and 1970s came to be known as the Rights Period for its focus on prisoners' rights.[29]

During the Rights Period, the "deliberate indifference" standard became the governing standard for prisoners' Eighth Amendment claims.[30] Because inmates rely on prison officials to provide their basic human needs, a prison official's "deliberate indifference" to any identifiable human need may result in violation of the prisoner's Eighth Amendment rights.[31] The Supreme Court first articulated the Eighth Amendment standard of "deliberate indifference" in *Estelle v. Gamble*.[32]

In *Estelle*, the prisoner complained that he was subjected to cruel and unusual punishment because he received inadequate treatment for a back

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harsh, as they are part of the penalty that criminal offenders pay for their violations of the law, a court should defer to legislative determination of the States to determine what conditions their prisons must conform. *Rhodes*, 452 U.S. at 347; *see also* Bukowski, *supra*, at 434-35.

24. *See* Jack Call, *The Supreme Court and Prisoner's Rights*, 59 FED. PROBATION 36, 36 (1995).

25. *See id.* Deference to prison officials was thought necessary to preserve separation of powers between the branches of government.

26. Sanabria, *supra* note 3, at 1134. This judicial hesitation was described in *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951), where the court stated, "[w]e think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *Stroud*, 187 F.2d at 851-52.

27. *See* Nasheri, *supra* note 16, at 1178. The lack of publicity from behind prison walls allowed prison officials relative ease in depriving prisoners of their rights. *Id.* at 1176.

28. *Id.* at 1178-79. The courts began to scrutinize prison conditions more closely in an effort to minimize deplorable conditions of confinement. *See* Sanabria, *supra* note 3, at 1135. The Supreme Court expanded the Eighth Amendment far beyond the scope that it had during the hands off period. *Id.*

29. *See* Call, *supra* note 24. *But see* Nasheri, *supra* note 16, at 1178-79 (indicating that the Rights Period occurred during the tenure of Chief Justice Earl Warren on the United State Supreme Court). Justice Warren was on the Court from 1953 to 1969. Ralph Adam Fine, Book Review, 70 WIS. LAW. 47, 47 (1997) (reviewing CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997)).

30. Nasheri, *supra* note 16, at 1181.

31. *See* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). "It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle*, 429 U.S. at 104 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)); *see also* Wilson v. Seiter, 501 U.S. 294, 302 (1991).

32. 429 U.S. 97 (1976).

injury allegedly sustained while doing prison work.[33] To establish an unconstitutional denial of medical care, the Court determined that a prisoner must prove "deliberate indifference to [his] serious medical needs."[34] A prison official exhibits "deliberate indifference" if she knows that an inmate "face[s] substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[35] This interpretation alleviates the prisoner's need to show intent and comes close to equating "deliberate indifference" with negligence on the culpability continuum.[36] Some courts, however, enforced a stricter standard by equating "deliberate indifference" with recklessness.[37]

Thus, courts identified two major levels of neglect in defining "deliberate indifference." At the first level, tortiously reckless conduct defines "deliberate indifference."[38] Tortious recklessness is a heightened form of negligence similar to criminal recklessness.[39] To demonstrate the prison official's deliberate indifference, an inmate must show that the prison official entertained an appreciation of the high degree of risk resulting from their action or inaction.[40]

The second level finds "deliberate indifference" when conduct is criminally reckless.[41] Under this characterization, prison officials must

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33. *Estelle*, 429 U.S. at 98.

34. *Id.* at 104.

35. Farmer v. Brennan, 511 U.S. 825, 847 (1994).

36. Nasheri, *supra* note 16, at 1181.

37. *Id.* The Second Circuit, in assessing deliberate indifference, has held that recklessness is some proof of the requisite degree of intent to cause harm, although an express intent to inflict unnecessary pain is not required to prove deliberate indifference. *See* Hendricks v. Coughlin, 942 F.2d 109, 112 (2d Cir. 1991) (finding an Eighth Amendment claim existed when an inmate was drenched with scalding water while in special housing unit despite requesting a transfer rather than release into general prison population due to threats from another inmate).

38. *See* Wright v. Jones, 907 F.2d 848, 851 (8th Cir. 1990).

39. Nasheri, *supra* note 16, at 1183.

40. *Id.* A number of courts have recently held that the deliberate indifference standard may be met by proof of repeated negligent acts. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1506 (11th Cir. 1991) (stating that prisoners can establish prison officials' deliberate indifference to their medical needs by showing repeated negligent acts).

41. Criminal recklessness is found when

> A person acts recklessly with respect to a material element of an offense when [s]he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his [or her] conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to his[or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

BLACK'S LAW DICTIONARY 1270 (6th ed. 1990). *Compare* Miltier v. Beorn, 896 F.2d 848, 852-53 (4th Cir. 1990) (finding deliberate indifference when three doctors ignored a prisoner's complaints of chest pains, blackouts and shortness of breath, and the prisoner consequentially died from a heart attack), *and* Estate of Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) (identifying deliberate indifference when prison officials failed to give an inmate liquid diet supplements when the inmate was unable to ingest solid foods), *with* Banuelos v. McFarland, 41 F.3d 232, 234 (5th Cir. 1995) (finding no deliberate indifference when a prisoner with an ankle injury was forced to work in hard-soled boots after an x-ray came back negative for fracture or break), *and* Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994) (finding no deliberate indifference when prison officials transported an

have actual knowledge of the high degree of risk resulting from their action or inaction.[42] Criminal recklessness and intentional conduct are parallel in this formulation because an inmate must demonstrate that the prison official was aware of the high risk present and, despite this awareness, deliberately continued in his action or inaction.[43]

The Rights Period of the 1960s and 1970s found the courts inundated with prisoner complaints.[44] Consequently, the courts began to abandon their commitment to protecting prisoners' rights in hopes of freeing up the dockets.[45] The Court thus returned to a more conservative, "hands off" approach to prisoners' rights.[46]

The Court's modern approach to prison litigation began in 1979.[47] In *Bell v. Wolfish*,[48] the Supreme Court held that prison policies should not be questioned so long as they are rationally related to a correctional institution's legitimate goals.[49] *Bell* involved body cavity searches of inmates which were required after every contact visit with a person from outside of the institution.[50] Prison administrators identified the penal interest for the searches as the prevention and deterrence of the smuggling of contraband.[51] The Court reversed the holdings of the lower courts and held that the interest in prison security was of paramount importance and

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inmate to a medical center within two hours of the inmate noticing blood in urine and the inmate was unable to offer proof of harm from delay).

42. Nasheri, *supra* note 16, at 1182-83.

43. *Id.*

44. *Id.* at 1188.

45. Herbert A. Eastman, *Draining the Judicial Swamp: An Examination of Judicial and Congressional Policies Designed to Limit Prisoner Litigation*, 20 COLUM. HUM. RTS. L. REV. 61, 71-73 (1988).

46. Nasheri, *supra* note 16, at 1188. Most recently, Congress passed the Prison Litigation Reform Act (P.L.R.A.) on April 26, 1996 to address the alarming explosion in the number of frivolous lawsuits filed by state and federal prisoners. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996); *see also* 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole introducing the P.L.R.A. in the Senate). "The P.L.R.A. announced a comprehensive restructuring of remedies available to prisoners in state and federal courts . . . ." Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1189 (1997). Section 803(e) of the P.L.R.A. provides that: "No Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." P.L.R.A. § 803(e), 28 U.S.C.A. § 1346(b)(2) (West Supp. 1997); *see also* P.L.R.A. § 806, 28 U.S.C.A. § 1346(b)(2) (West Supp. 1997). Although the P.L.R.A. was enacted just prior to the start of the 1996-97 survey period, few courts have interpreted the statute. Those that have already vary in their interpretation of the level of injury required. O'Bryan, *supra*, at 1213. Legal scholars have questioned the intent of the requirement of a physical injury. *Id.* at 1224. Their concern is that the physical injury requirement may prevent legitimate claims. *Id.*

47. Call, *supra* note 24, at 38.

48. 441 U.S. 520 (1979).

49. *Wolfish*, 441 U.S. at 539.

50. *Id.* at 558.

51. *Id.*

therefore outweighed the inmates' interests in being free from such procedures.[52]

In *Rhodes v. Chapman*,[53] the Supreme Court further restricted the circumstances under which a prisoner may seek relief for his grievances. The Court reviewed a prisoner's claim that "double celling"[54] inmates was cruel and unusual punishment.[55] Without conducting an inquiry into the prison official's state of mind, as in *Estelle*, the Court determined the prison officials had not inflicted "unnecessary or wanton pain."[56] Considering the objective seriousness of the alleged deprivation, the Court acknowledged that conditions of confinement, "alone or in combination," may amount to deprivation of an inmate's basic necessity, so as to constitute a violation of the Eighth Amendment.[57] In this case, however, the Court concluded that no constitutional violation occurred.[58]

During the most recent Deference Period[59] the courts tightened the application of the "deliberate indifference" standard in cases where prisoners claimed that prison conditions violated the Eighth Amendment's Cruel and Unusual Punishment Clause.[60] In *Wilson v. Seiter*,[61] the prisoner alleged that the conditions of his confinement[62] violated his Eighth Amendment rights.[63] *Wilson* extended the "deliberate indifference" standard to Eighth Amendment attacks on prison conditions by identifying two requirements that a prisoner must satisfy: a subjective prong and an objective prong.[64] The subjective prong requires evidence that the prison official acted with a culpable state of mind and was deliberately indifferent to the inmate's health or safety.[65] The prisoner must satisfy the objective prong by demonstrating a sufficiently serious deprivation.[66] Justice Scalia, writing for the majority, reasoned that *Estelle* established the basis for the subjective part of the test and that *Rhodes* was the basis for the

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52. *Id.* at 560.

53. 452 U.S. 337 (1981).

54. "Double celling" is putting more than one prisoner in each cell, which measures only sixty-three square feet. *Rhodes*, 452 U.S. at 340.

55. *Id.*

56. *Id.* at 348.

57. *Id.* at 352.

58. *Id.* at 347.

59. The Deference Period saw courts return to a hands-off approach when considering prisoners' claims. The courts recognized that prison administrators were in a better position to operate penal institutions than the judiciary. Call, *supra* note 24, at 38-39.

60. Nasheri, *supra* note 16, at 1191. For a discussion of the Prison Litigation Reform Act, see *supra* note 46.

61. 501 U.S. 294 (1991).

62. The prisoners alleged overcrowding, excessive noise, inadequate heating, cooling, and ventilation, insect infestation, insufficient storage space, unsanitary eating conditions, unsanitary restrooms, and being housed with mentally and physically ill prisoners. *Wilson*, 501 U.S. at 296.

63. *Id.*

64. *Id.* at 298.

65. *Id.*

66. *Id.*

objective component.[67] The Court then remanded the case for reconsideration under the two-prong "deliberate indifference" standard.[68]

The Supreme Court's decision in *Wilson* became a landmark for reinstituting a policy of deference to prison administrators.[69] By defining "punishment" narrowly, the Court effectively placed prison conditions outside the scope of the Eighth Amendment and limited the Court's role in prison reform.[70] The majority argued that an implicit intent requirement must be satisfied to show a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[71] Justice Scalia further articulated that, by definition, "punishment" involves a "deliberate act intended to chastise or deter."[72] Thus, *Wilson* provided that a prisoner making an Eighth Amendment challenge to prison conditions must demonstrate that prison officials acted with at least deliberate indifference, regardless of whether the conduct was intentionally directed at the prisoner, or whether it was a result of the general prison conditions.[73]

In *Farmer v. Brennan*,[74] the Supreme Court further refined this standard. The Court found that liability attaches to prison officials under the "deliberate indifference" test only when the officials knew that an inmate faced substantial risk of serious harm and then did not take reasonable measures to diminish it.[75] The Court renounced a purely objective test for determining liability. Instead, the Court applied subjective recklessness.[76] In addition, the subjective *Farmer* test does not require an inmate who requests refuge from threatening circumstances to await trauma before receiving relief.[77] Writing for the majority, Justice Souter indicated that a

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67. *Id.*

68. *Id.* at 306.

69. *Cruel and Unusual Punishments Clause—Prison Conditions:* Wilson v. Seiter, 105 HARV. L. REV. 235, 236 (1991).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 511 U.S. 825 (1994).

75. *Farmer*, 511 U.S. at 830-31, 849 (remanding an Eighth Amendment claim charging prison officials with deliberate indifference when they placed a transsexual inmate, whose behavior reflected many feminine characteristics, in the general male prison population, and who was subsequently beaten and raped by another inmate).

76. *Id.* at 835-36. *Compare* DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) (finding deliberate indifference when prison officials state of mind indicated recklessness because they had knowledge of impending harm which would have been preventable), *with* Thomas v. Farley, 31 F.3d 557, 558-59 (7th Cir. 1994) (finding no deliberate indifference when secretary negligently left prisoner's authorization to attend mother's funeral on desk).

77. *Farmer*, 511 U.S. at 837 (quoting Helling v. McKinney, 509 U.S. 25, 33-34 (1993)); *see also* Sarah Botz & Robert C. Scherer, *Substantive Rights Retained by Prisoners*, 84 GEO. L.J. 1465, 1479 (1996).

prisoner may fulfill the subjective intent requirement by proving that the risk of harm was obvious.[78]

The Tenth Circuit has relied on Supreme Court precedent in determining Eighth Amendment violations by prison officials.[79] In the following cases, the Tenth Circuit adopted the subjective test of the "deliberate indifference" standard requiring the prison guard's actual knowledge of a substantial risk, and subsequent disregard of that known risk.

B. *Tenth Circuit Decisions*

1. *Northington v. Marin*[80]

a. *Facts*

In February 1990, Northington was serving a sentence at the Denver County Jail that allowed him to leave the jail to work for a painting company.[81] A deputy at the jail sold Northington a truck, despite a regulation forbidding deputies from engaging in business relationships with inmates.[82] As a result of the deputy's conduct, internal affairs conducted an investigation in which Northington cooperated, ultimately leading to the dismissal of the deputy.[83] Northington alleged that Deputy Marin, an internal affairs investigator, "assaulted and threatened him to obtain his cooperation."[84] He also alleged that Deputy Marin labeled him as a snitch in the prison population, causing other inmates to assault him.[85] Northington based his claims on the Eighth Amendment.[86] The district court entered judgment against Deputy Marin and the Tenth Circuit affirmed.[87]

b. *Decision*

The Tenth Circuit held that under the Eighth Amendment, liability extends to a prison official for denying an inmate humane conditions of confinement if the official knows of and disregards a substantial risk of serious harm to the inmate.[88] The court rejected Deputy Marin's argument that the evidence did not support liability under the Eighth

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78. *Farmer*, 511 U.S. at 842.

79. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (addressing the right to be free from sexual harassment in prison); Supre v. Ricketts, 792 F.2d 958, 962-63 (10th Cir. 1986) (determining that prison administrators are not required to administer estrogen as a particular treatment, but do have a duty to address the medical needs of transsexual prisoners).

80. 102 F.3d 1564 (10th Cir. 1996).

81. *Northington*, 102 F.3d at 1566.

82. *Id.* at 1566-67.

83. *Id.* at 1567.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

Amendment.[89] The court relied on Marin's acknowledgment that it was probable that if he spread a rumor that an inmate was a snitch, that prisoner would likely be beaten by other inmates.[90] Adopting the magistrate's finding, the court concluded that Marin knew that spreading such a rumor placed Northington in serious jeopardy of assault by other inmates.[91] Denying Marin's claim that his motivation was to protect other inmates from being labeled snitches by association, the court asserted that an "intent to protect other inmates is not inconsistent with a knowing disregard of a substantial risk to Northington's safety."[92]

2. *Green v. Branson*[93]

a. *Facts*

Green filed suit against the warden, physicians, and guards employed at the Oklahoma State Penitentiary alleging prison beating and wrongful medical treatment which occurred in 1993.[94] Green was an inmate at the Oklahoma State Penitentiary when a fight erupted between him and several prison guards.[95] The cause of the fight was in dispute.[96] After the fight, Green returned to his cell and asked for medical attention for his injuries resulting from the fight.[97] According to Green, Warden Reynolds was aware of the beating, but took no action.[98] Additionally, Green claimed that the prison physician "refused to treat his injuries and falsified medical documents to help cover up the beating."[99] The district court granted summary judgment for the prison officials and the court of appeals reversed on Green's Eighth Amendment claims.[100]

b. *Decision*

The Tenth Circuit addressed Green's excessive force claim and held that "[a] prison guard's use of excessive force is not a violation of the Eighth Amendment if it is 'applied in a good faith effort to maintain or

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1567-68.
93. 108 F.3d 1296 (10th Cir. 1997).
94. *Green*, 108 F.3d at 1298.
95. *Id.*
96. *Id.* at 1299. According to Green, he was seeking legal information from another inmate when a prison guard became impatient and beat him with a stick. *Id.* The prison guard, however, claimed that Green initiated the altercation by hitting him with his handcuffs and then falling on top of him. Green claims that two other prison guards joined the first in kicking, stomping on, and punching him, and then dragged him by his handcuffs to his cell. *Id.* The guards denied using any unnecessary force, only that which was needed to subdue Green after his attack on the first guard. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1305-06.

restore discipline,' as opposed to being applied 'maliciously or sadistically for the very purpose of causing harm.'"[101] The court asserted that penal institutions should be given deference when reviewing a claim for use of excessive force.[102] The court also held that unless it appeared, when viewing the evidence in the light most favorable to the plaintiff, that there was a wanton infliction of pain, the case should not go to the jury.[103]

In *Green*, a material fact was the question of whether Green provoked the fight with the prison guards. The guards claimed that Green's alleged provocation of the fight was the reason that the guards used force to subdue him.[104] The court laid out the parameters for the standard of an Eighth Amendment claim:

> Where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." . . . "[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,". . . are relevant to that ultimate determination.[105]

The Tenth Circuit held that absence of serious injury[106] was not the deciding factor in determining whether the force inflicted was wanton, and remanded the issue to be determined by the trier of fact.[107]

In addition, the court considered Green's claim that the warden should be held liable for Green's alleged mistreatment and deliberate lack of medical care following his fight with the prison guards.[108] The Tenth Circuit applied the standard that a supervisor's liability is dependent on his "deliberate indifference," rather than mere negligence.[109] Therefore, to be liable, the warden must have known that he was creating a "substantial risk of bodily harm" to Green.[110] Green must prove that "an 'affirmative link' existed between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or

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101. *Id.* at 1300 (quoting Whitley v. Albers, 475 U.S. 312, 320-21(1986)).

102. *Id.*

103. *Id.* at 1301.

104. *Id.*

105. *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) and Whitley v. Albers, 475 U.S. 312, 320-21 (1986) respectively).

106. The absence of serious injury would be relevant to an Eighth Amendment claim. *Id.* at 1302. See *supra* note 46 for a discussion of the P.L.R.A.'s requirement of physical injury.

107. *Green*, 108 F.3d at 1302.

108. *Id.*

109. *Id.*

110. *Id.*

direction, or his failure to supervise.'"[111] The court held that Green met this burden.[112]

Finally, the Tenth Circuit applied the same "deliberate indifference" reasoning to the prison doctor and his supervisor.[113] The court determined that falsification of medical data involves plainly deliberate action and inaction of a culpable nature, and therefore reversed the summary judgment ruling with respect to the treating physician.[114] However, the court upheld summary judgment with respect to the supervising physician because an affirmative link did not exist between the constitutional deprivation and his failure to supervise.[115]

3. *Barrie v. Grand County Utah*[116]

a. *Facts*

Ricks was arrested in Grand County, Utah on October 26, 1991, and placed in the jail's "drunk tank" after the deputy noted that Ricks had been drinking alcohol.[117] Ricks was permitted to retain possession of the clothing he was wearing at the time of his arrest, which included sweat pants with a 38-inch long cord to cinch the waist.[118] Despite deputies making two routine cell checks of Ricks's cell without incident, during a third check deputies found that Ricks had committed suicide by hanging himself with the sweat pants' draw cord.[119]

Barrie, as personal representative of Ricks's estate, alleged that Deputies Walker and Neal subjected Ricks to "unreasonable conditions of confinement" which violated the Eighth Amendment.[120] In addition, Barrie asserted that Ricks's family had a liberty interest under the Fifth and Fourteenth Amendments "in the continued care, comfort and society of their father and son respectively"[121] which had been violated by the "gross negligence and callous indifference of the defendants."[122]

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111. *Id.* (quoting Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988)); *see also* Langley v. Adams County, 987 F.2d 1473, 1481 (10th Cir. 1993).

112. *Green*, 108 F.3d at 1303.

113. *Id.*

114. *Id.* at 1304.

115. *Id.* (quoting *Meade*, 841 F.2d at 1527).

116. 119 F.3d 862 (10th Cir. 1997).

117. *Barrie*, 119 F.3d at 863.

118. *Id.*

119. *Id.* at 863-64.

120. *Id.* at 864.

121. *Id.*

122. *Id.*

b. *Decision*

The Tenth Circuit noted that the treatment of claims based on a jail suicide is the same as claims based on the failure of prison administrators to provide adequate medical care for those in their custody.[123] In its Eighth Amendment analysis, the court applied the same constitutional protection against deliberate indifference to the medical needs of pretrial detainees as it did to convicted felons.[124]

Finally, the Tenth Circuit addressed the behavior that amounts to "deliberate indifference." Quoting *Estelle v. Gamble*,[125] the court concluded that indifference to serious medical needs of prisoners met the "unnecessary and wanton infliction of pain" standard.[126] The court further determined that the degree of fault required was "deliberate indifference" to a known or obvious risk, and in this case, the defendant's conduct did not rise to that level.[127]

C. *Other Circuits*

When defining "deliberate indifference," other circuits have applied the same test established by the Supreme Court. Initially the courts have evaluated whether there exists a showing of punishment that is an objectively, sufficiently serious risk to the prisoner. To meet this burden, the prisoner must show that prison officials possessed a sufficiently culpable state of mind, in that they knew of, yet disregarded, the serious risk to the inmate's health or safety.

The Second and Fifth Circuits considered Eighth Amendment claims from prisoners who had been sexually assaulted. The Second Circuit in *Boddie v. Schnieder*,[128] recognized that severe or repetitive sexual abuse of an inmate by a prison official "has no legitimate penological purpose, and is 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"[129] However, the court held that isolated episodes of harassment and touching were not severe enough to be objectively, sufficiently serious to constitute an Eighth Amendment

123. *Id.* at 866; *see* Poham v. City of Talladega, 908 F.2d 1561, 1563 (11th Cir. 1990) ("Because jail suicides are analogous to the failure to provide medical care, deliberate indifference has become the barometer by which suicide cases involving convicted prisoners as well as pretrial detainees are tested.").

124. *Barrie*, 119 F.3d at 866-67.

125. 429 U.S. 97 (1976).

126. *Barrie*, 119 F.3d at 869 (quoting *Estelle*, 429 U.S. at 104).

127. *Id.*

128. 105 F.3d 857 (2d Cir. 1997). Specifically, Boddie claimed that a female prison official made a statement that he believed to be "a pass" at him. *Boddie*, 105 F.3d at 859. In addition, he claimed that the prison official squeezed his hand, touched him inappropriately, and said, "[y]ou know your [sic] sexy black devil, I like you." *Id.* at 859-60. Finally, Boddie alleged that the prison official ordered that he take off his sweatshirt and that she rubbed against him pressing her body hard against his chest. *Id.* at 860.

129. *Id.* at 861 (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)).

violation.[130] The Fifth Circuit determined that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."[131]

The Third Circuit stated that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[132] The Third Circuit asserted that a Department of Corrections chairperson was aware of a substantial risk to a prisoner's safety when she reviewed the multi-disciplinary team's unanimous recommendation to place the prisoner in protective custody.[133] Relying on *Farmer*, the Third Circuit explained the type of circumstantial evidence sufficient to support a finding of actual knowledge on the part of the prison official.

> [I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.[134]

The court concluded that the circumstantial evidence of record in the pending case was essentially identical to the *Farmer* case.[135] Therefore, because the prison official's actions met the second prong of the *Farmer* test, he violated the prisoner's Eighth Amendment rights by failing to act to ensure the prisoner's safety.[136]

The Fourth Circuit held that an Eighth Amendment claim based on a deprivation of medical attention is valid only if the medical need of the prisoner is serious.[137] The court explained that "society does not expect that prisoners will have unqualified access to health care."[138] The court determined that the pharmacy's failure to deliver the medicine did not

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130. *Id.*

131. Downey v. Denton County, 119 F.3d 381, 385-86 (5th Cir. 1997). The court concluded that an inmate who was sexually assaulted by an employee of the county sheriff's department, and as a result had a child, failed to show that the sheriff was deliberately indifferent when the inmate and the employee were left alone for close to two hours in an unmonitored and unsupervised room. *Id.* at 386.

132. Hamilton v. Leavy, 117 F.3d 742 (3d Cir. 1997) (quoting Rhodes v. Chapman, 452 U.S. 337, 345 (1981)).

133. *Id.* at 747.

134. *Id.* (quoting Farmer v. Brennan, 511 U.S. 825, 842-43 (1994)).

135. *Id.* at 748.

136. *Id.*

137. Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589, 609 (4th Cir. 1997) (considering claims from disabled prisoners).

138. *Id.* at 610.

amount to deliberate indifference to the prisoner's medical needs because "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[139]

The Seventh Circuit relied on criminal recklessness as the standard to determine "deliberate indifference."[140] The court stated that "[m]ere negligence or even gross negligence does not constitute deliberate indifference."[141] In holding that the removal of an inmate's toenail, without local anesthetic, did not constitute cruel and unusual punishment, the court explained that "the Eighth Amendment is not a vehicle for bringing claims for medical malpractice."[142]

The Seventh Circuit also recognized that claims brought based on the deprivation of medical attention may only be valid if the medical condition is sufficiently serious.[143] In *Gutierrez*, an inmate brought an action claiming he received inadequate medical attention for an infection.[144] The Seventh Circuit analyzed several of its sister circuits' definitions of "sufficiently serious" in the Eighth Amendment medical care context and recognized that, although a condition did not have to be life-threatening, a mere ache or pain would not support an Eighth Amendment claim.[145]

Finally, the Seventh Circuit addressed the question of whether a federal prisoner may bring an Eighth Amendment claim against prison officials where the prisoner showed no physical harm.[146] The court held

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139. *Id.* at 612.

140. *See* Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996).

141. *Id.* at 590.

142. *Id.*

143. *See* Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

144. *Id.* at 1365.

145. *Id.* at 1371-72. Specifically, the court considered the following formulation: "A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* at 1373 (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977)). The court also considered the Ninth Circuit's formulation for when a "serious" medical condition exists: when "the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* (quoting McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992)). Finally, the court contemplated the Ninth Circuit's formulation for indications that a prisoner has a serious medical need: "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d at 1059-60; *see, e.g.*, Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 18 (1st Cir. 1995) (holding that prison officials cannot be held liable for failing to adjust its policy to accommodate a "serious medical need" of which it was not made aware); Hill v. Dekalb Reg'l Youth Detention Ctr., 40 F.3d 1176, 1186 (11th Cir. 1994) (deciding that a county in which a prison exists cannot be held responsible for a prison's alleged unreasonable delay in providing medical attention when it is not shown that the county had any control over the institution).

146. *See* Babcock v. White, 102 F.3d 267 (7th Cir. 1996). The prisoner had been stabbed seven times in an attack by a gang inside of the prison. *Id.* at 268. When he was transferred to a new facility, he discovered that he had not escaped the reaches of the gang. *Id.* The court considered principles of tort law to establish the duty that prison officials owe to their inmates. *Id.* at 271. Because

that despite the prisoner's fear of physical harm, prison officials had not violated the Eighth Amendment rights of a prisoner when no harm was inflicted and there was no indication of malice on the part of prison officials.[147]

The Eighth Circuit found that a serious medical need is one that a lay-person could easily identify as requiring a doctor's attention.[148] The court held that although a woman's pregnancy generally does not meet the sufficiently serious standard, evidence of previous rapid labors and premature deliveries indicative of pre-term labor, would be recognizable to a lay-person as requiring a doctor's attention.[149] The court paralleled the Seventh Circuit in its analysis of the subjective component of an Eighth Amendment claim, holding that a prison official's culpable mental state may be inferred from circumstantial evidence or from the fact that the risk was obvious.[150]

D. *Analysis*

In *Northington*, the Tenth Circuit, without lengthy discussion, followed Supreme Court precedent by applying the *Farmer* test.[151] The court acknowledged that a prisoner was not required to show malicious or wrongful intent to support liability, as long as evidence is introduced showing that prison officials knew of, and disregarded, a substantial risk of serious harm to the inmate.[152] The court's brevity demonstrates its easy acceptance of the well-established *Farmer* standard.[153] However, the court failed to discuss the prison official's alternatives with respect to the other inmates when noting that the prison official's intent to protect other inmates from being labeled snitches by association is not inconsistent with a knowing disregard of a substantial risk to the plaintiff-prisoner's safety. A prison official has a duty to protect all inmates under his supervision. The court left unanswered what a prison official should do when the means necessary to protect one or a group of inmates comes at the expense of possibly endangering another inmate. The court's absence of discussion about the prison official's options for protecting inmates' competing interests leaves no guidance for prison officials in such a situation. By not providing guidelines, the court invites abuse by prison administrators who choose to exploit the power structure established for prison security.

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there had not been a breach of the duty to protect, in that no harm materialized, the court held that an Eighth Amendment claim could not stand. *Id.* at 273.

147. *Id.* at 267.

148. Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997).

149. *Id.* at 785.

150. *Id.* at 786.

151. Northington v. Marin, 102 F.3d 1564, 1567 (10th Cir. 1996).

152. *Id.* at 1567.

153. *Id.* at 1567-68.

In *Green*, the Tenth Circuit followed Supreme Court precedent and carefully applied the two-prong test established in *Farmer*.[154] However, by concluding that the doctor exhibited deliberate indifference to the prisoner's serious medical needs, the court did not provide a discussion on the defining standard for a "serious" medical condition. The court duplicated the list of claimed injuries from the plaintiff's complaint, and held that a refusal to provide medical attention, along with falsification of medical records, may amount to an Eighth Amendment violation. Therefore, although the court explained that the falsification of medical records is highly suggestive of a culpable mental state, it fell short in dictating guidelines for the first prong of the analysis.

In *Northington* and *Green*, the court appeared conscious of the risks involved to inmates when courts defer to prison administrators. The administrations' close contact with inmates creates an atmosphere inviting direct abuses by prison officials, resulting in denial of inmates' basic constitutional rights.[155] When prison administrators are permitted to operate with little judicial scrutiny, they are left with wide discretion.[156] Prison administrators left with wide discretion could easily abuse their power and punish inmates by, for example, placing them in solitary or maximum confinement, preventing them from having visitors, and revoking their playground time.[157]

For purposes of an Eighth Amendment claim for denial of medical attention, the *Barrie* court established that there is no difference between a pre-trial detainee and an inmate in a correctional facility, and adhered to its earlier decisions rejecting the Seventh Circuit's meaning of deliberate indifference. Though courts have struggled to attach a strict definition to deliberate indifference, the majority are consistent with the Tenth Circuit, finding "deliberate indifference" requires less than intentional or malicious infliction of injury.

The Tenth Circuit, although recognizing the importance of penal interests, appears to be firm in its position that prisoners retain important rights while incarcerated. The late 1990s are no longer a time when cruel and unusual punishment refers only to barbarous conditions. However, in an effort to divert a free flow of frivolous claims brought by prisoners, the court was careful to provide and thoroughly discuss the two prongs in the *Farmer* test.[158]

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154. Green v. Branson, 108 F.3d 1296, 1302-04 (10th Cir. 1973).

155. Nasheri, *supra* note 16, at 1177.

156. *Id.*

157. *Id.*

158. As evidenced by the history of the "deliberate indifference" standard, it is very difficult to apply. Michael Cameron Friedman, Comment, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 947 (1992). The terms "deliberate" and "indifference" are contradictory in nature. *Id.* "Deliberate" suggests conduct that is considered, planned, or premeditated while "indifference" on the other hand,

III. UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT[159]

A. *Background*

In 1919, the United States Supreme Court held that the Fourth Amendment entitles inmates to rights, though those rights may be minimal.[160] In subsequent years, the Court addressed which elements constitute a reasonable search and seizure for Fourth Amendment purposes.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for a particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[161]

Today, only the Seventh Circuit has boldly proclaimed that prisoners do not have privacy interests protected by the Fourth Amendment.[162]

The law regarding prisoners is constantly shaping. Although the Supreme Court established that prisoners retain some of their basic, fundamental rights while incarcerated, the lower federal courts have attempted to define more specifically those rights to which prisoners are entitled. In 1973, the Tenth Circuit upheld a prison's requirement that its inmates submit to rectal examinations by trained medical personnel prior to leaving and before returning to the prison.[163] The court identified the dangers of contraband smuggling as significant justification for its decision.[164]

In 1984, in *Hudson v. Palmer*,[165] the Supreme Court granted certiorari to determine whether a prisoner had a "reasonable expectation of privacy in his cell entitling him to the protection of the Fourth Amend-

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suggests the absence of concern or attention. *Id.*; *see* Howell v. Evans, 922 F.2d 712, 720 n.7 (11th Cir. 1991), *vacated pursuant to settlement* (describing the conceptually vague distinction between deliberate indifference and negligence).

159. The Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

160. Stroud v. United States, 251 U.S. 15, 21-22 (1919). In 1962, the Supreme Court reaffirmed its holding in *Stroud* and again recognized that convicted prisoners and pretrial detainees retain Fourth Amendment rights. Lanza v. New York, 370 U.S. 139, 143-44 (1962).

161. Bell v. Wolfish, 441 U.S. 520, 559 (1979); *see, e.g.*, United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757 (1966).

162. *See* Johnson v. Phelan, 69 F.3d 144, 150 (7th Cir. 1995).

163. *See* Daughtery v. Harris, 476 F.2d 292, 294-95 (10th Cir. 1973).

164. *Id.* at 294.

165. 468 U.S. 517 (1984).

ment against unreasonable searches and seizures."[166] The Court balanced the competing interests of an inmate's subjective expectation of privacy in his cell, and society's objective determination of the reasonableness of that expectation.[167] The Court concluded that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[168] In addition, the Court explained that a "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."[169]

In 1989, the Tenth Circuit considered whether a prison system had a legitimate penal interest in extracting a prisoner's blood for AIDS testing.[170] The court applied the *Turner* test to balance the intrusiveness of requiring a prisoner to submit to blood testing against the interests that the prison advanced for administering such a test.[171] The court concluded that a rational relationship existed between the prison's regulations and the blood test, and therefore it passed constitutional muster.[172]

Despite the express holding in *Hudson*, the Court entertained prisoners' challenges to body cavity searches in the prison setting.[173] In those searches, the Court refused to adopt a precise definition of "reasonableness" for Fourth Amendment purposes.[174] Instead, the Court considered the circumstances of each case and relied on balancing the "need for the particular search against the invasion of personal rights that the search entails."[175]

In 1995, the Tenth Circuit considered what constituted a random selection process for requiring inmates to provide urine samples for drug analysis.[176] In *Lucero*, the court held that correctional facilities may sam-

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166. *Hudson*, 468 U.S. at 519.

167. *Id.* at 525.

168. *Id.* at 525-26.

169. *Id.* at 527-28.

170. *See* Dunn v. White, 880 F.2d 1188, 1194-96 (10th Cir. 1989).

171. *Id.* at 1194-96. For a discussion of the Turner test, see *supra* notes 13-14 and accompanying text.

172. *Dunn*, 880 F.2d at 1194-96.

173. *See* Levoy v. Mills, 788 F.2d 1437, 1439 (10th Cir. 1986) (determining that *Hudson* does not subtract essentially from the requirement of reasonableness for body cavity searches set forth in *Wolfish*).

174. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

175. *Id.* at 559 (stating that "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place where it is conducted").

176. Lucero v. Gunter, 52 F.3d 874 (10th Cir. 1995).

ple and test inmates' body fluids when such sampling and testing reasonably related to a legitimate penological interest.[177]

In the following cases, the Tenth Circuit expands its prior holdings, allowing prison administrators to sample and test inmates' body fluids. In reaching its conclusions, the Tenth Circuit used a balancing test to weigh the minimal intrusion on Fourth Amendment interests against the legitimate government interests.[178]

B. *Tenth Circuit Decisions*

1. *Boling v. Romer*[179]

a. *Facts*

Plaintiff Boling challenged the constitutionality of a Colorado statute[180] requiring him, as an inmate whose convictions involved a sexual assault, to provide the state with DNA samples before his release on parole.[181] He also challenged the Department of Corrections' policies in implementing that statute.[182] The district court entered summary judgment against Boling and the Tenth Circuit held that the search and seizure was reasonable.[183]

b. *Decision*

In holding that testing and analysis of DNA from inmates' saliva and blood samples was reasonable, the court weighed a prisoner's diminished privacy rights, the minimal intrusion of saliva and blood tests, and the legitimate governmental interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner similar to the use of fingerprinting.[184] The Tenth Circuit was persuaded by similar cases in the Ninth and Fourth Circuits.[185] Although the

177. *Id.* at 874. The courts generally give deference to prison officials who can best balance the constitutional rights of prisoners against penal interests. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

178. *See supra* notes 12-14 and accompanying text.

179. 101 F.3d 1336 (10th Cir. 1996).

180. The statute provides:

> As a condition of parole, the board shall require any offender convicted of an offense for which the factual basis involved a sexual assault as defined in part 4 of article 3 of title 18, C.R.S., to submit to chemical testing of his blood to determine the genetic markers thereof and to chemical testing of his saliva to determine the secretor status thereof. Such testing shall occur prior to the offender's release from incarceration, and the results thereof shall be filed with and maintained by the Colorado bureau of investigation. The results of such tests shall be furnished to any law enforcement agency upon request.

COLO. REV. STAT. § 17-2-201(5)(g)(I) (1997).

181. *Boling*, 101 F.3d at 1338.

182. *Id.*

183. *Id.*

184. *Id.* at 1340.

185. *Id.*

court recognized that obtaining and analyzing DNA or saliva of an inmate was considered a search and seizure, the court nonetheless held that such a search was reasonable.[186]

2. *Schlicher v. Peters*[187]

a. *Facts*

In 1992, five Kansas state prisoners challenged the constitutionality of a Kansas statute allowing for collection of saliva and blood samples from certain convicted felons for use by the government to detect and deter recidivists from committing crimes.[188] After the district court entered an order upholding the constitutionality of the Kansas statute at issue, Schlicher was the only prisoner to appeal.[189]

b. *Decision*

Recognizing that the collection, analysis, and storage of saliva and blood as authorized by Kansas law constitutes a search and seizure within the meaning of the Fourth Amendment, the Tenth Circuit decided

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186. *Id.* The court considered *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), in which the Fourth Circuit rejected a Fourth Amendment challenge to a Virginia statute requiring convicted felons and prison inmates to submit to DNA testing for inclusion into a data base for use in future law enforcement. *Id.* at 302. The court in *Jones* asserted that, "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Jones*, 962 F.2d at 306. The *Boling* Court also harbored *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), in which the Ninth Circuit noted that, "[t]he information derived from the blood sample is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived." *Boling*, 101 F.3d at 1340 (quoting *Rise*, 59 F.3d at 1559). The *Rise* court also articulated that, "[o]nce a person is convicted of [a felony] . . . his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." *Rise*, 59 F.3d at 1560. The distinction between drawing a person's blood and rolling a person's finger through ink was not held to render the intrusion on Fourth Amendment rights from DNA testing violative. *Id.*

187. 103 F.3d 940 (10th Cir. 1996).

188. *Schlicher*, 103 F.3d at 941-42. In 1991, McColpin, a state prisoner, brought suit alleging that the defendants, acting under color of state law, violated their constitutional rights. *Id.* at 942. In 1992, Hutchcraft and Schlicher, both state prisoners, brought suit also alleging that defendants, acting under color of state law, were violating their constitutional rights. *Id.* By order of the district court, these three actions were consolidated. *Id.* The Kansas statute provides in relevant part:

> Collection of specimens of blood and saliva from certain persons; Kansas bureau of investigation, powers and duties. a) Any person convicted. . . of an unlawful sexual act as defined in subsection (4) of K.S.A. 21-3501, and amendments thereto, or an attempt of such unlawful sexual act or convicted . . . because [of murder in the first degree, murder in the second degree, incest, aggravated incest or abuse of a child] . . . regardless of the sentence imposed, shall be required to submit specimens of blood and saliva to the Kansas bureau of investigation in accordance with the provisions of this act, if such person is: 1) Convicted . . . of a crime specified in subsection (a) . . . ; 2) ordered institutionalized as a result of being convicted . . . of a crime . . . ; 3) convicted . . . of a crime specified in this subsection . . . and is presently confined as a result of such conviction . . . in any state correctional facility or county jail . . . .

KAN. STAT. ANN. § 21-2511 (1995).

189. *Schlicher*, 103 F.3d at 942.

that the search and seizure in this case were reasonable.[190] The court identified the important purpose of DNA testing used to create data banks to assist the government with solving past and future criminal acts.[191]

C. *Other Circuits*

The Ninth Circuit considered whether a visual body cavity search of a male prisoner, performed by female prison guards, as well as being watched by the guards while showering naked, violated the prisoner's Fourth Amendment rights.[192] In *Somers v. Thurman*, the court discussed *Bell*[193] and *Hudson*,[194] and declared that a convicted prisoner retains some reasonable expectations of privacy while in prison, particularly if the prisoner is forced to expose himself to guards of the opposite sex.[195]

D. *Analysis*

Critics have questioned whether, in reality, balancing is really balancing.[196] Instead of balancing competing interests, the Tenth Circuit merely examined whether requiring inmates to provide saliva and blood samples was reasonably related to a government interest.[197] Under a true Fourth Amendment balancing test, the impact of extracting saliva and blood samples on the physical and psychological well-being of the prison inmate, as well as the government's needs for obtaining such samples must be considered.[198] By failing to give adequate consideration to the effect of the intrusion upon the inmate, the balancing test becomes nothing more than an if/then proposition: *If* there is any government interest in requiring prisoners to submit to saliva and blood tests, *then* such a requirement is valid on constitutional grounds.[199] The result gives wide latitude to courts to interpret statutes in favor of governmental and penological interests.[200]

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190. *Id.* at 942-43. The court relied on its recent opinion in *Boling*, although the court did not reiterate *Boling*'s analysis. *Id.*; *see supra* note 17 and accompanying text; *see also Boling*, 101 F.3d at 1336 (reviewing the reasoning of the Fourth and Ninth Circuits' decisions in Jones v. Murray, 962 F.2d 302 (4th Cir. 1992), and Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995), which held that statutes requiring inmates to submit saliva and blood samples for DNA testing did not violate their constitutional protections).

191. *Schlicher*, 103 F.3d at 942.

192. *See* Somers v. Thurman, 109 F.3d 614, 616 (9th Cir. 1997).

193. 441 U.S. 520 (1979).

194. 468 U.S. 517 (1984).

195. *Somers*, 109 F.3d at 617-19; *see supra* notes 46-50 and 150-56 and accompanying text.

196. *See* McMath, *supra* note 7, at 748.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* Supporters of deference given to prison administrators appreciate the difficult task administrators undertake to "preserve security in an explosive environment." Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV.

The Tenth Circuit's allowance of blood tests, which will yield personal information about the prisoners, follows Supreme Court decisions. The Supreme Court has progressively allowed more intrusive prison searches to come within the realm of Fourth Amendment reasonableness.[201] The increasing deference surrendered to prison administrators has resulted in a decline of Fourth Amendment protections for prison inmates.[202]

A "balancing" test, inquiring mainly into correctional facilities' interests, will likely lead prison officials to abuse their power.[203] These abuses, inherent in a system fostering close relations between prison officials and inmates without much judicial oversight, will go unnoticed, unless flagrant.[204] The consideration of the intrusiveness of a particular search will always be outweighed, and the once limited Fourth Amendment protections for prisoners have eroded to almost no protection at all.[205]

CONCLUSION

The Tenth Circuit carefully follows Supreme Court precedent in remaining committed to giving deference to prison administrations. The court recognizes important societal interests in correctional institutions' objectives and weighs those interests heavily against prisoners' competing interests. The court, however, also seems cognizant of the probable risks if prison administrations were granted unbridled power.

As a result of public policy, many of the court's decisions seem to protect those who inflict punishment. Actually, the Eighth Amendment was designed to protect those who are punished.[206] Therefore it is repugnant to the Constitution to determine that "punishment" cannot include conditions of confinement or treatment without some form of intent on the part of prison officials.[207] Failing to relieve prison conditions that are barbaric simply because a prison official did not have the proper state of mind is illogical.[208] The debate surrounding prisoners' rights undoubtedly

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857, 857 (1992). In addition to security, rehabilitation and discipline also outweigh many of prisoners' most basic and fundamental rights, in order that those important penal interests may be achieved. *Id.* As the courts shift in their trends of deferring to prison administrators, or alternatively recognizing the consequence of not upholding prisoners' rights, the question, "is balancing really balancing," can be asked in the other direction. *See supra* note 201 and accompanying text. The if/then proposition then becomes: If any conceivable constitutional right is in question, then the government's penal interests must succumb to constitutional protections for inmates.

201. *See* McNath, *supra* note 7, at 748.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. U.S. CONST. amend. VIII.
207. Sanabria, *supra* note 3, at 1153.
208. *Id.*

will continue, as the courts struggle to find a balance between a respect for human dignity and the difficulty of governing prisons.

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