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# MEDICALLY NECESSARY ORGAN TRANSPLANTS FOR PRISONERS: WHO IS RESPONSIBLE FOR PAYMENT?

## INTRODUCTION

*There is no iron curtain drawn between the Constitution and the prisons of this country.*<sup>1</sup>

In 1969, James Earl Ray was convicted of murdering Rev. Martin Luther King Jr. and sentenced to ninety-nine years in a Tennessee prison.<sup>2</sup> He confessed to the murder but then recanted, claiming that he had been framed.<sup>3</sup> He never stopped trying to overturn his conviction.<sup>4</sup> King's family, led by his thirty-seven year-old son Dexter Scott King, vigorously supported Ray and to this day maintain that he was innocent.<sup>5</sup> Ray suffered from end-stage hepatitis C, which he contracted from a blood transfusion he received after being stabbed twenty-two times in a prison attack in 1981.<sup>6</sup> Ray had been medically approved for a liver transplant through the University of Pittsburgh Medical Center, but he was not accepted into the program and was placed on an organ waiting list.<sup>7</sup> Before Ray could be placed on the list, he had to raise a \$278,000 deposit and demonstrate that he could receive proper post-operative care in prison.<sup>8</sup> Ray was unable to raise the money for the transplant, and the Tennessee Department of Corrections would not finance it.<sup>9</sup> Ray was thus left without options; he

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<sup>1</sup> Wolff v. McDonald, 418 U.S. 539, 555-56 (1974).

<sup>2</sup> See Rob Johnson, *James Earl Ray Liver Transplant Status May Be Announced Today*, COM. APPEAL (Memphis), Nov. 26, 1997, at B10.

<sup>3</sup> See *Lawyer Says James Earl Ray Needs a Liver Transplant*, STAR-TRIB. (Minneapolis-St. Paul), Jan. 11, 1997, at 6A [hereinafter *Lawyer Says*].

<sup>4</sup> See *id.*

<sup>5</sup> See *Old Case, New Data: Bullet that Killed Dr. King May Not Match Others in Gun*, SUN-SENTINEL (Fort Lauderdale), July 12, 1997, at 1A.

<sup>6</sup> See Johnson, *supra* note 2, at B10.

<sup>7</sup> See Marc Perrusquia, *Ray's Lawyer Says Funds Lacking for Transplant*, COM. APPEAL (Memphis), Nov. 27, 1997, at B2.

<sup>8</sup> See *id.*

<sup>9</sup> See Perrusquia, *supra* note 7, at B2; *Lawyer Says, supra* note 3, at 6A. According to Bob Bradford, the Director of Health Services for the Tennessee Department of Corrections, the Department has no written policy on funding inmate organ transplants, but the Department does not pay for transplants and never has. See First Telephone Interview with Bob Bradford, Director of Health Services, Tennessee Department of Correction (Feb. 17, 1998) [hereinafter *First*

could not raise the money himself because he was incarcerated and the state refused to pay for the treatment. On April 23, 1998, at the age of 70, Ray died of liver failure.<sup>10</sup>

Issues relating to organ transplants for prisoners have not yet been studied at any great length, in part because prisons are only recently seeing inmates who are aging or very sick.<sup>11</sup> In Michigan, for example, the first evaluation of an inmate for major organ transplant surgery did not occur until 1997.<sup>12</sup> Rising prison populations and health care costs have forced prison authorities to make tough choices.<sup>13</sup> These choices, however, must be made within constitutional limitations, and courts have consistently held that a lack of funds does not justify denying medical care to inmates.<sup>14</sup>

This Note demonstrates that the government's refusal to fund medically necessary organ transplants for prisoners, whether through formal legislation or internal prison regulations, where the inmate himself is indigent and cannot pay, violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>15</sup> Part I identifies the scope of the health care funding problem in the United States.<sup>16</sup> Part II discusses United Network for Organ Sharing ("UNOS"), the transplant umbrella organization, and the organ allocation process.<sup>17</sup> Part III considers issues specific to prisoners receiving organ transplants.<sup>18</sup> Part IV examines the Eighth Amendment's ban on cruel and unusual punishment and applies it to the medical care context.<sup>19</sup> It

Telephone Interview with Bob Bradford]. Bradford stated that the Department allows organ transplant surgery only if the prisoner pays for it himself. *See id.* According to Pam Hobbins, spokesperson for the Tennessee Department of Corrections, post-operative care must also be funded by the inmate. *See* Ferrusquia, *supra* note 7, at B2.

<sup>10</sup> *See Church Didn't Want to Endorse Ray's Claim of Innocence*, COM. APPEAL (Memphis), May 28, 1998, at B1 [hereinafter *Claim of Innocence*].

<sup>11</sup> *See* Judy Putnam, *Inmate's Failing Heart Poses Transplant Policy Challenge*, GRAND RAPIDS PRESS, Aug. 18, 1997, at A1. The aging of the prison population is a result of these trends: (1) older people constitute the fastest growing segment of the population; (2) the percentage of older persons arrested for serious crimes is increasing; and (3) offenders serving long-term sentences are aging. *See* Cheryl Crawford, *Health Care Needs in Corrections: NIJ Responds*, 228 NAT'L INST. OF JUST. J. 31, 34-35 (Nov. 1994).

<sup>12</sup> *See* Putnam, *supra* note 11, at A1.

<sup>13</sup> *See* Michael Cameron Friedman, Note, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 934 (1992).

<sup>14</sup> *See, e.g.,* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245 (1983); Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987); Ancata v. Prison Health Serv., 769 F.2d 700, 705 (11th Cir. 1985).

<sup>15</sup> *See infra* notes 22-380 and accompanying text.

<sup>16</sup> *See infra* notes 22-38 and accompanying text.

<sup>17</sup> *See infra* notes 39-74 and accompanying text.

<sup>18</sup> *See infra* notes 75-108 and accompanying text.

<sup>19</sup> *See infra* notes 109-263 and accompanying text. This Note is limited to examining the

specifically examines the medical professional judgment standard established by the United States Supreme Court in *Estelle v. Gamble*.<sup>20</sup> Part V analyzes the constitutionality of denying funding for transplants in light of the information presented.<sup>21</sup>

### I. THE PROBLEM OF FUNDING PRISONER'S HEALTH CARE NEEDS

The recent dramatic rise in health care costs raises serious concerns about the funding of expensive health care procedures such as organ transplants.<sup>22</sup> In 1990, health care spending in the United States exceeded \$600 billion and was rising at four times the rate of inflation.<sup>23</sup> There is a fiscal dilemma within the nation's prison systems because of the high cost of medical care, shrinking governmental budgets, the unwillingness of prison administrators to allocate scarce funds to medical services and an increasing frustration on the part of taxpayers with the government's willingness to spend tax dollars on criminals.<sup>24</sup> Moreover, the cost of health care for prisoners has risen just as rapidly as medical costs for the general population and spending for health care is increasing faster than other correctional costs.<sup>25</sup> For instance, between 1982 and 1989, at least eleven states increased their annual health cost per inmate by over 100%.<sup>26</sup> Texas increased its annual health care expenditure per inmate by 472%.<sup>27</sup> Between 1990 and 1996, spending on federal inmate health care increased from \$138 million to \$327 million, an increase in average cost per inmate of over 60%.<sup>28</sup> In addition, prison inmates may actually require *more* medical services than the general public because they suffer from an above-average incidence of most illnesses and because they are prone to hypo-

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Eighth Amendment's application to organ transplant funding for prisoners. Prisoners can bring challenges based on the Fourteenth Amendment's Equal Protection and Due Process clauses as well.

<sup>20</sup> See *infra* notes 140–263 and accompanying text.

<sup>21</sup> See *infra* notes 264–367 and accompanying text. This Note is limited to a constitutional examination of the government's obligation to fund organ transplants for prisoners. It does not attempt to address any of the obvious ethical implications of basing transplant decisions on medical criteria rather than on the perceived social worth of the transplant recipient.

<sup>22</sup> See Putnam, *supra* note 11, at A1.

<sup>23</sup> See B. Jaye Anno, *The Cost of Correctional Health Care: Results of a National Survey*, 9 J. OF PRISON & JAIL HEALTH 105, 118 (1990).

<sup>24</sup> See Friedman, *supra* note 13, at 934; Putnam, *supra* note 11, at A1.

<sup>25</sup> See Crawford, *supra* note 11, at 36. The prison population has been growing rapidly as well: in 1995, there were 1,126,287 prisoners in the federal and state systems. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995, 86 [hereinafter BUREAU OF JUSTICE STATISTICS].

<sup>26</sup> See Anno, *supra* note 23, at 113.

<sup>27</sup> See *id.*

<sup>28</sup> See Thomas (visited Mar. 27, 1998) <<http://thomas.loc.gov/cemp/~r105cfxRG:c19873>>.

chondria and malingering.<sup>29</sup> Organ transplant procedures are among the most expensive medical procedures available and many individuals who need transplants cannot afford to pay for them.<sup>30</sup> Transplant costs include transplant evaluation and testing, transplant surgery, follow-up care, laboratory tests and medication.<sup>31</sup> In 1996, for example, the estimated cost of a liver transplant was \$314,500, with annual follow-up costs of \$21,900.<sup>32</sup> Similarly, the estimated cost of a heart transplant was \$253,200, with annual follow-up costs of \$21,200.<sup>33</sup> Private insurers are often reluctant to cover the high cost of transplant procedures and, until fairly recently, avoided coverage by deeming the procedures "experimental."<sup>34</sup> Although private insurers have begun expanding coverage, they consistently do not include organ transplants in individual contracts.<sup>35</sup> Medicare covers only procedures deemed non-experimental by the National Institute of Health.<sup>36</sup> Moreover, organ transplants are not covered by Medicaid in a uniform manner; rather, each state determines its own eligibility standards and the scope of available benefits.<sup>37</sup> Medicaid benefits are unavailable to prisoners.<sup>38</sup>

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<sup>29</sup> See Friedman, *supra* note 13, at 943. Commentators suggest that prisoners (1) have more genuine health problems, (2) are more generally concerned for their bodily well-being and (3) avail themselves of health services because they are bored or lonely, because they seek excuses from assigned work or because they seek numbing medication. See *id.*

<sup>30</sup> See UNOS—Patients (visited June 9, 1998) <[http://www.unos.org/Patients/financ\\_costs.htm](http://www.unos.org/Patients/financ_costs.htm)>.

<sup>31</sup> See *id.* Other costs include time spent in the hospital's Intensive Care Unit, fees for transplant surgeons, anesthesia, recovery of the organ from the donor, transportation, food and lodging near the transplant center, rehabilitation costs and the cost of anti-rejection drugs, which are required for the rest of the patient's life. See *id.* Anti-rejection drugs can cost over \$10,000 per year. See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Raymond D. Cotton & Andrew L. Sandler, *The Regulation of Organ Procurement and Transplantation in the U.S.*, 7 J. LEGAL MED. 55, 75 (1986).

<sup>35</sup> See *id.* In the mid-1980s, approximately 80% of commercial insurers, including Blue Cross and Blue Shield, covered both heart and liver transplants. See James F. Childress, *Some Moral Connections Between Organ Procurement and Organ Distribution*, 3 J. CONTEMP. HEALTH L. & POL'Y 85, 109 (1987).

<sup>36</sup> See Cotton & Sandler, *supra* note 34, at 75. Medicare covers heart, liver and lung transplants, but not pancreas transplants. See 60 Fed. Reg. 6537 (1995); 56 Fed. Reg. 15,006 (1991); 52 Fed. Reg. 10,935 (1987).

<sup>37</sup> See Cotton & Sandler, *supra* note 34, at 80. As of 1997, Medicaid paid for heart transplants in 34 states. See Putnam, *supra* note 11, at A1. In Michigan, Medicaid paid for 13 transplants in 1993 and 15 transplants in 1994. See *id.*

<sup>38</sup> See 42 U.S.C. § 1396d(a)(25)(A) (1994). The statute excludes from coverage "payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)." *Id.*

## II. UNOS AND THE ORGAN ALLOCATION PROCESS

The United Network for Organ Sharing ("UNOS") is the umbrella organization that manages transplant waiting lists and decisions nationwide.<sup>39</sup> Congress created this system for organ donation and distribution in 1984 through the Organ Procurement and Transplantation Act ("OPTA").<sup>40</sup> UNOS is a private, non-profit agency based in Virginia, and it operates both the Organ Procurement and Transplantation Network ("OPTN") and the United States Scientific Registry of Transplant Recipients ("Registry"), both authorized by OPTA, under contract to the United States Department of Health and Human Services ("HHS").<sup>41</sup> Because UNOS is an independent, non-profit agency, its operations and policies are to some measure insulated from the political process.<sup>42</sup> Congress wanted to separate politics from the organ donation and distribution system and to prevent fame and notoriety from influencing decisions.<sup>43</sup> In response to these concerns, Congress required HHS to contract with a non-governmental organization to manage the allocation of organs through collective decisionmaking.<sup>44</sup>

Every transplant program, organ procurement organization and tissue-typing laboratory in the United States is a member of UNOS.<sup>45</sup> As of November 1997, UNOS had a total of 440 members, including 275 transplant centers.<sup>46</sup> UNOS members must meet certain minimum standards in areas such as quality of services provided and they must agree to follow UNOS policies and by-laws.<sup>47</sup> UNOS policy prohibits access to the waiting lists and the computer system by non-members, so individuals cannot gain access to the waiting list without approval by an UNOS transplant program.<sup>48</sup> The UNOS membership develops policy governing the entire transplant community through regional

<sup>39</sup> See UNOS—About UNOS (visited June 9, 1998) <[http://www.unos.org/About/who\\_main.htm](http://www.unos.org/About/who_main.htm)>.

<sup>40</sup> See Cotton & Sandler, *supra* note 34, at 57; Dr. John Rabkin, *Patient Care v. Market Share*, COM. APPEAL (Memphis), Dec. 15, 1997, at A9.

<sup>41</sup> See Cotton & Sandler, *supra* note 34, at 58; *Organ Transplants: Patients on Waiting List Up 300 Percent from 1988 to 1995, HRSA Report Finds*, HEALTH CARE DAILY (BNA), Feb. 4, 1997, at d4 [hereinafter *Patients on Waiting List*].

<sup>42</sup> See Rabkin, *supra* note 40, at A9.

<sup>43</sup> See *id.* These kinds of charges were raised when Mickey Mantle, a Hall of Fame baseball player, received a liver transplant. See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See UNOS—About UNOS, *supra* note 39.

<sup>46</sup> See UNOS—Newsroom: Critical Data (visited June 9, 1998) <[http://www.unos.org/Newsroom/critdata\\_inain.htm](http://www.unos.org/Newsroom/critdata_inain.htm)>.

<sup>47</sup> See UNOS Policies 1., 2., UNOS—Policies and Bylaws (visited June 9, 1998) <[http://www.unos.org/About/policy\\_policies1.htm](http://www.unos.org/About/policy_policies1.htm)>.

<sup>48</sup> See UNOS Policies 3.2.1.1., 3.2.1.2., UNOS—Policies and Bylaws, *supra* note 47.

meetings, national committee deliberations and ultimate approval by a forty-member board of directors comprised of medical professionals, transplant recipients and donor family members.<sup>49</sup> It also obtains input from transplant professionals, patients and their families, the public and HHS representatives.<sup>50</sup>

For organ allocation purposes, UNOS has divided the United States into eleven regions and staffs each with an UNOS administrator.<sup>51</sup> As a general policy matter, organs are first offered in the region in which they were donated.<sup>52</sup> This policy reduces organ preservation time, improves organ quality, reduces costs and increases access to available organs.<sup>53</sup>

The UNOS Organ Center manages the national transplant waiting list and matches organ donors with recipients.<sup>54</sup> Access to the organ transplant waiting list is not automatic.<sup>55</sup> First, a patient's regular doctor must refer her to a transplant center.<sup>56</sup> At the center, the patient receives an independent evaluation during which the center's physician determines whether the patient is an appropriate candidate for an organ transplant.<sup>57</sup> Different transplant programs use different criteria to determine whether the patient should be placed on the waiting list for a particular organ, so variations in medical practices among transplant centers can result in discrepancies in waiting times for individual patients.<sup>58</sup> If the patient meets the criteria of the center, she can be added to the waiting list and will be registered with the UNOS Organ Center.<sup>59</sup> The Center uses a centralized computer network to link all organ procurement organizations and transplant centers to maximize the chances of finding matches.<sup>60</sup> When an organ is donated,

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<sup>49</sup> See *UNOS—About UNOS*, *supra* note 39.

<sup>50</sup> See Rabkin, *supra* note 40, at A9.

<sup>51</sup> See *UNOS—About UNOS*, *supra* note 39.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *UNOS—Patients*, *supra* note 39. A transplant center is a hospital which, as a member of UNOS, performs transplants. See UNOS Policy 3.1.2., *UNOS—Policies and Bylaws*, *supra* note 47.

<sup>57</sup> See *id.*

<sup>58</sup> See *UNOS Rationale for Objectives of Equitable Organ Allocation*, *UNOS—Newsroom*, *supra* note 46. In addition, patients may be accepted by one program although they have been rejected by others. See Anita Srikameswaran, *Precious Organs, Endangered Lives: Ethicists Debate Worth of Inmates, Alcoholics, Drug Abusers, HIV Infected*, *PITTSBURGH POST-GAZETTE*, Sept. 21, 1997, at A1. For example, James Earl Ray was rejected by both transplant programs in Tennessee, but was subsequently evaluated as "medically qualified" at the University of Pittsburgh Medical Center. See Perrusquia, *supra* note 7, at B2; Srikameswaran, *supra*, at A1.

<sup>59</sup> See *UNOS—Patients*, *supra* note 30.

<sup>60</sup> See *id.*

the procuring organization enters relevant information into the UNOS computer network, which generates a list of potential recipients based on objective medical criteria.<sup>61</sup> The transplant coordinator begins at the top of the list and contacts the patients' transplant centers.<sup>62</sup> Once contacted by UNOS, the center can either accept the organ or reject it if the transplant team foresees particular problems with the organ.<sup>63</sup> It is not unusual for a transplant team to turn down an offer for an organ.<sup>64</sup>

UNOS is responsible for prioritizing the candidates for organs. UNOS bases its policy decisions on objective medical criteria, not on the perceived social worth of those seeking organs.<sup>65</sup> The UNOS ethics committee believes, for example, that being accused or convicted of a crime is irrelevant to the selection of transplant recipients.<sup>66</sup> Moreover, because of the unique characteristics of each human organ, the waiting lists for each organ are maintained separately and use different criteria to determine whether a transplant is appropriate for an individual patient.<sup>67</sup> All of these policies for organ waiting lists account for technical medical data, such as blood type, antigens and medical urgency, as well as geographic factors, but they do not account for the social worth of the patient.<sup>68</sup> Many people view this as unfair and believe it contributes to the shortage of organ donations in the country.<sup>69</sup> Because public opinion is so strongly against giving scarce organs to convicted criminals, patients fear that news of transplants to such "undeserving" people will decrease the number of donations.<sup>70</sup> Public distrust of medical institutions is a significant reason why people refuse to donate organs, and commentators worry that if the public perceives

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<sup>61</sup> See *id.*

<sup>62</sup> See *id.* First, the list of patients waiting in the local area is checked, then the regional list is checked and then if no match has been made the organ will be made available nationwide. See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *UNOS—Newsroom: All About UNOS*, *supra* note 46.

<sup>65</sup> See *id.*

<sup>66</sup> See Srikameswaran, *supra* note 58, at A1.

<sup>67</sup> See *UNOS—Policies and Bylaws*, *supra* note 47. For example, UNOS policy 3.5 deals with the allocation of cadaveric kidneys; policy 3.6 handles liver allocation; policy 3.7 is for thoracic organs (heart and lung); policy 3.8 is for pancreas allocation; policy 3.9 is for all other organs not specifically addressed; and policy 3.11 is for intestinal organ allocation (stomach, small and large intestine, gastro-intestinal tract). See *id.*

<sup>68</sup> See *UNOS: About UNOS* (visited June 9, 1998) <[http://www.unos.org/About/what\\_organ.htm](http://www.unos.org/About/what_organ.htm)>.

<sup>69</sup> See Srikameswaran, *supra* note 58, at A1.

<sup>70</sup> See *id.*



the distribution policies as unfair, then public distrust will increase, thereby reducing the effectiveness of efforts to procure organs.<sup>71</sup>

The shortage of organs in the United States cannot be overemphasized and the demand for organs keeps rising. According to the Annual Report on Transplant Data released in February 1997, the number of patients waiting for organ transplants increased by 300% between 1988 and 1995, while the number of donors increased by only 30%.<sup>72</sup> The number of patients who have died while on an organ transplant waiting list rose from 1507 in 1988 to 3549 in 1995.<sup>73</sup> As of September 2, 1998, there were 58,114 patients on the national transplant waiting list.<sup>74</sup>

### III. PRISONERS IN THE ORGAN TRANSPLANT COMMUNITY

Prisoners have received organ and bone marrow transplants in the past.<sup>75</sup> For instance, in the University of Pittsburgh Medical Center program alone, approximately twenty people were in some way involved in the criminal process when they received organs.<sup>76</sup> Three of these twenty were actually serving prison sentences when they had the surgery, but none had received the death penalty or life sentences.<sup>77</sup> To date, no death row inmate in the nation is believed to have received a transplant.<sup>78</sup>

Because UNOS bases all of its transplant decisions on purely objective medical criteria, being accused or convicted of a crime is theoretically irrelevant to the selection of transplant recipients.<sup>79</sup> The practical effect of applying objective medical criteria, however, often

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<sup>71</sup> See Childress, *supra* note 35, at 89; Paul P. Lee, *The Organ Supply Dilemma: Acute Responses to a Chronic Shortage*, 20 COLUM. J.L. & SOC. PROBS. 363, 369 (1986). Commentators suggest that the public fears that if doctors know an individual is willing to donate her organs, then fewer life-saving measures will be taken to prevent her death. See *id.*

<sup>72</sup> See *Patients on Waiting List*, *supra* note 41, at d4.

<sup>73</sup> See *id.*

<sup>74</sup> See UNOS—Newsroom: *Critical Data*, *supra* note 46.

<sup>75</sup> See Michele Grygotis, *Washington State Legislature's Rush to Pass Bill Prohibiting State to Fund Organ Transplants for Patients on Death Row Appears to be Based on Hoax*, TRANSPLANT NEWS, Nov. 30, 1996. Because there is no way to tell from the information which UNOS gathers whether a patient is a prisoner, UNOS has no statistics on the number of transplants performed on prison inmates. See E-mail from Samia Buckingham, UNOS Research Department, to Jessica Wright, Topics Editor, *Boston College Law Review* (Feb. 16, 1998) (on file with author). Joel Newman, a spokesman for UNOS, characterized inmate transplants as "infrequent." See Caroline Young Ullmann, *Questions & Answers*, NEWS TRIB. (Tacoma), May 18, 1997.

<sup>76</sup> See Srikameswaran, *supra* note 58, at A1.

<sup>77</sup> See *id.*

<sup>78</sup> See Grygotis, *supra* note 75.

<sup>79</sup> See Srikameswaran, *supra* note 58, at A1.

prevents inmates from gaining access to the waiting lists.<sup>80</sup> For example, Mindy Brass, a Michigan inmate sentenced to life imprisonment without chance of parole, needs a heart transplant but was rejected by one of the three transplant teams in Michigan because of her history of drug abuse.<sup>81</sup> Likewise, a doctor on the University of Pittsburgh liver transplant team stated that convicted Whitewater defendant Jim Guy Tucker would not get a liver transplant if he was sentenced to serve time in prison because of the heightened risk of post-surgical infection and the inadequate post-operative support system in prison.<sup>82</sup> Similarly, James Earl Ray was denied by both transplant programs in Tennessee, in part because transplant physicians were concerned about the availability of post-operative care in the prison system.<sup>83</sup>

States have approached the problem of funding organ transplants for prisoners in various ways.<sup>84</sup> For example, the state of Washington attempted to deal with the issue, at least in part, through legislation.<sup>85</sup> In 1996, a bill which would have banned public use of funding for organ transplants for inmates sentenced to death passed both houses, but was vetoed by then-Governor Mike Lowry.<sup>86</sup> The Governor's veto message stated that the bill was "most probably a violation of the prohibition against cruel and unusual punishment."<sup>87</sup> The bill was re-introduced in 1997 with minor modifications, but it died in the Senate Rules Committee as the deadlines for its approval expired.<sup>88</sup> According to Bob Jones, Health Care Coordinator for the Washington Department of Corrections, if a prisoner is approved for a transplant by a transplant center, the case will be referred to the Utilization Review Committee ("Committee"), which will determine on a case-by-

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<sup>80</sup> See Joan I. Duffy, *Tucker Gets Probation Because of Poor Health; Prison for Whitewater Role a Death Sentence, Judge Says*, COM. APPEAL (Memphis), Aug. 20, 1996, at A1; Putnam, *supra* note 11, at A1.

<sup>81</sup> See Putnam, *supra* note 11, at A1. Mindy Brass was released from prison in July of 1998 and granted a new trial, after a judge determined that the prosecution had withheld evidence during her 1992 trial. See Judy Putnam, *A Second Chance?*, GRAND RAPIDS PRESS, Aug. 11, 1998, at B4 [hereinafter *A Second Chance*]. She is still waiting to be approved by a heart transplant team and was added to the national waiting list. See *id.*

<sup>82</sup> See Duffy, *supra* note 80, at A1.

<sup>83</sup> See Srikameswaran, *supra* note 58, at A1.

<sup>84</sup> See, e.g., SB 5190, 55th Leg., 1997 Reg. Sess. (Wa. 1997); First Telephone Interview with Bob Bradford, *supra* note 9; Telephone Interview with Gayle Lafferty, Administrator, Bureau of Health Care, Michigan Department of Corrections (Feb. 23, 1998) [hereinafter Telephone Interview with Gayle Lafferty].

<sup>85</sup> SB 5190, 55th Leg., 1997 Reg. Sess. (Wa. 1997).

<sup>86</sup> See Lisa Kremer & Peter Callaghan, *Legislation Would Change Date of State Primary Election Day*, NEWS TRIB. (Tacoma), Jan. 18, 1997, at B3.

<sup>87</sup> See HEALTH CARE DAILY (BNA), Apr. 3, 1996, at d19.

<sup>88</sup> See Washington State Legislature (visited Sept. 12, 1998) <<http://leginfo.leg.wa.gov/>>

case basis whether to authorize payment for the transplant.<sup>89</sup> The Offender Health Plan ("Plan"), which describes the scope of available services and lists limitations and exclusions, states that organ transplants are excluded from coverage unless the Committee overrides the Plan.<sup>90</sup> The Committee will first seek alternative methods of funding, such as private insurance or veterans groups.<sup>91</sup> If the only source of available funding is the Department, the Committee can deny to pay for the transplant.<sup>92</sup> Jones stated, however, that to his knowledge this has never happened.<sup>93</sup> Jones asserted that at least "a couple" of kidney transplants have been funded by the Department because it is more cost-effective to pay for the transplant than to maintain patients on dialysis.<sup>94</sup>

Other states have no written policy addressing organ transplants.<sup>95</sup> For instance, in Tennessee, according to Bob Bradford, Director of Health Services for the Department of Corrections, the Department has no written policy on the funding of organ transplants.<sup>96</sup> Bradford stated that although there is no written policy, the Department's stance is that it will not pay for the procedure.<sup>97</sup> Bradford acknowledged that if an inmate's physician or family member requests an organ transplant, the Department will determine the course of treatment on a

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pub/billing/senate/5175-5199/5190\_history>; Telephone Interview with Kai Trapp, Office of Washington State Senator Calivan Going (Aug. 27, 1998). Northwest Life Center, a private firm which provides dialysis and other transplant-related services to Washington inmates, opposed passage of the bill. See Telephone Interview with Bob Jones, Health Care Coordinator, Washington Department of Corrections (Aug. 21, 1998) [hereinafter Second Telephone Interview with Bob Jones]. The legislation discriminated against a class of people (death row inmates), which would put Northwest Life Center's federal funding at risk. See *id.* The Veteran's Administration also opposed the bill. See *id.*

<sup>89</sup> See First Telephone Interview with Bob Jones, *supra* note 9.

<sup>90</sup> See WASHINGTON STATE DEP'T OF CORRECTIONS, OFFENDER HEALTH PLAN § 3 (Dec. 13, 1996). The utilization review process is conducted at the Washington Department of Corrections headquarters. See *id.* § 4. The Utilization Review Committee may include the offender's primary care physician, other health care providers, the facility's Superintendent, the facility's Health Care Manager and the Administrator of Health Services. See *id.* The review team makes a recommendation to the Secretary for approval and the final determination is shared with the prisoner through a Department health care provider. See *id.* The prisoner may appeal the decision through the Department's established grievance program. See *id.*

<sup>91</sup> See Second Telephone Interview with Bob Jones, *supra* note 88.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See First Telephone Interview with Bob Bradford, *supra* note 9; Telephone Interview with Gayle Lafferty, *supra* note 84.

<sup>96</sup> See First Telephone Interview with Bob Bradford, *supra* note 9.

<sup>97</sup> See *id.*

case-by-case basis.<sup>98</sup> Bradford stated, however, that to his knowledge, the Department has never paid for an organ transplant.<sup>99</sup>

In Michigan, the Department of Corrections has no written policy on funding organ transplants and does not plan to write one, according to Gayle Lafferty, an administrator in the Department's Bureau of Health Care.<sup>100</sup> Lafferty stated that Department officials anticipate that inmates rarely will require organ transplants, thus rendering a written policy unnecessary.<sup>101</sup> Only one inmate in the state's history has sought a major organ transplant.<sup>102</sup>

Because of events which have occurred recently in these states, the issue of funding for transplants has been removed from the top of the political agenda and government officials will not have to make a decision on this matter in the immediate future.<sup>103</sup> For example, at present, the failure of SB5190 to pass in the Washington state legislature removes the issue of funding transplants for death row inmates from the political process.<sup>104</sup> In Tennessee, James Earl Ray's death ended the controversy about whether the Department of Corrections should pay for a liver transplant to extend his life.<sup>105</sup> In Michigan, Mindy Brass's release from prison removed the funding decision from the Department of Corrections altogether.<sup>106</sup> The issue is certain to arise again, whether in these states or elsewhere, given that prison populations are continuing to rise and that organ transplant technology is advancing rapidly.<sup>107</sup> Individualized consideration of each inmate's case, as occurs in Tennessee, Michigan and Washington through the Utilization Review Process, will probably continue to be the predominant method of dealing with the funding question, at least until states see a need to formulate specific, written policies.<sup>108</sup>

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<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See Telephone Interview with Gayle Lafferty, *supra* note 84.

<sup>101</sup> See *id.*

<sup>102</sup> See Putnam, *supra* note 11, at A1.

<sup>103</sup> See *A Second Chance*, *supra* note 81; *Claim of Innocence*, *supra* note 10; Second Telephone Interview with Bob Jones, *supra* note 88.

<sup>104</sup> See Second Telephone Interview with Bob Jones, *supra* note 88.

<sup>105</sup> See *A Claim of Innocence*, *supra* note 10.

<sup>106</sup> See *A Second Chance*, *supra* note 80. Because Brass's legal status is now "innocent," she will qualify for Medicaid, which pays for heart transplants. See *id.*

<sup>107</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 25.

<sup>108</sup> See *supra* notes 89-102.

#### IV. THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment, from which the government's duty to provide medical care to prisoners stems, prohibits the federal government from inflicting cruel and unusual punishment.<sup>109</sup> It is clear that this prohibition also applies to the states through the Fourteenth Amendment's Due Process Clause.<sup>110</sup> Moreover, provisions similar to the Eighth Amendment are found in virtually every state constitution.<sup>111</sup>

##### A. Historical Perspective

The ban on cruel and unusual punishment was originally adopted in the English Declaration of Rights of 1689 to curtail torturous physical punishments.<sup>112</sup> Until the early twentieth century, the prohibition was interpreted narrowly, as merely a protection against torture and other barbaric forms of punishment.<sup>113</sup> Until recently, the Cruel and Unusual Punishment Clause was not interpreted as an affirmative duty of the state to provide medical care to its prisoners.<sup>114</sup>

In addition to the narrow interpretation of the Cruel and Unusual Punishment Clause, judicial interference with the administration of punishments was limited by the "hands-off doctrine," which recognized the necessity of according prison officials vast discretion in administration and discipline.<sup>115</sup> For example, in 1954, in *Wagner v. Ragen*, the United States Court of Appeals for the Seventh Circuit held that a

<sup>109</sup> U.S. CONST. amend. VIII. The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

<sup>110</sup> See *Robinson v. California*, 370 U.S. 660, 667 (1962) (applying the Eighth Amendment to the states).

<sup>111</sup> See, e.g., *Billings v. Gates*, 916 P.2d 291, 293 (1996) (decided under Article I, section 16 of the Oregon Constitution which states that "[c]ruel and unusual punishments shall not be inflicted").

<sup>112</sup> See Friedman, *supra* note 13, at 925.

<sup>113</sup> See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>114</sup> See Wesley P. Shields, Comment, *Prisoner Health Care: Is It Proper to Charge Inmates for Health Services?*, 32 HOUS. L. REV. 271, 276 (1995).

<sup>115</sup> See, e.g., *Coppinger v. Townsend*, 398 F.2d 392, 393 (10th Cir. 1968) ("The internal affairs of prisons, including the discipline, treatment, and care of prisoners are ordinarily the responsibility of prison administrators and not subject to judicial review"); *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (noting the natural reluctance to interfere with a prison's internal discipline); Friedman, *supra* note 13, at 927-28. The hands-off doctrine was based on the theory of separation of powers, the lack of judicial expertise in penology and the fear that judicial intervention would subvert prison discipline. See Carl T. Dreschler, Annotation, *Relief Under Civil Rights Acts to State Prisoners Complaining of Denial of Medical Care*, 28 A.L.R. Fed. 279, 295 (1976).

prisoner had no right to maintain an action alleging due process and Civil Rights Act violations because federal courts do not have the power to regulate the ordinary internal management and discipline of state operated prisons.<sup>116</sup> In *Wagner*, the prisoner alleged that the warden refused to permit him to register his inventions with the United States Patent Office and that the warden seized the oil paintings that the prisoner had painted while in prison.<sup>117</sup> The court first noted that the federal courts have held that they have no authority to regulate the internal management of state prisons.<sup>118</sup> The court then noted that prison officials have wide discretion to protect the prisoners in their custody and that, so long as reasonably maintained, discipline in state prisons is not supervised through the federal courts.<sup>119</sup> The court reasoned that the same principle of non-intervention applies when a prisoner is in a federal penitentiary.<sup>120</sup> Thus, the Seventh Circuit held that the federal courts had no jurisdiction to supervise the internal management of state prisons.<sup>121</sup>

Recently, courts have limited the hands-off doctrine to circumstances that necessarily accompany prison life, such as discipline or security issues, and no longer invoke the doctrine in cases involving serious infringements on inmate rights.<sup>122</sup> The hands-off doctrine no longer prevents judicial review of prisoner complaints which establish the existence of a constitutional infringement on the prisoner's rights.<sup>123</sup> This is especially true in the medical context, where the policy of deference to the judgment of prison officials does not apply as strongly as it does in other contexts.<sup>124</sup> For example, in 1970, in *Martinez v. Mancusi*, the United States Court of Appeals for the Second Circuit held that an action against prison officials for inadequate medi-

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<sup>116</sup> 213 F.2d 294, 295 (7th Cir. 1954).

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* (quoting *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944)).

<sup>120</sup> See *id.*

<sup>121</sup> See *Wagner*, 213 F.2d at 295.

<sup>122</sup> See *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977) (traditional hands-off attitude toward daily problems of prison administration does not encompass valid constitutional claims arising in federal and state institutions); *Martinez v. Mancusi*, 443 F.2d 921, 923 (2d Cir. 1970); *Friedman*, *supra* note 13, at 928.

<sup>123</sup> See *Todaro*, 565 F.2d at 53; *Martinez*, 443 F.2d at 923; *Friedman*, *supra* note 13, at 928.

<sup>124</sup> See *Wellman v. Faulkner*, 715 F.2d 269, 272, 274 (7th Cir. 1983) (relying on principle that deferring to prison officials on prison discipline and security does not apply with the same force in the medical context and holding that failure to provide a proper staff, sufficient supplies or adequate medical treatment at a prison medical facility violates the Eighth Amendment); *cf. Todaro*, 565 F.2d at 54 (less deference to state officials if prison discipline or security is not at issue).

cal care could be brought in the federal district courts under the Civil Rights Act when the violations rose to the level of cruel and unusual punishment.<sup>125</sup> In *Martinez*, the prisoner alleged that after he underwent surgery, he was transferred back to the prison before he was ready to be moved and forced to walk on his injured leg in violation of his doctor's orders, which ultimately caused his surgery to be unsuccessful.<sup>126</sup> The court reasoned that, although federal courts are normally reluctant to interfere with the normal processes of state prison administration, they readily intervene where action is necessary to protect a prisoner's constitutional rights.<sup>127</sup> Thus, the Second Circuit held that federal courts have jurisdiction over complaints which allege violations of constitutional rights.<sup>128</sup>

In addition to limiting the hands-off doctrine, the courts have expanded the scope of the Eighth Amendment to include a broad range of punishments, including conditions of confinement which are not directly attributable to the execution of a sentence.<sup>129</sup> In 1910, in *Weems v. United States*, the United States Supreme Court began to expand its definition of cruel and unusual punishment, holding that fifteen years of hard labor was a disproportionately harsh sentence and thus violated the Eighth Amendment.<sup>130</sup> The plaintiff had been convicted of falsifying an entry in a government payroll book.<sup>131</sup> The Court reasoned that the concept of cruel and unusual punishment may acquire new meaning as public sentiment develops and "becomes enlightened by a humane justice."<sup>132</sup> The Court thus held that a sentence of fifteen years of hard labor for falsifying an entry in a government document was too inconsistent with the public's sense of humane justice to survive scrutiny under the Eighth Amendment.<sup>133</sup>

Similarly, in 1958, in *Trop v. Dulles*, the United States Supreme Court further expanded the scope of the Cruel and Unusual Punishment Clause by holding unconstitutional a section of the Nationality Act of 1940, which divested an individual of his or her citizenship for deserting the military in time of war.<sup>134</sup> The plaintiff, a private in the

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<sup>125</sup> 443 F.2d at 923.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 381, 382 (1910); Friedman, *supra* note 13, at 925.

<sup>130</sup> See *Weems*, 217 U.S. at 381, 382.

<sup>131</sup> See *id.* at 357, 358.

<sup>132</sup> See *id.* at 378.

<sup>133</sup> See *id.* at 382. The Court was, in part, reacting to public sentiment about harsh prison conditions. See Shields, *supra* note 114, at 277.

<sup>134</sup> 356 U.S. at 101. Section 401(g) of the Nationality Act states that "[a] person who is a

United States Army, escaped from a stockade and surrendered willingly the following day.<sup>135</sup> He was subsequently convicted of desertion and dishonorably discharged.<sup>136</sup> In 1952, his application for a passport was denied because he had lost his citizenship, and he filed suit seeking a declaratory judgment that he was a citizen.<sup>137</sup> The Court reasoned that denationalization, although it involves no physical mistreatment, is a form of punishment more primitive than torture because it destroys an individual's political existence and, as a result, subjects the individual to constant fear and distress.<sup>138</sup> The Court reasoned that the basic concept underlying the prohibition against cruel and unusual punishment is human dignity and that the Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society."<sup>139</sup> The Court thus held that denationalization, although not the type of punishment that had been addressed previously by the courts, violated the Eighth Amendment.<sup>140</sup>

#### B. *Estelle v. Gamble: The Medical Professional Judgment Standard*

In 1976, in *Estelle v. Gamble*, the United States Supreme Court held that deliberate indifference by prison personnel to a prisoner's serious medical needs constituted cruel and unusual punishment under the Eighth Amendment.<sup>141</sup> In *Estelle*, a state prisoner was injured when a bale of cotton fell on him.<sup>142</sup> He was treated at the prison hospital twice that day and on fifteen additional occasions throughout the subsequent three months.<sup>143</sup> In reaching its decision, the Court reasoned that although the state was normally not obligated to provide medical care to its citizens, it was forced to provide care to those whom it incarcerated because the incarcerated prisoners could not care for themselves.<sup>144</sup> The Court further reasoned that inmates must rely on

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national of the United States . . . shall lose his nationality by—(g) deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged . . . ." 8 U.S.C. § 1481(a)(8) (repealed 1978).

<sup>135</sup> See *Trop*, 356 U.S. at 87.

<sup>136</sup> See *id.* at 88.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* at 101–02.

<sup>139</sup> See *id.* at 100–01.

<sup>140</sup> See *Trop*, 356 U.S. at 101; see also *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (physical suffering can be a factor in determining whether a punishment is cruel and unusual, but Eighth Amendment violations can occur even in the absence of physical mistreatment because the clause prohibits punishments that are degrading to human dignity).

<sup>141</sup> 429 U.S. at 104.

<sup>142</sup> See *id.* at 99.

<sup>143</sup> See *id.* at 99, 107.

<sup>144</sup> See *id.* at 103–04; see also *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926) ("It is but



prison officials for their medical needs and therefore, officials' failure to treat these needs may produce unnecessary pain, suffering, torture or a lingering death.<sup>145</sup> The Court determined that a prison violates a prisoner's right to medical care only if prison officials are deliberately indifferent to serious medical needs.<sup>146</sup> As a result, the Court indicated that the test excludes accidents, deliberate indifference to needs which are not serious and negligence.<sup>147</sup> The Court decided that, in this case, the prisoner did not have an Eighth Amendment claim because he was seen by medical personnel on seventeen occasions in three months.<sup>148</sup> In addition, the Court stated that the decision not to order x-rays for him was a medical judgment that, at most, amounted to medical malpractice, not cruel and unusual punishment.<sup>149</sup> Thus, the Court held that prison authorities' deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment.<sup>150</sup>

### 1. Deference to the Medical Judgment of the Prison Doctor

Several aspects of the *Estelle* deliberate indifference standard require prison officials to accord great deference to the opinions of the treating physician.<sup>151</sup> First, intentional interference with prescribed medical treatment constitutes deliberate indifference.<sup>152</sup> In addition, prison officials should defer to the treating physician's opinion by defining medical needs as "serious" once they have been identified as such by a doctor exercising professional judgment.<sup>153</sup> Thus, once a physician has characterized an illness or injury as serious and has

just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.").

<sup>145</sup> See *Estelle*, 429 U.S. at 103.

<sup>146</sup> See *id.* at 104. "Deliberate indifference" has been referred to as the subjective prong of the standard and asks whether the prison officials acted with a sufficiently culpable state of mind. See *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). "Serious medical needs" is considered to be the objective prong and asks whether the deprivation was sufficiently serious. See *id.*

<sup>147</sup> See *Estelle*, 429 U.S. at 106.

<sup>148</sup> See *id.* at 107.

<sup>149</sup> See *id.* The Court stated that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.*

<sup>150</sup> See *id.* at 104.

<sup>151</sup> See, e.g., *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *Derrickson v. Keve*, 390 F. Supp. 905, 907 (D. Del. 1975); Marc J. Posner, *The Estelle Medical Professional Judgment Standard: The Right of Those in State Custody to Receive High-Cost Medical Treatments*, 18 AM. J.L. & MED. 347, 351-52 (1992).

<sup>152</sup> See, e.g., *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (holding that Eighth Amendment violation established where prison authorities prevent inmate from receiving recommended treatment for serious medical needs); *Pugliese v. Cuomo*, 911 F. Supp. 58, 62-63 (N.D.N.Y. 1996); *Derrickson*, 390 F. Supp. at 907.

<sup>153</sup> See *Lanzaro*, 834 F.2d at 347; Posner, *supra* note 151, at 351. Medical needs are also

ordered a particular treatment, prison officials cannot violate or ignore the order—the prisoner is constitutionally entitled to the treatment which the medical professional decides is necessary.<sup>154</sup>

For example, in 1975, in *Derrickson v. Keve*, the United States District Court for the District of Delaware held that refusing to allow a prisoner serving a life sentence to elect physician-recommended surgery violated the Eighth Amendment.<sup>155</sup> In *Derrickson*, the prisoner suffered from severe repeated headaches and constant congestion.<sup>156</sup> Two physicians recommended that the prisoner undergo surgery, one advising that the operation take place “as soon as possible.”<sup>157</sup> The court stated that this surgery was generally considered to be elective rather than emergency in nature because many patients with similar conditions decide against undergoing the operation.<sup>158</sup> The court reasoned that for this particular prisoner, however, the elective aspect of the surgery was removed because he was serving a life sentence.<sup>159</sup> The court distinguished this situation from one in which a prisoner seeks treatment that he might elect to have performed once released from prison.<sup>160</sup> Because the prisoner in this case would never be released, refusing to provide him with the surgery would render his condition irreparable.<sup>161</sup> The United States District Court for the District of Delaware thus held that where a physician recommends that an inmate serving a life sentence undergo surgery, a decision *never* to allow the prisoner to elect to have the surgery would violate the Eighth Amendment.<sup>162</sup>

In 1996, in *Pugliese v. Cuomo*, the United States District Court for the Northern District of New York refused to grant summary judgment against a state prisoner who alleged that prison officials disregarded medical instructions that he receive physical therapy because the state

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considered serious if they are so obvious that even a layperson could recognize that they required medical attention. See *Lanzaro*, 834 F.2d at 347; Posner, *supra* note 151, at 352.

<sup>154</sup> See *Lanzaro*, 834 F.2d at 347; *Derrickson*, 390 F. Supp. at 907; Posner, *supra* note 151, at 352.

<sup>155</sup> 390 F. Supp. at 907.

<sup>156</sup> See *id.* at 905.

<sup>157</sup> See *id.* The physicians recommended a tonsillectomy and “submucous resection of the nasal septum.” See *id.*

<sup>158</sup> See *id.* at 906.

<sup>159</sup> See *id.* at 907.

<sup>160</sup> See *Derrickson*, 390 F. Supp. at 907.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* Failing to provide the surgery *to date*, however, is not a violation of the Eighth Amendment. See *id.* Although *Derrickson* was decided before *Estelle*, it prohibited prison officials from ignoring the recommendations of prison doctors. See *id.* This prohibition was embodied in the *Estelle* standard. See Posner, *supra* note 151, at 351–52.

did not want to pay for the treatment.<sup>163</sup> A prison doctor prescribed physical therapy three times weekly along with electrostimulation for injuries sustained in an accident before the prisoner was incarcerated.<sup>164</sup> The plaintiff was transferred six times and did not receive the prescribed treatment on a consistent basis.<sup>165</sup> A prison physician responded to his complaint about the perceived denial of medical treatment by saying that he would never waste the state's money on such treatment.<sup>166</sup> The court reasoned that the plaintiff's allegations of interference with his prescribed physical therapy treatments and electrostimulation constituted allegations of a wanton disregard for his medical needs.<sup>167</sup> The United States District Court for the Northern District of New York thus held that prison authorities who interfere with treatment prescribed by the prisoner's doctor could violate the Eighth Amendment.<sup>168</sup>

Another aspect of the *Estelle* standard which gives deference to the prison doctor's opinion relates to the definition of "serious" medical needs.<sup>169</sup> Medical needs are considered "serious" when they are diagnosed as such by a doctor or when they are so obvious that even a layperson could recognize that they require medical attention.<sup>170</sup> A doctor's opinion on whether a condition constitutes a serious medical need receives great deference so long as the process by which the doctor arrived at this conclusion conforms to generally accepted professional standards.<sup>171</sup> A doctor whose treatment of a patient varies significantly from accepted medical practice will be deemed to have acted with deliberate indifference towards the prisoner, thus violating

<sup>163</sup> 911 F. Supp. at 63-64.

<sup>164</sup> *See id.* at 60.

<sup>165</sup> *See id.* at 60-61.

<sup>166</sup> *See id.* at 61.

<sup>167</sup> *See id.* at 62-63.

<sup>168</sup> *See Pugliese*, 911 F. Supp. at 62-63; *see also Williams v. O'Leary*, 805 F. Supp. 634, 638 (N.D. Ill. 1992) (holding that prisoner sufficiently alleged deliberate indifference to serious medical needs where prison doctors ignored outside physicians' prescription and treated inmate ineffectively with antibiotics to which infection was resistant).

<sup>169</sup> *See Posner, supra* note 151, at 351-52.

<sup>170</sup> *See, e.g., Lanzaro*, 834 F.2d at 347 (stating that a medical need is serious if it has been diagnosed by a physician as requiring treatment or is so obvious that a layperson would easily recognize the necessity of a doctor's attention).

<sup>171</sup> *See Inmates of Allegheny County*, 612 F.2d at 762 (deferring to prison medical authorities implies an assumption that the medical authorities have reached an informed, professional medical judgment); Posner, *supra* note 151, at 352. Because treatments chosen for inmates through an exercise of professional judgment are roughly the same treatments that professionals prescribe to society in general, the *Estelle* standard equates the standard of care to which prisoners are entitled to the standard of care available in the community at large. *See Posner, supra* note 151, at 361, 364.

the *Estelle* standard.<sup>172</sup> For example, in 1974, in *Williams v. Vincent*, the United States Court of Appeals for the Second Circuit held that throwing away a portion of the prisoner's ear, rather than attempting to reattach the severed portion, could constitute deliberate indifference.<sup>173</sup> In *Williams*, a prisoner was assaulted by another inmate and lost a large part of his right ear.<sup>174</sup> He alleged that the prison hospital personnel told him that he did not need his ear, threw it away and sewed up the stump with ten stitches.<sup>175</sup> The court reasoned that the doctors could have been acting out of deliberate indifference towards the prisoner's medical needs because a concerned doctor would have tried to reattach the ear of a patient if it were practicable.<sup>176</sup> The court stated that deliberate indifference may have caused the prison doctors consciously to choose an easier and less efficacious treatment.<sup>177</sup> Thus, the Second Circuit held that a prison doctor's deliberate choice of a less efficacious treatment could violate the Eighth Amendment.<sup>178</sup>

## 2. Cost of Treatment

Another crucial aspect of the *Estelle* standard is that it does not consider the cost of the treatment as influencing the prisoner's right to medical care.<sup>179</sup> This differs significantly from the procedural due process context, where the court balances the individual's interest against the state's interest, including cost.<sup>180</sup> In Eighth Amendment jurisprudence, the court balances individual and governmental interests only in the context of discipline and security; the state's interest in limiting expenditures is not considered.<sup>181</sup> Occasionally, however,

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<sup>172</sup> See *White v. Napoleon*, 897 F.2d 103, 110-11 (3d Cir. 1990) (holding that allegations of physician's repeated use of drugs without a valid medical reason, solely to inflict pain on the prisoner, were sufficient to state claim of violation of the Eighth Amendment); *Martinez*, 443 F.2d at 923, 925 (ignoring doctor's orders by moving prisoner before he was ready to be moved and forcing him to stand on his injured leg after surgery, causing operation to fail, could violate Eighth Amendment); Posner, *supra* note 151, at 352.

<sup>173</sup> 508 F.2d 541, 544 (2d Cir. 1974).

<sup>174</sup> See *id.* at 543.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 544.

<sup>177</sup> See *id.*

<sup>178</sup> See *Williams*, 508 F.2d at 544.

<sup>179</sup> See, e.g., *Lanzaro*, 834 F.2d at 336, 351; *Martin v. DeBruyn*, 880 F. Supp. 610, 615 (N.D. Ind. 1995); Posner, *supra* note 151, at 353.

<sup>180</sup> See *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) (stating that government's interest in limiting expenditures is a factor that must be considered in determining whether certain procedural safeguards are required prior to an administrative decision regarding social security eligibility); Posner, *supra* note 151, at 353-54.

<sup>181</sup> See *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (holding that deliberate indifference in

courts have allowed cost considerations to affect the determination of the extent of medical care that the state is obligated to provide under the Eighth Amendment.<sup>182</sup> Nevertheless, most courts that have addressed the issue have found that a lack of funds cannot justify an unconstitutional level of medical treatment for inmates.<sup>183</sup>

A few cases have stated explicitly that the court should consider financial concerns when determining the extent of medical treatment required by the Eighth Amendment.<sup>184</sup> For example, in 1977, in *Bowring v. Godwin*, the United States Court of Appeals for the Fourth Circuit held that prison inmates are entitled to psychiatric treatment based upon reasonable cost and time, if a physician exercising ordinary skill concludes that the prisoner has a serious problem which may be substantially alleviated through treatment.<sup>185</sup> In *Bowring*, the petitioner was denied parole in part because of the results of his psychological evaluation, which stated that he would not successfully complete a parole period.<sup>186</sup> He thus maintained that the state's failure to provide him with psychiatric treatment, in order that he might ultimately qualify for parole, constituted cruel and unusual punishment and violated his due process rights.<sup>187</sup> The court first noted that there is no difference between the right to medical care for physical ills and for psychiatric ills.<sup>188</sup> The court reasoned, therefore, that inmates are entitled to psychiatric treatment if failure to provide it would constitute deliberate indifference to serious medical needs.<sup>189</sup> The court stated that the limited right to psychiatric treatment stems from the Eighth Amendment, interpreted in light of "the evolving standards of decency that mark the progress of a maturing society."<sup>190</sup> Thus, the Fourth

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the medical care context can be established or disproved without balancing competing institutional and individual concerns, unlike prison security issues, where competing obligation of the prison to maintain safety and security must be balanced against the prisoners' individual rights); *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979) (maintaining institutional security may require limitation of prisoners' and detainees' constitutional rights); Posner, *supra* note 151, at 353-54.

<sup>182</sup> See *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981); *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977); Posner, *supra* note 151, at 359-60.

<sup>183</sup> See *infra* notes 192-227 and accompanying text.

<sup>184</sup> See *Woodall*, 648 F.2d at 272; *Bowring*, 551 F.2d at 47-48; Posner, *supra* note 151, at 359-60.

<sup>185</sup> 551 F.2d at 47-48.

<sup>186</sup> See *id.* at 46.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 47.

<sup>189</sup> See *id.* at 47-48.

<sup>190</sup> See *Bowring*, 551 F.2d at 48. The court stated that "[m]odern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy." *Id.* at 47; see also *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (stating that the inmate's entitlement to medical treatment is reasonably commensurate with modern medical science).

Circuit held that prisoners have a right to reasonable psychiatric treatment, but approved the use of cost as a consideration in determining the extent of that right.<sup>191</sup>

The majority of courts, however, have reached the opposite conclusion and held that a lack of funds can never justify providing unconstitutional levels of medical care to inmates.<sup>192</sup> For example, in 1985, in *Ancata v. Prison Health Services*, the United States Court of Appeals for the Eleventh Circuit held that the refusal of medical personnel to provide the diagnostic care prescribed by prison health officials, in part because petitioner could not pay for the services, could constitute deliberate indifference to serious medical needs.<sup>193</sup> In *Ancata*, the petitioner, a pre-trial detainee, began to suffer from a variety of serious symptoms.<sup>194</sup> The treating physician suggested an orthopedic or psychiatric evaluation, but informed the petitioner that he would not be referred without a court order and that a court order would not be entered unless he agreed to bear the costs of the evaluation.<sup>195</sup> Eventually the petitioner obtained the court order and the orthopedist recommended a neurological evaluation.<sup>196</sup> The petitioner was hospitalized after this evaluation and diagnosed with leukemia. He died four months after the appearance of his symptoms.<sup>197</sup> The court stated that knowledge of the necessity of medical care and intentional refusal to provide it constituted deliberate indifference.<sup>198</sup> Furthermore, the court stated that delay in medical treatment cannot be justified as a means to coerce payment and that delaying treatment for any non-medical reason is deliberate indifference.<sup>199</sup> The court pointed out that a state statute placed responsibility on the county to insure that ade-

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<sup>191</sup> See *Bouring*, 551 F.2d at 47-48; see also *Woodall*, 648 F.2d at 272 (setting forth a balancing test, which includes the availability and expense of the treatment, to assess claims of unconstitutional denial of psychiatric care).

<sup>192</sup> See, e.g., *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983); *Lanzaro*, 834 F.2d at 350-51; *Ancata v. Prison Health Serv.*, 769 F.2d 700, 704 (11th Cir. 1985).

<sup>193</sup> 769 F.2d at 704.

<sup>194</sup> See *id.* at 702. The petitioner experienced, among other things, hyperventilation and double vision. See *id.* Because the plaintiff was a pre-trial detainee, the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment was the applicable constitutional provision. See *id.* at 703 n.5. The court pointed out, however, that the due process rights of a pre-trial detainee are at least as great as the Eighth Amendment rights of a convicted prisoner. See *id.*

<sup>195</sup> See *id.* at 701, 702.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 702.

<sup>198</sup> See *Ancata*, 769 F.2d at 704. The court cited *Ramos v. Lam*: "Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment." 639 F.2d 559, 575 (10th Cir. 1980).

<sup>199</sup> See *Ancata*, 769 F.2d at 704.

quate funds were provided to meet the medical needs of inmates.<sup>200</sup> Thus, the Eleventh Circuit concluded that a shortage of funds cannot justify an unconstitutional lack of medical treatment for inmates.<sup>201</sup>

Several cases have analyzed whether the government has an obligation to pay for medical treatment when there are other means available to pay for the care, including a prisoner's personal funds.<sup>202</sup> For example, in 1983, in *City of Revere v. Massachusetts General Hospital*, the United States Supreme Court held that once the government provides needed medical care, state law—not the federal Constitution—dictates how the cost of that care should be allocated between the government and the care provider.<sup>203</sup> In *City of Revere*, Revere police officers shot and wounded a man as he fled the scene of a crime.<sup>204</sup> The officers called an ambulance to transport the man to Massachusetts General Hospital ("MGH"), where he was admitted for nine days.<sup>205</sup> MGH sued the City of Revere ("City") to recover the full cost of the services rendered to the gunshot victim.<sup>206</sup> The Court reasoned that the City had met its Eighth Amendment obligation by taking the victim to the hospital and ensuring that he received proper care for his injury.<sup>207</sup> The Court further reasoned that the allocation of the cost of treatment between the government and the care provider was not a constitutional question but a matter of state law.<sup>208</sup> The Court noted several means, other than state funding, through which the government could obtain payment for the services, but added that, if it can obtain the necessary care for a detainee only by paying for it, then it must pay for the treatment.<sup>209</sup> The Supreme Court thus held

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<sup>200</sup> See *id.* at 705. The court stated that "[a]lthough the statute makes clear that the county can seek reimbursement from a person incarcerated, the plain wording of the statute indicates that the county has the responsibility for securing adequate medical treatment. A prisoner does not have to bargain for medical care." *Id.* at 705 n.7. The court also pointed out that the county was unable to absolve itself of its constitutional or statutory duties by contracting with an entity such as Prison Health Services. See *id.* at 705.

<sup>201</sup> See *id.* at 702.

<sup>202</sup> See, e.g., *Collins v. Romer*, 962 F.2d 1508, 1513 (10th Cir. 1992); *Martin*, 880 F. Supp. at 615.

<sup>203</sup> 463 U.S. at 245.

<sup>204</sup> See *id.* at 240.

<sup>205</sup> See *id.* at 241. The total bill for his treatment was \$7,948.50. See *id.* He was again hospitalized for fifteen days at a cost of \$5,360.41. See *id.*

<sup>206</sup> See *id.* Because the patient had not been found guilty of anything at the time he received medical treatment, the Court analyzed the case under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment. See *id.* at 244. The Court noted that due process rights are at least as great as the Eighth Amendment rights available to convicted prisoners. See *id.*

<sup>207</sup> See *id.* at 245.

<sup>208</sup> See *City of Revere*, 463 U.S. at 245.

<sup>209</sup> See *id.* The Court noted that some hospitals are required to provide free care to indigents

that the government must pay for the medical care of detainees and prisoners with government funds when that is the only means available to obtain the necessary medical care.<sup>210</sup>

Similarly, in 1987, in *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the United States Court of Appeals for the Third Circuit held that the County of Monmouth ("County") could not condition the provision of needed medical services on the inmates' ability to pay and that the County must fully assume the cost of all inmate abortions if there are no alternative funding methods.<sup>211</sup> In *Lanzaro*, several inmates at Monmouth County Correctional Institution brought a class action suit to enjoin the County from enforcing a requirement that female prisoners secure court-ordered releases and their own funding in order to receive an abortion which was not medically necessary while in the County's custody.<sup>212</sup> The court stated that providing funds for an elective abortion would not burden the prison's limited resources, because it imposed no greater burdens than those that already exist under the County's responsibility to provide all pregnant inmates with proper pre- and post-natal care.<sup>213</sup> Furthermore, the court noted that a prison's obligation to accommodate the right to choose abortion should not be treated differently than the obligation to accommodate other fundamental rights, such as access to the courts, for which prison funds are routinely expended.<sup>214</sup> The court reasoned, however, that accommodations of the right to choose abortion might not *require* the expenditure of prison funds, so long as the government ensures that adequate means exist to allow the inmate to choose abortion.<sup>215</sup> The court stated that the prison could not condition the provision of necessary medical services, which it has an affirmative duty to provide, on the inmate's ability or willingness to pay.<sup>216</sup> The court cited *City of Revere* for the proposition that the County must assume the cost of providing inmates with the necessary medical care in the absence of alternative means of funding.<sup>217</sup> Thus, the Third Circuit held that if an inmate elects to have an abortion and is unable

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and that the government may be able to recover the costs of treatment directly from the detainee. *See id.* at 245 n.7.

<sup>210</sup> *See id.* at 245.

<sup>211</sup> 834 F.2d at 350-51.

<sup>212</sup> *See id.* at 328.

<sup>213</sup> *See id.* at 341.

<sup>214</sup> *See id.* at 343.

<sup>215</sup> *See id.* at 343-44. The Court envisioned the possibility of philanthropic groups and other organizations such as Planned Parenthood assisting the prisoners in paying for abortions. *See id.* at 344 n.27.

<sup>216</sup> *See Lanzaro*, 834 F.2d at 351.

<sup>217</sup> *See id.* at 350-51.



to pay for the procedure, the government has an obligation to secure funding for the procedure.<sup>218</sup>

In 1995, in *Martin v. DeBruyn*, the United States District Court for the Northern District of Indiana held that the Eighth Amendment did not guarantee free medical care to those who are able to pay for it, but that failure to provide treatment for serious medical needs to inmates who cannot afford to pay for it violated the Eighth Amendment.<sup>219</sup> In *Martin*, the plaintiff, who was receiving treatment for ulcers and had a prescription from a doctor for certain over-the-counter ("OTC") medication, alleged that the Department of Correction's policy for dispensing OTC medications violated his Eighth Amendment right to be free from cruel and unusual punishment.<sup>220</sup> The policy prohibited inmates from receiving OTC medication on sick call unless it was part of a necessary treatment for a serious medical condition, which would have required them to purchase the OTC medications from the commissary.<sup>221</sup> The court reasoned that the plaintiff's ulcers were a serious medical need because a prison doctor had prescribed treatment for them and because, if left untreated, ulcers may cause intense and persistent pain and perhaps require emergency surgical intervention.<sup>222</sup> The court refused to defer to the Department of Correction's list of "serious" medical problems, which did not include ulcers, because the policy of deferring to the judgment of prison officials carries less significance in the context of medical care.<sup>223</sup> The court concluded that prison officials would only exhibit deliberate indifference, thus violating the Eighth Amendment, by refusing to provide the prescribed OTC medication if the plaintiff did not have sufficient resources to pay for it.<sup>224</sup> The court recognized that, because incarceration prevents a person from seeking medical care of his own choosing, the state must provide some degree of care for serious medical needs.<sup>225</sup> The court reasoned, however, that this principle did not forbid a state from requiring that an inmate pay for his medical treatment to the extent that he is able to do so.<sup>226</sup> Thus, the United States District Court for

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<sup>218</sup> See *id.*

<sup>219</sup> 880 F. Supp. at 615.

<sup>220</sup> See *id.* at 612-13.

<sup>221</sup> See *id.* at 612.

<sup>222</sup> See *id.* at 614.

<sup>223</sup> See *id.*

<sup>224</sup> See *Martin*, 880 F. Supp. at 615.

<sup>225</sup> See *id.* at 614-15.

<sup>226</sup> See *id.* at 615. The court stated that "[t]he Eighth Amendment guarantees only that states will not ignore an inmate's serious medical needs; it does not guarantee free medical care." *Id.*

the Northern District of Indiana held that withholding necessary care for serious medical needs because the inmate cannot pay for the treatment violated the Eighth Amendment.<sup>227</sup>

In response to escalating health care costs and shrinking budgets for correctional institutions, some jurisdictions have passed laws permitting prison authorities to deduct funds from prisoners' trust accounts to pay for medical services provided during incarceration.<sup>228</sup> The Federal Prisoner Health Care Copayment Act is currently pending before the United States Senate.<sup>229</sup> It would require inmates to make a copayment of between three and five dollars for all self-initiated medical visits but specifically states that no prisoner can be refused treatment because he is unable to pay the fee.<sup>230</sup> Prisoners have filed federal lawsuits challenging state payment statutes under both the Eighth and Fourteenth Amendments.<sup>231</sup> For example, in 1992, in *Collins v. Romer*, the United States Court of Appeals for the Tenth Circuit held that the Colorado payment statute, which assessed a three-dollar charge for self-initiated visits to a physician, dentist or optometrist, was constitutional.<sup>232</sup> The court, however, recognized that an earlier version of the law, which assessed the three-dollar fee for *all* visits including referral visits initiated by medical personnel, was unconstitutional.<sup>233</sup> Speci-

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<sup>227</sup> See *id.* The court denied the plaintiff's motion for summary judgment because there was insufficient evidence of his ability or inability to pay for the prescribed medicine. See *id.* at 616.

<sup>228</sup> See, e.g., NEV. REV. STAT. ANN. § 209.246 (Michie 1993) (allowing director of prisons to establish reasonable deduction from inmate's account to defray costs of inmate's medical care); TEX. CRIM. PROC. CODE ANN. § 104.002(d) (West Supp. 1994) (requiring person who received medical care while in a county jail to pay for such services when rendered). At least 20 states have implemented statewide prisoner health care copayment programs. See *Thomas*, *supra* note 28. Generally, prison trust funds operate as follows: prisoners receive work assignments for which they are paid prison scale wages, which are then credited to the inmates' trust accounts. See *Shields*, *supra* note 114, at n.113. The inmates may spend the funds as they choose or as the court orders. See *id.* Because many prisoners and detainees come from lower socioeconomic classes and have no outside savings, the only funds they have available are in their inmate trust accounts. See *id.* at 285. Thus, if an indigent inmate is required to pay for his medical treatment, the money in his trust account is most likely the only source from which to draw. See *id.*

<sup>229</sup> S. 494, 105th Cong. (1997). Section (2)(e) states that "[n]othing in this section shall be construed to permit any refusal of treatment to a prisoner on the basis that—(1) the account of the prisoner is insolvent; or (2) the prisoner is otherwise unable to pay a fee assessed under this section in accordance with subsection (d)(1)." *Id.* § 2(e).

<sup>230</sup> See *id.*

<sup>231</sup> See, e.g., *Collins*, 962 F.2d at 1510 (challenging Colorado's payment statute under Eighth Amendment); *Scott v. Angelone*, 771 F. Supp. 1064, 1065 (D. Nev. 1991), *aff'd*, 980 F.2d 738, 1992 WL 354598 (9th Cir. 1992) (challenging application of Nevada's payment statute as a violation of Fourteenth Amendment due process rights).

<sup>232</sup> 962 F.2d at 1510, 1514.

<sup>233</sup> See *id.* at 1511, 1513, 1514. The plaintiffs challenged both the earlier and amended versions of the Act. See *id.*

fically addressing the earlier version of the Act, the plaintiffs claimed that the three-dollar fee constituted cruel and unusual punishment because it was disproportionately large compared to inmate wages.<sup>234</sup> The inmates argued that this forced them to choose between seeking medical treatment and purchasing basic hygiene products, because few prisoners could afford both.<sup>235</sup> In 1990, at a hearing on the prisoners' motion for attorneys' fees, the court held the earlier version of the statute unconstitutional.<sup>236</sup> The court reasoned that, because the inmate level of pay was "far, far below" the three-dollar fee required by the statute, it effectively deprived indigent inmates of meaningful access to medical care.<sup>237</sup> Furthermore, the court reasoned that the statute was particularly harsh on the chronically ill or those who had to visit a doctor on more than one occasion for the same illness.<sup>238</sup> The court upheld the constitutionality of the amended statute, however, because it applied the three-dollar fee only to limited medical visits.<sup>239</sup> Thus, the Tenth Circuit held that inmates can be required to make payments which help defray the costs of their medical treatment, but only in a limited manner which does not deny them meaningful access to health care.<sup>240</sup>

### 3. Transplant Cases

In 1996, the United States Court of Appeals for the Eighth Circuit squarely addressed the issue of post-transplant care for inmates in *Miller v. Schoenen*.<sup>241</sup> In *Miller*, the court held that the inmate had produced enough evidence to allow a reasonable jury to conclude that the prison doctors knew about his serious medical needs and did not address them, thereby violating the Eighth Amendment.<sup>242</sup> The plaintiff alleged that, because of a heart transplant he had received four years prior to his incarceration, he required six types of specialized

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<sup>234</sup> See *id.* at 1510.

<sup>235</sup> See *id.* at 1510-11.

<sup>236</sup> See *id.* at 1511, 1513.

<sup>237</sup> See *Collins*, 962 F.2d at 1513.

<sup>238</sup> See *id.*

<sup>239</sup> See *id.* at 1510-11, 1514; see also *Scott*, 771 F. Supp. at 1067 (finding four-dollar fee constitutes reasonable deduction from inmate trust account for self-initiated medical visits).

<sup>240</sup> See *Collins*, 962 F.2d at 1510, 1513, 1514.

<sup>241</sup> 75 F.3d 1305 (8th Cir. 1996).

<sup>242</sup> See *id.* at 1307, 1311. This case was an interlocutory appeal from a denial of summary judgment based on qualified immunity. See *id.* at 1307. Thus, the court had limited jurisdiction and addressed only the narrow question of whether the defendant doctors knew of the prisoner's need for specialized care and whether they acted reasonably in light of that knowledge. See *id.* at 1309.

medical care which were not provided at an adequate level during his incarceration.<sup>243</sup> The court reasoned that a jury could disbelieve the prison doctors' defense that, because the plaintiff's body had not rejected his heart and he was still alive, their treatment must have been adequate and instead could conclude that the plaintiff had survived in spite of the doctors' inadequate treatment.<sup>244</sup> The court concluded that a reasonable jury could find that the prison doctors acted with deliberate indifference to the plaintiff's serious medical needs.<sup>245</sup> Thus, the Eighth Circuit held that failure to provide adequate post-transplant care for transplant patients could violate the Eighth Amendment.<sup>246</sup>

In 1991, the United States Court of Appeals for the Eleventh Circuit considered guidelines promulgated by the Federal Bureau of Prisons ("Bureau") regarding the funding of organ transplants.<sup>247</sup> In *Fernandez v. United States*, the Eleventh Circuit held that prison officials did not treat the medical needs of a prisoner with deliberate indifference by refusing to provide him with highly specialized medical treatment and failing to grant him a medical furlough, reduce his sentence, grant him parole or pardon him so he could seek the treatment on his own.<sup>248</sup> The plaintiff suffered from terminal coronary artery disease and sought through various legal means to reduce his sentence so he could undergo a life-saving heart transplant.<sup>249</sup> In denying the prisoner's request for a medical furlough, the Federal Bureau of Prisons adhered to its guidelines, which required prisoners to establish their ability to pay for an organ transplant procedure and the willingness of a transplant program to consider accepting them before granting a furlough.<sup>250</sup> The court refused to grant the prisoner's request for a medical furlough because the record did not show that he had filed the required documentation with the Bureau.<sup>251</sup> Although the court did not explicitly address the validity of the requirements, it referred to them as "reasonable guidelines."<sup>252</sup> The court recognized that the

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<sup>243</sup> See *id.* at 1307-08, 1310. The inmate was serving a "lengthy sentence." *Id.* at 1307.

<sup>244</sup> See *id.* at 1310.

<sup>245</sup> See *id.* at 1311.

<sup>246</sup> See *Miller*, 75 F.3d at 1311.

<sup>247</sup> See *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991).

<sup>248</sup> *Id.* at 1494.

<sup>249</sup> See *id.* at 1491. According to the petitioner, he was told by a physician in 1988 that he would not live more than two years without a heart transplant. See *id.* He was serving two concurrent twelve-year prison terms at one of the principal medical facilities in the federal prison system. See *id.* at 1490.

<sup>250</sup> See *id.* at 1493.

<sup>251</sup> See *id.*

<sup>252</sup> See *Fernandez*, 941 F.2d at 1493.

medical care essential to the prisoner's long-term survival was not available through the prison system, but nevertheless held that his condition had not been treated with deliberate indifference.<sup>253</sup> Thus, the Eleventh Circuit held that enforcing the guidelines of the Bureau, which effectively denied the petitioner the opportunity to receive an organ transplant, did not constitute deliberate indifference to serious medical needs and, therefore, did not violate the Eighth Amendment.<sup>254</sup>

In some cases, prisoners were denied requests for medical care because the type of treatment requested was rare or still in the development stages.<sup>255</sup> For example, in 1974, in *Hampe v. Hogan*, the United States District Court for the Middle District of Pennsylvania held that the petitioner was not entitled to a particular type of treatment that was in the extremely early stages of development and was capable of being performed by only a very few surgeons in limited circumstances.<sup>256</sup> In *Hampe*, the petitioner argued that the prison medical system was incapable of performing sphincter muscle transplants, which he claimed was necessary to cure his severe rectal problems.<sup>257</sup> He had letters from three private surgeons stating that a sphincter transplant might be an available remedy, although the operation was still in the primitive stages.<sup>258</sup> The court stated that two standards are used to determine the adequacy of medical treatment provided to prisoners: (1) whether the prison doctors abused their discretion; or (2) whether the treatment was reasonable.<sup>259</sup> The court noted that, by either standard, the prisoner is not the judge of what treatment need be provided to him.<sup>260</sup> The court observed that the prisoner had received the most intensive treatment that the federal prison system could provide and that the additional treatment he sought was still in the extremely early stages of development.<sup>261</sup> In addition, the court expressed concern that the sphincter muscle transplants would not cure the prisoner's real medical problem.<sup>262</sup> Thus, the United States District Court for the

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<sup>253</sup> See *id.* at 1494. The court noted that the prisoner had received treatment at the Mayo Clinic and had undergone several specialized procedures, as well as constant monitoring and medication at the prison. See *id.*

<sup>254</sup> See *id.* at 1493, 1494.

<sup>255</sup> See, e.g., *Hampe v. Hogan*, 388 F. Supp. 13, 15 (M.D. Pa. 1974).

<sup>256</sup> *Id.*

<sup>257</sup> See *id.* at 13-14.

<sup>258</sup> See *id.* at 14.

<sup>259</sup> See *id.* *Hampe* was decided before *Estelle* and thus did not use the *Estelle* medical professional judgment standard.

<sup>260</sup> See *Hampe*, 388 F. Supp. at 14.

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

Middle District of Pennsylvania held that the prisoner was not entitled to receive the rare, experimental method of treatment he sought.<sup>263</sup>

## V. THE EIGHTH AMENDMENT AND THE GOVERNMENT'S REFUSAL TO FUND PRISONERS' ORGAN TRANSPLANTS

### A. *Application of the Estelle Standard*

The *Estelle* standard established by the United States Supreme Court bases violations of the Eighth Amendment on deliberate indifference to serious medical needs.<sup>264</sup> Failure to provide funding for medically necessary organ transplants for prison inmates does not satisfy the *Estelle* standard and, thus, violates the Eighth Amendment for a number of reasons.<sup>265</sup> First, the *Estelle* standard does not take the cost of the treatment into account, so the high cost of organ transplants should not weigh against the obligation to provide this type of care.<sup>266</sup> In addition, as shown in *City of Revere* and *Martin*, courts have consistently held that the government cannot withhold necessary medical treatment because of the inmate's inability to pay.<sup>267</sup> As illustrated by *Inmates of Allegheny County* and *Pugliese*, courts have also recognized that prison officials cannot interfere with the treatment of serious medical needs prescribed by a doctor, as long as the doctor's decision is within the range of professionally acceptable standards.<sup>268</sup> Once a transplant center has approved an inmate for a transplant, prison authorities are prohibited from interfering with the treatment; failure to provide funds for the procedure where the inmate herself cannot raise the money is as much an interference with the treatment as is failing to administer proper dosages of medication or otherwise disregarding doctor's orders.<sup>269</sup> Finally, "evolving standards of decency" require Eighth Amendment jurisprudence to evolve contemporaneously with society.<sup>270</sup> Although organ transplants were once considered rare and experimental, their status in the medical community has risen

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<sup>263</sup> See *id.*

<sup>264</sup> See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>265</sup> See *supra* notes 109-240 and accompanying text.

<sup>266</sup> See *supra* notes 179-240 and accompanying text.

<sup>267</sup> See *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983); *Martin v. DeBruyn*, 880 F. Supp. 610, 615 (N.D. Ind. 1995); see also *supra* notes 186-240 and accompanying text.

<sup>268</sup> See *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); *Pugliese v. Cuomo*, 911 F. Supp. 58, 62-63 (N.D.N.Y. 1996); see also *supra* notes 151-78 and accompanying text.

<sup>269</sup> See *Inmates of Allegheny County*, 612 F.2d at 762; *Pugliese*, 911 F. Supp. at 62-63; see also *supra* notes 151-78 and accompanying text.

<sup>270</sup> See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

considerably over the past few decades and some organ transplants are becoming routine, cost-effective treatment options for thousands of patients each year.<sup>271</sup> This suggests that prisoners should be constitutionally entitled to this treatment.<sup>272</sup>

As in *Ancata*, where the court held that a lack of funds did not justify an unconstitutional lack of medical care for inmates, a particular prisoner's inability to pay for a medically necessary organ transplant does not preclude him from obtaining this treatment.<sup>273</sup> The U.S. Constitution obligates the state to fund the procedure.<sup>274</sup> The treatment at issue in *Ancata* was diagnostic in nature—the inmate's doctors had recommended orthopedic, psychiatric and neurological evaluations.<sup>275</sup> This type of medical care is undoubtedly less costly than an organ transplant, but the principle remains the same. The *Estelle* standard does not allow cost to influence *any* decision to provide care; it does not say that cost can be considered when the procedure is unusually expensive.<sup>276</sup>

Although it is unfortunate that expensive medical procedures are cost-prohibitive and, thus, unavailable to many members of society, the government is not *legally* obligated to provide costly health care procedures to *all* of its citizens.<sup>277</sup> This obligation extends only to those whom the state has incarcerated because these individuals are denied the opportunity to care for themselves.<sup>278</sup> One commentator, James Childress, argues that there is a societal obligation to provide funds to all citizens who cannot afford expensive transplants; significantly, none of his arguments rely on a *legal* obligation.<sup>279</sup> Rather, Childress points

<sup>271</sup> See UNOS—Newsroom: Critical Data, *supra* note 46.

<sup>272</sup> See *infra* notes 273–367 and accompanying text.

<sup>273</sup> See *Ancata v. Prison Health Serv., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985).

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* at 702; see also *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (noting that preventing an inmate from receiving prescribed treatment or denying an inmate access to medical personnel capable of evaluating the need for treatment constitutes deliberate indifference).

<sup>276</sup> See *infra* notes 287–93 and accompanying text. Some prison systems already recognize their obligation to provide costly medical care when it is medically necessary. For example, the Washington Department of Corrections pays for radiation therapy. See WASHINGTON STATE DEP'T OF CORRECTIONS, *supra* note 90, § 3(1)(A).

<sup>277</sup> See Friedman, *supra* note 13, at 923 (noting that *Estelle* makes the incarcerated the only Americans who have a constitutional guarantee of medical care at government expense); cf. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."); *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 341 (3d Cir. 1987) ("[W]hile the government must provide prisoners in its custody with adequate food and housing, no such affirmative duty is deemed to exist as to the nation's poor and homeless.").

<sup>278</sup> See *Estelle*, 429 U.S. at 103–04.

<sup>279</sup> See Childress, *supra* note 35, at 109.

out that society has a responsibility to meet the basic needs of its members, including insuring that "all citizens be able to secure an adequate level of health care without excessive burdens."<sup>280</sup> He noted that the Task Force on Organ Transplantation strongly recommended that the federal government, as a last resort, pay for non-experimental extrarenal transplants for economically disadvantaged patients who have no other means of funding the transplants.<sup>281</sup> This recommendation focused on notions of justice and fairness, rather than a legal duty.<sup>282</sup> In formulating its proposal, the Task Force considered the ethical responsibility of providing for the basic needs of society's members as well as the inequity of procuring organs from the community at large, including the poor, while regulating access to the donated organs through the ability to pay.<sup>283</sup> Americans who need organ transplants, but are unable to afford them, exemplify the difficulty of securing funding for expensive medical procedures.<sup>284</sup> The government, however, is not constitutionally obligated to provide health care to these citizens as it is obligated to those it imprisons.<sup>285</sup>

There is a line of cases holding that, if a prisoner is unable to afford necessary medical care, the state cannot withhold treatment and must pay for the care.<sup>286</sup> For example, in *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit stated that, in the absence of alternative means of funding, the county had the duty to assume the costs of providing its inmates with necessary medical care.<sup>287</sup> Although the care at issue in *Monmouth* was an abortion procedure, the court did not limit its holding to the abortion context; it stated that the correctional institution could not condition the provision of "needed medical services," which it is duty-bound to provide, upon the inmate's ability to pay.<sup>288</sup> Similarly, in *Martin v. DeBruyn*, the United States District Court for the Northern District of Indiana did not limit its language to payment for the low-cost over-the-counter medications

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<sup>280</sup> See *id.* (quoting PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH, SECURING ACCESS TO HEALTH CARE vol. 1 (1983)).

<sup>281</sup> See *id.* at 110 (quoting TASK FORCE ON ORGAN TRANSPLANTATION, ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS at 99-105 (Apr. 1986)).

<sup>282</sup> See *id.* The Task Force also considered the continuity between certain organ transplants and other forms of health care that are part of the decent minimal level of care that society is obligated to provide. See *id.*

<sup>283</sup> See *id.* In addition, the Task Force noted that excluding the poor from the allocation process fostered distrust in the system and ultimately reduced the overall supply of donated organs. See *id.*

<sup>284</sup> See *supra* notes 30-37 and accompanying text.

<sup>285</sup> See *supra* notes 277-78 and accompanying text.

<sup>286</sup> See *supra* notes 192-227 and accompanying text.

<sup>287</sup> 834 F.2d 326, 351 (3d Cir. 1987).

<sup>288</sup> See *id.*



at issue in that case.<sup>289</sup> Although the holding specifically referred only to prescribed OTC medicine, the court stated in dicta that prison officials who withhold "necessary medical care" to indigent inmates violate the Eighth Amendment.<sup>290</sup> Based on the courts' broad language referring to medical care generally, it does not appear that courts are concerned with whether the cost of the treatment was at the high or the low end of the cost continuum.<sup>291</sup> Also, these courts have never reserved the question of whether they would decide differently if a more expensive treatment had been at issue.<sup>292</sup> This seems to indicate a true indifference to the cost of medical care when the treatment is required constitutionally. Thus, although the courts have never addressed specifically whether the state must pay for an organ transplant if the inmate cannot afford it, the language in the cases implies that the Eighth Amendment would require such an expenditure.<sup>293</sup>

The Eleventh Circuit, however, has implied that it is the responsibility of the inmate seeking the transplant to secure funding for the procedure.<sup>294</sup> In *Fernandez v. United States*, the court implicitly approved the Federal Bureau of Prisons's guidelines requiring prisoners seeking organ transplants to establish their ability to pay for the procedure before obtaining a medical furlough.<sup>295</sup> The court upheld the denial of the prisoner's request for a medical furlough because he had not filed the required documentation demonstrating his ability to pay.<sup>296</sup> This holding, coupled with the court's language referring to the guidelines as "reasonable," implies that the court approved of the policy of requiring inmates within the federal prison system to pay for transplants themselves.<sup>297</sup> The court gave no reasoning for this proposition, however, and failed to address the Eighth Amendment implications.<sup>298</sup> It seems to conflict directly with the deliberate indifference standard articulated in *Estelle*, especially given that the guidelines assume that a transplant team is already considering the prisoner for medical approval.<sup>299</sup> Once a physician has prescribed a course of treat-

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<sup>289</sup> 880 F. Supp. 610, 615 (N.D. Ind. 1995).

<sup>290</sup> *See id.*

<sup>291</sup> *See id.*

<sup>292</sup> *See Lanzaro*, 834 F.2d at 326; *Martin*, 880 F. Supp. at 610.

<sup>293</sup> *See supra* notes 286-92 and accompanying text.

<sup>294</sup> *See Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991).

<sup>295</sup> *Id.*

<sup>296</sup> *See id.*

<sup>297</sup> *See id.* This guideline applies only to prisoners within the federal system; each state has its own guidelines.

<sup>298</sup> *See id.*

<sup>299</sup> *See Fernandez*, 941 F.2d at 1493.

ment, prison officials are prohibited from interfering with the prisoner's ability to obtain the treatment; failing to pay for the treatment would constitute interference, and, thus, deliberate indifference.<sup>300</sup>

The caveat which the United States Supreme Court attached to its holding in *City of Revere v. Massachusetts General Hospital* signifies the Court's concern with inmates who are unable to afford medical care.<sup>301</sup> The Court left the question of cost allocation to state law, but noted, "if, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay."<sup>302</sup> Thus, while it is up to an individual state to enact copayment statutes and otherwise formulate policy about the contributions they expect from inmates for their health care, if an inmate is without funds to pay for constitutionally required care, the government must somehow secure the funds.<sup>303</sup> Similar to *Lanzaro* and *Martin*, the Supreme Court in *City of Revere* framed this obligation generally, by using the term "medical care" instead of limiting the statement to the type of treatment at issue in the case.<sup>304</sup> This shows that the Court was not limiting the obligation to provide medical care to relatively low-cost procedures.<sup>305</sup> Had it wanted to make a distinction, it easily could have articulated its desire to reserve the question of whether the governmental entity must pay for treatments which are significantly more expensive than the treatment considered in this case.

In addition, the payment statute cases indicate that the courts will impose limits on prison officials' authority to fund medical care for an inmate using the inmate's personal trust account.<sup>306</sup> In *Collins v. Romer*, the Tenth Circuit concluded that the original version of the Colorado payment statute was unconstitutional because the three-dollar fee charged to inmates whenever they saw a physician was disproportionately large.<sup>307</sup> The court was concerned that the fee assessment was so out of proportion to prisoner wages that it could operate to deny meaningful access to medical care; the court realized that it could take days or even weeks for an inmate to earn the three dollars to cover the visit.<sup>308</sup> Three dollars is a trivial amount compared to the thousands of

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<sup>300</sup> See *supra* notes 151-78 and accompanying text.

<sup>301</sup> 463 U.S. 239, 245 (1983).

<sup>302</sup> See *id.*

<sup>303</sup> See *id.*

<sup>304</sup> See *id.* The detainee in this case was treated for a gunshot wound. See *id.* at 240.

<sup>305</sup> See *id.* at 245.

<sup>306</sup> See, e.g., *Collins v. Romer*, 962 F.2d 1508, 1513 (10th Cir. 1992); *Scott v. Angelone*, 771 F. Supp. 1064, 1067 (D. Nev. 1991), *aff'd*, 980 F.2d 738, 1992 WL 354598 (9th Cir. 1992).

<sup>307</sup> 771 F. Supp. at 1511, 1513.

<sup>308</sup> See *id.* at 1513.

dollars required to pay for an organ transplant.<sup>309</sup> Given that the court determined that three dollars for every visit to a physician was unconstitutionally burdensome on inmates without outside income, it seems obvious that requiring an inmate to secure funding for an organ transplant is unconstitutional as well.<sup>310</sup> Because the cost is so much greater, the burden on the inmate would, of course, be proportionately greater. The plaintiffs in *Collins* alleged that the three-dollar fee forced them to choose between basic medical care or basic hygiene necessities, because few inmates could afford both.<sup>311</sup> Requiring prisoners to fund their own organ transplants does not provide them with even the constitutionally questionable option of choosing medical care over hygiene products, because inmates with no outside income would never be able to earn sufficient funds to pay for the transplant. The fact that the court found the 1989 amended version constitutional because it only assessed the three-dollar fee for self-initiated visits to a physician is significant.<sup>312</sup> It suggests that the court was willing to require the inmate to accept some responsibility for his health care expenses, but only to an extent that would not be exceedingly burdensome and force him to choose between medical care and other basic necessities.<sup>313</sup> That being said, the court was only willing to require *reasonable* payments from the inmates.<sup>314</sup> In light of the *Collins* decision, the cost of an organ transplant clearly would constitute an unreasonable payment.<sup>315</sup>

Some commentators suggest that, although cost was not considered in the original *Estelle* standard, changed circumstances, such as the rising cost of health care, dictate that financial matters be factored

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<sup>309</sup> See *UNOS—Patients*, *supra* note 30. Organ transplants can cost in excess of \$300,000 in the first year alone. See *id.*

<sup>310</sup> See *Collins*, 962 F.2d at 1511.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> See *id.* *Prows v. United States Department of Justice* held that the government's program to charge inmates for their medical care was within their authority to reform and rehabilitate prisoners. 704 F. Supp. 272, 275 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991). The court stated that such programs encourage inmates to satisfy their legitimate financial obligations and demonstrate their acceptance of responsibility. See *id.* The objectives of rehabilitation and reform are not, however, furthered by requiring inmates who have no possible way to pay for an organ transplant to forego this life-saving procedure. Requiring prisoners to pay for treatment which they plainly cannot afford or else forego treatment altogether does not qualify as a legitimate element in the process of rehabilitating and reforming prisoners. See generally *Shields*, *supra* note 114, at 298-300. In fact, the Fifth Circuit has recognized that deficiencies in health care and hygiene foster inmate frustration and resentment, which in turn thwart the purported goal of rehabilitation. See *Newman v. Alabama*, 503 F.2d 1320, 1333 (5th Cir. 1975).

<sup>314</sup> See *Collins*, 962 F.2d at 1511, 1513.

<sup>315</sup> See *id.*

into the determination of what level of medical care must be provided.<sup>316</sup> Sister Rosemary Donley argues that technological advances have forced physicians to begin considering cost, both to the patient and to the system, in making decisions about access to treatment.<sup>317</sup> Another commentator, Wesley Shields, has argued that if the realm of health care decisions has changed to the extent that doctors are required to include cost in their treatment decisions, then the *Estelle* standard which prohibits the consideration of cost must be abandoned.<sup>318</sup> He proposes a new standard with a fee scale tied to the inmate's wages which defines exactly how much can be charged for specific medical services.<sup>319</sup> He makes special allowances for indigent inmates, however, and stresses that inmates should receive the necessary treatment before the government pursues reimbursement.<sup>320</sup> The special provision for indigent inmates unable to pay for care illustrates that even proponents of balancing the state's financial interest against the prisoner's interest in receiving health care recognize that, when the inmate is utterly without means to finance his treatment, the government remains responsible.<sup>321</sup> This principle is reflected in the Federal Prison Health Care Copayment Act currently pending before the United States Senate.<sup>322</sup> The Act requires prisoners to make copayments of three to five dollars for each self-initiated medical visit and for certain prescriptions, but specifically exempts inmates who cannot afford the fee.<sup>323</sup> Section 2(e) of the Act states that prison officials

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<sup>316</sup> See CURTIS PROUT & ROBERT N. ROSS, CARE AND PUNISHMENT: THE DILEMMAS OF PRISON MEDICINE 232 (1988) (arguing that health care both in and out of prisons must resolve tension between three competing considerations: right to care, acceptable standards of care, and cost); Sister Rosemary Donley, *A Brave New World of Health Care*, 2 J. CONTEMP. HEALTH L. & POL'Y 47, 51-52 (1986); Shields, *supra* note 114, at 297, 300-01.

<sup>317</sup> See Donley, *supra* note 316, at 52-53 (arguing "[h]ealth care professionals need to include cost in their decisional paradigms").

<sup>318</sup> See Shields, *supra* note 114, at 301. The acceptance of the use of cost as a factor in treatment decisions for patients in the private market may not translate into acceptance of the use of cost as a factor in treatment decisions for prisoners. See Posner, *supra* note 151, at 367. In the private market, if it is the patient herself who will pay for the care and who considers the cost of various treatments in making the ultimate decision regarding the appropriate care, then it is acceptable for the doctor to suggest different treatment options based on cost. See *id.* In the prison setting, however, the state, not the patient, bears the cost of the treatment. See *id.* Thus, all gains or losses based on the cost of the medical care fall on the state, impairing patient autonomy. See *id.* The prisoner, unlike the "free" patient, is unable to perform a cost-benefit analysis because the decision will be made for her. See *id.*

<sup>319</sup> See Shields, *supra* note 114, at 301.

<sup>320</sup> See *id.*

<sup>321</sup> See *id.*

<sup>322</sup> See S. 494, 105th Cong. (1997).

<sup>323</sup> See *id.* § 2(c).

cannot refuse to treat prisoners because they are unable to pay the required fees.<sup>324</sup> Payment is the government's obligation in the first instance and reimbursement can be sought from the inmate only when possible.<sup>325</sup> Accordingly, when an inmate without financial resources requires an organ transplant, legislation would demand that the government must supply the funds.<sup>326</sup>

Even if one concedes that cost can be considered in determining what treatment to prescribe, it may not influence the prison authorities' deference to the medical doctor's decision once it is made.<sup>327</sup> If, after considering cost, a transplant team determines that an organ transplant is necessary, prison officials cannot object on the basis of cost because they must defer to the doctor's prescribed treatment, assuming that the doctor reached his conclusion regarding appropriate treatment using generally accepted professional standards.<sup>328</sup> By analogy, if prison authorities interfere with a prescribed transplant by failing to pay for it, their actions would constitute deliberate indifference.<sup>329</sup> In *Pugliese*, the court recognized that disregarding an outside medical consultant's recommendation that an inmate receive physical therapy because the state considered the expense a waste of the state's money could be a constitutional violation.<sup>330</sup> This plaintiff's situation is similar to the predicament of an inmate who has been medically approved for an organ transplant, but the prison authorities fail to provide access to the procedure.<sup>331</sup> The fact that the prison authority does not want to pay for the treatment becomes irrelevant once it has been prescribed by a doctor.<sup>332</sup> This has special meaning for inmates who have life-threatening conditions which are degenerating quickly.<sup>333</sup> In such circumstances, time is of the essence; the sick inmate's health will deteriorate, perhaps to the point of death, while prison authorities

<sup>324</sup> See *id.*

<sup>325</sup> See, e.g., S. 494, 105th Cong. (1997); *City of Revere*, 463 U.S. at 245; Shields, *supra* note 114, at 301.

<sup>326</sup> See, e.g., S. 494, 105th Cong. (1997); *City of Revere*, 463 U.S. at 245; Shields, *supra* note 114, at 301.

<sup>327</sup> See *supra* notes 151-78 and accompanying text.

<sup>328</sup> See, e.g., *Inmates of Allegheny County*, 612 F.2d at 762; *Pugliese*, 911 F. Supp. at 63-64; Posner, *supra* note 151, at 351-52; see also *supra* notes 151-78 and accompanying text.

<sup>329</sup> See *Inmates of Allegheny County*, 612 F.2d at 762; *Pugliese*, 911 F. Supp. at 63-64; Posner, *supra* note 151, at 351-52; see also *supra* notes 151-78 and accompanying text.

<sup>330</sup> See *Pugliese*, 911 F. Supp. at 63.

<sup>331</sup> See *id.*

<sup>332</sup> See Posner, *supra* note 151, at 351-52.

<sup>333</sup> Cf. *Liscio v. Warren*, 901 F.2d 274, 276-77 (2d Cir. 1990) (holding that where inmate's condition was life threatening and degenerating quickly, prison doctor's failure to examine over three day period could violate the Eighth Amendment).

ignore prescribed treatment. The sick inmate simply does not have the time to wait.

In addition, if the inmate is serving a long sentence, ignoring the prescribed treatment will operate as a permanent denial of medical care because the inmate most likely will not have the opportunity to obtain the treatment independently once released, if at all, from the prison system.<sup>334</sup> In *Derrickson v. Keve*, the Federal District Court of Delaware held that refusing to allow a prisoner serving a life sentence to elect surgery which had been recommended by a physician would violate the Eighth Amendment.<sup>335</sup> Although the surgery was normally considered elective, the court determined that the life sentence removed the choice from this inmate: if prison authorities did not provide access to the operation, his condition would be irreparable.<sup>336</sup> The same can obviously be said for an inmate who needs a life-saving organ transplant: if her physical condition is deteriorating rapidly and she is not expected to outlive the remaining duration of her sentence without a transplant, then the state's failure to provide access to the transplant procedure will render her condition irreparable and she will die. Thus, if a prisoner is medically approved for a transplant by a physician or transplant team using their best professional judgment, a court should conclude that the prison must honor this medical decision and finance the treatment.

### B. *Other Aspects of Eighth Amendment Analysis*

A crucial aspect of Eighth Amendment analysis links the standard for determining the scope of the Cruel and Unusual Punishment Clause directly to public sentiment concerning the reasonableness of punishments.<sup>337</sup> In *Trop v. Dulles*, the Court stated that the clause must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society."<sup>338</sup> The Court intended that, as society evolved and became more technologically (and perhaps morally) advanced, the definition of cruel and unusual punishment would evolve contemporaneously to reflect society's modernized views on what constitutes humane treatment of prisoners.<sup>339</sup> This is reflected in the way courts have interpreted the Eighth Amendment over the

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<sup>334</sup> See *Derrickson*, 390 F. Supp. at 907.

<sup>335</sup> *Id.*

<sup>336</sup> See *id.*

<sup>337</sup> See *Trop*, 356 U.S. at 101; Shields, *supra* note 114, at 277-78.

<sup>338</sup> 356 U.S. at 101.

<sup>339</sup> See *id.*

years.<sup>340</sup> For example, in *Bowring v. Godwin*, the Fourth Circuit held, and the vast majority of courts later agreed, that denial of psychiatric and psychological care came within the purview of the Cruel and Unusual Punishment Clause.<sup>341</sup> In holding that a prisoner had a right to psychiatric treatment, the Fourth Circuit noted that there was no distinction between the right to medical care for physical ills and its psychiatric counterpart.<sup>342</sup> It emphasized the increased role of psychiatric care in modern society and pointed out that at least one Court of Appeals had considered psychiatric care in testing the constitutional validity of systemwide prison conditions.<sup>343</sup> Thus, the court recognized that society's standards had evolved and had made psychiatric care a scientifically acceptable form of medical treatment.<sup>344</sup>

When organ transplant technology was in its developmental stages, it held the same status as psychological care held before its use became widespread—such treatment was considered to be experimental and rare. As late as 1986, Medicare did not cover heart, heart/lung or pancreas transplants because they were considered experimental by the National Institute of Health.<sup>345</sup> Today, transplant technology has made significant advances. Most transplants are no longer considered experimental; Medicare, for example, now covers heart, liver and lung transplants.<sup>346</sup> In addition, thousands of transplants are performed each year and virtually all transplant procedures have experienced increased success rates in recent years.<sup>347</sup> A large independent agency, UNOS, is maintained with the sole purpose of coordinating transplant activity throughout the country.<sup>348</sup> American citizens are becoming

<sup>340</sup> See *supra* notes 112-40 and accompanying text; see also Shields, *supra* note 114, at n.38 (citing Carlene Gattig Carraba, *Prisoner's Constitutional Right to Medical Treatment: A Right Without Substance?* 7 NEW ENG. J. ON PRISON L. 341, 348 (1981)) (stating that public opinion about what constitutes humane treatment may change over time and this factors into determining a punishment's constitutionality).

<sup>341</sup> *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

<sup>342</sup> See *id.*

<sup>343</sup> See *id.* The court stated that the Fifth Circuit, in *Newman v. Alabama*, considered the inadequate treatment of mentally ill inmates as a factor in determining that Alabama penal system was operating in violation of the Eighth Amendment. See *id.* at 47.

<sup>344</sup> See *id.* at 47.

<sup>345</sup> See Cotton & Sandler, *supra* note 34, at 78.

<sup>346</sup> See 60 Fed. Reg. 6537 (1995); 56 Fed. Reg. 15,006 (1991); 52 Fed. Reg. 10,935 (1987).

<sup>347</sup> See Cotton & Sandler, *supra* note 34, at 75; UNOS—Newsroom: *Critical Data*, *supra* note 46. Nearly 20,000 transplants, or 55 per day, were performed in 1997. See UNOS—Newsroom: *Critical Data*, *supra*. The UNOS 1997 Annual Report stated that one-year graft and patient survival rates for all organs improved nearly every year between 1988 and 1995, with the greatest improvements seen among lung and heart/lung transplants. See UNOS: *Annual Report-Data Highlights* (visited June 9, 1998) <[http://www.unos.org/Data/anrpt97/anrpt\\_datahigh.htm](http://www.unos.org/Data/anrpt97/anrpt_datahigh.htm)>.

<sup>348</sup> See *supra* notes 39-74 and accompanying text.

more accepting of organ transplants as an effective means of medical treatment and nationwide efforts have been launched to increase organ donation.<sup>349</sup> Organ transplantation is thus moving toward the status that psychiatric care had achieved in 1977 when *Bowring* was decided.<sup>350</sup> If this is so, then evolving standards of decency suggest that prison inmates should obtain this treatment, even if unable to fund the procedures themselves.<sup>351</sup>

In some cases, such as *Hampe v. Hogan*, the courts have been reluctant to force prison authorities to provide rare and experimental medical treatments that are still in the development stages.<sup>352</sup> This case, however, can be distinguished from the organ transplant context. First of all, it was decided before *Estelle*, and thus may not have significant precedential value in light of the new standard announced in that case.<sup>353</sup> In addition, the medical care at issue in *Hampe* was far more "experimental" than certain organ transplants are today.<sup>354</sup> The plaintiff in *Hampe* sought a sphincter muscle transplant, a sophisticated surgery which was in the extremely early stages of development and capable of being performed by only a very few surgeons in limited circumstances.<sup>355</sup> In contrast, organ transplants, especially kidney and liver replacements, are performed thousands of times each year and are available at transplant centers throughout the country.<sup>356</sup> Some prisoners receive transplants every year—usually bone marrow or kidney replacements.<sup>357</sup>

*Hampe* can be distinguished for another reason. In addition to the treatment's experimental status, the court was concerned by the phy-

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<sup>349</sup> See *Organ & Tissue Coalition on Donation* (visited June 9, 1998) <<http://www.shareyour-life.org>>. This is a site by the National Coalition on Donation.

<sup>350</sup> See *Bowring*, 551 F.2d at 44.

<sup>351</sup> See *Trop*, 356 U.S. at 101; *Bowring*, 551 F.2d at 47; cf. *U.S. v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (finding that Federal Bureau of Prisons is required to provide medical services at a level reasonably commensurate with modern medical science); Friedman, *supra* note 13, at 948 ("[S]ocietal expectations of medical care, which are a key consideration in the evaluation of Eighth Amendment claims, are heightened as a result of continuing advancements in medical technologies.").

<sup>352</sup> *Hampe v. Hogan*, 388 F. Supp. 13, 15 (M.D. Pa. 1974); see also OFFENDER HEALTH PLAN, *supra* note 276, § 3.

<sup>353</sup> See *Hampe*, 388 F. Supp. at 13. The court applied two standards: whether the prison's medical authorities abused their discretion and whether the treatment rendered has been reasonable. See *id.* at 14.

<sup>354</sup> See *id.* at 15.

<sup>355</sup> See *id.*

<sup>356</sup> See UNOS—Newsroom: *Critical Data*, *supra* note 46. There are 275 medical institutions throughout the country which operate organ transplant programs. See *id.*

<sup>357</sup> See Grygotis, *supra* note 75. Kidney transplants are actually cost-effective because they eliminate the need for costly dialysis. See *id.*



sicians' consensus that sphincter muscle damage was not the plaintiff's real problem and that the transplant might actually retard the plaintiff's healing.<sup>358</sup> In contrast, if a transplant team medically approves a patient for a transplant, it can be assumed that the failure of the organ in need of replacement is the patient's real problem and that the transplant will help alleviate the problem.<sup>359</sup> If this were not the case, the patient would not receive medical approval for the transplant.<sup>360</sup> Thus, the *Estelle* standard dictates that prison authorities respect the medical judgment of the treating physician and pay for the procedure if the inmate has no personal resources upon which to rely.<sup>361</sup>

The courts are slowly beginning to consider the special obligations of prison systems to organ transplant patients.<sup>362</sup> The Eighth Circuit, for instance, has recognized the duty of the state to maintain heart transplant patients.<sup>363</sup> In *Miller v. Schoenen*, the plaintiff survived summary judgment by alleging facts sufficient to allow a reasonable jury to conclude that he had particular medical needs as a transplant patient and the defendant prison doctors did nothing about them.<sup>364</sup> By recognizing that the defendant's failure to provide the prisoner with the specialized treatment he required may have constituted deliberate indifference, the court implicitly held that the state could be obligated to pay for the provision of these medical services.<sup>365</sup> The court expressly recognized that the defendants were required to provide the prisoner with adequate care.<sup>366</sup> If the jury determined that anything less than the six specific treatment needs of heart transplant patients would constitute inadequate treatment, then the state would be required to provide the six treatments.<sup>367</sup> Requiring the state to pay for maintenance of transplant patients is not significantly different from requiring the government to pay for the actual transplant procedure, if the transplant is the only adequate treatment for the patient's illness.

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<sup>358</sup> See *Hampe*, 388 F. Supp. at 15.

<sup>359</sup> See *supra* note 262 and accompanying text.

<sup>360</sup> See *supra* notes 55-57 and accompanying text.

<sup>361</sup> See *supra* notes 151-78 and accompanying text.

<sup>362</sup> See, e.g., *Miller v. Schoenen*, 75 F.3d 1305, 1310 (8th Cir. 1996); *Fernandez*, 941 F.2d at 1488.

<sup>363</sup> See *Miller*, 75 F.3d at 1310.

<sup>364</sup> See *id.*

<sup>365</sup> See *id.*

<sup>366</sup> See *id.*

<sup>367</sup> See *id.*

## CONCLUSION

*Estelle v. Gamble* established that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment.<sup>368</sup> Judicial interpretation of this standard clearly dictates that prisoners are entitled to medical treatment prescribed by a physician, so long as the physician exercises professional judgment.<sup>369</sup> If such conditions are met, prison authorities cannot interfere with the provision of this treatment for any reason, including the inmate's inability to pay for the treatment.<sup>370</sup> The progressive nature of the Cruel and Unusual Punishment Clause considers society's "evolving standards of decency" in determining what violates the Eighth Amendment.<sup>371</sup> These factors require that prison authorities, whether pursuant to a written policy or as a result of a case-by-case analysis, obtain funding for a medically necessary organ transplant when no alternative sources of funding are available and the prisoner cannot afford to pay for it herself. Failing to provide the funds after the transplant has been recommended by a medical transplant team, which is possible under the Washington State Offender Health Plan and the Federal Bureau of Prisons Guidelines, and actually happened to James Earl Ray, impermissibly impedes the prisoner's access to medical care.<sup>372</sup> This is not to say that the prison authority must pay for the transplant using prison funds—it is free to obtain the money from other sources, including the inmate herself.<sup>373</sup> If the only available option, however, is for the prison authorities to pay for the transplant, then they must do so.<sup>374</sup> Several decades ago, prison officials would probably not have been required to pay for organ transplants, because they were considered rare and experimental. Today, however, they are generally accepted in the medical community and are performed regularly throughout the United States.<sup>375</sup> Evolving standards of decency thus require the government to make this level of care available to prisoners as well.

There is an obvious disparity between the level of care available to prisoners and that available to some groups of free citizens unable to afford adequate medical treatment.<sup>376</sup> The government's obligation

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<sup>368</sup> 429 U.S. 97, 104 (1976).

<sup>369</sup> See *supra* notes 141–263 and accompanying text.

<sup>370</sup> See *supra* notes 141–263 and accompanying text.

<sup>371</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>372</sup> See *supra* notes 141–367 and accompanying text.

<sup>373</sup> See *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983).

<sup>374</sup> See *id.*

<sup>375</sup> See *supra* notes 345–49 and accompanying text.

<sup>376</sup> See Friedman, *supra* note 13, at 935.

to provide adequate health care, however, is limited to those in its custody and does not extend to society at large.<sup>377</sup> In addition, it is not sensible to lower the standard of care applied to prisoners to match the level of care available to the least well off members of society.<sup>378</sup> A more equitable solution involves raising the standards of health care available to people presently unable to afford quality care, rather than viewing their lack of health care as a benchmark which can be used to limit the quality of care that prisoners receive.<sup>379</sup>

It is up to the courts to identify when it is unconstitutional for the federal or state governments to fail to pay for medically necessary organ transplants when prisoners have insufficient resources to cover the costs associated therewith. As Justice Brennan has remarked, the courts have a special ability to remedy unconstitutional prison conditions: "insulated as they are from the political process, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost."<sup>380</sup> Given the questionable legislation and administrative guidelines regarding the obligation of prison authorities to pay for prisoners' organ transplants, which have been proposed by both the federal and state governments, it is clear that the courts will have to intervene to protect prisoners' rights to be free from this form of cruel and unusual punishment.

JESSICA WRIGHT

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<sup>377</sup> See *supra* notes 277-85 and accompanying text.

<sup>378</sup> See Friedman, *supra* note 13, at 935.

<sup>379</sup> See *id.*

<sup>380</sup> *Rhodes v. Chapman*, 452 U.S. 337, 359 (1981) (Brennan, J., concurring).