Note

DO PRISONERS HAVE A RIGHT UNDER THE EIGHTH AMENDMENT TO HIV TESTING ON DEMAND?

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I. INTRODUCTION

This paper examines whether prisoners have a right to human immunodeficiency virus (HIV) testing on demand, as part of the Eighth Amendment requirement that prison officials provide prisoners with adequate medical care.[1] There is a dearth of case law regarding a prisoner's right to HIV testing upon demand. No Supreme Court case has held that prisoners do (or do not) have this right. In addition, only two reported federal cases have discussed this issue.[2] One such case from the Sixth Circuit, *Doe v. Wigginton*, held in 1994 that an inmate was not deprived of his Eighth Amendment rights when his request to be tested for HIV was denied.[3] However, almost ten years have passed since this case was decided, and no reported case has cited this decision either favorably or unfavorably.[4] The other federal district court case could not be decided on Eighth Amendment grounds, because the plaintiff appeared to have no standing regarding denial of an HIV test upon demand.[5]

Testing upon demand becomes more crucial for inmates as more developments arise in the field of medical care for HIV. A positive test result for HIV allows physicians to begin performing crucial immune system monitoring to determine the best time to begin medical therapies

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1. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

2. Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994); Feigley v. Fulcomer, 720 F. Supp. 475 (M.D. Pa. 1989).

3. *Wigginton*, 21 F.3d at 739-40.

4. *Wigginton* was only referenced in one other case, where it was disagreed with by the Third Circuit. However, that case addressed a different holding than the one discussed in this paper.

5. *Feigley*, 720 F. Supp. at 482.

to decrease the effects of HIV on the body.[6] In addition, diagnosing HIV in prisoners during their period of incarceration, as opposed to forcing prisoners to wait until they are back in the community to get tested, allows them to take advantage of the newer anti-retroviral drugs sooner. These drugs often greatly lower the amount of HIV in the bloodstream.[7] The improvements in medical science, which help HIV patients to lead longer and healthier lives, have placed a new importance on early diagnosis of HIV.[8]

Existing case law establishes that prisoners have a constitutional right to obtain adequate medical treatment and care.[9] This paper will examine the development of the theory entitling prisoners to adequate medical care regardless of their ability to pay for it. In addition, this paper will assert that the right to receive HIV testing on demand is covered by the right to receive adequate medical care. This assertion is backed by an analysis under the two-pronged test of *Estelle v. Gamble*, the landmark case where the Supreme Court established a prisoner's right to receive adequate medical care.[10] In addition, the Supreme Court has noted that the "standards of decency" regarding treatment of prisoners are evolving, "mark[ing] the progress of a maturing society."[11] The Court noted at the beginning of the Twentieth Century that Eighth Amendment factors are "progressive" and "acquire meaning as public opinion becomes enlightened by a humane justice."[12] While no case has yet held that prisoners have a right to HIV testing on demand, this paper contends that we have evolved to a point where this right should be recognized under the current standards of decency in our society.

II. HISTORY OF PRISONERS' RIGHT TO ADEQUATE MEDICAL CARE UNDER THE EIGHTH AMENDMENT

Requiring the government to provide its prisoners with adequate medical care originates from the Eighth Amendment's[13] prohibition of "cruel and unusual punishments."[14] The notion of setting limits on

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6. Canadian HIV/AIDS Legal Network, *HIV Testing, Benefits of Testing*, *at* http://www.aidslaw.ca/Maincontent/issues/testing/e-info-ta3.htm (2000).

7. San Francisco AIDS Foundation, *AIDS 101: Guide to HIV Basics*, *at* http://www.sfaf.org/aids101/hiv_testing.html (updated Dec.15, 1998).

8. Robert J. Frascino, M.D., *Early Diagnosis and Appropriate Treatment of HIV-Related Anemia Important to Survival of the HIV-Positive*, *at* http://www.thebody.com/confs/ias2003/frascino1.html (July 14, 2003).

9. *See infra* Part II.

10. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

11. Trop v. Dulles, 356 U.S. 86, 101 (1958).

12. Weems v. United States, 217 U.S. 349, 378 (1910).

13. U.S. CONST. amend. VII.

14. Wesley P. Shields, *Prisoner Health Care: Is it Proper to Charge Inmates for Health Services?*, 32 HOUS. L. REV. 271, 275 (1995) (citing 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, 349-50 (1992)).

punishment in proportion to the crime or offense developed within the common-law tradition of England during the Middle Ages.[15] This concept was integrated into the Magna Carta and was also incorporated into the English Declaration of Rights of 1689.[16] This Declaration was the first document using the phrase "cruel and unusual punishments."[17] The Eighth Amendment of the United States Constitution adopted this phrase in the Bill of Rights, which became law in 1787.[18]

However, the courts have only recently interpreted the Eighth Amendment to impose an affirmative duty on the government to provide adequate medical care for prisoners.[19] This recent interpretation of the Eighth Amendment reflects the fact that the clause forbidding cruel and unusual punishments attains new meaning as society becomes "enlightened by a humane justice."[20]

However, even before the courts developed the "evolving standards of decency" test regarding the Eighth Amendment in 1958, through the case of *Trop v. Dulles*,[21] judges identified the government's duty to provide its prisoners with medical care.[22] This was based on the common-law principle of custodial care.[23] The principle of custodial care appeared as early as 1899, where an Indiana court recognized that a sheriff owed a duty to provide reasonable care to a prisoner who had been lynched by a mob.[24] The sheriff watched as the mob attacked a prisoner and tied him from a tree and did nothing to stop the mob or help the inmate.[25] The judge found that the sheriff could have intervened and attempted to resuscitate the prisoner and that he had a duty to do so under the common-law principle of custodial care.[26]

The case of *Estelle v. Gamble* combined this common-law right to medical treatment with the idea of evolving standards of decency under the Eight Amendment to require the government to provide adequate medical care for its prisoners.[27] In this case, Justice Marshall wrote that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth

15. *Id.* at 276 (citing Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 844 (1969)).

16. Granucci, *supra* note 15, at 845.

17. Granucci, *supra* note 15, at 840 ("That excessive bayle ought not to be required, nor excessive fynes imposed nor cruel and unusuall Punishments inflicted." (spelling in original)).

18. U.S. CONST. amend. VII.

19. Shields, *supra* note 14, at 276 (citing 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, 349-50 n.25 (1992)).

20. Weems v. United States, 217 U.S. 349, 378 (1910), *cited in* Shields, *supra* note 14, at 277.

21. Trop v. Dulles, 356 U.S. 81, 101 (1958).

22. Shields, *supra* note 14, at 278-79.

23. *Id.*

24. *Id.* (discussing Indiana *ex rel.* Tyler v. Gobin, 94 F. 48, 50 (C.C.D. Ind. 1899)).

25. *Id.*

26. *Id.*

27. Shields, *supra* note 14, at 279.

Amendment."[28] The two-pronged test of *Estelle v. Gamble* that requires plaintiffs to prove (1) deliberate indifference by prison officials (2) to a prisoner's *serious* medical needs is still the controlling standard for determining whether a prisoner's medical care adequately satisfies the Eighth Amendment.[29]

In *Farmer v. Brennan*, the Supreme Court defined what "deliberate indifference" means for the purposes of the two-pronged test of *Estelle v. Gamble*.[30] The Court held that to be found liable under the Eighth Amendment for denying humane conditions of confinement to an inmate, a prison official must know of and disregard an "excessive risk to inmate health or safety."[31] The official must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[32] A prison official's awareness of a substantial risk to the health of a prisoner may be inferred from "the very fact that the risk was obvious."[33] This circumstantial proof can be proven by obvious conditions such as quick weight loss.[34] In addition, a prison official cannot "escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist."[35]

One problem with this test is that, even with legal training, it is hard to prove the subjective issue of whether a prison official actually drew the inference that a substantial risk existed. Considering that many prisoners' rights cases are filed pro se, the standard is even more daunting.[36] For this reason, some have called for a lower objective standard in cases involving HIV.[37]

Regarding the second prong of the *Estelle* test, the United States District Court for the Southern District of New York held that a medical

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28. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citing Gregg v. Georgia, 418 U.S. 153, 173 (1976) (holding that punishments "grossly out of proportion to the severity of the crime" or "involving the unnecessary and wanton infliction of pain" are prohibited by the Eighth Amendment)).

29. *Id.* at 104-05.

30. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

31. *Id.*

32. *Id.*

33. *Id.* at 842, *cited in* ACLU OF TEX. PRISON & JAIL ACCOUNTABILITY PROJECT, 2003-2004 PRISONER RESOURCE GUIDE 13 (2003), *available at* www.aclutx.org/pjap/pdfdocs/PrisonerResourceGuide.pdf.

34. ACLU OF TEX. PRISON & JAIL ACCOUNTABILITY PROJECT, 2003-2004 PRISONER RESOURCE GUIDE 13 (2003), *available at* www.aclutx.org/pjap/pdfdocs/PrisonerResourceGuide.pdf.

35. *Farmer*, 511 U.S. at 843 n.8, *cited in* ACLU OF TEX. PRISON & JAIL ACCOUNTABILITY PROJECT, 2003-2004 PRISONER RESOURCE GUIDE 13 (2003), *available at* www.aclutx.org/pjap/pdfdocs/PrisonerResourceGuide.pdf.

36. Ninety-three percent of habeas petitions in one study were filed pro se. Duncan v. Walker, 533 U.S. 167, 191 (citing U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW, CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (Sept. 1995), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf).

37. Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 900-01 (1997).

need is "serious" if it causes the inmates to suffer from pain and discomfort, or causes them to suffer serious health consequences if they do not receive treatment in prison.[38] Previously, in *Todaro v. Ward,* the same court had ruled that a serious medical need can be one that "although not life-threatening or likely to result in permanent disability, causes discomfort."[39]

III. CASE LAW REGARDING THE RIGHT TO HIV TESTING ON DEMAND

As previously mentioned, only two reported cases address HIV testing on demand. Among other questions relating to HIV and prisoners, *Feigley v. Fulcomer* deals with whether prison officials' failure to test a prisoner for HIV upon his or her request violates the prisoner's Eighth Amendment right to be free from cruel and unusual punishment.[40] In this case, Feigley feared that he would involuntarily contract the virus from other inmates and employees at the State Correctional Institution at Huntingdon, Pennsylvania.[41] Among other demands, he requested that he be given an HIV test and asked that other inmates also receive the test upon their request.[42] He alleged that prison officials' failure to provide prisoners with HIV tests on demand was a violation of their constitutional rights.[43] However, Justice Muir's opinion for the United States District Court for the Middle District of Pennsylvania inferred that Feigley wanted prisoners to have access to the test in order to relieve his anxiety[44] about whether he had acquired HIV.[45] Muir noted that the Pennsylvania Department of Corrections only

38. Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985).

39. Todaro v. Ward, 431 F. Supp. 1129, 1132-33 (S.D.N.Y. 1977).

40. Feigley v. Fulcomer, 720 F. Supp. 475, 480-81 (M.D. Pa. 1989) (also holding that prison officials' practice of not routinely testing inmates for HIV does not violate an inmate's Eighth Amendment rights).

41. *Id.* at 478.

42. *Id.* at 480-81. Feigley also demanded that inmates be routinely tested for HIV at the time they enter the correctional institution, that inmates be routinely tested for HIV, and that all inmates who test positively for HIV or are suffering from any stage of AIDS be automatically segregated from the general population. He also alleged that prison officials failed to take adequate steps to prevent homosexual conduct and drug use by inmates, thereby failing to adequately protect him from becoming infected with HIV in violation of his Eighth Amendment right to be free from cruel and unusual punishment. The court denied all these claims. *See generally Id.*

43. *Id.*

44. Feigley's anxiety was not unfounded. Between 1995 and 1999, the rate of prisoners infected with HIV fluctuated between 2.3 and 2.1 percent. *See* Press Release, U.S. Department of Justice, Bureau of Justice Statistics, HIV Rates in Nation's Prisons Remain Stable; Aids-Related Deaths Among Prisoners Drop Sharply (July 8, 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/hivp99pr.htm. [hereinafter HIV Rates]. In some jurisdictions, it is as high as 9.7% (New York) and 7.8% (District of Columbia). *Id.* In the Northeast, the rate of prisoners infected with HIV is 6.0%, and in the South, 2.2% of prisoners are infected. *Id.* By contrast, the rate of HIV infection among the general population of the United States is 0.13%. Brown University AIDS Program, *Report from the HEPP Report, at* http://www.brown.edu-/Departments/BRUNAP/hepp.htm (last visited Nov. 9, 2003).

45. *See Feigley,* 720 F. Supp. at 481.

tested inmates for HIV when "ordered by a physician based upon the inmate's recent medical history and current clinical signs or symptoms, [or] based on past sexual or drug abuse behavior [as] ordered at the discretion of the physician."[46] Justice Muir found that Feigley had not presented any evidence to defeat the defendant's motion for summary judgment that indicated that prison officials' refusal to test prisoners for HIV at their request "involve[d] the unnecessary and wanton infliction of pain by failing to relieve the anxiety which might accompany an inmate's uncertainty as to whether he or she has a fatal disease."[47] Therefore, this case did not squarely address whether denial of an HIV test is unconstitutional when there is actual medical evidence that a prisoner may have been infected with HIV.

The court found another difficulty with Feigley's claim that prison officials denied him his Eighth Amendment rights by refusing to administer a requested HIV test.[48] Feigley did not specifically allege that he had actually requested and was denied an HIV test.[49] Therefore, the court was concerned that there might be no case or controversy on the issue, which would leave the court without jurisdiction to hear the claim.[50] Feigley was given twenty days to file a brief addressing whether the United States District Court for the Middle District of Pennsylvania had jurisdiction to consider his claim that the defendant's refusal to provide him with an HIV test upon request violated his Eighth Amendment right to be free from "cruel and unusual punishment."[51] No further published rulings exist for this case. [52] Therefore, this case did not answer whether refusing to test a prisoner for HIV violates his constitutional rights. While dicta seems to indicate that it may not violate prisoners' rights to deny them HIV tests when prisoners request them out of anxiety and fear that they may have contracted HIV, the holding provides no conclusive authority on this subject.[53]

Only one reported case, *Doe v. Wiggington*, holds that depriving inmates of HIV tests upon request does not violate the Constitution.[54] As stated earlier, however, this case is almost ten years old and has not been cited, positively or negatively, by any other reported federal or state case. In this case, Doe requested an HIV test during his initial medical

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46. *Id.* at 481 (quoting the State Correctional Institution at Huntingdon, Pennsylvania's Correction Policy for HIV Infection).

47. *Id.*

48. *Id.*

49. *Id.* at 481-82.

50. *Feigley*, 720 F. Supp. at 482.

51. *Id.* at 485.

52. An extensive search for any follow up on this case regarding whether Feigley did file a brief alleging that he had requested an HIV test and was refused one by the prison officials produced no results. Nothing could be located (case law or otherwise) that indicated what occurred after Justice Muir issued this opinion.

53. *Feigley*, 720 F. Supp. at 481.

54. Doe v. Wigginton, 21 F.3d 733, 739-40 (6th Cir. 1994).

screening upon arrival at the Kentucky State Reformatory in January 1989.[55] The nurse denied his request because he did not meet the testing criteria established by Kentucky Corrections Cabinet Policy 13.5.[56] The testing criteria provided that no routine HIV testing would be performed, but that the physician could order the test if an inmate presents clinical symptoms, provides a presumptive history of exposure, or is pregnant and reports a history of intravenous drug use, prostitution, or sexual activity with an intravenous drug user.[57]

Approximately two years later, the State of Kentucky transferred Doe to another correctional facility in the state.[58] He again asked for an HIV test and told the doctor that he wished to be tested due to the fact that he had slept with many prostitutes who were addicted to drugs prior to his incarceration.[59] At this time, Doe tested positive for HIV.[60] Additional tests indicated that his immune system had seriously declined by the time medical personnel diagnosed his infection with HIV.[61]

Doe filed a civil rights action pro se under 42 U.S.C. § 1983, in which he alleged that the implementation of Policy 13.5 "violated his rights under the Eighth and Fourteenth Amendments."[62] Doe did not claim that the prison officials were aware of the fact of his infection with HIV, but instead, he maintained that the officials were indifferent to the possibility that he may have been infected with the virus.[63] He asked that the Sixth Circuit extend the case of *Estelle v. Gamble* to establish an "Eighth Amendment guarantee against deliberate indifference to the possibility that a prisoner is seriously ill or injured."[64]

The court noted that case law supported Doe's position through analogy to similar prisoners' rights issues.[65] The opinion stated that an increasing number of courts have held that a prisoner's Eighth Amendment rights are violated if prison officials disregard a "strong likelihood," as opposed to a "mere possibility," that the inmate will attempt to commit suicide.[66] The court stated, "We see no principled basis to distinguish between a prison official's deliberate indifference to the strong likelihood that a prisoner will commit suicide or be assaulted

55. *Id.* at 735.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Wigginton*, 21 F.3d at 735. Doe later claimed that the story of the sexual relations with prostitutes was a fabrication. *Id.* at 739.
60. *Id.* at 735.
61. *Id.* at 735-36.
62. *Id.* at 736.
63. *Id.* at 738.
64. *Wigginton*, 21 F.3d at 738.
65. *Id.* at 738.
66. *Id.* (citing Hardin v. Hayes, 957 F.2d 845, 850-51 (11th Cir. 1992); Elliott v. Cheshire County, N.H., 940 F.2d 7, 10 (1st Cir. 1991); Molton v. City of Cleveland, 839 F.2d 240, 243 (6th Cir. 1988)).

and a prison official's deliberate indifference to the strong likelihood that a prisoner is afflicted with a serious illness, such as HIV infection."[67]

However, the court found that the prison officials were not "deliberately indifferent" to a "strong likelihood" that Doe had acquired HIV.[68] The court did find that Policy 13.5 expressly requires a prisoner to be tested for HIV upon request if there is a presumptive history of exposure to the virus, and therefore, the policy does not exhibit indifference to the possibility that a prisoner is infected with HIV.[69] The Court did not address the fact that there is a possibility that a prisoner could be HIV positive even if a prison official deems that they do not have a "presumptive history of exposure to the virus."[70]

Doe further argued that the implementation and enforcement of Policy 13.5 "violated his substantive due process 'right to life,'" as it caused his HIV infection to go untreated for approximately two years, decreasing his life expectancy.[71] He argued that the prison officials should have known of the "inevitable danger" that the policy created for prisoners.[72] The Court decided that because this claim dealt with the *negligence* of prison officials, it was foreclosed by the Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment.[73] The opinion cited *Daniels v. Williams*,[74] in which the Supreme Court stated that the guarantee of due process has historically applied to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property."[75] The Supreme Court in *Daniels* held that protection under the Due Process Clause is not "triggered by lack of due care by prison officials."[76] Therefore, the Sixth Circuit in *Wigginton* avoided the question of whether the prison officials reduced Doe's life expectancy, stating that while "their actions were intentional, they did not know that their actions would have that effect."[77]

Doe also argued that Policy 13.5 violated his right to equal protection as it created "classes" of inmates for purposes of HIV testing.[78] The Sixth Circuit stated that persons who do not provide a "presumptive history of exposure" are not a "suspect class" and declined to create a rule suggesting that people who do not offer a presumptive

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67. *Id.*
68. *Id.*
69. *Wigginton*, 21 F.3d at 738.
70. Opinions could differ on what constitutes a "presumptive history," as there have been disagreements in the medical field as to what kinds of behavior put a person at high risk for contracting HIV.
71. *Wigginton*, 21 F.3d at 739.
72. *Id.*
73. *Id.*
74. Daniels v. Williams, 474 U.S. 327 (1986).
75. *Wigginton*, 21 F.3d at 739 (citing *Daniels*, 474 U.S. at 331).
76. *Id.* (citing *Daniels*, 474 U.S. at 333).
77. *Id.*
78. *Id.*

history are a suspect class.[79] Therefore, the court decided that the policy did not violate Doe's right to equal protection.[80] The court stated that as long as an official avoids singling out a "suspect class," the action will be upheld providing that it "rationally furthers" a legitimate state purpose.[81] To further support its position, the court stated that the actual text of the Constitution did not guarantee a right to HIV testing on demand, and that this "supposed right" was not "deeply rooted in this Nation's history and tradition."[82]

As *Wigginton* was decided almost ten years ago, the issues it raises would now be evaluated by judges armed with new knowledge related to HIV. Prison officials who deny HIV testing to prisoners today would have a hard time stating honestly that they did not know that their actions would have the effect of decreasing a prisoners' life expectancy. In addition, the *Wigginton* court stated that Doe's "right to life" claim was foreclosed by the Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment, as the claim dealt with prison officials' negligence.[83] Given the fact that medical and corrections officials recognize the relatively high rate of HIV in prison populations, refusal of an HIV test on demand could rise above mere negligence to intentional or knowing conduct.[84]

IV. CASE LAW ANALYZING PRISON OFFICIALS' DUTY TO CONTROL INFECTIOUS DISEASE

While only two cases discussing prisoners' rights to HIV testing on demand are reported, many cases exist that involve a prison official's duty to control the spread of other infectious diseases. Cases involving the duty of prison officials to control the spread of infectious diseases can be analogized to the duty to provide HIV testing on demand. Lower courts have read *Estelle* to require that prison officials "take reasonable steps" to contain or thwart the spread of disease.[85] In the case of *Lareau v. Manson*, the district court concluded that the failure to screen new inmates for communicable diseases "violated the constitutional rights of all inmates."[86] On appeal, the United States Court of Appeals for the Second Circuit held in this case that it is unnecessary for prison officials to wait for evidence that an infectious disease had spread before

79. *Id.*
80. *Wigginton*, 21 F.3d at 739.
81. *Id.* (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).
82. *Id.* at 739-40 (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).
83. *Id.* at 739.
84. *See* Centers for Disease Control, Divisions of HIV/AIDS Prevention, *Routine HIV Testing of Inmates in Correctional Facilities, at* http://www.cdc.gov/hiv/partners/Interim/routinetest.htm (Aug. 1, 2003).
85. Vetstein, *supra* note 37, at 888.
86. Lareau v. Manson, 651 F.2d 96, 98 (2d Cir. 1981).

providing a remedy to thwart the spread of that disease.[87] The court held prison officials liable for not screening incoming inmates for contagious diseases, holding that this "inadequate medical practice" violates the Eighth Amendment, as it is an "[omission] sufficiently harmful to evidence deliberate indifference to serious medical needs."[88]

In an order certifying a class of prisoners for a class action suit, the United States District Court for the District of Minnesota found in *DiGidio v. Perpich* that prison officials may have been liable for their failure to prevent and control an outbreak of tuberculosis in a prison.[89] The court found that the prisoners received inadequate medical care due to the failure to appropriately screen incoming inmates for disease.[90] *DiGidio* held that the prison officials' actions may have constituted "deliberate indifference" to the serious medical needs of the inmates.[91]

Although these cases do not deal with HIV, they may be correlated to cases involving the prevention of HIV among prisoners. Providing HIV tests for prisoners who demand them is a "reasonable step" to contain or thwart the spread of disease, as required by *Estelle*. The Second Circuit has held that not screening incoming inmates for communicable diseases is an "inadequate medical practice."[92] This case did not state which communicable diseases were at issue. As HIV is transmitted from person to person via bodily fluids, it is considered a communicable disease, and therefore should fall under the Second Circuit holding requiring detection of HIV by prison medical officials to protect the inmates.

Other cases, such as *DeGidio v. Perpich*, deal with airborne diseases such as tuberculosis.[93] While HIV is not transmitted through the air, it can be easily passed from prisoner to prisoner through sexual contact. Many prisoners are subject to non-consensual sexual contact. Some researchers estimate that over twenty percent of prisoners in the American criminal justice system will be raped at some point during their incarceration.[94] Therefore, just as prisoners are at risk for contracting tuberculosis no matter what precautions they attempt to take on their own, they are also at risk for contracting HIV, even if they take steps to try and prevent infection. Given this high number, prisoners are

87. *Id.* at 109.

88. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

89. DeGidio v. Perpich, 612 F. Supp. 1383, 1389-90 (D. Minn. 1985). No further opinions were published for this case following the class certification, and therefore, it is not known if the prison officials were actually held liable for their failure to prevent the outbreak. This case only stated that they *may* be held liable.

90. *Id.* at 1390.

91. *Id.*

92. Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981).

93. *DeGidio*, 612 F. Supp. at 1385.

94. Vetstein, *supra* note 37, at 863 (citing CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS 61 (1974)).

at a higher risk for contracting HIV than the general public.[95] Just as failing to screen inmates for tuberculosis is an inadequate medical practice that violates the Eighth Amendment, failure to screen for HIV should be regarded as unconstitutional.

V. HOW DOES HIV TESTING STAND UNDER THE *ESTELLE V. GAMBLE* ANALYSIS?

To determine whether withholding HIV tests from inmates is a constitutional violation, the practice must be examined under the analysis provided in *Estelle v. Gamble*. *Estelle* holds that prisoners have the right to adequate medical attention under the Eighth Amendment.[96] A recent editorial has stated, "when it comes to HIV testing . . . it seems that many prisons are neglecting to provide the inmate with a level of attention that would fit the 'community standard,' which is how the Supreme Court defined the use of 'adequate.'"[97]

Proof of this "community standard" lies in the fact that the United States is a member state of the United Nations (UN). This body has implemented the United Nations Standard Minimum Rules for the Treatment of Prisoners.[98] These rules recognize the need for prison officials to test for contagious diseases and call for prison officials to examine each prisoner as soon as possible after his admission "with a view particularly to the discovery of physical . . . illness and the taking of all necessary measures."[99] In addition, the rules state that the medical services of the prison or jail shall "seek to detect" any physical illnesses that may obstruct the rehabilitation of a prisoner.[100] HIV is a physical illness that would obstruct the rehabilitation of a prisoner, as it attacks the physical and mental health of an individual. These rules point to evidence of the need to provide inmates with HIV testing on demand as part of the "community standards" of the many nations belonging to the UN that follow the United Nations Standard Minimum Rules for the Treatment of Prisoners.[101]

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95. Tuberculosis cases occur on average at least three times more often in correctional facilities than in the general population. National Commission on Correctional Health Care, *Management of Tuberculosis in Correctional Facilities, at* http://www.ncchc.org/resources/statements/tb.html (1996).

96. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

97. Kate Silver, *Ground Zero: HIV Growth in Prison Populations Exceeds Rate in United States*, LAS VEGAS WKLY., *available at* http://www.lasvegasweekly.com/departments/09_14_00/upfront_prison.html (last modified Mar. 15, 2001).

98. *United Nations Standard Minimum Rules for Treatment of Prisoners*, E.S.C. Res. 663, U.N. ESCOR, 24th Sess., Supp. No. 1, at 10, U.N. Doc. E/3048 (1957) (amended 1977), *available at* http://www.unhchr.ch/html/menu3/b/h_comp34.htm (last visited Mar. 15, 2004) [hereinafter *U.N. Standard*].

99. *Id.* at 24.

100. *Id.* at 62.

101. *See generally id.*

To prove that denying prisoners HIV testing upon demand is a violation of the Eighth Amendment, *Estelle* requires evidence that (1) there was deliberate indifference on the part of prison officials and (2) the prisoners' medical needs must be serious.[102] The United States Court of Appeals for the Ninth Circuit ruled against prison officials in a case where the prison lacked routine medical or dental examinations, interpreting *Estelle* to hold that "[p]rison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff."[103] Thus, when prison officials refuse to provide HIV tests to prisoners on demand – either because the prisoners are not automatically screened for HIV or the prisoner does not meet the testing guidelines – the inmates will be unable to inform the staff of their specific medical problems. Therefore, withholding access to HIV testing upon demand constitutes deliberate indifference as defined by the Ninth Circuit.

Furthermore, prison officials may not escape liability by declining to confirm that an inmate is ill.[104] Consequently, when a prisoner demands an HIV test, an official may not avoid liability by declining to confirm that the prisoner is ill through testing. To do so would constitute deliberate indifference as to the medical needs of the prisoner.

For the reasons mentioned above, denying HIV tests to prisoners appears to meet the first prong of the *Estelle* test. The main difficulty presents itself in proving that prison officials drew the inference that a risk of serious harm existed from the facts of a particular case, as required by *Farmer v. Brennan*. However, the public, including prison officials, has become better informed about the risk of acquiring HIV from sexual contact. Given that approximately one-fifth of prisoners are raped while incarcerated, and that consensual sex in prisons is more common than previously believed, it is likely that a reasonable person would draw the inference that a risk of serious harm exists to prisoners.[105]

The denial of prisoner requests for HIV tests easily passes the second prong of the *Estelle* test. As HIV can lead to opportunistic infections such as tuberculosis, systemic non-Hodgkin's lymphoma, AIDS dementia complex, shingles, and eventual death,[106] it falls within the definition of a serious medical issue – one that causes a prisoner to suffer serious health consequences if treatment is not received in

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102. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

103. Hoptowit v. Ray, 682 F.2d 1237, 1252, 1253 (9th Cir. 1982).

104. Farmer v. Brennan, 511 U.S. 825, 837 n.8 (1994), *cited in* ACLU OF TEX. PRISON & JAIL ACCOUNTABILITY PROJECT, 2003-2004 PRISONER RESOURCE GUIDE 13 (2003), *available at* www.aclutx.org/pjap/pdfdocs/PrisonerResourceGuide.pdf.

105. Vetstein, *supra* note 37, at 863 (citing CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS 61 (1974)).

106. AIDS Education Global Information System (AEGiS), *Opportunistic Infections, at* http://www.aegis.com/topics/oi/ (2001).

prison.[107] Therefore, denial of requested HIV testing to a prisoner meets both prongs of the *Estelle* test. As a result, such denials are violations of an inmate's Eighth Amendment rights.

In writing the majority opinion for *Estelle*, Justice Marshall stated,

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the [Eighth] Amendment.[108]

A prison official's failure to detect HIV early enough to provide adequate treatment would be an example of one of these "worst cases" because failure to discover HIV early could result in physical torture and a lingering, painful death. This is the tragedy that the *Estelle* test seeks to prevent.

VI. DO THE EVOLVING STANDARDS OF DECENCY IN SOCIETY CALL FOR THE PROVISION OF HIV TESTING?

As previously mentioned, *Wigginton* – the case that held that prisoners do not have a constitutional right to HIV testing on demand – is almost ten years old. The "evolving standards of decency" discussed in *Trop v. Dulles*[109] calls upon society to evaluate penal practices against the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[110] This paper contends that these concepts call for the provision of HIV testing for inmates on demand.

Furthermore, given the advancements in medical science regarding the treatment of HIV, the concepts of dignified, civilized standards should include a prisoner's right to testing for HIV on demand. Early detection of HIV is extremely important, as the alternative can have extreme consequences.[111] When HIV is not detected until its later stages, the immune system is often ruined, and the damage may be irreversible.[112] In 1994 when *Wigginton* was decided, survival rates were much lower than they are today, regardless of how early a prisoner tested

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107. Dean v. Coughlin, 623 F. Supp. 392, 401, 404 (S.D.N.Y. 1985).

108. Estelle v. Gamble, 429 U.S. 97, 103 (1976). *See In re* Kemmler, 136 U.S. 436, 447 (1890) (using the phrase "torture or a lingering death").

109. Trop v. Dulles, 356 U.S. 86, 101 (1958).

110. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968), *cited in Estelle*, 429 U.S. at 102.

111. BestDoctors: Information When it Matters Most, *How Important is Early Detection of HIV Infection, at* http://www.bestdoctors.com/en/askadoctor/f/folk/sfolk_030600_q5.htm (Mar. 6, 2000) [hereinafter *Early Detection*].

112. *Id.*

positive for HIV.[113] Today, early detection makes a big difference in both quality of life and life-expectancy for a prisoner living with HIV.[114] Our society's "idealistic concepts of dignity, civilized standards, and decency" do not allow for the possibility of prison officials taking years off prisoners' lives by denying them HIV testing upon demand.[115]

Not all inmates who may be positive will meet the qualifications to receive testing that some prisons and jails require before a test is given. In fact, approximately one-third of people infected with HIV show no symptoms in the early stages of the disease.[116] Ironically, this is the best time for detection of HIV, as it may allow for the most effective treatment of the disease.[117] In addition, some may be afraid to disclose why they fear they have contracted the HIV virus, including being labeled as a "snitch." Prison officials often fail to acknowledge the pervasiveness of sexual activity and drug use within the penitentiary.[118] Prisoners often go along with this denial in an attempt to avoid potential punishment.[119] If we are to continue to evolve as a civilized society, we must take steps to make sure this denial does not prevent HIV from being detected in prisoners and provide testing on demand for all inmates.

The Centers for Disease Control (CDC) urges correctional systems to routinely offer HIV testing as a part of the standard medical intake evaluation for all prisoners.[120] The CDC advocates for this position because many prisoners have a history of high-risk sexual behaviors, substance abuse, or both.[121] As a result of these behaviors, high rates of HIV among inmates have been documented by public health officials.[122] Furthermore, the countries of the United Nations, including the United States, have already recognized the need to provide medical screening of prisoners for illnesses by creating the United Nations Standard Minimum Rules for the Treatment of Prisoners.[123] Testing for HIV logically becomes a part of these minimum standards.

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113. *See* HIV Rates, *supra* note 44 (noting decline in AIDS-related deaths since peak in 1995).

114. *Early Detection*, *supra* note 111.

115. *Jackson*, 404 F.2d at 579.

116. Harold Oster, *Early Symptoms of HIV Infection*, *at* http://www.ivillagehealth.com/experts/infectious/qas/0,242108_128833,00.html?arrivalSA=1&arrival_freqCap=2 (Sept. 27, 1999).

117. *Early Detection*, *supra* note 111.

118. Silver, *supra* note 97.

119. *Id.*

120. Centers for Disease Control, Divisions of HIV/AIDS Prevention, *Routine HIV Testing of Inmates in Correctional Facilities*, *at* http://www.cdc.gov/hiv/partners/Interim/routinetest.htm (Aug. 1, 2003).

121. *Id.*

122. *Id.* (citing T.M. Hammett et al., *The Burden of Infectious Disease Among Inmates and Releasees from U.S. Correctional Facilities*, 92 AM. J. PUB. HEALTH 1789 (2002)).

123. *See U.N. Standard*, *supra* note 98 at ¶ 24. This document is non-binding, but was adopted by the United Nations to provide guidelines and rules for member nations' prisons. *See* Barbara Nazareth Andrade de Oliveira, OSCE Office for Democratic Institutions and Human Rights, *Prison Service; United Nations*, *at*

VII. OPPOSING VIEWS

People opposed to the idea of providing HIV testing for prisoners upon request may use an economic argument against such a policy. Opponents could cite the expense of HIV tests for every inmate as a reason not to test without a "valid reason."[124] State officials should feel compelled to balance their financial interests against the personal interests of prisoners.[125] However, a state's interest in cutting costs does not excuse the provision of medical care below minimum standards.[126] In addition, many of the other medical treatments that prison officials are required by law to provide for prisoners cost much more than HIV testing. Financial woes of a state do not excuse constitutional violations.

Another argument against providing HIV testing on demand is that prisoners who may be infected with HIV "get what they deserve," and therefore, the state should not have to provide them with HIV tests. Under social contract theory, some believe that prisoners give up their rights when they refuse to play by the laws of society. However, today's jurisprudence does not hold that people give up all their constitutional rights when they lose their right to liberty. Our society has evolved to the point of recognizing that prisoners have the right to humane treatment, including medical care, no matter what law they violated.

Others may fear that prisoners will abuse their right to HIV testing on demand, just as some prisoners may abuse their right to use the legal system by clogging the courts with frivolous pro se appeals. Such abuse wastes taxpayers' money. However, we cannot deny a right to all prisoners merely because some may abuse that right. Otherwise, any of our rights could be chiseled away by merely proving that some individuals exploit that right.

VIII. CONCLUSION

Although current case law indicates that prisoners do not have a right to HIV testing upon request, several factors indicate that the denial of HIV testing in prisons is a constitutional violation. As the Supreme Court has stated, Eighth Amendment considerations are flexible, dynamic standards that change on a regular basis in order to keep up with the changing attitudes of our society.[127] Since early detection of HIV can

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http://www.legislationline.org/index.php?country=0&org=1&eu=0&topic=12 (last visited Apr. 19, 2004).

124. Serum specimen HIV tests cost between $0.45 and $4.80. Healthlink Worldwide, *HIV Testing: A Practical Approach*, *at* http://www.aidsaction.info/ht/appendix2.html (2003).

125. Shields, *supra* note 14, at 272.

126. *Id.* at 280 (citing Hamm v. DeKalb Co., 774 F.2d 1567 (11th Cir. 1985), *cert denied*, 475 U.S. 1096 (1986)).

127. Shields, *supra* note 14, at 272 (citing Weems v. United States, 217 U.S. 349, 378 (1910)).

mean the difference between a normal life and an early, torturous death, we must recognize that providing prisoners with HIV testing upon demand is in line with the evolving standards of decency.

A study of the history of prisoners' rights under the Eighth Amendment indicates that society's perception of the prohibition on cruel and unusual punishment has evolved from viewing it as only a negative proscription to seeing it as an affirmative duty on the government to provide adequate medical care.[128] In addition, prison officials have the duty to control infectious disease in the penitentiary.[129] This duty should extend to controlling the spread of HIV in prisons. The most effective way to do so is to make HIV testing available to inmates on demand.

Currently, only twenty states provide all prisoners with tests for HIV.[130] Therefore, prisoners in a majority of the states may not have access to an HIV test if they do not show symptoms or meet other criteria deemed necessary to receive an HIV test. The Eighth Amendment, in addition to reported case law, supports the idea that prisoners have a right to HIV testing upon demand. Evolving standards of decency compel us to recognize this right.

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128. Shields, *supra* note 14, at 276 (citing 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, 348-49 (1992)).

129. Lareau v. Manson, 651 F.2d 96, 109 (2nd Cir. 1981); DeGidio v. Perpich, 612 F. Supp. 1383, 1383 (D. Minn. 1985).

130. Adam Liptak, *Alabama Prison at Center of Suit Over AIDS Policy*, *at* http://www.nytimes.com/2003/10/26/national/26ALAB.html (Oct. 26, 2003).