COMMENT

STATE PRISONERS' RIGHTS TO MEDICAL TREATMENT: MERELY ELUSIVE OR WHOLLY ILLUSORY?

INTRODUCTION

America's criminally committed population has slowly acquired common law, statutory and finally, constitutional rights to medical treatment. These rights gradually developed with the realization that prisoners are not slaves of the state, who abandon their civil rights at the prison gates.[1] Today, for various reasons which will be detailed later, most claims of prisoners' rights to medical care are based on the eighth amendment's proscription against cruel and unusual punishment. The basic rationale is that deprivation of adequate medical care is not a civilized form of punishment and of course, contributes nothing to prisoners' resocialization.

Theoretically, state prisoners should be able to enforce their rights to medical treatment through the courts. The Supreme Court has helped facilitate prisoners' in bringing their claims of denial of medical care by requiring that pro se prisoner complaints be liberally construed.[2] Despite prisoners' common law, statutory and constitutional rights to treatment and their favorable complaintant status, individual state prisoners seldom state cognizable causes of action. Those prisoners who do manage to state a claim may proceed to trial, but rarely do they recover.

This comment will explore the difficulties encountered by prisoners attempting to have the judiciary enforce their rights to medical treatment. Since the success of the prisoner's suit depends on both the nature of the claim and whether the claimant is suing as an individual or as a member of a class action, this comment will also address these issues. Finally, this comment will suggest some viable alternatives for prompting the judiciary into making prisoners' rights to medical treatment more enforceable.

I. HISTORICAL PERSPECTIVE

The duty of prison officials to provide medical care to inmates was recognized as early as the 1899 case of *Indiana ex rel. Tyler v. Gorbon*,[3] where a federal district court determined that a jailor:

> as the law custodian of the deceased [prisoner] . . . owed to him the duty of exercising ordinary and reasonable care for his life and health. . .This duty of care arose from him having the person of the deceased committed

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1. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); *see also* Annot., 28 A.L.R. FED. 279, 286 (1976).

2. Pro se complaints, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers," and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Estelle v. Gambelle, 429 U.S. 97, 106 (1976).

3. 94 F. 48, 50 (D. Ind. 1899).

to his custody by virtue of his office.[4]

A mob had removed Tyler from the jail and hung him from a nearby tree. The sheriff was held negligent for failing to cut the prisoner down before he died, and for not resuscitating the prisoner from the strangulation. The sheriff's negligence was found to be the proximate cause of the prisoner's death.[5]

In the early part of this century following *Tyler*, the only cases that addressed the issue of medical treatment for prisoners were tort suits. These suits usually sought damages against prison officials for bodily injuries. *Spicer v. Williamson*[6] was one of a line of cases which met with varying success in recovering damages for prison officials' failure to provide medical treatment.[7] Since these suits were claims for infliction of bodily injury, they were decided on grounds of simple negligence. The issue was whether prison authorities were negligent in failing to provide the level of care imposed upon them by either common law or statute.[8] These decisions did not involve constitutional considerations, but several principles emerged which persist today:

(1) 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,[9]
(2) Every tortfeasor whose wrongful act concurs in inflicting the injury is liable for the resulting damage,[10]
(3) Prison officials owe prisoners an affirmative duty of 'ordinary and reasonable care for the prisoners life and health,' the breach of which entitles a prisoner to recover tort damages for resultant bodily injury.[11]

These prisoner tort actions based upon negligence were later restricted by the development of myriad defenses for officials. These defenses included sovereign immunity, administrative discretion and state civil disability statutes.[12]

The next thirty years of this century produced more cases which affirmed prison officials' common law duty to safeguard prisoners' health.[13] Perhaps even more significant than this reaffirmation, two competing trends emerged to expand and limit, respectively, prisoners' rights to medical treatment. Prisoners' rights were expanded when constitutional claims, especially eighth amendment allegations of cruel and unusual punishment,

4. *Id.* at 50.
5. *Id.* at 48.
6. 191 N.C. 487, 132 S.E. 291 (1926).
7. *Ex parte* Jenkins, 25 Ind. App. 532, 58 N.E. 560 (1900); Kusah v. McCorkie, 100 Wash. 318, 170 P. 1023 (1918); Hunt v. Rowton, 143 Okla. 181, 288 P. 342 (1930); State *ex rel.* Morris v. National Surety Co., 162 Tenn. 547, 39 S.W.2d 581 (1931).
8. *See, e.g., Hunt*, 143 Okla. 181 where jailer failed to perform his statutory duty to isolate an inmate with a contagious disease (diagnosed small pox), thus breaching the jailer's duty to provide adequate medical care, resulting in plaintiff's husband's death.
9. *Williamson*, 191 N.C. at 490.
10. *Hunt*, 143 Okla. at 182.
11. *Jenkins*, 25 Ind. App. 532.
12. *See, e.g.*, Note, *Prisoners' Constitutional Right to Medical Treatment: A Right Without Substance?*, 7 NEW ENG. J. ON PRISON L. 341, 356-57 (1981) [hereinafter cited as *Prisoners' Medical Treatment*].
13. Kendrick v. Adamson, 51 Ga. App. 402, 180 S.E. 647 (1935); Smith v. Slack, 125 W. Va. 812, 26 S.E.2d 387 (1943); McCrossen v. State, 277 App. Div. 1160, 101 N.Y.S.2d 591 (1950), *appeal denied*, 302 N.Y. 950, 98 N.E.2d 117 (1950); Pisano v. State, 8 A.D.2d 335, 188 N.Y.S.2d 35 (1959).

replaced tort actions as the primary vehicle for prisoners alleging a right to medical treatment. This expansion of prisoners' rights developed simultaneously with a countervailing restriction in prisoners' rights which is known as the "hands-off" doctrine. The "hands-off" doctrine greatly curtailed judicial intervention into correctional affairs, as this paper will detail.

The eighth amendment[14] has only recently been applied to prisoners' rights to medical treatment, but it has historical roots in the English Bill of Rights of 1689.[15] This Bill of Rights may, in turn, be traced back at least to the Magna Carta. The English designed the cruel and unusual clause as protection against the executions and torture which occurred in England during the Stuarts' reign. The clause forbade punishments which were either unauthorized by statute, beyond the courts' discretion or disproportionate to the offense. Sharing the English concern for preventing barbarous treatment of prisoners, the Drafters incorporated the eighth amendment into the United States Constitution in 1791.[16]

Although the eighth amendment remained in limited use throughout the nineteenth century, the Supreme Court greatly expanded the scope of the clause in a line of twentieth century cases including *Weems v. United States*,[17] *Trop v. Dulles*,[18] *Gregg v. Georgia*,[19] and *Rochin v. California*.[20] While only *Rochin* directly concerned a prisoner's right to refuse medical intrusion (forcibly pumping suspect's stomach), each case yielded eighth amendment principles which remain important in determining a prisoner's right to medical treatment.

In *Weems*, the Court struck down, as excessive, a fifteen year hard labor sentence for falsifying government records. This case established that the cruel and unusual clause is a progressive, dynamic concept which is capable of including additional forms of punishment as public opinion becomes more sensitive to prison conditions. Conversely, although the Court did not so state, the organic nature of the clause makes it susceptible to retraction relative to the public's increasing apathy towards prison health care.

In *Trop*, the defendant received a sentence of three years at hard labor, a dishonorable discharge and revocation of his citizenship for deserting the army. The Court found the sentence to be inherently cruel by analyzing its effect on the person's dignity according to contemporary societal standards. In *Trop*, the cruelty consisted of total destruction of the army private's citi-

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

15. English Bill of Rights (1869) stated that "Excessive bail ought not to be required, nor excessive fines inflicted," *cited in* Note, *Constitutional Law—The Eighth Amendment and Prison Reform*, 51 N.C.L. REV. 1539, 1540 (1973).

16. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969), *cited in* Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause*, 7 FORDHAM UNIV. L.J. 1 (1978) [hereinafter cited as *Prisoners' Right to Health Care*].

17. 217 U.S. 349 (1910). In *Weems*, the Court first began to focus on looking at the relationship between the offense and the punishment to find that excessive punishment is constitutionally objectionable as cruel and punishment, and for the first time, struck down a legislatively prescribed punishment.

18. 356 U.S. 86 (1958).

19. 428 U.S. 153 (1976), *reh'g denied*, 429 U.S. 875 (1979).

20. 342 U.S. 165 (1952).

zenship.[21] The Court reasoned that the eighth amendment thus derives its meaning from the "evolving standards of decency that mark the progress of [a] maturing society."[22]

The Court, in *Gregg*, developed a two-prong test for evaluating supposedly objective indices of public opinion towards any particular form of punishment. First, does the punishment inflict unnecessary and wanton pain? Second, is the punishment grossly disproportionate to the severity of the crime?[23] If either inquiry is answered affirmatively, the *Weems-Trop-Gregg* line of cases would proscribe the conduct as inherently cruel medical treatment violative of the eighth amendment.

Additionally, *Rochin* requires that prison officials provide prisoners with adequate medical care whenever necessary to avoid inflicting punishment which is so "barbarous" that it is "shocking to the conscience."[24] This highly subjective standard is supposed to reflect the collective conscience of society relative to the evolving standards of decency announced in *Trop*. Instead, the "barbarous" standard more often is a subjective evaluation of whether a prisoner's medical treatment shocks the individual judge's conscience. Judicial dissatisfaction with the "barbarous" standard led federal district and circuit courts to devise alternate tests. These tests include such equally vague and ambiguous terms as "deprivation of basic elements of adequate medical treatment,"[25] abuse of discretion,[26] unreasonable care[27] and "deliberate indifference" to serious medical needs.[28]

The Supreme Court finally adopted the stringent "deliberate indifference" standard in the 1975 case of *Estelle v. Gamble*.[29] *Estelle* at least reaffirmed prisoners' unique position in society as the only group constitutionally guaranteed medical care by the state. The failure of prison officials to fulfill this constitutional duty may result in the infliction of unnecessary suffering, which is inappropriate according to our contemporary standards of human decency.[30]

21. Klein, *Prisoners' Right to Health Care, supra* note 16.

22. *Trop*, 356 U.S. at 100-1.

23. *Gregg*, 428 U.S. at 173, citing *Trop*, 356 U.S. 86; *Weems*, 217 U.S. 349.

24. *But see* Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969), which held that "[m]ere negligence" does not shock the conscience, rather treatment mus be intentionally denied, unless the inmate's injuries are both severe and obvious or there are other "exceptional circumstances."

25. Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972).

26. Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1979).

27. Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969) (an inmate alleging that prison guards forcibly prevented him from receiving medical treatment for his epileptic condition was entitled to "reasonable medical care"). *But see* Mills v. Oliver, 267 F. Supp. 77 (E.D. Va. 1973) (where a four day delay in treatment for "knots" in the prisoner's underarms did not warrant relief, which is contrary to the *Blanks* holding that a prisoner has a constitutional right to have reasonable medical treatment administered when there is reason to believe it is needed). *See also* Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965); Collins v. Schoonfield, 344 F. Supp. 257, 277 (D. Md. 1972); Blakely v. Sheriff of Abermarle County, 370 F. Supp. 283 (N.D. Ga. 1973); Rickitts v. Ciccone, 371 F. Supp. 1249 (W.D. Mo. 1974); Note, *Prisoners' Medical Treatment, supra* note 12. Carraba, the author of *Prisoners' Medical Treatment*, suggests that the "reasonableness" standard was less restrictive than the "deliberate indifference" standard, each seems equally evasive when used as guidance for an administrator faced with any particular decision regarding medical treatment.

28. Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Freeman v. Lockhart, 503 F.2d 1016, 1017 (8th Cir. 1974).

29. *Estelle*, 429 U.S. 94.

30. *Id.* at 102-4.

The eighth amendment has not been the exclusive means used by prisoners to gain access to medical treatment. The due process clauses of the fourteenth and fifth amendments, have formed the basis for constitutional claims of denial of medical treatment. Due process suits are much less frequent and are generally of more recent vintage than eighth amendment suits for cruel and unusual punishment.[31] The due process challenges are not governed by any unique standard of review; the same "deliberate indifference" standard which is used to determine eighth amendment claims is used to determine when denial of medical treatment amounts to denial of due process of law.[32]

As the constitutional bases for prisoners' rights to medical treatment expanded, their ultimate effect was tempered, as noted earlier, by the "hands-off" doctrine. This doctrine of judicial deference to the decisions of correctional administrators extends to the decision to deny prisoners medical treatment. The "hands-off" doctrine has several underlying rationales. First, the doctrine was historically predicated upon the view that the inmate was a "slave of the State," without any rights for the state to violate.[33] Second, federalism is advanced as a reason for federal courts to refrain from interfering in the operation of both state and federal correctional systems.[34]

Third, courts are said to lack expertise in the field of corrections which is best left to penal officials.[35] Fourth, courts are concerned that their intervention might subvert the internal prison discipline crafted by professional prison administrators.[36] The fifth rationale for the "hands-off" doctrine is that since state courts may decide prisoner medical suits under state statutes, negligence and malpractice actions, federal courts should rely on the state judiciary to provide an inmate with some remedy.[37] Other reasons for judicial nonintervention include increased litigation and fiscal conservation.[38] Finally, although courts never articulate this view, societal toleration for higher levels of violence outside prison may make courts more willing to accept higher levels of prisoner mistreatment.[39]

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31. *See, e.g.*, Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Fitzke v. Sharppell, 468 F.2d 1072 (6th Cir. 1972); Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974); Startz v. Cullen, 468 F.2d 151 (7th Cir. 1974) *vacated on other grounds*, 419 U.S. 813 (1974), *reh'g denied*, 423 U.S. 877 (1975); Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976); McCollum v. Mayfield, 130 F. Supp. 112 (D.C. Cal. 1955). Also, for a summary of due process arguments see Comment, *The Eighth Amendment: Medical Treatment of Prisoners as Cruel and Unusual Punishment*, 1 CAP. U.L. REV. 83 (1973).

32. *Westlake*, 537 F.2d 857.

33. *Ex parte* Pickens, 101 F. Supp. 285 (D. Alaska 1951); Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). *Cf.* U.S. CONST. amend. XIII, § 1 (allowing convicts to be enslaved or forced into involuntary servitude), *noted in* Comment, *Legal Aspects of Prison Riots*, 16 HARV. C.R.-C.L. L. REV. 735, 748 n. 40 (1982).

34. Note, *Eighth Amendment Rights of Prisoners: Adequate Medical Care and Protection from the Violence of Fellow Inmates*, 49 NOTRE DAME LAW. 454 (1973) [hereinafter cited as *Adequate Care*]. *See also* Comment, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions*, 48 N.C.L. REV. 847 (1970) [hereinafter cited as *Inadequacy of Prisoners' Rights*]; Klein, *Prisoners' Rights to Health Care, supra* note 16; Plotkin, *Enforcing Prisoners' Rights to Medical Treatment*, 9 CRIM. L. BULL. 159 (1973) [hereinafter cited as *Enforcing*].

35. *See* Novak v. Beto, 453 F.2d 661, 670 (5th Cir. 1971) "[w]e are simply not qualified to answer the many difficult medical. . .and correctional questions."

36. Klein, *Prisoners' Rights to Health Care, supra* note 16, at 460.

37. Plotkin, *Enforcing, supra* note 34, at 161.

38. Comment, *Legal Aspects of Prison Riots, supra* note 33, at 749.

39. Comment, *Inadequacy of Prisoners' Rights, supra* note 34.

The need for the judicially self-imposed "hands-off" deference to penal administration is exaggerated in the area of prisoner medical treatment. Courts feel restrained from dealing with the issue because of a lack of both correctional and medical expertise.[40] This deferential posture is suspect.

The court's federalism concerns are outweighed by the need for vindication of individual prisoner's civil liberties. Moreover, prisoners' most effective actions are usually based upon federal statutes or the Constitution. Courts seldom require correctional expertise to determine when a prisoner has been intentionally denied medical care. Qualified corrections witnesses can provide courts with whatever insight they need to resolve incidental correctional issues. Furthermore, the absence or improper administration of medical care poses a more direct and immediate threat to prison discipline than court intervention. An inmate may be more likely to disregard security and act to preserve his physical well-being, than to suffer in pain while awaiting court ordered treatment.

The remaining reasons for the "hands-off" doctrine are equally fallacious. As it will be shown later, state prisoners are often unable to enforce their rights to medical treatment in state courts. The inability or unwillingness of state courts to enforce certain inmate rights is well known to the prison population. Thus, inmates unable to tailor their claim to fit federal court jurisdiction may abandon the claim altogether and be left without any remedy. Finally, court toleration of prisoner mistreatment can only foster increased violent reactions. Free people have the luxury of choosing their environment and associates to minimize involvement with violent behavior. Prisoners negotiate their continued existence as captives in a setting permeated by violence.

Courts are no less equipped to deal with inmate medical claimants than with similar tort claimants. Moreover, courts must judiciously intervene in correctional administration for a group which has no legislative avenue of redress. The failure of courts to ensure inmate medical rights may lead to more inmate efforts at self-help, such as the September, 1983 inmate work strike at Attica. Of course, courts should not open the floodgates to the frequently frivolous litigation initiated by prisoners, but a more balanced approach than "hands-off" is clearly in order.

While there is disagreement over the continuing vitality of the "hands-off" doctrine,[41] its vestiges continue to make a prisoner's claim of a right to medical treatment elusive. In light of the recent abysmal intrusions by fed-

40. *See* Note, *Prisoners Medical Treatment, supra* note 12, at 355, *citing* Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970). "The prisoner can't be the ultimate judge of what medical treatment is necessary or proper for his care. . .In absence of factual obligations of obvious neglect, or intentional mistreatment, the courts should place their confidence in the reports of reputable prison physicians that reasonable medical care is being rendered." *Cates*, 422 F.2d at 928.

41. *Contra* Plotkin, *Enforcing, supra* note 34, at 161 ("The 'hands off' doctrine has met its demise, as the current spate of prison litigation makes clear, and courts have become concerned with internal policies that violate constitutional rights."); Klein, *Prisoners' Right to Health Care, supra* note 16, at 460-61. Carabba's view in *Prisoners' Medical Treatment, supra* note 12, at 355 that reliance on the "hands off" doctrine has been increased and refined in the area of medical treatment is evidenced by the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979). Commentators have suggested that the Supreme Court has dealt the death blow to the prisoners' rights movement, by transcending the issues presented in *Bell* and declaring that jail management should be left to correctional personnel.

eral courts into state prison systems, the "hands-off" doctrine may already be reduced to an indeterminative, and largely historic, judicial consideration. The doctrine seems inconsistent with the recently emerging area of prisoners' rights.

II. The Modern Cause Of Action For Interference With A Prisoner's Right To Receive Medical Treatment

Today, the issue of whether a prisoner has a right to receive medical treatment depends upon analysis of several factual determinations;

(1) How 'serious' was the prisoner's need for medical attention?
(2) Is the prisoner asserting a right to medical treatment based upon his own perception of need, or medical need determined by a health care professional?
(3) Did the prisoner request *any* medical treatment, and if so did he receive any treatment which addressed his need?
(4) Was the treatment rendered adequate?
(5) If the prisoner did not receive any treatment, or received only inadequate treatment, what was the subjective motivation of the responsible prison official for denying or delaying medical treatment?

The Supreme Court made these five issues determinative of prisoners' right to medical treatment in *Estelle v. Gamble*.[42] In *Estelle* the Court held that only "deliberate indifference to serious medical needs of prisoners" constitutes the "unnecessary and wanton infliction of pain" proscribed by the eighth amendment. As a result, only the "intentional denial to a prisoner of needed medical treatment is cruel and unusual punishment."[43] The Court duly noted that this standard was basically an adoption of at least ten circuit court cases which were essentially in accord with their ruling.[44]

As noted earlier, such eighth amendment claims are the primary means by which most prisoners sue for denial of medical care. State prisoners usually enforce their constitutional right to medical treatment by bringing suit in federal court under the Federal Civil Rights Act.[45] The main provision for prisoners' claims is 42 U.S.C. § 1983 (hereinafter referred to as Section 1983).[46]

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42. 429 U.S. 97 (1976).

43. Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1979).

44. *See* Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (deliberate indifference); Russell v. Shaeffer, 528 F.2d 318 (4th Cir. 1975); Newman v. Alabama, 503 F.2d 1320, 1330 n. 14 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (failure to provide sufficient medical facilities and staff constituted willful and intentional violations of prisoners' rights guaranteed by the eighth and fourteenth amendments); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), *reh'g denied*, 419 U.S. 1041 (1974).

45. Klein, *Prisoners' Rights to Health Care, supra* note 16, at 460.

46. Section 1983 of Title 42 of the United States Code was originally enacted as part of the Civil Rights Act of 1871 to extend federal court protection to newly freed blacks. An excellent discussion of Section 1983 can be found in McCray v. Burrell, 367 F. Supp. 1191 (D.C. Md. 1973). The text of the Civil Rights Act of 1871, § 7, 42 U.S.C. § 1983 (1970) reads as follows:

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

Jurisdiction of suits under 42 U.S.C. § 1983 is vested in the United States District Courts by 28

In order to state a claim under Section 1983 a prisoner must allege facts sufficient to warrant the conclusion that a state officer has violated a right secured by the Constitution or another federal law.[47] Since Section 1983 is limited to actions under color of state law, this restricts federal prisoners from using Section 1983 as a basis for complaints of denied medical treatment.

One of the reasons that prisoners prefer to bring suit under Section 1983 is that the statute is relatively immune to the "hands-off" doctrine, largely due to *Wilwording v. Swenson*.[48] The Supreme Court in *Wilwording* held that: (1) federal pleadings by state prisoners may state a cause of action under Section 1983 for prison officials' deprivation of constitutional rights; (2) such relief claims were not subject to the prerequisite exhaustion of state remedies; (3) Section 1983 remedies are supplementary to state remedies, and state remedies need not be sought and refused before the federal remedy was invoked; and (4) state prisoners are not held to any stricter standards of exhaustion of state remedies than any other civil rights plaintiff.[49] The holdings in *Wilwording* give prisoners more direct access to federal courts.

III. State Prisoners' Rights To Medical Treatment Under Section 1983

This section will examine the rights of state prisoners to medical treatment under Section 1983 as individuals and classes. There will be discussion of both isolated incidents of denied medical care and systematic denials attributable to general confinement conditions. Institutional interference with prescribed treatment will also be examined.

The rights of state prisoners will be correlated with each of the five factual contexts enumerated in the preceding section. The purpose of subdividing factual contexts is to attempt more clearly to define which facts are required in each circumstance to state a valid claim for relief. This clarification is important because although pro se complaints must be liberally construed,[50] most prisoner complaints which allege inadequate medical treatment fail to survive the defendant's motion to dismiss or motion for summary judgment.[51]

U.S.C. § 1343 without any necessity of allegations of either diversity of citizenship, or of any particular sum in controversy. *See* 15 Am. Jur. 2d, *Civil Rights* § 65 (1976).

47. Note, *Prisoners' Medical Treatment, supra* note 12, at 345 n.5. The eighth amendment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

48. 404 U.S. 249 (1971).

49. *Id.* An extensive review of when a state prisoner may be entitled to relief under the Federal Civil Rights Acts for denied medical care can be found in *Relief Under the Federal Civil Rights Acts to State Prisoners Complaining of Denial of Medical Care*, Annot., 28 A.L.R. Fed. 279 (1976), and its "Later Case Service" 1982.

50. Conley v. Gibson, 355 U.S. 41, 45 (1957); Haines v. Kerner, 404 U.S. 519 (1972). Regardless of how inartfully pleaded a pro se complaint may be, it should only be dismissed if it is beyond doubt that the plaintiff prisoner can prove no facts to support her claim.

51. Note, *The Difficulty in Defining Constitutional Standards for State Prisoners' Claims of Inadequate Medical Treatment*, 17 Duq. L. Rev. 687, 698 (1979) [hereinafter cited as *Difficulty*].

A. *Individual State Prisoner's Section 1983 Claims for Denied Access to State Medical Treatment*

1. *What Constitutes a "Serious Medical Need?"*

In light of the *Estelle* holding that only prison officials' "deliberate indifference" to prisoners' "serious medical needs" constitutes cruel and unusual punishment, the first factual issue to examine is the severity of the prisoner's medical need. Unless a state prisoner is in "serious" need of medical attention, prison officials may be as unresponsive as they wish. Generally, serious illnesses (those serious enough to constitutionally require treatment) include those defined as such by statute or medical personnel, highly dangerous and contagious illnesses, and severe and obvious injuries. Judges will most likely find these types of conditions to be serious. This is probably because it is "easy" for judges to find that correctional authorities should have been able to ascertain that a prisoner was suffering from a severe and obvious injury or illness, chronic disabilities and afflictions, and conditions which result in serious tangible injury when left untreated. Inmates with such medical conditions make sympathetic plaintiffs, and observing the need for treatment only requires lay medical knowledge.

An objective index of the "seriousness" of a prisoner's medical condition is the presence of state health or correctional statutes pertaining to the condition. State statutes may regulate the treatment of particular medical conditions afflicting a prisoner. This may be especially true of dangerous and highly contagious illnesses, such as tuberculosis, which frequently occur among the institutionalized. However, there are relatively few statutes that require treatment of particular inmate illnesses. The few statutes that directly pertain to prisoner medical treatment are so ambiguous[52] that they

52. Note, *Prisoners' Medical Treatment, supra* note 12, at 352 n.52: "Present state statutes define the duty to provide medical care with varying degrees of specificity. Some jurisdictions require only that a corrections administrator supervise the provision of medical treatment. *E.g.*, ALASKA STAT. § 33.30.050 (1978); ARIZ. REV. STAT. § 31-201.01(D) (1979); DEL. CODE ANN. tit. 11 § 6536 (1974); FLA. STAT. ANN. § 945.025(2) (West Supp. 1978); PA. CODE ANN. § 77-309(e) (1978); IND. CODE ANN. § 11-10-3-4 (Burns 1981); KAN. STAT. ANN. § 75-5249 (1977); LA. REV. STAT. ANN. § 15:831 (West Supp. 1978); NEV. REV. STAT. § 209.381(2) (1973); N.H. REV. STAT. ANN. § 619:9 (1974); OR. REV. STAT. § 179.360(1) (1977); UTAH CODE ANN. § 64-13-10(6) (Supp. 1977). A few states place supervisory responsibility in the courts. *E.g.*, N.D. CENT. CODE § 12-44-04(5) (1976); OHIO REV. CODE ANN. § 34.06(F) (Page Supp. 1977).

Other states require that each prisoner be given a medical examination upon entrance to a penal institution. *E.g.*, CONN. GEN. STAT. § 19-60 (1979); HAW. REV. STAT. § 353-10 (1976); ILL. ANN. STAT. ch. 38 § 1003-8-2(c) (Smith-Hurd 1973); MASS. GEN. LAWS ANN. ch. 127, § 16 (West 1974); MONT. REV. STAT. § 216.090(1) (1969); NEB. REV. STAT. § 82-179 (1976); N.M. STAT. ANN. § 42-1-31.2 (1972); N.C. GEN. STAT. § 148-19(c) (1978); OKLA. STAT. tit. 57, § 51 (Supp. 1978); PA. STAT. ANN. tit. 61 § 1 (Purdon 1964); R.I. GEN. LAWS § 42-56-29 (1977); S.D. COMPLIED LAWS ANN. § 24-2-4 (1957); TENN. CODE § 41-313 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6166x-1 (Vernon 1970); VT. STAT. ANN. tit. 28, § 801(b) (Supp. 198). Some states require that prisoners with communicable diseases be isolated. *E.g.*, ALA. CODE § 14-3-43 (1975); COLO. REV. STAT. § 25-1-635 (1973); ILL. ANN. STAT. ch. 38, § 1003-8-2(c) (Smith-Hurd 1973); ME. REV. STAT. tit. 34, § 134 (1978); MISS. CODE ANN. § 47-3-7 (1973); NEB. REV. STAT. § 83-179 (1976); N.J. STAT. ANN. § 30.4-8 (West 1964); N.M. STAT. ANN. § 33-2-16 (1978); N.Y. CORREC. LAW § 141 (McKinney Supp. 1976); PA. STAT. ANN. tit. 61, § 2 (Purdon 1964); VT. STAT. § 801(b) (Supp. 1978); VA. CODE § 32-81 (1973); WASH. REV. CODE § 70.20.140 (1943). Many recognize a duty to transfer prisoners to hospitals for appropriate treatment. *E.g.*, ARK. STAT. § 46-150 (1977); CAL. PENAL CODE §§ 4007, 4011 (West 1979) (requires court approval if prisoner presents custodial problem); DEL. CODE ANN. tit. 11, § 6536 (1975); ILL. ANN. STAT. ch. 38, § 1003-6-2(f) (Smith-Hurd 1973); IOWA CODE § 218.90 (1977); KAN. STAT. § 75-5249 (1977); LA. REV. STAT. ANN. § 15.831 (West Supp.

provide little practical guidance for determining seriousness. Given the dearth of useful statutory guidance, prison administrators must make almost completely discretionary treatment decisions and judges must make ad hoc determinations of the issue of "seriousness."

Before examining post-*Estelle* case law, a review of pre-*Estelle* decisions of medical seriousness may prove useful. Prior to *Estelle*, isolation from inmates known to have a highly contagious and dangerous illness was held by the Eighth Circuit to constitute a serious medical need.[53] In addition, there was also a constitutional requirement for treatment of prisoners' "severe and obvious" injuries.[54]

The case law in the eight years following *Estelle* has not produced any universal or even majority definition of what constitutes a "serious" medical need for eighth amendment and Section 1983 purposes. During the first four years from 1976-80 the federal courts found everything from the need for surgery[55] to broken arms[56] and necks[57] to be sufficiently serious medical needs that officials were constitutionally required to treat the condition. Conversely, neither the need for painkillers for a prisoner awaiting a major operation,[58] nor the denial of outdoor exercise to prisoners without verified medical need[59] were held to be sufficiently serious.

The Supreme Court has not enunciated a standard of "seriousness" for physical conditions. Various circuit and state courts have grappled with the issue and determined numerous standards. In *Bowring v. Godwin*,[60] the

1978); MD. ANN. CODE art. 27, § 698 (1976); MASS. GEN. LAWS ANN. ch. 127, § — (West 1974); NEB. REV. STAT. § 83-175 (1975); NEV. REV. STAT. § 209.331 (1973); N.H. REV. STAT. ANN. § 623:1 (Supp. 1977) (requires approval of governor); N.J. STAT. ANN. § 30:4-7 (West 1964); N.Y. CORREC. LAW § 23(2) (McKinney Supp. 1976); N.C. GEN. STAT. § 148-19(a) (1978); OR. REV. STAT. § 179.479 (1977); VT. STAT. ANN. tit. 28, § 801(a) (Supp. 1978); W. VA. CODE § 25-1-16 (1976); WIS. STAT. § 53.88 91973). A minority of states and the District of Columbia impose no specific statutory duty to provide medical care to prisoners. *E.g.*, D.C. CODE § 24-442 (1973); IDAHO CODE § 20-209 (1978); KY. REV. STAT. § 197.020 (1977); MINN. STAT. § 241.01 (1978); S.C. CODE § 55-302 (1976)."

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

54. For the exhaustive citation of case law concerning severe and obvious illnesses/injuries predating *Estelle*, see the following: Annot., 28 A.L.R. FED. 279, 322-323 (1976); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D. N.H. 1977); and other federal court decisions immediately preceding and following *Estelle* have also indicated that nontreatment of a serious injury is unconstitutional where the injury is so severe and obvious that medical treatment is clearly required. *See, e.g.*, Bartling v. Ciccone, 376 F. Supp. 200 (W.D. Mo. 1974); Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976); Murrell v. Bennett, 615 F.2d 306, 309 (5th Cir. 1980) (delayed provision of medical care to prisoner visibly in need of immediate treatment constitutes deliberate indifference).

55. West v. Keve, 571 F.2d 158 (3d Cir. 1978).

56. Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978).

57. Sanabria v. Village of Monticello, 424 F. Supp. 402 (S.D.N.Y. 1976).

58. Courtney v. Adams, 528 F.2d 1056 (8th Cir. 1976) (the circuit court affirmed the district court's holding that the claim expressed a mere difference of opinion).

59. Jones v. Diamond, 594 F.2d 997, 1013 (5th Cir. 1979); other cases defining respective illnesses as creating a "serious" enough medical need that prison officials were constitutionally required to treat them in cases immediately following *Estelle* include Todaro v. Ward, 565 F.2d 48, 51 (2d Cir. 1977) (fevers and high blood pressure); Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (broken bones); Massey v. Hutto, 545 F.2d 45, 47 (8th Cir. 1976) (ulcers); West v. Keve, 571 F.2d 158, 160 (3d Cir. 1978) (varicose veins); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977); and Laaman v. Helgemoe, 437 F. Supp. 269, 313 (D. N.H. 1977) (psychological illnesses); Chapman v. Rhodes, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977) (dental care).

60. 551 F.2d 44 (4th Cir. 1977). *Bowring* was also followed by a New Hampshire District Court in Laaman v. Helgemoe, 437 F. Supp. 269, 313 (D. N.H. 1977). *See also* Note, *Prisoners'*

Fourth Circuit determined when prisoners have a mental health problem "serious" enough to constitutionally require treatment.

> Bowring (or any other prison inmate) is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care. . . concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; (3) and the potential for harm to the prisoner by reason of delay or denial of care could be substantial.[61]

In *Rust v. State*,[62] the Alaska Supreme Court interpreted Alaska's state prison's statutes according to the *Bowring* criteria and found that *Bowring* constitutionally entitled prisoners to receive medical care under circumstances in which a reasonable person would seek medical care.

The *Rust* decision is significant for two reasons. It is only one of thirteen state cases decided during the four years following *Estelle*, which cite *Estelle*. Apparently, state appellate courts were either refusing to hear prisoners' eighth amendment complaints of a right to treatment, or not applying *Estelle*. The latter reason may suggest how little guidance *Estelle* provided to the states' courts. *Rust* still remains one of the exceedingly few cases to interpret a state prisoner health statute under the *Estelle* criteria.

Although the *Bowring* test is rather clear, both its premise and the Alaska application in *Rust* raise questions about the test's usefulness. *Bowring* requires that prisoners first undergo psychological or psychiatric evaluation. Prisoners may have problems gaining access to psychiatric personnel since they do not make the ultimate choice of when they need such care. Moreover, even after receiving a health care professional's attention, the prisoner must have a disease or injury which can either be cured or substantially alleviated. This rationale, if followed to its logical conclusion, would preclude chronic or moribund prisoners from any constitutional right to treatment. Ironically, these are the prisoners most in need of medical care. But, because their condition is either incurable or beyond relief, they would be denied treatment under the *Bowring* rule.

The *Rust* interpretation of *Bowring* is only sensible if the "reasonable person" seeking medical care is a prisoner subject to all the institutionalization of the particular prisoner in need. Since institutionalization fosters dependency and stifles initiative and self-responsibility, the "reasonable" prisoner should not always be expected to request medical care. Whether the *Bowring* "reasonable person" contains this subjective component is a crucial issue left unaddressed by the cases applying *Bowring* outside of the mental health context.[63]

Other courts examining the seriousness of inmates' mental health needs have found various practices to be unconstitutional. The Third Circuit held that deliberately withholding treatment for a pretrial detainee's "serious

Rights—Bowring v. Godwin: *The Limited Right of State Prisoners to Psychological and Psychiatric Treatment*, 56 N.C.L. REV. 612 (1978); and Fielding v. LaFevre, 548 F.2d 1102, 1108 (2d Cir. 1977) (denial of continued psychotherapy was not violative of the eighth amendment).

61. *Bowring*, 551 F.2d at 47.

62. 582 P.2d 134, 143 (Alaska 1978).

63. *See, e.g.*, Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978) (class action); and Brown v. Beck, 481 F. Supp. 723 (S.D. Ga. 1980); Campbell v. Sacred Heart Hospital, 496 F. Supp. 692 (E.D. Pa. 1980) (individual actions).

mental ailments" violated the eighth amendment.[64] Requiring a mentally ill inmate with a "serious" medical need for a toilet to request the toilet was found to be cruel and unusual punishment.[65] A mentally and emotionally diseased inmate was held to have a "serious" medical need for the medication required to control the disease.[66] One state court has even held that an insomniac may have a sufficiently "serious" need for both a psychiatrist and medication that neither may be constitutionally delayed for years.[67]

Cases dealing with physical, rather than mental, conditions have failed to develop any definition of seriousness as decisive as *Bowring*. However, chronic conditions are more readily perceived by the judiciary as "serious," than injuries which are neither severe nor obvious. The following chronic conditions have been found to be "serious" enough that treatment of each was constitutionally required: condyloma (a recurrent growth on the penis required more treatment than the aspirin dispensed),[68] brittle diabetes (required both treatment and special diet),[69] disability coupled with obesity (required that prisoner be allowed to sit and rest intermittently throughout his job assignment),[70] and asthma coupled with allergy (precluded work farm assignments during hayfever season).[71] Black prisoners can especially appreciate a recent Fifth Circuit decision which held that sickle-cell anemia is a "serious" medical condition for Section 1983 purposes.[72] New York's highest court went so far as to grant a 73 year-old felon afflicted with a chronic urological condition furloughs for treatment.[73] When this procedure became too burdensome the court granted release from imprisonment altogether. This allowed the prisoner to obtain treatment in the only area hospital with a physician capable of treating the condition.

Physically handicapped prisoners often have afflictions which courts recognize as "serious" for eighth amendment purposes. If an inmate requires a leg brace to walk without difficulty and pain, New York's Southern District Court has ruled that the inmate has a "serious" medical need for the brace. A quadriplegic inmate may have a "serious" medical need for a transfer to suitable treatment facilities.[74] However, not all handicaps qualify as "serious." A chronic phlebitis prisoner was found not to have a "serious" medical need to be confined in the prison's infirmary rather than the general population.[75] Another inmate's minimally deformed finger was not a "serious" enough defect that prison officials were required to surgically restruc-

64. Inmates of County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979).

65. Flakes v. Percy, 511 F. Supp. 1325, 1330 (W.D. Wis. 1981).

66. Crawford v. Loving, 80 F.R.D. 84 (1979). In one of the more factually horrible eighth amendment claims, inmate Crawford castrated himself with a razor after being deprived of medication prescribed to control his mental and emotional illnesses.

67. Tedder v. Fairman, 93 Ill. App. 3d 948, 953 (1981).

68. Hamilton v. Roth, 624 F.2d 1204, 1207 (3d Cir. 1980).

69. Johnson v. Harris, 479 F. Supp. 333, 336 (S.D.N.Y. 1979); *but see* Jefferson v. Douglas, 493 F. Supp. 13, 18 (W.D. Okal. 1979) (deprivation of diabetics required sugar by officer's cancelling canteen is a mere difference of opinion).

70. Speed v. Adams, 502 F. Supp. 426, 428 (E.D. Ark. 1980).

71. McDaniels v. Rhodes, 512 F. Supp. 117, 120 (S.D. Ohio 1981).

72. Barksdale v. King, 669 F.2d 746 (5th Cir. 1983).

73. People v. Notey, 423 N.Y.S.2d 947, 951 (1980).

74. Villa v. Franzen, 511 F. Supp. 231 (N.D. Ill. 1981) (quadriplegic had "serious need" for proper facilities); Macklin v. Freake, 650 F.2d 885, 889 (7th Cir. 1981).

75. Burgeois v. Hongisto, 488 F. Supp. 304 (S.D.N.Y. 1980).

ture the finger.[76]

Another major exception to the general judicial receptivity to chronic illnesses as "serious" is drug dependency. Although punishment for mere addiction to narcotics has been unconstitutional for over twenty years,[77] prisoners have not been held to have any "serious" medical need for methadone administration upon their incarceration.[78] Forcing a recently admitted prisoner to endure "cold-turkey" withdrawal is generally only unconstitutional if prison officials' nontreatment neglects the prisoner's statutorily "serious" medical needs.[79] As a result, many prisons do not provide any methadone treatment during the painful withdrawal period upon admission.[80] Furthermore, it has been held that a prisoner does not have a "serious" medical need for treatment to overcome addiction during incarceration.[81]

Prisoners who suffer injuries have as difficult a task in convincing judges of their "serious" medical needs as drug-dependent prisoners. Although inmates are occasionally assaulted by guards, and frequently by other inmates, there is no presumption of a "serious" need to treat any resultant injuries. An inmate may be injured seriously enough by a guard's blow to require immediate attention,[82] especially when in obvious need (i.e., bleeding) or severely injured.[83] However, absent severe and obvious injuries or other exceptional circumstances, following assaults, an inmate must first request and then be denied medical attention to state a Section 1983 claim.[84]

Courts are also reluctant to find female prisoners' unique medical needs to be "serious." Women inmates have the peculiar medical needs of prena-

76. Meriwether v. Sherwood, 514 F. Supp. 433, 438 (S.D.N.Y. 1981).

77. Rochin v. California, 370 U.S. 660 (1962).

78. *See* United States *ex rel.* Walker v. Fayette Cty., Pa., 599 F.2d 573, 575-76 (2d Cir. 1979) (per curiam) (failure to provide drug addict with methadone does not violate eighth amendment even though prisoner suffers); Inmates of Allegheny County v. Pierce, 612 F.2d 754, 760 (3d Cir. 1979) (failure to provide methadone treatment to detainnes after six days of incarceration not violative of fourteenth amendment since not punitive in purpose); Holly v. Rapone, 476 F. Supp. 226, 229 (E.D. Pa. 1979) (pretrial detainee heroin addict has no right to methadone treatment). *Contra*, Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978) (detainee has right to *continued* methadone treatment).

79. In *Walker*, 599 F.2d 573 a prisoner who was an admitted eight-bag-a-day heroin addict, received no treatment during the first ten days of incarceration, although Pennsylvania state law required a medical examination for all prisoners within forty-eight hours of incarceration. The court found deliberate indifference to the prisoner's serious medical needs, despite the absence of any state requirement for methadone maintenance. *See also* Comment, *The Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pretrial Detainees*, 42 U. CHI. L. REV. 705, 707-12 (1975) [hereinafter cited as *Drug-Dependent Prisoners*] for an extensive analysis of addict's statutory rights to medical care; Holly v. Rapone, 476 F. Supp. 226 (E.D. Pa. 1979) (after receiving medical treatment within forty-eight hours of admission to the prison, the inmate's "deliberate indifference" allegation for failure of the officials to provide methadone was defeated because there was not a state statute or constitutional basis for the claim).

80. Comment, *Drug-Dependent Prisoners, supra* note 79.

81. *Id.* Fiallo v. Batista, 666 F.2d 729, 731 (1st Cir. 1981) (denial of transfer to afford prisoner drug treatment does not violate the fourteenth amendment due process clause); Bresolin v. Morris, 88 Wash. 2d 167, 558 P.2d 1350 (1977) (absent an "accepted" method of drug treatment in prison, inmate lacks constitutional right to prison drug rehabilitation).

82. Hernandez v. Lattimore, 612 F.2d 61, 63 (2d Cir. 1979).

83. Dailey v. Byrnes, 605 F.2d 858, 860 (5th Cir. 1979); Spicer v. Hilton, 618 F.2d 232 (3d Cir. 1980) (arrestee's obvious" injuries may be serious enough that even a three hour delay in treatment constitutes "deliberate indifference" and states an eighth amendment claim).

84. Grillo v. Sielaff, 414 F. Supp. 272 (N.D. Ill. 1976).

tal care, and sometimes, abortions when they become pregnant either before or during incarceration.[85] One decision seems to indicate that female prisoners have the right to provision of prenatal care by prison authorities, since prenatal treatment is a "medical need," even if arguably not a medical necessity.[86] A woman has an unrestricted right to an abortion during the first trimester, and a qualified right thereafter.[87] However, the issue of whether an unwanted pregnancy constitutes a "serious medical need" for female prisoners has not been decided. Since the physical and psychological pain and anguish of an unwanted pregnancy is the same for both civilian and incarcerated women, it seems that female prisoners should be as constitutionally entitled to abortions as free women.

Even if a prisoner can demonstrate that he was deliberately denied treatment for a "serious" medical need, courts may nonetheless deny any eighth amendment claim which fails to allege any resultant injury. An inmate did not state an eighth amendment claim where he was denied medical therapy because he suffered neither permanent residual injury nor any injury accompanied by undue suffering.[88] The Ninth Circuit has held that "acute physical conditions" which result in "tangible residual injury" when left unattended are "serious" medical needs.[89] Many courts favor this view. The United States District Court of New Hampshire in *Laaman v. Helgemoe*,[90] made the clearest and perhaps most influential attempt to define a "serious" medical need.

> Traditionally, in the Section 1983 context, a plaintiff must show not only that the defendant was callously indifferent to his or her medical needs, but that those needs were serious and that the failure to treat them *resulted in considerable harm*.[91]

The *Laaman* court further defined "serious medical need" as a need for treatment that has either been diagnosed by a physician as necessitating treatment, or a need that is so obvious that even a layman would recognize the need for a doctor's attention.

The decisions which require lasting damage to a prisoner claiming denial of necessary medical care may be read in two ways. Requiring resultant injury can either be a high standard of the preexisting "serious" prong of the *Estelle* test, or it may be a third prong appendaged on to *Estelle* by the lower courts. Whether requiring resultant injury merely imposes a high standard of seriousness or creates an additional requirement into the *Estelle* two-prong test, the effect remains the same: prisoners' rights to medical treat-

85. *See But for Pregnancies, Coed Prisons Seem to Work*, L.A. Daily Journal, July 1, 1983, at 5, col. 3. *See also* Foy v. Greenbolt, 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983).

86. *See* Comment, *Inmate Abortions—the Right to Government Funding Behind the Prison Gates*, 48 FORDHAM L. REV. 550, 559-60 (1980) [hereinafter cited as *Inmate Abortions*]. Although much of the author's funding argument has been voided by the holding in Harris v. McCrae, 448 U.S. 297 (1980); it should be noted that the state need not fund medically necessary abortions for free women. *See also* Foy v. Greenbolt, 141 Cal. App. 3d 1 (1983) where in an analogous matter, California's Court of Appeal held that mental institutions may be obliged to provide patients with contraceptive counseling and birth control devices. The decision followed a "wrongful birth" action by a mental patient who became a mother while a patient in a mental institution.

87. Roe v. Wade, 410 U.S. 113, 154, 163-64 (1973).

88. Mitchell v. Hendricks, 431 F. Supp. 1295 (E.D. Pa. 1977).

89. Mayfield v. Craven, 299 F. Supp. 1111 (C.D. Cal. 1969), *aff'd*, 433 F.2d 873 (9th Cir. 1970).

90. 437 F. Supp. 269 (D. N.H. 1977).

91. *Id.* at 311 (emphasis added).

ment are made more elusive. *Russell v. Enser*[92] is illustrative of this point. In *Russell*, a prisoner with an ulcer was denied his bland diet and prescribed drugs. The court reasoned that although the prisoner suffered pain and discomfort, the prisoner had suffered no permanent damage and therefore had failed to state a claim under the *Estelle* standard.[93]

In sum, the only two cases which provide any real guidance in defining a "serious" medical need, *Bowring* and *Laaman*, are both problemmatic. Neither of these two tests is accepted as the standard for defining medical seriousness. However, there are five types of medical need which seem most likely to be found "serious" under the *Estelle* standard for eighth amendment deprivations of medical care:

(1) highly contagious or dangerous conditions or illnesses which a state statute clearly mandates that prison officials treat,[94]
(2) injuries which are both severe and obvious,[95]
(3) professionally diagnosed mental or physical illnesses or injuries which are either curable or relievable, and threaten substantial harm when left untreated,[96]
(4) chronic disabilities and afflictions,[97] and
(5) conditions or illnesses which result in serious injury when requests for their treatment are denied.[98]

Conversely, the prisoner least likely to have an illness which is constitutionally cognizable as "serious" is a prisoner with a temporary latent illness which has not been professionally diagnosed and which will not result in any significant lasting injury if left untreated.

The lack of any clear, accepted definition of a "serious medical need" may be as much a problem to penal administrators as it is to the courts. Since correctional administrators cannot issue guidelines to correctional officers or health care professionals, problems of discretion arise in defining serious medical conditions that require treatment. The primary health care

92. 496 F. Supp. 320 (D. S.C. 1979).
93. *Id.* at 326-27.
94. *See supra* text accompanying notes 49, 58 and 74.
95. Mere pain and discomfort attributable to prison officials' denial of prescribed drugs and a bland diet for a prisoner's ulcer were held not to be serious medical needs in Russell v. Enser, 496 F. Supp. 320 (D. S.C. 1979). *Compare* Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) wherein the court held that when a county jail inmate vomitted blood and was denied special diet and ulcer medication for two days, denial of an obvious need for medication stated a Section 1983 claim. In another case involving a chronically ill prisoner, it was held that failure to provide an epileptic medication may amount to cruel and unusual punishment. Mitchell v. Chester County Farms Prison, 426 F. Supp. 271, 274 (E.D. Pa. 1976). The *Russell* court reasoned that since the prisoner had not suffered any permanent damage, no eighth amendment claim was stated under *Estelle*. This read into *Estelle*'s "serious medical need" requirement the necessity of lasting damage to the prisoner's health.

The Ninth Circuit has found that "acute physical conditions" which result in "tangible residual injury" when left untreated are "serious medical needs." Mayfield v. Craven, 299 F. Supp. 1111 (C.D. Cal. 1969), *aff'd*, 433 F.2d 873 (9th Cir. 1970). In probably the most significant case to define *Estelle*'s "serious medical need" requirement, the United States District Court of New Hampshire advanced this judicially-created resultant injury requirement to its furthest. In Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D. N.H. 1977) the court noted that Section 1983 plaintiffs were traditionally required to show considerable resultant harm. In Freeman v. Lockhart, 561 F.2d 728, 730 (8th Cir. 1977) an eighth amendment claim was upheld primarily because of the denial of optical treatment which resulted in the prisoner's loss of vision.
96. *See supra* note 58 and accompanying text.
97. *See supra* text accompanying note 58, 66-70, and 81.
98. *See supra* text accompanying note 95.

decision of whether any particular inmate will even be allowed to see a health care professional becomes a correctional officer's discretionary decision. Since correctional officers are not medically trained, they possess only lay knowledge of when medical care should be rendered. Moreover, their principal charge is security. Any decision to allow an inmate to see a health care professional will necessarily be tainted by the officer's security function. As a result, the least qualified corrections employee, with the greatest potential conflict of interest, is left to make the most fundamental inmate health care decision with virtually no legal or medical guidance.

Prison is an institution which does not allow inmates to make health care decisions. Inmates may only make health care requests. Until they are afforded more autonomy to initiate and challenge health care decisions, correctional officers will remain the institutional determinants of medically "serious" needs. Judges, except in cases of first impression, are supposed to apply existing law. Until they are given some standard of what qualifies as a constitutionally "serious" medical need, they are left to make unqualified medical judgments of seriousness in Section 1983 claims.

This unqualified judicial intrusion into correctional discretion is precisely what the nearly abandoned "hands-off" doctrine was designed to prevent. Perhaps instead of regressing to the use of this doctrine to resolve the medical seriousness issue of inmates' Section 1983 claims, courts might increase use of expert medical testimony. While courts do not allow inmates to be the ultimate judge of their health care needs,[99] they should at least examine how serious the inmate alleges his need for medical care to be to prison officials. This would impart some congruity and fairness into requiring inmates to make health care requests for latent illnesses. If an inmate's representation of the seriousness of his illness is given judicial weight, they will have more incentive to request treatment. Alternatively, courts might employ a "reasonable prison official" standard. The inquiry under this standard would be whether a reasonable prison official in the same situation would have acted as the actual prison personnel did.

2a. *What Constitutes "Deliberate Indifference?"*

Even before *Estelle*, courts granted inmates Section 1983 relief when intentional denial of medical care was established.[100] The various circuit and district courts used differing terminology to define the requisite official conduct necessary to establish a Section 1983 claim for relief.[101] However,

99. Brown v. Beck, 481 F. Supp. 723 (S.D. Ga. 1980) (a prisoner with a head injury and suffering from hearing problems, pain and dizziness, who was denied requested subscalp steel plate to cover trephin skull opening did not suffer "deliberate indifference"). *See also* Bass v. Sullivan, 550 F.2d 229 (5th Cir. 1977), *cert. denied*, 434 U.S. 864 (1978) (neither carelessness, nor "the deliberate creation of a charade or simalacrum of treatment insidiously designed to injure rather than to cure" made even a colorable showing of indifference when treating physicians questionably amputated prisoner's gangrenous legs at the knees).

100. *See* 28 A.L.R. FED. 279, 313 (1976).

101. *Id.* at 314-315. The various circuit court tests for a Section 1983 claim of denial of medical care tests included "unusual" treatment or lack thereof (Third Circuit); "serious endangerment of prisoner's well being" (Fourth Circuit); "abuse of discretion" (Fifth Circuit); "exceptional circumstances" (Seventh and Ninth Circuit). *Id.* at 314. Several courts specifically required a showing of "deliberate indifference" to warrant relief under the Civil Rights Acts; Martinez v. Mancusi, 433 F.2d 921, (9th Cir. 1979), *cert. denied*, 401 U.S. 983; Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972);

the end result remained the same—only "outrageous" violations of inmates' civil rights were likely to be remedied.[102] Since similar results are being reached by today's federal courts, it may be useful to first examine the factors which *Estelle* expressly excludes from its "deliberate indifference" considerations.

Mere malpractice is not, per se, an eighth amendment violation simply because the tort victim was a prisoner.[103] In *Estelle*, the Court purposely avoided making medical malpractice into a constitutional tort. The appellate court had found that the attending physicians had only treated the symptoms of Gamble's back injuries,[104] but not the causes.[105] The appellate court found that the inadequate care caused Gamble's needless suffering in violation of the eighth amendment.[106]

In reversing the appellate court decision, the Supreme Court found that since Gamble's claim was based solely upon the lack of follow-up diagnosis and treatment, and not their complete omission, the doctor's choice not to perform the follow-up procedure was "a classic example of a matter for medical judgment."[107] A medical decision as to the proper course of treatment was found to be an improper basis for an eighth amendment claim.[108] The Court indicated that decisions involving the choice of a course of treatment were, at most, questions of medical malpractice to be heard in a state court under a state tort claims statute.[109]

Thus, the *Estelle* holding indicates that neither mere malpractice nor decisions about the proper course of treatment constitute "deliberate indifference." The Court also explicitly excludes two other circumstances from being regarded as "deliberate indifference." Accidents (even those producing added anguish), and inadvertent failures to provide sufficient medical care do not evidence "deliberate indifference."[110] Thus, the Court made it clear that the following four categories of inmate medical complaints do not qualify as "deliberate indifference:" malpractice alone, differences of opinion over the course of treatment, accidents, and inadvertent failures to render adequate care.

Other than these four exclusions, the Court gave few other guidelines for applying the "deliberate indifference" standard. The Court explained which prison officials may be deliberately indifferent, how they may be indifferent and the consequences under Section 1983. Deliberate indifference may be manifested by "prison doctors in response to the prisoner's

Jones v. Lcokhart, 484 F.2d 1192 (8th Cir. 1973); Westlake v. Lucas, 537 F.2d 857, (6th Cir. 1976) (prison authorities may not be deliberately indifferent to the suffering of prisoners); Russell v. Sheffer, 528 F.2d 1320, 1330 n.14 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) ("callous indifference").

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

103. *Estelle*, 429 U.S. at 106.

104. *Estelle*, 516 F.2d at 941.

105. *Estelle*, 429 U.S. at 107.

106. *Id.* at 103.

107. *Id.*

108. *Id.*

109. *Id.* at 106.

110. *Id.* at 105-6. "[a]n inadvertent failure to provide medical care cannot be said to constitute 'an unnecessary and wanton infliction or pain,' or to be 'repugnant to the conscience of mankind' "); Klein, *Prisoners' Rights to Health Care, supra* note 16, at 16. *See also* Campbell v. Sacred Heart Hospital, 496 F. Supp. 692, 694 (E.D. Pa. 1980).

needs,"[111] or by prison guards intentionally denying or delaying access to medical care,[112] or by prison guards intentionally interfering with the treatment once prescribed.[113] Regardless of how the deliberate indifference is manifested, it states a cause of action under Section 1983 for unconstitutional denials of required medical treatment.[114]

The lower federal and state courts have applied these guidelines differently under various circumstances. Therefore, it is most useful to analyze the "deliberate indifference" standard in each of the four most typically litigated areas of prisoner medical treatment: complete denials of medical care, inadequacy of medical care, denials of prescribed treatment, and delivery of medical care services throughout the particular institution or prison system.

2b. *Complete Denials of Medical Care as "Deliberate Indifference"*

The first issue which must be resolved whenever an inmate alleges that he was denied medical care altogether is whether the inmate has requested treatment. This seems logical. Unless an inmate requests treatment, absent obvious afflictions, a prison official cannot be said to have had knowledge of the inmate's medical needs.[115]

When an inmate does request medical treatment the attendant prison official has knowledge of a purported need, and may then choose to act (either affirmatively or by omission). Once a request for treatment has been made the issue becomes whether the responsible prison official acted indifferently. Even before *Estelle*, the circuit courts agreed that "a total denial of medical attention requested by the inmate, whether caused intentionally or through deliberate indifference, states a cause of action for which relief under the Federal Civil Rights Act [for an eighth amendment violation] will be granted or held supportable."[116]

Prison guards or other lay officials, and not medical personnel, are usually the defendants in actions alleging denials of requested medical care.[117] Courts have found that lay officials have exhibited the requisite intentional motivation to deny a prisoner his requested medical treatment in a variety of contexts. Prison officials' refusal to allow a prisoner to attend his scheduled doctor's appointments because the prisoner was a "safety risk" was deliberately indifferent.[118] Prison officials have also been found to be deliberately indifferent when they have forced an inmate to complete a job assignment

111. *Estelle*, 429 U.S. at 104. *See, e.g.*, Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away prisoner's ear and stitching the stump may be attributable to "deliberate indifference. . .rather than the exercise of professional judgment").

112. *Estelle*, 429 U.S. at 104. *See also* Hughes v. Noble, 295 F.2d 495 (5th Cir. 1961); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Hutchens v. Alabama, 466 F.2d 507 (5th Cir. 1972); Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972); Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976).

113. *Estelle*, 429 U.S. at 105. *See also* Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Wilburn v. Hutto, 509 F.2d 621 (8th Cir. 1975).

114. *Estelle*, 429 U.S. at 104-5.

115. Grillo v. Sielaff, 414 F. Supp. 272, 275 (N.D. Ill. 1976).

116. Annot., 28 A.L.R. FED. 279, 330 (1976).

117. Note, *Difficulty, supra* at note 51, at 698.

118. Hurst v. Phelps, 579 F.2d 940, 942 (5th Cir. 1987).

which aggravates his serious medical condition;[119] refused an inmate his authorized medicine which was required to prevent serious harm to his health;[120] denied an inmate medical treatment on the presumption he was faking, even in light of increasingly bizarre behavior;[121] injured an inmate seriously enough to render him unable to walk and then refused him a wheelchair, forcing him to crawl;[122] and denied an inmate access to dental treatment which inflicted unnecessary and wanton pain.[123]

Several cases attempted to more generally define when completely denying an inmate medical care constitutes "deliberate indifference." The Illinois District Court has ruled that "deliberate indifference" occurs when there is a showing that officials had an intent either to deny or delay access to needed medical care, or to wantonly inflict unnecessary pain.[124] Another district court has found that deliberate indifference is demonstrated whenever prison officials "knowingly deprives a prisoner of vital medical treatment."[125] Other courts have found deliberate indifference whenever prison officials have acted "wantonly, recklessly, or with gross negligence,"[126] or with "callous" or "shocking" disregard for a prisoner's medical needs.[127]

Regardless of the jargon employed by the various courts, the decisions remain faithful to *Estelle*. Only intentional, and not negligent, complete denials of requested necessary medical treatment violate the eighth amendment and state a Section 1983 cause of action.

2c. *Inadequate Medical Care as "Deliberate Indifference"*

The first issue to be examined whenever an inmate alleges that he has received inadequate medical care is whether the treatment was negligently administered.[128] A claim of denial of adequate medical care must allege facts which at least indicate negligent medical treatment.[129] However, mere negligence alone constitutes medical malpractice which of course does not, by itself, violate the eighth amendment.[130] Complaints of negligent treatment or malpractice only rise to constitutional complaints when coupled

119. Black v. Ciccone, 324 F. Supp. 129, 133 (W.D. Md. 1970) (officials' knowingly made a job assignment to plaintiff prisoner which was inappropriate because of the prisoner's medical condition and this amounted to cruel and unusual punishment, even though inmate did not object at the time. Contrast *Black* with officials' failure to treat a non-obvious injury in the Grillo v. Wielaff, 414 F. Supp. 272 (N.D. Ill. 1976) where there was an allegation of denial of medical care, following a beating, which failed to state an eighth amendment claim where it was not alleged that defendants were ever made aware of prisoner's request for medical attention.

120. Frazier v. Wilson, 450 F. Supp. 11, 12 (E.D. Tex. 1977).

121. Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979). There were circumstances in this case which made a finding of "deliberate indifference" particularly appealing. Aside from presumptuously dismissing the inmate's deteriorating behavior as a ruse, custodians made callous remarks regarding the prisoner's welfare, and the prisoner was found dead on his cell floor. These acts by prison custodians prompted the Fifth Circuit to find that the prison custodians had demonstrated a conscious purpose to inflict suffering. *Id.* at 107-8.

122. Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980).

123. Frazier v. Wilson, 450 F. Supp. 11 (E.D. Tex. 1977).

124. McEachern v. Civiletti, 502 F. Supp. 532 (N.D. Ill. 1980).

125. Williams v. Treen, 617 F.2d 892 (5th Cir. 1982).

126. Leite v. City of Providence, 463 F. Supp. 585, 590 (D. R.I. 1978).

127. Arroyo v. Schaefer, 548 F.2d 47, 49 (2d Cir. 1977).

128. Note, *Difficulty, supra* note 51.

129. *Id.*

130. *See, e.g.*, Scittarelli v. Manson, 447 F. Supp. 279 (D. Conn. 1978) (prisoner's Section 1983

with an independent showing of bad faith[131] (i.e., an intention to deprive the prisoner of his constitutional right to adequate medical treatment). Inmates' eighth amendment complaints concerning the adequacy of medical care must allege that the responsible prison personnel intentionally or knowingly provide insufficient medical care.

Courts are generally unwilling to presume intentional cruelty by prison officials, so bad faith elements of willful, wanton or reckless conduct are required to elevate adequacy complaints to constitutional proportions.[132] These bad faith elements have been found to exist under myriad circumstances and labels including "extraordinary," "shocking," "callous," "barbarous,"[133] "intentionally injurious," "reckless," or "unconscionable" behavior,[134] or behavior with "a conscious purpose to inflict suffering."[135] Regardless of the wording of the bad faith requirement, it must be present in order to raise a complaint concerning the adequacy of treatment from mere malpractice to the deliberate indifference standard required for a Section 1983 claim.[136] This stringent two-prong reckless test (inadequacy and bad faith) substantially interferes with an inmate's ability to attack the issue of adequacy under Section 1983. Under this test, in order to recover an inmate must establish that the official deliberately provided inadequate medical treatment.

One district court has held that so long as a prisoner has received some treatment when he is injured, he may not raise an eighth amendment claim.[137] In the Fourth Circuit, when a treating doctor fails to exercise sound professional judgment he commits only negligence and not deliberate indifference. This remains true even when the physician's misjudgment results in serious permanent injury to the inmate.[138] A prisoner is not constitutionally entitled to the "best treatment" available,[139] since "the prisoner cannot be the ultimate judge of what medical treatment is necessary or proper for his care."[140] This paternalistic reasoning leads courts to conclude

claim alleging insufficient medical care was held to be groundless because the facts did not even evidence negligence).

131. Klein, *Prisoners' Right to Health Care, supra* note 16.

132. Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979).

133. Comment, *Drug-Dependent Prisoners, supra* note 79.

134. *See* Annot., 28 A.L.R. FED. 313, 353-54 (1976). *But see* notes 140-41 *infra* and accompanying text. *See also* Klein, *Prisoners' Right to Health Care, supra* note 16, at 16; Ward v. Johnson, 437 F. Supp. 1053 (E.D. Va. 1977) (questions of medical judgment are not justiciable).

135. Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979).

136. *Estelle*, 429 U.S. at 107 (mere difference of opinion as to course of treatment a matter better left to medical discretion). Courtney v. Adams, 528 F.2d 1056 (8th Cir. 1976) (doctor and prisoner disagreement over pre-operation treatment invalid claim for relief); Mosby v. O'Brien, 414 F. Supp. 36 (E.D. Mo. 1976) claim that during two and a half months prisoner had only received "darvon and promises" for kidney problem, but no outside examination, at most, amount to disagreement with course of medical treatment and thus no section 1983 claim); Young v. Gray, 560 F.2d 201 (5th Cir. 1977) (doctor's failure to provide inmate with additional diagnosis was not deliberate indifference); Wellons v. Townley, 528 F. Supp. 73, 74 (W.D. Va. 1981) (although dentist's attempted tooth extraction failed, thus causing inmate pain, state inmate has no federal remedy for disagreement with dentist's course of treatment); Mastrota v. Robinson, 534 F. Supp. 434, 438 (E.D. Pa. 1982).

137. Walnorch v. McMonagle, 412 F. Supp. 270, 275 (E.D. Pa. 1976).

138. *See supra* notes 31-38 and accompanying text.

139. McMahon v. Beard, 583 F.2d 172, 174 (5th Cir. 1978).

140. Cates v. Ciccone, 422 F.2d 926, 928 (8th Cir. 1970); Ward v. Johnson, 437 F. Supp. 1053 (E.D. Va. 1977).

that the medical care provided a prisoner need not be "perfect, the best obtainable, or even very good," so long as it is not deliberately indifferent.[141]

Ethically, it is difficult to agree that competent adults are not the ultimate judges of when they require medical treatment. This line of reasoning would virtually eliminate complaints about the quality of prisoners' medical care from Section 1983. Fortunately, other courts differ with these holdings. Eighth amendment complaints have been recognized against prison personnel on the basis that the medical care rendered has been so minimal or inadequate that care has effectively been denied.[142] Courts have also recognized that improper or inadequate medical treatment may be sufficiently cruel and unusual to raise an eighth amendment claim.[143] One court recently employed an expert witness to help determine the eighth amendment issue of the adequacy of a prisoner's medical care.[144] These cases suggest that while an inmate's right to challenge the constitutional adequacy of his treatment may still be somewhat elusive, the right may be gaining substance.

2d. *Interference with Prescribed Medical Treatment as "Deliberate Indifference"*

This third type of eighth amendment action under Section 1983 involves the determination of when the prison staff interference with an inmate's medically prescribed course of treatment constitutes deliberate indifference. Prior to the *Estelle* deliberate indifference standard, district courts recognized causes of action for cruel and unusual punishment when prison officials intentionally, callously or recklessly denied an inmate his prescribed medication.[145]

The judicial recognition that an inmate has a limited eighth amendment right to treatment prescribed by a physician has persisted under "deliberate indifference" analysis. Prison officials may not use security as a justification

141. *See supra* note 97 and accompanying text.

142. Washington Mobilization Comm. v. Cullinane, 400 F. Supp. 186, 215 (D.C. Cir. 1975) (even the judgment of medical authorities may be questioned when the medical care provided an inmate is so inadequate that it may be cruel and unusual punishment); Martinez-Rodriguez v. Jimenez, 409 F. Supp. 582, 594 (D.P.R. 1976) (grossly inadequate medical services may establish a deliberate indifference towards a prisoner's medical needs); Sturts v. City of Philadelphia, 529 F. Supp. 434, 438 (E.D. Pa. 1982) (when any treatment is given to a prisoner courts will generally defer to the medical judgment rendered. However, when such treatment is so inadequate that it effectively equals no treatment, the claim rises to a Section 1983 level.).

143. Sawyer v. Sigler, 320 F. Supp. 690, 696 (D.C. Neb. 1970) (arbitrarily inducing inmate nausea by requiring the ingestion of emphysema medication in only its crushed or liquid form, which lessened the medication's effectiveness, may be both cruel and unusual punishment and denial of adequate medical treatment where such practice did not further the prison goal of guarding against drug abuse). May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980) (improper medical treatment resulting in the "unnecessary and wanton infliction of pain" may amount to deliberate indifference to serious medical needs); Daniels v. Murphy, 528 F. Supp. 2, 6 (E.D. Okla. 1978) (treatment without examining prisoner's medical history may be deliberate indifference to serious medical needs).

144. Stickney v. List, 519 F. Supp. 617, 620 (D.C. Nev. 1981).

145. Tolbert v. Pyman, 434 F.2d 625, 626 (9th Cir. 1970); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970) (after surgery for infantile paralysis inmate who was instructed to minimize leg movement was forced to walk handcuffed during return from prison and denied prescription medication, constituted "deliberate indifference"); Reynolds v. Swenson, 313 F. Supp. 328, 329 (W.D. Mo. 1979).

for violation of a physician's orders,[146] nor may they ignore the orders or effectively deny the order through punitive measures.[147] However, courts have sanctioned prison officials' failure to provide an inmate's prescribed therapy,[148] and tuberculosis medication.[149]

Whether harm results from officials' interference with prescribed treatment influences when courts will recognize Section 1983 claims. The judicially created "resultant harm" component of the deliberate indifference test is crucial. For example, officials who denied an inmate his medication for ten days upon the inmate's transfer into their institution did not violate Section 1983 because their omission was "medically insignificant," as the inmate was later discovered not to have required the medication. Conversely, when an inmate suffered head injuries from his epileptic seizure, officials who denied him his requested medication for three days were found to have been deliberately indifferent.[150]

B. *Class and Group Actions for Inadequate Medical Treatment: Systems and Conditions Constituting "Deliberate Indifference"*

The fourth type of eighth amendment complaint which inmates frequently raise concerns group or class allegations that inmates are suffering systematic medical care deprivations. The claims further allege that such deprivations are caused by inadequate institutional or system-wide medical facilities or conditions. These actions have only been utilized during the last thirteen years, but have had the greatest impact of any prisoner claims for medical treatment.

The medical care services of an entire state correctional system have been susceptible to attack since the 1970 case of *Holt v. Sarver*.[151] The medical care services of a correctional institution have been susceptible to court injunctions, at least since 1972, whenever the institution's "conditions"[152] present a "grave and immediate threat to [prisoners'] health or physical well-

146. Hurst v. Phelps, 579 F.2d 940 (5th Cir. 1978).

147. Sawyer v. Sigler, 320 F. Supp. 690 (D.C. Neb. 1970).

148. Mitchell v. Chesterfield County Farms Prison, 426 F. Supp. 271 (E.D. Pa. 1976); Alexander v. Robinson, 463 F. Supp. 1232, 1235 (E.D. Pa. 1979) (the failure of various doctors to provide treatment recommended by a specialist only amounted to a challenge of medical judgment, and therefore was not a violation of the eighth amendment).

149. Mitchell v. Hendricks, 431 F. Supp. 1295, 1298 (E.D. Pa. 1977) (in a civil rights action for failure of prison's physician to provide prescribed neuromuscular therapy resulting in the loss of the inmate's arm, the plaintiff prisoner did not present a colorable eighth amendment violation).

150. *See also* Note, *Difficulty, supra* note 51, at 701; Mitchell v. Chesterfield County Farms Prison, 426 F. Supp. 271 (E.D. Pa. 1976).

151. 309 F. Supp. 362 (E.D. Ark. 1970). (Conditions in the Arkansas state prison system when viewed in their totality were so intolerable that they constituted cruel and unusual punishment in violation of both the eighth and fourteenth amendments.) *See also* Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1974) (the most significant statewide conditions suit predating *Estelle* finding that such conditions as unsupervised, informally trained inmates rendering diagnostic, dental nursing and minor surgical services, and ignoring a bedridden quadriplegic's bedsores until they became maggot-infested, were unconstitutional).

152. "Prison conditions" do not include actions, practices and treatments mandated by either statute or by the specific terms of a sentence. Comment, *Federal Intervention in State Prisons: the Modern Prison Conditions Case*, 19 HOUS. L. REV. 931, 935 (1982) [hereinafter cited as *Conditions*]. Prison conditions which have been closely examined include all treatments and practices involving inmates, and all circumstances in which inmates are placed which are "alleged to be attributable to the independent decisions, acts, or omissions of members of the correctional force, whether they be

being."[153] The adequacy of the institution's treatment facilities are the focus of most of these institution-wide suits. These suits have become so prevalent that the majority of inmate health care suits brought since *Estelle* involve challenges to institutions' medical treatment facilities.[154]

Inmates may join together to file a class action against either an institution or a prison system under Federal Rule of Civil Procedure 23(b)(3),[155] whenever their complaints allege that eighth amendment violations affect enough inmates that joinder of all class members would be impracticable. Substantively, inmates may choose to attack unconstitutional health delivery systems as a class because they are all within the particular institution or prison system, and are totally dependent upon prison officials to maintain an adequate health care system.[156]

Inmate groups may allege that the conditions which the penal institution or state officials maintain amount to cruel and unusual punishment. Before 1981, federal courts issued judgments which required the losing defendant prisons to change various confinement conditions held to be violative of the eighth amendment.[157] But, it was not until the 1981 case of *Rhodes v. Chapman*[158] that the Supreme Court addressed "for the first time the limitation that the Eighth Amendment. . .imposes upon the conditions in which a state may confine those convicted of crimes."[159]

Courts currently examine confinement conditions within the context of the eighth amendment in accordance with the guidelines outlined in *Rhodes*. A court must identify and evaluate each allegedly inadequate medical condition (or procedure) in its factual context to determine whether the condition is unconstitutional either alone, or in contribution to overall confinement conditions. Courts may evaluate confinement conditions under any acceptable "test,"[160] but medical care cases are still governed by the "deliberate indifference" test.

Once the prison's medical facilities or conduct are found to be unconstitutional under the "deliberate indifference" test, federal courts are limited in the types of relief available to the prisoner by the tenth amendment[161] and recent Supreme Court decisions. Courts may only issue orders to correct

low echelon prison guards or policymaking administrative officers of the prison system as a whole." Annot., 51 A.L.R. 3d 111 n. 2 (1973).

153. Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972). *See also* Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 848 (1974).

154. Note, *Difficulty, supra* note 51, at 702.

155. FED. R. CIV. P. 23(b)(3) (West 1982) states, "An action may be maintained as a class action if. . .the court finds that the questions of law or fact common to members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair adjudication of the controversy. . . ."

156. Klein, *Prisoners' Right to Health Care, supra* note 16, at 12 n.71.

157. Note, *Prisoners' Rights*, 69 GEO. L.J. 591, 609-10 (1980).

158. 452 U.S. 337 (1981).

159. *Id.* at 344-45. The Court noted that "until this case, we have not considered a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment." *Id.* at 345.

160. In *Rhodes*, "no static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual." *Id.* at 346.

161. U.S. CONST. amend. X states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

those aspects of prison conditions necessary to bring an institution or system up to minimal constitutional standards.[162] As long as the court-ordered corrections are designed to elevate prison conditions to minimal constitutional standards, the purpose of the condition, whether administrative or punitive, is irrelevant.[163]

Medical conditions lawsuits typically allege that inmates are being subjected to cruel and unusual punishment because a correctional system either lacks adequate treatment facilities,[164] procedures,[165] or personnel.[166] Courts have assumed an active role in addressing eighth amendment complaints of inadequate facilities since there is no risk of creating a constitutional tort of medical malpractice.[167] As a result, when inmates have lodged facility complaints pursuant to Section 1983 courts have aggressively imposed broad and affirmative corrective duties upon prison officials.[168] However, the United States District Court for the Western District of Virginia has succinctly stated the problem with assessing the adequacy of medical conditions: there is "obviously" no consensus of what precise amount of medical care must be available to make a facility or staff constitutionally adequate.[169]

Although the individual cases challenging medical staffs, procedures and facilities have been decided on divergent rationales, several generalizations have emerged. Challenges against an entire state's health care system are recognized when there are repeated examples of negligent delays or denials of treatment by medical staff.[170] Challenges against a particular institution's health care system are most likely recognized when they disclose systematic and gross medical care deficiencies that effectively act to deny the institutions' population of adequate medical care. These deficiencies make unnecessary suffering inevitable.[171]

Thus, courts analyze group claims of inadequate medical conditions differently from allegations by an individual that he has been deprived of

162. Bell v. Wolfish, 441 U.S. 520, 561-62 (1979) (Supreme Court admonition to federal courts that corrections management should be left to correctional personnel, unless challenged practices were unrelated to any legitimate penological objective); Rhodes v. Chapman, 452 U.S. 337 (1981) (Supreme Court invalidation of the Sixth Circuit Court of Appeal's specific mandates required to elevate various unconstitutional conditions in state prison).

163. Bono v. Saxbe, 620 F.2d 609, 611-13 (7th Cir. 1980).

164. Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (total inadequacy of prison hospital contributed to systemwide cruel and unusual punishment by increasing and prolonging inmates' suffering).

165. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976).

166. Cotton v. Hutto, 540 F.2d 412 (8th Cir. 1976); Cruz v. Ward, 558 F.2d 658, 6363 (2d Cir. 1977).

167. Note, *Difficulty, supra* note 51, at 702.

168. *See supra* notes 96, 97 and accompanying text.

169. Coxson v. Goodwin, 405 F. Supp. 1009, 1101 (W.D. Va. 1975).

170. Bishop v. Stoneham, 508 F.2d 1224 (2d Cir. 1974); Todaro v. Ward, 565 F.2d 48, 58 (1977); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Hendrix v. Faulkner, 525 F. Supp. 435 (N.D. Ind. 1981); Lightfoot v. Walker, 486 F. Supp. 1009 (W.D. Va. 1975).

171. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977). (Prisoners and pretrial detainees challenged the conditions of their confinement in a Rhode Island adult correctional facility. Among their challenges were: deficiencies in medical equipment, staff size, inadequate training for existing staff, inadequate procedures for containing infectious diseases, and lack of any plan to handle medical emergencies. The district court ordered that failure to comply with minimum standards of human habitation would necessitate closing the facility.)

medical care. In individual claims courts focus upon the intent of a defendant official. The issue is to determine whether the official acted, affirmatively or by omission, with the purpose of denying the prisoner treatment for his serious medical needs. Courts make such inquiries to determine whether the official acted with the bad faith intention of impermissibly punishing an inmate by depriving him of needed medical care.

In group medical "conditions" cases, inmates allege that prison officials have acted, affirmatively or by omission, to maintain inadequate staff, procedures or facilities. The reviewing court focuses not on the defendant official's state of mind, but rather on the level of prison conditions the responsible official maintains. If the official maintains "grossly" deficient medical conditions[172] which "shock the conscience,"[173] the court will impute the requisite wilful, wanton or reckless state of mind necessary to evidence the "deliberate indifference" which violates the eighth or (in medical procedure cases) fourteenth amendment.

IV. THE REMEDY MIRAGE

Once an individual or group of inmates overcomes the hurdles of medical seriousness, deliberate indifference, the "hands-off" doctrine and demonstrates resultant harm, thereby stating a cause of action, what relief is available? In general, there are very types of relief available to an individual prisoner. The inmate's remedy will depend upon whether the inmate has proven mere negligence, malpractice or a constitutional tort. Basically, regardless of how egregious the negligence or malpractice was, unless it was done with implied or express intent, it does not rise to a constitutional tort. The proper forum for these traditional tort actions is state court, or federal court if diversity exists. Absent diversity, federal courts do not have jurisdiction over mere negligence or malpractice cases. Hence individual inmates are often precluded from Section 1983 remedies by the clear limiting language in *Estelle* that: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."[174]

Relegated to a state court to redress a tort of negligence or malpractice, the inmate stands to recover little. Many states have civil death or other statutory equivalents which bar inmates from recovering against the state, absent consent, for state officials' negligent acts.[175] Moreover, state courts have traditionally been unreceptive to prisoner complaints.[176] An inmate's chances of recovery in a state court are improved when the negligent prison officials have breached a common law or statutory duty of care.[177] But proving official negligence is difficult for inmates. Witnesses are often other inmates. They may be reluctant to testify from fear of retaliation by prison officials.[178] Any testimony which is offered by inmate witnesses will be dis-

172. Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1974).

173. Schmidt v. Wingo, 499 F.2d 70 (6th Cir. 1974).

174. *Estelle*, 429 U.S. 97.

175. *The Emerging Rights of the Confined*, reported in *Medical and Health Care In Jails, Prisons and Other Correctional Facilities*, A.B.A. COMM'N ON CORRECTIONAL FACILITIES AND SERV. RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERV. (D.C. 1974).

176. *See* Note, *Prisoners' Medical Treatment, supra* note 12, at 359-63.

177. *Id.*

178. *Id.* at 356-57.

counted by the witnesses' "convict" status, as opposed to that of presumptively good faith administrators.[179]

The inmate's road to state court recovery is not as simple as overcoming problems of proof. The attitude of the judiciary, and the measure of damages create formidable obstacles to inmates' recovery. Even when an inmate proves he has been a medical tort victim, state courts remain hesitant to award any damages absent indices of tangible residual injury or death.[180] When state courts do award prisoners damages, the suit may still be an effort in economic futility. An inmate is unlikely to recover monetary damages, unless he can demonstrate a tangible financial loss and the judgment is levied against the prison, and not the individual prison officials.[181]

When inmates prove constitutional torts by demonstrating that prison officials intentionally deprived them of needed medical care, federal courts may award the inmate damages for the imposition of "pain and suffering, emotional distress, and impairment of their prospects for future employment proximately caused by the defendants' unconstitutional conduct. . .,"[182] but not damages for the intrinsic value of plaintiff's cruel and unusual punishment. Thus, inmate plaintiffs who succeed in federal court are entitled to compensation for the actual harm caused by the deprivation of their constitutional rights.

Whether an inmate may recover this compensation from the official personally depends upon the official's immunity. State officials who "knowingly" (i.e., with knowledge that they are violating the law) act to deprive an inmate of necessary medical treatment are not entitled to the qualified immunity from personal liability outlined by the Supreme Court in *Procunier v. Navarette*.[183] However, most inmates still choose to sue prison officials in their official capacity to pursue the "deep pocket." These suits may result in sizeable awards. An inmate who suffered permanent paralysis when a Virginia prison official improperly drugged him recovered $518,000.[184]

If an inmate is not qualified for federal relief under Section 1983, he may want to pursue the exceedingly elusive alternative remedy of habeas corpus pursuant to 28 U.S.C. §§ 2241-2255. This traditional avenue of redress for medical deprivations is far more limited than a Section 1983 action, and has thus fallen into disfavor. Habeas corpus actions, unlike Section 1983 actions, are limited by 28 U.S.C. § 2254(b) requirements of exhaustion of state remedies, and 28 U.S.C. § 2246 limitations on discovery in habeas corpus proceedings.[185] Moreover, monetary damages are unavailable in

179. *See* Note, *Difficulty*, *supra* note 51.

180. Note, *Prisoners' Medical Treatment, supra* note 12, at 367; *see also* notes 86, 87 and accompanying text regarding resultant injuries.

181. Doe v. District of Columbia, 697 F.2d 1115 (D.C. Cir. 1983).

182. *Id.* at 1124.

183. 434 U.S. 555 (1978). Officials are entitled to immunity from personal liability in Section 1983 actions when the following preconditions are met: (1) the official specifically pleads immunity as an affirmative defense; (2) the official's position required the exercise of official discretion; (3) the officials wrongful acts were performed pursuant to her duties and within such discretion; (4) the official acted without malice and was not in contravention of clearly established law. Williams v. Treen, 671 F.2d 892, 896 (5th Cir. 1982).

184. *See Depriving Prisoners of Medical Care: A 'Cruel and Unusual' Punishment*, 9 HASTINGS CENTER REP. 7, 10 (1979).

185. *See* Note, *Prisoners' Medical Treatment, supra* note 12, at 343 n.5.

habeas corpus proceedings.[186] In contrast, Section 1983 remedies permit not only monetary damages, but declaratory and injunctive relief as well.[187] However, courts rarely award damage judgments directly against correctional officials.[188]

Class action remedies are a different matter. Federal courts remedying medical deficiencies for an entire class have "often granted comprehensive relief requiring states to implement vast, costly improvements in their prison facilities and to completely alter unsatisfactory administrative policies and practices."[189] Intransigent prison officials sometimes frustrate such broad remedies by noncompliance. When courts retain jurisdiction this often leads to protracted complex litigation with prisoners, institutions and sometimes the federal government as parties. Various actual and threatened court sanctions for noncompliance ensue. Amidst all the tedious litigation, inmates sometimes resort to self-help measures. Recently, inmates at the California Rehabilitation Center in Norco staged a work stoppage demonstration to protest medical standards at the prison following the death of a female inmate.[190]

V. The Future of Inmates' Rights and Remedies for Medical Neglect

The future of litigation over prisoners' rights to medical treatment may be influenced by two recent developments: use of the Civil Rights of Institutionalized Persons Act,[191] and the awarding of punitive damages for Section 1983 violations. On March 4, 1983, the U.S. Department of Justice filed its first suit under the Civil Rights of Institutionalized Persons Act, passed by Congress in 1980. The suit was filed against two Hawaiian state prisons for having "egregious or flagrant conditions" which caused inmates "to suffer grievous harm," resulting in various constitutional violations.[192] Failure to provide adequate mental, medical and dental care services were among the alleged eighth amendment violations.[193]

The Civil Rights of Institutionalized Persons Act is potentially significant because it gives the United States Attorney General authority to bring a civil rights suit on behalf of state prisoners. Previously the Department of Justice had only intervened on behalf of inmate plaintiffs after their suit had already been filed.[194] There are potential problems with the suit against Ha-

186. Preiser v. Rodriguez, 411 U.S. 475, 49 (1973).

187. *See supra* note 44 and accompanying text.

188. *See, e.g.*, Landman v. Royster, 354 F. Supp. 1302, 1319 (E.D. Va. 1973).

189. Comment, *Federal Intervention in State Prisons: the Modern Prison-Conditions Cases*, 19 HOUS. L. REV. 931, 936 (1982); courts have threatened, *e.g.*, Hamilton v. Love, 328 F. Supp. 1183 (E.D. Ark. 1971); and actually closed challenged institutions, *e.g.*, Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd*, 430 U.S. 322 (1977). One court also threatened to release some nondangerous prisoners and initiate contempt proceedings against the correctional officials who failed to improve conditions. Barnes v. Virgin Islands, 415 F. Supp. 1218 (D. V.I. 1976).

190. L.A. Times, April 21, 1983, § A, at 2, col. 3.

191. 42 U.S.C. § 1997 (1980).

192. L.A. Times, March 5, 1983, § A, at 2, col. 3.

193. *Id.*

194. *Hawaii Prisons Sued: First 'Institutionalized Persons Act' Case*, 9 CORRECTIONS 4 (July, 1983).

waii, including the lack of any proposed remedy,[195] which threaten dismissal of the suit. But given the scope of past judicial remedies in class actions of this type, relief may be proposed by any measure from an injunction to requiring construction of entirely new facilities.[196] Increased intervention by the Department of Justice on behalf of prisoners' constitutional rights to medical care can only help make those rights more enforceable.

Aside from the increased Department of Justice intervention, prisoners' constitutional rights to medical treatment may have been made more real by the last session of the Supreme Court. In *Smith v. Wade*,[197] the Court held that punitive damages may be awarded under Section 1983, even absent any showing of actual ill will, spite, or intent to injure. Speaking for the majority, Justice Brennan deduced that there is: "no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action."[198] Prisoners' constitutionally guaranteed rights to remain free from cruel and unusual punishment are violated when they are deprived of medical care. Yet, the "deliberate indifference" standard conditions this right upon the subjective motivation of the depriving prison official. This makes it more difficult to state a constitutional claim for denial of medical care than it is to state a common tort claim for negligence or malpractice. As a result, any prisoner's medical claim which fails to allege an intentional deprivation of medical care only states a common tort. The negligence and malpractice remedies for these common torts are more restrictive than the vast Section 1983 remedies available for constitutional medical claims.

Superficially, it would seem that granting inmates who have been unconstitutionally deprived of medical care a broader remedy than inmates who have only been tortiously deprived of such care follows Brennan's reasoning. However, because of the high (i.e., gross) standard of negligence and difficulty which inmates encounter in proving the intent necessary to state a constitutional claim, many inmate medical cases are remanded to the state courts. The remedies available in state courts for common torts are more restrictive than the constitutional remedies that an inmate might be entitled to, but is denied due to problems of proof. The restrictive nature of the common tort remedy, and the difficulty which inmates encounter pursuing the remedy make compensation unlikely.

An inmate's constitutional right to medical care should not depend upon the state of mind of the prison official who denies the care. The eighth amendment does not read "nor intentional cruel and unusual punishment inflicted." The *Estelle* standard of "deliberate indifference" should be lowered, perhaps to requiring mere knowledge of the inmate's medical needs. The "serious" prong of *Estelle* should be lowered to only requiring that the inmate's medical need be expressed or obvious to lay prison personnel. This would limit lay personnel's liability to behavior based upon their sensory perceptions alone, and prevent them from having to exercise unqualified

195. *Id.*

196. Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975) (the lack of a prison clinic or hospital did not justify the inadequate medical treatment of the inmates, so the court ordered that a hospital be constructed).

197. — U.S. —, 103 S. Ct. 1625 (1983).

198. *Id.* at 1636.

medical judgments regarding the severity of the illness. It would be simple to have lay personnel enter evidence of their observations of either expressed or obvious medical need.

Whatever vestiges of the "hands-off" doctrine that still remain should be abandoned. The doctrine is irrational. Courts lack of correctional expertise is remedial by appointment of special masters, expert testimony and other innovative techniques. The same innovative attitude should be used by courts to compensate for their lack of medical expertise. Since courts make tort judgments constantly, this merely requires use of existing tort law. Any federalism concerns are disspelled by Section 1983's limitation to *state*, not federal, deprivations of civil rights. Recent inmate self-help measures demonstrate that improper medical conditions threaten subversion of prison discipline more than court intervention might.

Finally, state statutes governing prisoner medical rights could be more artfully redrafted to state clearly the minimal standards of medical care required for prisoners. This would better guide and instruct prison officials' in their behavior, and give courts some guidance as to what legislators and their constituents believe are serious medical needs.

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