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THE RIGHT TO LIVE: A CONSTITUTIONAL ARGUMENT FOR MANDATORY PREVENTATIVE HEALTH CARE FOR FEMALE PRISONERS

Two diseases have claimed women's lives for years but only within the last decade have they gained great notoriety. Pleas for women to take steps to facilitate early detection and treatment of the diseases – the key to survival – run rampant across television screens, newspapers, and virtually all means of communication. Western society has even set aside an entire month to raise awareness of the power of one of these diseases to strike at the very heart of womanhood. The two diseases do not discriminate in attacking young and old, rich and poor, and free and incarcerated. These diseases affect groups of women differently, based on whether each group has a meaningful opportunity to combat them. These two diseases are breast and cervical cancer.

Not surprisingly, “[b]reast cancer affects more women than any other cancer except skin cancer, and kills more than any cancer but lung cancer.”¹ Often a cancerous tumor grows for three to five years before detection by a mammogram.² The American Cancer Society estimates that a chilling 10,520 cases of invasive cervical cancer would be diagnosed in the United States in 2002.³ It is no wonder that the message of preventative care for each of these diseases has grown so rapidly and with such conviction.⁴

Preventative care and early detection take on new meaning, however, for female prisoners. As individuals at the mercy of their guardian, the state, female prisoners do not have access to the multiple health care options possessed by women in mainstream society. Consequently, it is arguable that the chances are much higher for female prisoners to develop breast or cervical cancer that remains undetected until late, irreparable stages.

This note will examine the extent to which access to preventative health care in the form of yearly mammograms for breast cancer and Pap tests for cervical cancer are more than just measures prisons *should* be encouraged to use. Instead, this note

1. Elizabeth Cohen, *New Treatments Hold Out Hope for Breast Cancer Patients*, at <http://www.cnn.com/2001/HEALTH/cancer/01/26/breast.cancer/index.html> (last visited Oct. 18, 2002).

2. *Id.*

3. AMERICAN CANCER SOCIETY, CERVICAL CANCER 3 (2004) available at <http://documents.cancer.org/115.00/115.00.pdf> (last visited Feb. 5, 2003).

4. See *id.* at 3 (Between 1955 and 1992, the number of deaths from cervical cancer in the United States dropped seventy-four percent, primarily due to increased use of the Pap test which is able to detect changes in the cervix before cancer develops and early cancer).

argues that routine access to preventative measures for female prisoners is a constitutional right – to deny women access to such measures is a violation of the Eighth Amendment proscription against cruel and unusual punishment.

To understand the constitutional argument for preventative health care for female prisoners one must first examine the origins of the Eighth Amendment's application to prison health care. Part I presents how the Supreme Court's historical interpretation of what constitutes cruel and unusual punishment has ultimately shaped basic rights to which all prisoners are entitled. Part II examines the Eighth Amendment's expansion and applicability to health care for prisoners. Part III makes the case for a constitutional right to preventative health care under the *Estelle v. Gamble*⁵ 'deliberate indifference' standard.

THE HISTORY OF CRUEL AND UNUSUAL PUNISHMENT OF PRISONERS

The Eighth Amendment of the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*."⁶ The 'cruel and unusual punishments' provision originated in the Virginia constitution.⁷ By the time of the provision's adoption as the Eighth Amendment to the United States Constitution in 1791, it had previously been adopted in eight other state constitutions as well as by the federal government in the Northwest Ordinance of 1787.⁸

Prior to the provision's adoption as the Eighth Amendment, its interpretation was discussed at length – the founding fathers engaged in great debate to define the parameters of "cruel and unusual punishments".⁹ For example, delegates to the Massachusetts convention expressed concern about limitations on methods of federal punishment.¹⁰ Members of the Virginia delegation expressed

5. 429 U.S. 97 (1976).

6. U.S. CONST. amend. VIII (emphasis added).

7. See Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

8. *Id.*

9. See *id.* at 841 (arguing that the American framers misinterpreted the intent of the drafters of the English Bill of Rights in which barbarous punishments that were proportionate to the crime were legitimate).

10. The delegation's sentiment was well expressed:

[Congress will] have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere

a similar sentiment reflected in their fear of the use of "tortures" and "barbarous" punishments because of a lack of prohibitions on them.¹¹ At the time of the "cruel and unusual punishments" clause's adoption, however, it became an accepted view that the provision prohibited the use of certain methods of punishment.¹² Despite the accepted view, the clause permitted much room for interpretation and was left in the hands of the Supreme Court.

Various opportunities to construe the parameters of the Eighth Amendment have been presented before the Court. The first noteworthy case to figure into the Court's construction of the Eighth Amendment 'cruel and unusual punishments' clause is *Wilkerson v. Utah*.¹³ In *Wilkerson*, the defendant was charged and convicted of murder in the first degree.¹⁴ He was subsequently sentenced to a public death by gunshot.¹⁵ On appeal to the Supreme Court, the defendant challenged his sentence, arguing that death by gunshot was not as a legitimate means of execution as the existing law of the Territory only provided that a person convicted of first-degree murder "shall suffer death."¹⁶ The law therefore, left no specific means by which an execution could take place.¹⁷ Furthermore, the existing law replaced a previous statute that *explicitly* stated that if a person were to be convicted of first-degree murder he could be executed by gunshot.¹⁸

In response to the defendant's challenge that death by gunshot was not within the acceptable means of punishment to be prescribed by courts, the Supreme Court presented numerous instances in which death by gunshot was used as the method of punishment.¹⁹

restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

Id. at 841 (quoting 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION III (2d ed. 1881)).

11. *Id.*

12. *Id.* at 842.

13. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

14. *Id.*

15. *Id.*

16. *Id.* at 132.

17. *Id.*

18. The provision in the superseded statute read, "when any person shall be convicted of any crime the punishment of which is death, . . . he shall suffer death by being shot, hung, or beheaded, as the court may direct." *Id.* at 132.

19. The Court provided,

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.

After establishing that the punishment was not cruel and unusual, and therefore legitimate within the meaning of the Eighth Amendment, the Court justified its authority to prescribe execution by shooting in the absence of specific statutory guidelines of the means of carrying out executions.²⁰ "It must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence prescribed."²¹

In hindsight, the case's outcome appears to have contributed very little to the effort to enforce the Eighth Amendment's condemnation of cruel and unusual punishment. The Court's underlying reasoning, however, which rendered shooting to be less barbaric than, for instance, burning someone alive, evinced a desire to seek means for execution that did not involve prolonged pain or suffering.²² Arguably, the Court was searching for humane means to execute punishments.

*In re Kemmler*²³ incorporated the same reasoning as used by the Court in *Wilkerson* when it held that execution by electrocution was not a cruel and unusual punishment under the meaning of the Eighth Amendment. As Chief Justice Fuller wrote in the opinion of the Court, "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution."²⁴ While the Court continued to construct the parameters of cruel and unusual punishments under the traditional view that the clause strictly applied to the means used for executing punishment, cases such as *O'Neil v. Vermont*²⁵ opened up the possibility for an expanded view of the cruel and unusual clause's prohibition.²⁶

In *O'Neil*, the State of Vermont charged the defendant with the illegal sale of alcohol, convicted him on three hundred and seven separate counts, and fined him a sum of money.²⁷ When defendant failed to pay, the court sentenced him to serve over fifty-four years

Id. at 134-35. The "authorities" that the Court refers to in *Wilkerson* consist primarily of military law. Like the statute at issue, military law also did not state how a person must be executed if it was determined that execution was the appropriate punishment. Instead, the punishments were left entirely to the custom of war, and death by shooting was a common means used for execution. *See id.*

20. *Wilkerson*, 99 U.S. at 136.

21. *Id.* at 137.

22. *See id.* at 135-36.

23. 136 U.S. 436 (1890).

24. *Id.* at 447.

25. 144 U.S. 323 (1892) (Writ of error dismissed).

26. Granucci, *supra* note 7, at 842.

27. *See O'Neil*, 144 U.S. at 330.

in prison.²⁸ Defendant argued on appeal to the Supreme Court of Vermont that the cruel and unusual punishment clause should extend to punishments that are disproportionate to the crime.²⁹ Although the Supreme Court dismissed the case on procedural grounds,³⁰ in *dicta*, they cited significant language from the Supreme Court of Vermont,

The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. If he has subjected himself to a severe penalty, it is simply because he has committed a great many such offences. . . The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed.³¹

O'Neil's argument was one of the Court's first exposures to a broader interpretation and application of the Eighth Amendment.³²

In 1909, the mere potential for a broader interpretation of the Eighth Amendment became law in *Weems v. United States*.³³ In *Weems*, the petitioner was convicted of falsifying a public and official document while serving in the capacity of disbursement officer in the Philippine Islands.³⁴ He was sentenced to fifteen years in prison, civil interdiction,³⁵ surveillance during life,³⁶ and perpetual,

28. *See id.* (The aggregate of three days of imprisonment for each dollar in default of payment of the fine and costs in criminal cases).

29. *See id.* at 331.

30. *See id.* at 331-32 (The question was raised but not decided because it was not as a Federal question assigned as error, and, so far as it arose under the constitution of Vermont, it was not within the province of the court to decide).

31. *State v. O'Neil*, 58 Vt. 140, 165, cited in *O'Neil* at 144 U.S. at 331.

32. *Id.* at 843.

33. 217 U.S. 349 (1909).

34. *Id.*

35. Under Article 42 of the Spanish Penal Code, civil interdiction "shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person of property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts inter vivos." *Id.* at 364.

36. Under Article 43 of the Spanish Penal Code, the responsibilities of a prisoner who is subjected to surveillance of authorities is as follows:

- 1) That the fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.
- 2) To observe the rules of inspection prescribed.
- 3) To adopt some trade, art, industry, or profession, should he not have

absolute disqualification from activities such as deprivation of office, the right to vote or be elected into office, eligibility to acquire honors, and the loss of retirement pay.³⁷ Among other objections to his sentence, Weems argued for assignment of error to the sentence because the punishment was excessive in relation to the crime, thereby constituting cruel and unusual punishment proscribed by the Eighth Amendment.³⁸

Writing for the Court, Justice McKenna addressed the question of what constitutes cruel and unusual punishment and noted that the question had not yet been decided with any level of precision.³⁹ By some definitions, he wrote, cruel and unusual punishment could imply "something inhuman and barbarous, torture and the like."⁴⁰ Some courts measured the boundaries of cruel and unusual punishment by referring to the punishments inflicted by English monarchs.⁴¹ In one particular circumstance, as Justice McKenna noted, a court even conceded the possibility that a sentence so disproportionate to the crime could constitute a cruel and unusual punishment.⁴²

Ultimately, his reasoning supported resistance to a narrow construction of the cruel and unusual clause's application.⁴³

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . They are not ephemeral enactments, designed to meet passing occasions. . . . The future is in their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.⁴⁴

known means of subsistence of his own.

Id. at 364.

37. *Id.* at 364-65.

38. *Weems*, 217 U.S. at 362-63.

39. *Id.* at 368.

40. *Id.* (citing *McDonald v. Commonwealth*, 173 Mass. 322, 328 (1898)).

41. *Id.*

42. *Id.* (citing *McDonald*, 173 Mass. at 328).

43. *Id.* at 373 ("Legislation, both statutory and constitutional, is enacted, it is true, from experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken").

44. *Weems*, 217 U.S. at 379.

The Court held in favor of defendant Weems and reversed his conviction because a disproportionate sentence could constitute cruel and unusual punishment.⁴⁵

The *Weems* holding paved a very important path for the protection that the 'cruel and unusual punishments' clause could potentially provide. The expansion continued in *Trop v. Dulles*.⁴⁶ Upon conviction by court martial for wartime desertion, the petitioner was forced to forfeit his United States citizenship thereby rendering him stateless.⁴⁷ In the Court's analysis of the constitutionality of denationalization as a punishment, the Court further developed its approach to interpreting the Eighth Amendment:

The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment certainly meets this test.⁴⁸

Thus, the Court's holding,

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . In short, the expatriate has lost the right to have rights. . . .⁴⁹

initiated an impact-based measure of what can constitute cruel and unusual punishment. In drawing the conclusion that the

45. *Id.* at 380-81. In addition to the discussion on condemning narrow interpretations of constitutional provisions, Justice McKenna also made comparisons of sentencing guidelines that were less severe for crimes that were arguably more atrocious than the crime at issue in the case. *See id.* at 380. With the comparison, he condemned Weems' sentence as exhibiting "a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." Accordingly, when a sentence is imposed that establishes justice and is within constitutional limitations, "[t]he purpose of punishment is fulfilled [because] crime is repressed by penalties of just, not tormenting, severity, its repetitions is prevented, and hope is given for the reformation of the criminal." *Id.* at 381.

46. 356 U.S. 86 (1958).

47. *Id.* at 87-89.

48. *Id.* at 101.

49. *Id.* at 101-02.

Constitution does not permit Congress to punish using denationalization, the Court reversed the imposed denationalization sentence.⁵⁰

Wilkerson, Kemmler, Weems, and Trop all illustrate the potential for a broad interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment. At the time that the Court handed down the *Trops* decision, however, the case law only considered the application of the Eighth Amendment to treatment of prisoners in the context of punishment. Society had not yet acknowledged the possibility that poor treatment within prison facilities also could be considered 'cruel and unusual punishment.'

PRISONERS' RIGHT TO HEALTH CARE

Pre-Estelle v. Gamble

Prior to the 1970s, many assumed that the state adequately provided for prisoners' basic material needs.⁵¹ However, in the 1970s, documentation emerged that greatly challenged this assumption.⁵²

General living conditions were undesirable, to say the least.⁵³ The basic structure of the buildings was hazardous due to old age, poor design, and, in some cases, disrepair.⁵⁴ Correctional facilities often maintained inadequate lighting, heating, and ventilation.⁵⁵ Little, if any opportunity was provided for sufficient exercise or other recreational activity.⁵⁶ One of the greatest threats to the prisoners' well-being, however, came from unsanitary conditions and practices.⁵⁷ For instance, correctional facility dining areas and kitchens were reportedly infested with cockroaches or contaminated

50. *Id.* at 103-04.

51. See B. JAYE ANNO, U.S. DEPT. OF JUSTICE, CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM (2001) available at <http://www.nicic.org/pubs/2001/017521.htm> (last modified Oct. 9, 2002.) "Now it is true that the prisoner's basic material needs are met – in the sense that he does not go hungry, cold or wet. He receives adequate medical care and he has the opportunity for exercise." *Id.* at 9 (quoting GRESHAM SYKES, *THE SOCIETY OF CAPTIVES* (1958)). It can be inferred that the statement by Sykes articulated an assumption held by society when taking into account the push for improvements in the treatment of prisoners in the decades to come.)

52. *Id.*

53. See *id.* at 13.

54. See *id.*

55. See *id.*

56. See *id.* at 14.

57. See *id.* at 13.

by rat droppings.⁵⁸ Facilities demonstrated insufficient management of food services – improper handling of food, unsanitary equipment and utensils, unclean refrigerators, and improperly maintained equipment.⁵⁹ Furthermore, institutions did not have formally established inspection guidelines to monitor the cleanliness of facilities.⁶⁰

The courts' earlier approach to these issues only exacerbated an already tragic situation. Essentially, the court system did not interfere with the treatment of prisoners, but rather justified its continued inaction on several grounds.⁶¹ First, courts refrained from interfering with correctional facilities' treatment of prisoners based on an attitudinal distinction between rights and privileges.⁶² Taking the approach that the Eighth Amendment's prohibition against 'cruel and unusual punishments' was the only protection expressly guaranteed to prisoners by the Constitution, courts viewed any other interference in correctional administration as unwarranted and beyond judicial authority.⁶³

A second reason that courts refrained from interfering in the treatment of prisoners was grounded in ignorance. Courts, lacking expertise in correctional facilities management, deferred to the judgment of facility officials concerning the treatment of inmates.⁶⁴ The result was an unchecked system of management that left an already helpless group of individuals with little, if any, recourse for inhumane conditions and treatment. The court's deferential approach permitted the operation of inadequate prison health care systems.

As organizations gained interest in the conditions in correctional facilities, they brought the inadequacy of the prison medical services to light.⁶⁵ For example, a survey conducted by the American Medical Association in the 1970s revealed information

58. *See id.*

59. *See id.* at 14.

60. *See id.* at 13.

61. *See id.* at 15.

62. *See id.*

63. *See id.* at 12.

64. *Id.* at 15.

65. *Id.* at 12.

concerning medical treatment availability in various jails.⁶⁶ For some jails, first aid was the only available medical treatment.⁶⁷ Other jails lacked even first aid provisions.⁶⁸ According to the study, "[n]o physician was available on a regularly scheduled basis in 28 percent of the jails studied and physicians were not available even in an "on-call" basis in 11.4 percent of the jails."⁶⁹ Despite the distinction between prisoners and jails and due to the unavailability of information from any national surveys conducted of prisons, inferences were drawn based on court cases and other studies indicating that prisons were facing the same medical services availability issues as jails.⁷⁰

The lack of availability of medical services was only half of the health care problem faced by prisons. In circumstances where prisons had available medical services, uncertainty remained concerning the adequacy and quality of the health care provided. For example, very few jails provided physical examinations for all inmates.⁷¹ In most instances where examinations were provided, the examinations were given only when inmates complained.⁷² The health staff in prisons frequently consisted of unlicensed health care providers, including foreign medical graduates and untrained 'nurses.'⁷³ Dental care was not geared towards preventative or

66. *Id.* (citing AMERICAN MEDICAL ASSOCIATION, MEDICAL CARE IN U.S. JAILS - A 1972 AMERICAN MEDICAL ASSOCIATION SURVEY 1-2 (1973)) [hereinafter MEDICAL CARE IN U.S. JAILS]. A distinction exists between prisons and jails - the AMA survey reflects responses from jails. *Id.* at 10. "A prison is usually defined as an individual facility operated by a unit of state (or federal) government for the confinement of adults convicted of a felony whose sentences exceed [one] year." *Id.* Jails, on the other hand "[are] generally operated by a city or county for the purpose of holding arrestees pretrial or confining individuals convicted of misdemeanors who generally are sentenced to 1 year or less." *Id.*

67. *Id.* (citing MEDICAL CARE IN U.S. JAILS, *supra* note 66, at 12) (65.5 percent of responding jails only had first aid available).

68. *Id.* (citing MEDICAL CARE IN U.S. JAILS, *supra* note 66, at 12) (16.7 percent of responding jails did not even have first aid facilities available).

69. *Id.* (citing MEDICAL CARE IN U.S. JAILS, *supra* note 66, at 20).

70. *Id.* at 12.

71. *Id.* at 13 (citing MEDICAL CARE IN U.S. JAILS, *supra* note 66, at 26) (In 1972, only seven percent of jails routinely provided physical exams for all inmates).

72. ANNO, *supra* note 51, at 12 (citing MEDICAL CARE IN U.S. JAILS, *supra* note 66, at 26).

Unfortunately, no comparable national surveys identified the level and extent of health care services in state correctional systems. . . . The evidence from the few studies of state prison health care delivery . . . or from court cases of that era . . . indicates that, contrary to popular opinion, health care systems in prisons were no better than those in jails.

Id. Because of this similarity, the jail data can still be construed as relatively representative of what was occurring in prisons.

73. *Id.* at 12.

restorative care but rather to an emergency services basis, which was likely well below the standard of quality dental care.⁷⁴

For the sake of prisoners' well-being, correctional facilities were in dire need of regulatory measures to establish a standard of treatment for prisoners. These measures needed to guarantee the prisoners a right to a baseline standard of health care rather than service provisions founded on the arbitrary determinations of correctional authorities. The Supreme Court heeded this need in *Estelle v. Gamble*.⁷⁵

Estelle v. Gamble and Prisoners' Right to Health Care

By the late 1970s, the outcry for a formal statement about prisoners' health care needs was at its peak. Ultimately, *Estelle v. Gamble*⁷⁶ made one of the boldest statements of the era regarding prison health care.

In *Estelle*, respondent J.W. Gamble filed a *pro se* complaint against prison officials under 42 U.S.C. § 1983 alleging the prison's failure to provide adequate medical care, thereby subjecting him to 'cruel and unusual punishment' in violation of the Eighth Amendment.⁷⁷ Gamble's complaint began with an injury he sustained while performing a prison work assignment.⁷⁸ Although he attempted to work after sustaining the injury, working only aggravated it and he was permitted to go to the unit hospital.⁷⁹ The medical assistant checked Gamble for a hernia and sent him back to the facility only for Gamble to return to the hospital with intense pain.⁸⁰ A doctor later diagnosed Gamble's injury as a lower back strain, prescribed medication, and retained "cell-pass, cell-feed" status for a period of time.⁸¹ Gamble continued to see the doctor on several occasions until one visit, when despite his complaints that his back had not improved, the doctor removed Gamble from "cell-pass, cell-feed" status and certified him for light work.⁸²

74. *Id.* at 13 (citing e.g., MICHIGAN DEPARTMENT OF CORRECTIONS, KEY TO HEALTH OF A PADLOCKED SOCIETY, LANSING: MICHIGAN DEPARTMENT OF CORRECTIONS 226 (1975)).

75. *Estelle v. Gamble*, 429 U.S. 97 (1976).

76. 429 U.S. 97 (1976).

77. *See id.* at 98.

78. *See id.*

79. *See id.*

80. *See id.*

81. *Id.*

82. *Id.* at 100.

Shortly thereafter, Gamble's back pain and other ailments required him to see yet another doctor.⁸³ Although the doctor prescribed medication for Gamble, he did not immediately receive it because prison staff lost the prescription.⁸⁴ During the ordeal, officials pressured Gamble to return to work, despite his ongoing pain.⁸⁵ For several months, his continuing medical difficulties, including chest pains and irregular cardiac rhythm, resulted in additional hospitalization and medication.⁸⁶ Ultimately, prison officials' refused to honor Gamble's requests to see a doctor for two days when he experienced chest pains became the impetus for the filing of his complaint.⁸⁷

The Court began the analysis of Gamble's complaint by affirming once again that the Eighth Amendment proscribes more than physically barbarous punishments.⁸⁸ Additionally, the Court stated that "[t]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . .,' against which we must evaluate penal measures."⁸⁹ Within these idealistic concepts, the Court established the government's obligation to provide medical care for those individuals who are incarcerated and have no other means to supply medical care for themselves.⁹⁰ After all, "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."⁹¹

Following the reasoning discussed *supra*, the Court held that the denial of medical care when shown as "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment."⁹² The Court further stated that "indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in *intentionally denying or delaying access* to medical care or *intentionally interfering* with the treatment once prescribed."⁹³ The Court dismissed Gamble's complaint, characterizing the physician's actions in *Estelle* as "a

83. *See id.*

84. *See id.*

85. *See id.* at 101.

86. *See id.*

87. *See id.*

88. *See id.* at 102.

89. *Id.*

90. *Id.*

91. *Id.* at 104.

92. *Id.*

93. *Id.* at 104-05 (emphasis added).

classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice".⁹⁴

Arguably since *Estelle*, the deliberate indifference standard has left opportunity to expand the application of the Eighth Amendment.⁹⁵ This opportunity for expansion is relevant to the argument for mandatory preventative health care for female prisoners. In constructing an argument for preventative care, the components of the deliberate indifference standard will be analyzed separately: what constitutes 'indifference,' and what constitutes 'deliberate.'

Three fundamental categories of 'indifference' have emerged for which the standard of liability under the Eighth Amendment requires resources to protect prisoners' rights.⁹⁶ The categories include 1) denial or unreasonable delay in access to a physician for diagnosis and treatment,⁹⁷ 2) failure to administer treatment prescribed by a physician,⁹⁸ and 3) the denial of professional medical judgment.⁹⁹

The intent or 'deliberate' component of 'deliberate indifference' is integral to applying the standard. "It is not enough that the defendant should have known or ought to have understood the danger to the inmate."¹⁰⁰ Instead, the defendant must have knowledge of the substantial risk to the prisoner and disregard the risk despite the knowledge.¹⁰¹ In some instances, an argument

94. *Id.* at 107.

95. *See* ANNO, *supra* note 51, at 46.

96. *Id.*

The right to access to care includes access to both emergency and routine care. Institutions of all sizes must have the capacity to cope with emergencies and provide for sick call. Access to specialists and inpatient hospital treatment, where warranted by the patient's condition, also are guaranteed by the eighth amendment. Access to care must be provided for any condition (medical, dental, or psychological) if denial of care may result in pain, continued suffering, deterioration, less likelihood of a favorable outcome, or degeneration.

Id. at 47.

97. *Id.* at 47

98. *See id.* ("[O]nce a health care professional orders treatment for a serious condition, the courts will protect, as a matter of constitutional law, the patient's right to receive that treatment without undue delay").

99. *Id.* ("Under *Estelle v. Gamble*, the actual decisions of prison medical personnel are at issue only when they are not medical in nature or are so extreme or abusive that they are completely outside the range of professional medical judgment").

100. *Id.*

101. *Id.* at 47. (This standard was put forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), in which a transsexual prisoner sued prison officials because they placed him in the general prison population despite possessing an awareness of his circumstances. According to petitioner, by placing him in the general population, the prison officials failed to keep him from the harm inflicted by other inmates).

exists that knowledge can be inferred because the obviousness of the risk is such that a person cannot reasonably deny knowledge of the situation.¹⁰² Such a situation, therefore, could constitute deliberate indifference in violation of the prohibition against cruel and unusual punishment in a health care context.

In applying this analysis of the deliberate indifference standard to mandatory preventative health care for female prisoners, an argument arises that female prisoners could have a legitimate constitutional right to preventative health care. First, the risk of not providing preventative health care is obvious due to widespread public awareness of the need for early detection. The extent of prison officials' interactions with female prisoners are such that knowledge can be inferred. Consequently, the 'deliberate' component of the standard can be satisfied. Second, the very nature of breast and cervical cancer requires early detection to provide a viable chance for survival.¹⁰³ When symptoms of each disease become apparent, each disease has likely progressed to a relatively difficult stage for successful treatment.¹⁰⁴ Consequently, the failure to provide preventative health care falls into one of the three major categories of 'indifference' – unreasonable delay in medical diagnosis.

MAKING THE EIGHTH AMENDMENT ARGUMENT FOR PREVENTATIVE HEALTH CARE

Three Faces of Knowledge through Inference: Satisfying 'Deliberate' in 'Deliberate Indifference'

Because intent can be demonstrated through an inference of knowledge based on the obviousness of the risk, the following section examines three points that support the argument that the danger of failing to provide routine preventative health care to female prisoners is so obvious to prison officials that one can infer knowledge of this risk. Accordingly, the inference of knowledge

102. *Id.* at 47.

103. See, e.g., AMERICAN CANCER SOCIETY, CERVICAL CANCER, *supra* note 3, at 4 ("Cervical cancer can be prevented, detected and treated successfully. If all women who are age 18 and over, or are sexually active had a Pap test on a regular basis, the survival rate for cervical cancer would be better than 90%").

104. See AMERICAN CANCER SOCIETY, BREAST CANCER 1, available at <http://www.cancer.org/downloads/PRO/BreastCancer.pdf> (last accessed Feb. 8, 2004) ("Early detection of malignant tumors, preferably before symptoms are present, is very important because the cancer can spread if not treated at its earliest stages").

provides the requisite intent and therefore satisfies the first component to the deliberate indifference standard.

First, the presence of the standards of health services accreditation process and the suggested standards provided by the accrediting institutions illustrate that prison officials are at least exposed to the health care needs of female prisoners that are considered 'essential.'¹⁰⁵ Recognition of these needs arguably leads to a basic understanding of the seriousness of breast and cervical cancer and the need to monitor for each of these diseases.

Second, the medical status of many female prisoners when they enter prison and the process for assessing this status before physically incarcerating prisoners suggests that duly trained doctors or treating personnel, once again, are exposed to the need for preventative care. Therefore, their awareness of the obviousness of the risk of a lack of continuing preventative care can be inferred.

Finally, because prisons provide OB/GYN services to pregnant inmates, it is arguable that those attending to these needs are aware of the risks of failure to appropriately monitor for reproductive health issues. Again, it appears easy to draw the inference of knowledge of the obviousness of the risk in the failure to provide preventative health care to female prisoners. Collectively, as will be discussed below, the three points provide grounds for satisfying the 'deliberate' component of the deliberate indifference standard to show that lack of preventative health care constitutes cruel and unusual punishment.

The Inference of Knowledge of an Obvious Risk through the Accreditation Process

Due to a desire to establish consistent, quality health services, various organizations now provide nationally-recognized standards for health care in prisons. In an attempt to encourage compliance with these standards, organizations such as the National Commission on Correctional Health Care (NCCHC) may incorporate the standards into an accreditation process for correctional facilities.¹⁰⁶

Since the 1970s, the NCCHC has served as a source of accreditation for correctional facilities that satisfy the Commission's *Standards for Health Services*.¹⁰⁷ The various areas covered by the

105. See discussion *infra*.

106. NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, ACCREDITATION, at <http://www.ncchc.org/accred/index.html> (last visited Feb. 8, 2004).

107. *Id.* The NCCHC is a private, not-for-profit organization whose voluntary accreditation program is "well-known and well-respected." *Id.*

Standards include "Facility governance and administration[, m]aintaining a safe and healthy environment[, p]ersonnel and training[, h]ealth care services support[, i]nmate care and treatment[, h]ealth promotion and disease prevention[, s]pecial inmate needs and services[, h]ealth records[, and m]edical legal issues."¹⁰⁸

The NCCHC accreditation process involves several steps. First, the facility must submit an application to which the NCCHC will respond with a self-survey questionnaire.¹⁰⁹ Once the facility completes and returns the questionnaire, the NCCHC staff uses the information to prepare for an on-site survey of the facility.¹¹⁰ The on-site survey includes an assessment of policies and procedures; interviews with health staff, officers, detainees; and a tour of the facility.¹¹¹ The NCCHC staff determines whether to grant accreditation to the facility based on all of the information gathered during the assessment period.¹¹²

According to the NCCHC, accreditation has its benefits:

It promotes and documents an efficient and well-managed health care delivery system. It adds to the prestige of the facility, increases staff morale, aids recruiting efforts, helps to obtain community support and provides additional justification for budgetary requests. Accreditation also can help protect a facility's assets by minimizing the occurrence of adverse events. . . . Accreditation benefits the health of the public, staff and inmates by assuring that those incarcerated and released receive adequate and appropriate health care according to nationally accepted standards.¹¹³

Standards for women's health issues are not always articulated clearly in the accreditation process.¹¹⁴ However, the NCCHC has

108. *Id.*

109. See NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, ACCREDITATION PROCESS, at <http://www.ncchc.org/accred/process.html> (last visited Feb. 8, 2004) [hereinafter NCCHC, ACCREDITATION PROCESS]; NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, APPLICATION AND CONTRACT FOR ACCREDITATION OF CORRECTIONAL HEALTH SERVICES PROGRAMS, at <http://www.ncchc.org/accred/AccredApp2004.pdf> (last visited Feb. 8, 2004).

110. NCCHC, ACCREDITATION PROCESS, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. In its Position Statement, the NCCHC acknowledges that issues in women's health care have changed to warrant the need for addendum standards or guidance to the current standards. See NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, POSITION STATEMENTS: WOMEN'S HEALTH CARE IN CORRECTIONAL SETTINGS, at <http://www.ncchc.org/resources/statements/womenshealth.html> (last visited Feb. 8, 2004) [hereinafter NCCHC, WOMEN'S HEALTH CARE].

issued a position statement on women's health care issues for prisons to consider when constructing their health care standards.¹¹⁵ The relevant portion of the Position Statement reads:

The National Commission on Correctional Health Care recognizes that the number of female inmates is large and is growing annually, and present unique and increasing health problems for correctional facilities. Therefore, the Commission recommends the following: . . . Comprehensive services for women's unique health problems should be provided in prisons, jails, and juvenile detention and confinement facilities. . . . Considering the special reproductive health needs of women, the frequency of repeating certain tests, exams and procedures (e.g. Pap smears, mammograms. etc.) should be based on guidelines established by professional groups such as the American Cancer Society, and the American College of Obstetricians and Gynecologists, and should take into account age and risk factors of the female correctional population.¹¹⁶

The reputation of the NCCHC¹¹⁷ and the integral role that the NCCHC's suggested standards play in the structuring of many prison health care standards and policies permits the reasonable presumption that prisons are aware of the underlying rationale that fuels the promulgation of various accreditation standards. This reasoning arguably transfers to preventative health care, (i.e. mammograms and pap smears) for female prisoners. Because many prisons look to the NCCHC for *guidance* and approval on establishing standards, it logically follows that prisons should also acknowledge the seriousness of breast and cervical cancer and the consequences of late detection, given the NCCHC's published opinion on preventative care for female prisoners, which includes justification for its reasoning. The risk of failure to detect, therefore, becomes so obvious that one can infer that prison officials have knowledge of the situation they potentially create by failing to provide routine preventative care to female prisoners. Accordingly, the accreditation process yields support for satisfying the 'deliberate'

115. "NCCHC has adopted the following position statement that, along with the published standards, may assist correctional facilities in designing their own procedures on this matter." *Id.*

116. *Id.* (citing ANNO, *supra* note 51).

117. "With more than four hundred and fifty institutions of all shapes and sizes accredited by NCCHC, this voluntary program is wellknown and wellrespected among the nation's prisons, jails and juvenile detention facilities." NCCHC, ACCREDITATION PROCESS, *supra* note 109.

component of the deliberate indifference standard as applied to failure to provide female prisoners' preventative health care.

The Inference of Knowledge of an Obvious Risk Based on the Status of Female Prisoners upon Entry

The number of women who have become a part of the prison system drastically increased during the 1980s and 1990s.¹¹⁸ Often these women are poor and uneducated.¹¹⁹ The indigence of many of these women indicates that they are uninsured or underinsured.¹²⁰ Therefore, the risk of a prisoner having poor health care habits is higher due to the limited or lack of access to health care prior to incarceration.¹²¹ Many women offenders will enter prisons either pregnant¹²² or carrying a sexually transmitted disease.¹²³ For female prisoners, the poor status of their health prior to incarceration can arguably have a substantial effect on their physical status in prison, i.e., greater susceptibility to diseases with questionable hope of successful treatment.

Unfortunately, even though prison officials are consistently faced with this prototypical female prisoner, research, though limited, has indicated that gynecological services for women in prisons has been insufficient.¹²⁴ Prisons do not perform routine gynecological exams, nor do they in every instance provide the exams on admission.¹²⁵ Some prisons may not ask the appropriate initial screening questions.¹²⁶ Furthermore, many prisons do not have physicians trained in obstetrics and gynecology.¹²⁷ "As a result women in prison are at risk for the lack of detection of some diseases such as breast cancer, ovarian cancer, and abnormal pap smears."¹²⁸

'Obviousness of the risk' under these circumstances arises simply because prison officials continually see women with similar health backgrounds, regardless of a facility's capacity to handle their needs. Prison officials, therefore, would presumably have familiarity with the possible health issues surrounding female

118. See ANNO, *supra* note 51, at 233.

119. *Id.*

120. See Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16 CRIM. JUST. 39, 40 (2001).

121. *Id.* at 40.

122. See NCCHC, WOMEN'S HEALTH CARE, *supra* note 114.

123. See ANNO, *supra* note 51, at 234.

124. See NCCHC, WOMEN'S HEALTH CARE, *supra* note 114.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

prisoners' physical condition due to this continuous exposure. Hence, the possibility of female prisoners' suffering from gender specific diseases fails to be a secret, even if prison officials lack specialized OB/GYN training. Furthermore, coupled with what is arguably becoming increasingly common knowledge that cancers such as breast and cervical cancer carry a death sentence if not detected early enough to be successfully treated, one would be hard pressed to argue lack of knowledge of the risk of failing to provide preventative care to detect these diseases. Consequently, the inference of knowledge, due to the obviousness of the risk of not providing preventative care, is present through simple, consistent exposure to female prisoners with similar backgrounds as they enter the correctional facilities. Support, therefore, exists once again for satisfying the 'deliberate' component of the 'deliberate indifference' standard as applied to the argument for mandatory preventative health care for female prisoners.

The Inference of Knowledge of an Obvious Risk Based on Care Provided to Pregnant Inmates

In *Pregnant Inmates' Right to Health Care*, Mary Catherine McGurrin discusses some of the medical conditions that could warrant attention during pregnancy, thereby exposing treating officials to the complexities of a woman's body.¹²⁹ Furthermore, the article discusses compilations of standards and guidelines that various organizations have put forth to treat pregnant inmates.¹³⁰ Groups such as the American Academy of Pediatrics and American College of Obstetricians and Gynecologists have published guidelines for appropriate prenatal care and medical services.¹³¹ After all, "unique health needs are associated with the female reproductive system[, and thus penal institutions] . . . must provide for their special health needs."¹³²

Certain penal institutions, such as the Federal Correctional Institution at Kentucky, have heeded the need to address the special needs of pregnant inmates through its design of a prenatal care

129. *Id.* at 17779 (Complications can include development of various infections such as hepatitis. Other medical conditions include, but are not limited to preeclampsia or acute hypertension of pregnancy (toxemia)).

130. *See id.* at 18194.

131. *See id.* (citing AMERICAN ACADEMY OF PEDIATRICS & AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, GUIDELINES FOR PRENATAL CARE (Frederic Frigoletto et al. eds) (2d ed. 1988)).

132. *Id.* at 179 (quoting ANNO, *supra* note 51, at 143).

program.¹³³ Under the system, "inmates at all security levels are guaranteed access to obstetric and gynecological care" within the federal correctional institution.¹³⁴

In dealing with pregnant inmates, whether or not a formal system of treatment exists, one can assume that prison officials have at least a basic level of knowledge, based on their involvement in monitoring these inmates. First, individuals come into firsthand contact with the unique nature of women's health care, in particular, reproductive health care needs, as they monitor inmate pregnancies. Therefore, prison officials have at least a basic understanding of what is required to maintain a relatively healthful status for a woman's body. This direct exposure to pregnant female inmates renders obvious the risk created by the lack of preventative care. Furthermore, it provides yet another means of support for satisfying the "deliberate" component of the "deliberate indifference" standard.

Satisfying 'Indifference' in 'Deliberate Indifference': Unreasonable Delay in Medical Diagnosis Through the Failure to Monitor Possible Cancer Development

As discussed *supra*, indifference in the 'deliberate indifference' standard falls into three general categories. The constitutional argument for the provision of preventative health care to female inmates falls into the third category – unreasonable delay of medical diagnosis. Failure to provide preventative care for detection is unreasonable and promotes delay because fundamentally, breast and cervical cancers develop over time and neither are easily detected in their initial, curable stages without monitoring.¹³⁵ The following section further discusses the nature of each cancer thereby better illustrating why the failure to monitor for these diseases is to unreasonably delay medical diagnosis.

Breast Cancer

In general, cancers are defined as "a group of diseases that cause cells in the body to change and grow out of control" with most

133. *Id.* at 182.

134. *Id.* at 182-83 (citing Anita G. Huft, et al., *Care of the Pregnant Offender*, 3 FED. PRISONS J. 49, 49 (1992)).

135. See AMERICAN CANCER SOCIETY, BREAST CANCER, *supra* note 104, at 1; AMERICAN CANCER SOCIETY, CERVICAL CANCER, *supra* note 3, at 4.

types forming a tumor, that is, a lump or mass.¹³⁶ Generally, the cancer is named after the part of the body from which the tumor initially originates.¹³⁷

"Breast cancer begins in breast tissue, which is made up of glands for milk production, *lobules*, and the *ducts* that connect lobules to the nipple. The remainder of the breast is made up of fatty, connective and lymphatic tissue."¹³⁸ Cancerous breast tumors come in two general forms: *in situ* and invasive or infiltrating.¹³⁹ Cancerous tumors that are *in situ* are named so because they are confined to either the ducts or the lobules.¹⁴⁰ Invasive or infiltrating tumors by contrast have "broken through the duct or gland walls and have begun to invade the surrounding fatty tissue."¹⁴¹ The seriousness of the invasive cancer is determined by how far the tumor has spread at the time of the initial diagnosis.¹⁴²

Treatment options for breast cancer varies.¹⁴³ For example, cancer patients may choose to undergo surgery in the form of a lumpectomy or mastectomy.¹⁴⁴ A lumpectomy requires the removal of the cancerous tissue as well as a rim of the normal tissue.¹⁴⁵ Generally, the procedure is followed by six to seven weeks of radiation therapy.¹⁴⁶ For those patients opting to undergo a mastectomy, the surgery includes the removal of the entire breast.¹⁴⁷ Often when the cancer is not removed by surgery, patients may choose to attack the cancer through systematic therapies, such as, chemotherapy, radiation therapy, or hormone therapy.¹⁴⁸

One of the most effective ways of fighting breast cancer is through preventative care, and mammography is the leading means by which to detect breast cancer.¹⁴⁹ "Mammography is a lowdose xray procedure that allows visualization of the internal structure of the breast."¹⁵⁰ The procedure is highly accurate with a detection

136. AMERICAN CANCER SOCIETY, BREAST CANCER FACTS & FIGURES 2003-2004 1, at <http://www.cancer.org/downloads/STT/CAFF2003BrFPWSecured.pdf> (last visited Feb. 8, 2004).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* ("[L]ocal stage describes cancers confined to the breast; regional stage tumors have spread to the lymph nodes; distant state cancers have *metastasized* (spread to distant sites)").

143. *See id.* at 1215.

144. *Id.* at 1314.

145. *Id.*

146. *See id.* at 14.

147. *See id.*

148. *See id.* at 1415.

149. *See id.* at 12.

150. *Id.*

rate of about ninety percent in asymptomatic women.¹⁵¹ Accordingly, "[m]ammography is the best method available for diagnosing breast cancer at a stage when it can be most effectively treated, since it can identify cancer several years *before* physical symptoms develop."¹⁵² Early detection not only improves treatment options, but it improves the success of the treatment, as well as chances for survival.¹⁵³

The circumstances under which early detection is encouraged do not change just because a female is in prison. Without regular mammograms, the strong possibility exists of missing a diagnosis of treatable breast cancer prior to development of symptoms at later stages of the disease. Accordingly, there is an increased likelihood that harsher, more drastic means to address the illness will be less effective in sustaining a meaningful rate of survival. Therefore, because breast cancer is symptom free in the early stages and the cancer develops and manifests over many years, failure to provide mammograms is to delay medical diagnosis of breast cancer and essentially, increase the chances of sentencing inmates to death.

Cervical Cancer

Cervical cancer begins in the lining of the cervix, which is the area of the body that connects the body of the uterus to the vagina.¹⁵⁴ Cervical cancers do not form rapidly but rather, the normal cervical cells develop precancerous changes and "some women with precancerous changes of the cervix will develop cancer. This process usually takes several years but sometimes can happen in less than a year."¹⁵⁵ Like breast cancer, several options for treatment exist for cervical cancer but depend on the stage of the cancer.¹⁵⁶ The three main options generally include surgery, which can range from removal only of cancerous cells or complete removal of the uterus (hysterectomy), radiation therapy, and/or chemotherapy.¹⁵⁷

According to the American Cancer Society, the number of deaths caused by cervical cancer in the United States has declined

151. *Id.*

152. *Id.* (emphasis added). Mammography is so effective and so important to use because "[e]arly cancer, when it is most treatable, typically does not produce any symptoms." *Id.*

153. *See id.*

154. *See* AMERICAN CANCER SOCIETY, CERVICAL CANCER, *supra* note 3, at 1.

155. *Id.* at 2. ("Some women with precancerous changes of the cervix will develop cancer. This process usually takes several years but sometimes can happen in less than a year").

156. *See id.* at 1624

157. *Id.* at 1619.

by seventy-four percent between 1955 and 1992.¹⁵⁸ The decrease in the number of deaths is attributed to the increased use of the Pap test, a screening procedure designed to diagnose precancerous changes and early invasive cancer.¹⁵⁹ With regular Pap tests comes the possibility of detecting precancerous cells to destroy them and prevent true cancers from forming.¹⁶⁰ Without Pap tests there is the strong likelihood of meeting the same fate faced by women in many developing countries who do not receive routine Pap tests – leading to a diagnosis of the cervical cancer at an invasive, late, and often *deadly* stage.¹⁶¹

Applying the previous discussion to the circumstances of female prisoners, the nature of cervical cancer and the possible consequences of failing to provide Pap tests support the argument that failing to provide a means to monitor the possible formation of this condition is unreasonable delay in providing medical diagnosis. Thus, the unreasonable delay in medical diagnosis because of the failure to provide preventative care to detect cervical cancer joins in addition to the failure to provide preventative care to detect breast cancer, satisfies the “indifference” component of the deliberate indifference standard.

CONCLUSION

For a prisoner to invoke the protection of *Estelle v. Gamble* against cruel and unusual punishment inflicted by poor medical judgment and care of treating physicians or other personnel, the prisoner must show that the actions or decisions constituted *deliberate indifference* towards the prisoners’ need for health care. As this note has attempted to illustrate, failure to provide preventative care to female prisoners satisfies the deliberate indifference standard. Coupled with the increasing public awareness of the dangers posed by breast cancer and cervical cancer, direct interaction with female prisoners in various medical capacities provides a strong argument that the risks of not providing preventative care is obvious to prison officials. The obviousness permits an inference of knowledge of a risk and therefore, satisfies the requisite intent.

The argument satisfies the proof of indifference because of the nature of breast and cervical cancer’s development. In most cases,

158. *Id.* at 3.

159. *See id.* at 810.

160. *See id.* at 12.

161. *See id.*

symptoms of both diseases become apparent only in later stages, therefore, treatment dispensed only after an inmate patient displays symptoms, drastically decreases the chances of successful treatment and survival. Consequently, it would be an unreasonable delay of a medical diagnosis to fail to provide preventative health care because delaying monitoring may yield unfortunate consequences.

The feasibility of complying with this 'constitutional right' to preventative care health care remains a separate issue primarily grounded in the availability of funding from already tight budgets: the cost of equipment and qualified personnel to perform the various monitoring tests may be prohibitive and the fear of waste should prisoners opt not take advantage of the services.

Financial concerns, however, do not erode the fundamental underlying principles for providing care. With the opportunity for care, female prisoners stand the chance of serving only the court appointed time in prison. Denying the opportunity for care, female prisoners face the possibility of, for example, a twoyear sentence converting to a formerly preventable death penalty. Consequently, preventative health care for female prisoners should be at the very least a constitutional right. Ideally, preventative health care should be embedded in female prisoners' right to maintain their existence as women, free of unnecessary pain and suffering beyond the scope of their punishment.

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