

Exploring a Prisoner's Eighth Amendment Right to Health Care

Victoria A. Kellogg, PhD, CRNP, MBA

Correctional nurses supply a substantial portion of a prisoner's health care. In order to effectively provide this care, these health care providers need to understand a prisoner's Eighth Amendment right to avoid cruel and unusual punishment. The author, in this article, provides nurses with an understanding of the Eighth Amendment by discussing the history of the Eighth Amendment, explaining the two-prong *Estelle* test for determining whether a prisoner's Eighth Amendment right has been violated and exploring, through case law, common types of deliberate indifference identified by LaFarge (2007) in *A Jailhouse Lawyer's Manual*. Finally, the author offers a perspective on whether the Eighth Amendment will one day entitle prisoners with the right to complementary and alternative medicine.

Keywords: Eighth Amendment; deliberate indifference; serious medical need; *Estelle* test; cruel and unusual punishment

As the number of prisoners with health care needs increases, it is critical that correctional nurses understand how the Eighth Amendment affects their practices. In 2007, approximately 2.3 million individuals were in federal and state prisons as well as local jails, an increase of about 2% from the previous year (West & Sabol, 2008). This statistic translated into 1 in every 198 U.S. residents serving a prison sentence in either a federal or state prison in 2007 (West & Sabol, 2008). Many of these individuals come to prison with health problems. For instance, a 2004 study found 38.5% of federal prisoners and 43.8% of state prisoners reported having at least one medical problem (Maruschak, 2008). Furthermore, delineated by sex, women in this study reported more medical conditions than men (52.2% of women vs. 37.5% of men in federal prisons; 56.7% of women vs. 42.9% of men in state prisons) (Maruschak, 2008).

Correctional nurses are essential for meeting the many health care needs of prisoners. In addition, unlike nurses practicing outside correctional facilities, correctional nurses have a constitutional responsibility to provide all prisoners with health care under the Eighth Amendment. Yet many correctional nurses are unaware of this constitutional responsibility and/or what it means for their practices. In this article, I begin

to fill this knowledge gap by (a) examining the history of the Eighth Amendment, (b) discussing the two-prong Eighth Amendment test promulgated in *Estelle v. Gamble* (1976), and (c) providing case law examples of Eighth Amendment claims. The final section provides a perspective on whether the Eighth Amendment provides prisoners with the right to complementary and alternative medicine.

HISTORY OF THE EIGHTH AMENDMENT

The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." A prisoner's right to health care is gleaned from the phrase "nor cruel and unusual punishment inflicted." This prohibition against the infliction of cruel and unusual punishment can be traced back to the Bible. The Western expression "let the punishment fit the crime" comes from the biblical saying "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe" (Exodus 21:24–25, King James Version) (Granucci, 1969). Later in history, the English Declaration of Rights of 1689 was the first document that actually included the phrase "cruel and unusual punishment" (Granucci, 1969). The

United States later adopted the Declaration's phrase into its Bill of Rights.

Although the Eighth Amendment was adopted in 1791, courts did not originally interpret the amendment as providing prisoners with a right to health care. Rather, prisoners acquired the right to health care from the convergence of three concepts: a broader interpretation of the Eighth Amendment, the inquiry into excessive punishment, and the common law right to health care (Shields, 1995). Each of these concepts is discussed here.

The development of the first concept, the broader interpretation of the Eighth Amendment, began with the 1910 Supreme Court case *Weems v. United States* (Carrabba, 1981). Weems was convicted of falsifying public and official documents and sentenced to 15 years in prison. The Supreme Court found that the sentence was cruel and unusual punishment because the severity of the prison sentence did not match the severity of the crime. In explaining its decision, the Court discussed the need for a dynamic Eighth Amendment:

Legislation, both statutory and constitutional, is enacted . . . from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. 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. (p. 373)

Thus, this case signified a movement to broaden the Eighth Amendment beyond the original purpose to prevent torturous and inhuman punishments (Carrabba, 1981; Granucci, 1969) and to utilize the amendment to address contemporary issues.

Trop v. Dulles (1958) was the second Supreme Court case that broadened the scope of the Eighth Amendment. Trop lost his citizenship after he was convicted of wartime desertion by court-martial. The Supreme Court held that Trop's citizenship forfeiture did not comport with the Eighth Amendment. In discussing its holding, the Court stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (p. 100). This "basic concept" means that Eighth Amendment is not static; it is capable of changing to meet the needs of an advancing society.

The 1976 Supreme Court case *Gregg v. George* defined the two inquiries for determining the meaning of excessive punishment, the second converging concept. Gregg was convicted of two counts of armed

robbery and two counts of murder and was sentenced to death under Georgia law. Gregg appealed, arguing that the death sentence amounted to cruel and unusual punishment. In affirming the sentence, the Court, dovetailing with *Trop's* dignity-of-man concept, stated that the inquiry into excessive punishment has two aspects: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime" (p. 173). Hence, the Eighth Amendment imposes limitations on a prisoner's punishment.

A prisoner's common law right to health care, the third converging concept, was seen in American jurisprudence as early as 1899. In *State of Indiana ex rel. Tyler v. Gobin* (1899), Gobin, a sheriff, was sued for damages in the death of Tyler, a prisoner who was lynched by a mob while in the sheriff's custody. Gobin allegedly refused to cut the rope strangling Tyler and refused to resuscitate Tyler before he died. The circuit court found Gobin owed Tyler a duty of care: "When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health" (p. 50).

Spicer v. Williamson (1926) was another case that articulated that prisoners have a right to health care. Spicer owned a hospital. After Camel was shot while resisting arrest for robbery, larceny, and assaulting an officer with a deadly weapon, he was taken by Williamson, the sheriff, to the hospital owned by Spicer for treatment. Spicer sued for payment when the Board of County Commissioners refused to pay Camel's medical bills. The North Carolina Supreme Court, in ruling for Spicer, explained that

the prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself. (p. 490)

Because courts have interpreted the Eighth Amendment as providing prisoners with a constitutional right to health care, a test was needed to determine when this right was violated. The Supreme Court in *Estelle v. Gamble* (1976) provided this test.

TWO-PRONG EIGHTH AMENDMENT TEST

The convergence of the three concepts discussed previously led the Court in *Estelle v. Gamble* (1976)

to promulgate a two-prong test to determine when a prisoner's Eighth Amendment right has been violated. Gamble injured his back on a prison work assignment when a bale of cotton fell on him while loading a truck. Even though Gamble was seen and treated numerous times by the correctional facility's medical staff, he contended that the correctional facility could have done more to diagnose and treat him. Gamble claimed his medical care amounted to cruel and unusual punishment and thus a violation of his Eighth Amendment right. The Supreme Court held that failure to provide prisoners with health care could constitute cruel and unusual punishment prohibited by the Eighth Amendment. However, in this case the medical director did not violate Gamble's constitutional right. The Court found that the medical decision not to order a test, such as an X-ray, was not cruel and unusual punishment, that at most the medical decision was malpractice. Explaining its holding, the Court concluded that "deliberate indifference to serious medical needs of prisoners" constitutes a violation of the Eighth Amendment (p. 104). From this conclusion came the two prongs of the *Estelle* test: (a) deliberate indifference to a prisoner's (b) serious medical need.

While prisoners have a constitutional right to health care, they do not have a constitutional right to malpractice-free health care. The Court in *Estelle* (1976) stated,

A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. (p. 106)

Additionally, the Court in *Estelle* (1976) stressed it was not in the business of second-guessing health care providers' medical judgments; health care providers do not violate a prisoner's Eighth Amendment right by making a medical judgment. Thus, violating a prisoner's Eighth Amendment right by inflicting cruel and unusual punishment is different than medical malpractice. In order to violate a prisoner's constitutional right, a prisoner must prove that a correctional facility employee violated both prongs of the *Estelle* test.

Deliberate Indifference

The Court in *Estelle* (1976) identified deliberate indifference as the first prong in its Eighth Amendment test; however, the Court provided minimal guidance on what constitutes deliberate indifference (Frank, 2005). Later cases provided this guidance, defining deliberate indifference as possessing both subjective and objective components (Frank, 2005). The subjective component

examines factors used to demonstrate whether an individual possessed the required mens rea (i.e., an individual's mental state) to violate the prisoner's constitutional right (Andreopoulos, 2005; Frank, 2005). The objective component examines factors used to determine the minimum level of care required under the Constitution (Frank, 2005).

Subjective Component of Deliberate Indifference

Courts have refined deliberate indifference's subjective component more than its objective component. In a case preceding *Estelle v. Gamble* (1976), the Supreme Court determined that the Eighth Amendment was not violated by an unforeseeable accident; rather, to violate the Eighth Amendment, an individual needed to possess the mens rea to violate the amendment (Andreopoulos, 2005; *Francis v. Resweber*, 1947). Specifically, in *Francis v. Resweber* (1947), Francis was convicted of murder and sentenced to death by electrocution. The executioner threw the switch that should have resulted in Francis's death; however, because of a mechanical difficulty, Francis survived. A new death warrant was issued for another execution 6 days later. Francis filed suit claiming the circumstances of his execution equated to cruel and unusual punishment. The Supreme Court disagreed with Francis, finding,

The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. (p. 464)

The Court in *Estelle* (1976) imported the mens rea requirement from *Francis v. Resweber* (1947).

After *Estelle v. Gamble* (1976), two important cases elaborated on the subjective component's meaning. In the first case, *Wilson v. Seiter* (1991), Wilson claimed he suffered cruel and unusual punishment from the conditions of his confinement (e.g., overcrowded and noisy facility, unclean restrooms, and improper ventilation). To prove an Eighth Amendment violation, the Supreme Court held that "a prisoner claiming that the conditions of his confinement violate the Eighth Amendment must show a culpable state of mind on the part of prison officials. An intent requirement is implicit in that Amendment's ban on cruel and unusual punishment" (p. 294). Stated another way, the Eighth Amendment prohibits cruel and unusual punishment: "If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" (p. 300) as a constitutional violation.

Farmer v. Brennan (1994), the second case, continued to refine the subjective component. Farmer was a male to female transsexual serving a federal criminal sentence for credit card fraud. In 1989, Farmer was transferred from a correctional facility in Wisconsin to a correctional facility in Indiana. At the Indiana facility, Farmer was placed in general population. He raised no concerns about his transfer or his placement in general population. Within 2 weeks of being placed in general population, however, Farmer was allegedly beaten and raped by fellow prisoners. Farmer filed a complaint claiming the correctional facility's failure to protect his safety amounted to cruel and unusual punishment. The Supreme Court held that a correctional facility employee violates the Eighth Amendment when he acts with "deliberate indifference to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it" (p. 825). The word "reasonable" in this holding highlighted that correctional facility employees are not free to take every conceivable measure; correctional facility employees do work with limitations. Correctional facility employees are not liable for violating the Eighth Amendment because of these work limitations: "Prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted" (p. 844). Hence, correctional facility employees satisfy the subjective component of deliberate indifference if (a) they knew of a substantial risk to prisoner's health or safety and chose not to act on this knowledge and (b) the action taken by them was unreasonable.

Deliberate indifference is different than malpractice; it is also different than negligence. Deliberate indifference is a constitutionally driven standard. For instance, courts generally do not find health care providers deliberately indifferent for using their medical judgment. However, a court may find a correctional facility employee who chose not to follow a health care provider's medical judgment or plan of care deliberately indifferent (Brunsden, 2006). Likewise, a court may decide that correctional facility employees were deliberately indifferent if they make medical judgments that are not based on medical standards (Brunsden, 2006). In both these situations, the court would examine the correctional facility employee's knowledge and actions to determine if the two subjective criteria were met.

Objective Component to Deliberate Indifference

Unlike the subjective component, the objective component of deliberate indifference has no single test (Frank,

2005). Rather, it requires a court to determine through objective criteria whether the punishment comports with the evolving standards of decency mentioned in *Trop* (1958) (Frank, 2005). Courts decide whether the harm from medical treatment was sufficiently serious enough to rise to the level of an Eighth Amendment violation. *Rhodes v. Chapman* (1981) provided guidance in making this determination. Chapman and his fellow prisoners brought a class-action claim alleging that double ceiling (i.e., housing two prisoners in one cell) was cruel and unusual punishment. The Supreme Court held that double ceiling was not cruel and unusual punishment under "contemporary standards" (p. 337). In making this determination, the Court found that the Constitution does not guarantee prisoners comfortable confinement. In fact, the conditions of prisoner's confinement may be "restrictive and even harsh, [as] they are part of the penalty that criminals pay for their offenses against society" (p. 337).

In 1996, Congress passed the Prison Litigation Reform Act to curb the number of frivolous prisoner law suits (American Civil Liberties Union, 2005). Under this act, prisoners must prove they suffered a physical injury to qualify as a sufficiently serious harm (LaFarge, 2007). Numerous cases have examined the concept of sufficiently serious harm.

In *Smith v. Carpenter* (2003), Smith claimed that his Eighth Amendment right was violated when he was denied his HIV medication on two separate occasions—once when there was a delay in refilling his prescription and once when his medication was confiscated during a random cell search. In response, the Second Circuit declared that objective deliberate indifference is determined by examining the facts of each individual case. In cases where the medical treatment was adequate despite a temporary delay or interruption, it is appropriate for courts to focus on the effect of the delay or interruption rather than the underlying medical condition alone. Hence, the appeals court concentrated on the effect of missing the HIV medication rather than on Smith's HIV status. Later, the appeals court affirmed the jury's ruling that Smith failed to prove, by a preponderance of evidence, a serious medical harm occurred from missing his medication twice.

Balkum v. Unger (2009) is another case that explored the objective component. Balkum was diagnosed with degenerative joint disease of the right acromioclavicular joint. The physician scheduled surgery for August 26, 2003, with occupational therapy prior to surgery. When Balkum refused occupational therapy, the surgery was canceled. In November 2003, Balkum was seen again for his shoulder pain. Surgery was scheduled

and successfully performed on February 3, 2004. Despite the success, Bulkum filed a claim alleging that his Eighth Amendment right was violated by denying him medical care. The district court held that Bulkum failed to meet the objective standard of deliberate indifference because there was no adverse effect from the 6-month delay in surgery other than pain for which he was given pain medication. In its analysis, the court stressed the need to consider the severity of the delay or interruption in medical care rather than the underlying condition alone.

Hemmings v. Gorczyk (1998) is a third objective component case. On July 11, 1993, Hemmings injured his ankle while playing a basketball game with other prisoners. He was seen by the correctional medical staff, who diagnosed the ankle as badly sprained. Hemmings continued to complain about his painful and swollen ankle but was denied access to a specialist. After receiving a letter of concern from Hemmings's brother, the medical staff sent Hemmings to a specialist. The specialist diagnosed the injury as a ruptured Achilles tendon. Hemmings had surgery to repair the injury in October, 1993, but he later filed an Eighth Amendment claim for violation of his constitutional right. In analyzing the case, the Second Circuit found that "[o]bjectively the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists" (p. 108). Because his injury was sufficiently painful, Hemmings met the objective component of deliberate indifference.

Serious Medical Need

The second prong of the *Estelle* test is that a prisoner must have a serious medical need. While the Court in *Estelle* (1976) failed to directly define serious medical need (Marschke, 2004; Morasca, 2006), the Court did highlight the need not to inflict unnecessary and wanton pain on prisoners. A definition of serious medical need used frequently by courts can be found in *Gaudreault v. Municipality of Salem, Massachusetts* (1990). In this case, the First Circuit defined a serious medical need as (a) a condition that has been diagnosed by a physician as requiring treatment or (b) a condition that is so obvious that even a layperson would recognize the need for treatment.

An alternative definition for serious medical need was given in *McGuckin v. Smith* (1992), when the Ninth Circuit defined serious medical need as "the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment;

the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain" (p. 1060).

In *Helling v. McKinney* (1993), McKinney filed an Eighth Amendment claim arguing that his exposure to secondhand smoke from other prisoners resulted in unreasonable risks to his health. The Supreme Court found that serious medical needs may include future health problems.

The 11th Circuit in *Brown v. Johnson* (2004) applied the First Circuit's definition of serious medical need. Brown's medical records indicated that he entered prison with HIV and hepatitis. A correctional facility physician prescribed Brown medication for his declining health. At an appointment the next month, another correctional facility physician discontinued the HIV and hepatitis medications. In analyzing this case, the court found that HIV and hepatitis fulfilled the First Circuit's serious medical need definition.

A second case to use the First Circuit's serious medical need definition was *Farrow v. West* (2003). In this case, Farrow filed a claim against a dentist alleging that a 15-month wait to receive dentures amounted to cruel and unusual punishment. The court found that Farrow had a serious medical need: the pain and malnutrition resulting from the absence of dentures.

While a prisoner can use any judicially accepted definition of serious medical need to fulfill this prong of the *Estelle* test, a court evaluates the prong's fulfillment on a case-by-case basis (*Martin v. DeBruyn*, 1995) because courts do not have a list of what does and what does not constitute a serious medical need (LaFarge, 2007).

EXAMPLES OF EIGHTH AMENDMENT VIOLATIONS

Prisoners must establish both prongs of the *Estelle* test to prove an Eighth Amendment violation. Of the two prongs, health care providers are better equipped to determine when a condition may qualify as a serious medical need than when an action or omission may qualify as deliberate indifference. In *A Jailhouse Lawyer's Manual*, LaFarge (2007) listed the following common types of deliberate indifference: (a) ignoring obvious conditions, (b) failing to provide treatment for diagnosed conditions, (c) failing to investigate enough to make an informed judgment, (d) delaying treatment, (e) interfering with access to treatment, (f) making medical decisions based on nonmedical factors, and (g) making medical judgments that are so bad that they are not medical. The following is a discussion of these common types of deliberate indifference.

Ignoring Obvious Conditions

Health care providers are deliberately indifferent when they fail to provide medical care to a prisoner with an obviously serious medical need that they knew of or should have been aware of. *Mandel v. Doe* (1989) provides an example of a case in which a health care provider was found liable for failing to treat an obviously serious medical need. On July 1, 1982, Mandel jumped from the bed of the work crew pickup truck, injuring his left leg and hip. From July 3, 1982, until his release in September 1982, Mandel made numerous requests for medical treatment. The same physician assistant diagnosed Mandel first with inflammation of the bone and later with muscle inflammation. As Mandel's condition deteriorated to the point where he could no longer walk, the physician assistant refused multiple requests by Mandel and his family to order an X-ray or consult a physician. Following his release, Mandel saw an orthopedic surgeon who ordered an X-ray and determined that Mandel fractured the round part of the hip joint. In the orthopedic surgeon's opinion, the failure to perform surgery after the injury occurred resulted in Mandel's needing a complete hip replacement. The 11th Circuit, in finding the physician assistant liable for deliberate indifference, stated that "when the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference" (p. 789).

Atkins v. Coughlin (1996) was a case where a health care provider was possibly negligent in her care but was not deliberately indifferent to the prisoner's condition. Atkins injured his elbow during a basketball game on January 3, 1993; the next day, he saw a nurse who told him that nothing was wrong with his arm. Nine days later, Atkins again complained to the nurse about his arm. The nurse made a physician appointment for Atkins but did not order pain medication. Atkins was diagnosed with a chip fracture of the ulna at his physician appointment. In analyzing the case, the Second Circuit found that the nurse may be liable for delaying medical treatment to a prisoner where "(1) the [prisoner] suffers from severe pain that obviously warrants prompt medical attention; (2) the inmate makes multiple complaints of pain; or (3) the prison officials withhold treatment in order to make the inmate suffer" (p. 20873). However, the nurse may not be liable for inadvertently failing to provide medical care or providing negligent care.

Failing to Provide Treatment for Diagnosed Conditions

When health care providers fail to provide treatment for a diagnosed condition, they may be liable

for deliberate indifference. *Hudson v. McHugh* (1998) illustrates this common type of deliberate indifference. Hudson, an epileptic, was taken back to jail from a correctional halfway house after he tested positive for cocaine. During his intake interview, Hudson told the correctional facility staff that he required Dilantin daily for his seizures. This fact was noted in Hudson's record, but he did not receive the medication. Over the course of the next few days, Hudson continued to request the medication and fill out medical request forms. Hudson told a nurse about his condition, but she failed to take steps to obtain the needed medication. After 11 days, Hudson suffered a grand mal seizure. He filed an Eighth Amendment claim for failure to receive the medication. In analyzing the case, the Seventh Circuit found that

[t]his is the prototypical case of deliberate indifference, an inmate with a potentially serious problem repeatedly requesting medical aid, receiving none, and then suffering a serious injury . . . the jail knew the basic facts giving rise to the inference that he had a serious medical need—they knew he had epilepsy, they knew he didn't have his medicine and they knew he wasn't getting it. (p. 864)

Failing to Investigate Enough to Make an Informed Judgment

Because courts are not health care experts, they defer to health care providers' medical judgments when these judgments are based on informed knowledge and information (Posner, 1992). To receive this medical judgment deference, health care providers need the necessary education to care for a prisoner's medical need(s), ample understanding of the prisoner's complaint(s), medical history and physical examination, and assurance that the prisoner has received or will receive all essential medical tests and consultations.

Goodrich v. Clinton County Prison (2007) supplies an example of how courts give deference to a health care provider's medical judgment. Goodrich requested mental health treatment for bipolar disorder and severe depression soon after arriving at the prison on charges of conspiracy to manufacture methamphetamine. A mental health counselor met with Goodrich on several occasions, requested his old medical records, and spoke with the psychiatrist who treated Goodrich prior to his incarceration. The psychiatrist told the mental health counselor that Goodrich's medication was discontinued because he was self-medicating. Based on all the information, the mental health counselor told Goodrich that he did not require medication. Goodrich continued to make requests for medication and was eventually taken to see a doctor who prescribed Paxil. Soon after,

Goodrich was transferred to another correctional facility where he was placed on medication for attention-deficit/hyperactivity disorder and bipolar disorder. Goodrich filed an Eighth Amendment claim against the mental health counselor for indifference to his serious medical need. The Third Circuit found that the mental health counselor was not liable because she did not possess the culpable state of mind for deliberate indifference and she exercised her medical judgment based on her good faith clinical assessment, multiple meetings with Goodrich, and consultation with Goodrich's psychiatrist.

However, the dissenting judge would have allowed Goodrich to continue his case against the mental health counselor. In explaining his position, the judge declared that the mental health counselor was not entitled to medical judgment deference because she lacked the medical training necessary for an informed judgment. The dissent stressed the importance for health care providers to possess the level of education and skills required to care for the prisoner's medical need.

Delaying Treatment

Deliberate indifference by delaying treatment is found when health care providers do not provide a prisoner immediate treatment for an urgent condition or delay a prisoner's treatment for illegitimate reasons. In *Kendrick v. Frank* (2009), Kendrick claimed that a nurse practitioner violated his Eighth Amendment right when she did not refer him to an outside specialist for a fatty mass on his shoulder. The nurse practitioner examined Kendrick, noted a golf ball-sized, nontender mass on Kendrick's right deltoid, and referred him to the correctional facility physician. Kendrick refused to see the correctional facility physician and started submitting grievances for failure to be referred to an outside specialist. All three grievances were denied with the explanation that Kendrick needed first to see the correctional facility physician so that the physician could make the determination whether Kendrick needed to see an outside specialist. The Seventh Circuit, in dismissing the case against the nurse practitioner, found that Kendrick presented no evidence that the nurse practitioner had authority to refer him to an outside specialist, that the nurse practitioner's referral to the correctional facility physician demonstrated that she was not indifferent to his plight, and that Kendrick was responsible for his own delay in treatment for refusing to see the correctional facility physician.

The case of *Conquest v. Berge* (2002) involved a prisoner who claimed that his Eighth Amendment right was

violated because of a delay in receiving his pain medication. Conquest, who was ordered around-the-clock care for stomach cancer, filed an Eighth Amendment claim against health care providers alleging a delay in receiving Oxycodone nine times over the course of 13 months. Four of the nine delays in treatment occurred over a 3-week period. The Seventh Circuit held that the actions of the health care providers did not constitute deliberate indifference. In analyzing the case, the court acknowledged that

the inference of deliberate indifference is stronger where more negligent acts are committed in a shorter time interval, the four delays in treatment here cannot reasonably give rise to such an inference in view of the fact that Conquest received about 170 administrations of Oxycodone—not to mention his many other medications—during even that shorter time frame. (p. 4)

This court looked at the totality of the health care provided, not the nine incidents in isolation, to determine deliberate indifference.

Interfering With Access to Treatment

Health care providers cannot interfere with a prisoner's treatment. This interference includes obstructing a prisoner's access to a health care provider or failing to follow orders from the correctional facility's health care providers or from outside health care providers. *Finley v. Parker* (2007) provides an illustration of this type of deliberate indifference. Finley was denied access to a dentist when a dental assistant refused to place his name on the sick call list. The almost 8-month delay in dental care caused Finley needless pain and discomfort while eating and drinking. The Ninth Circuit stated that the dental assistant "manifested deliberate indifference by circumventing prison procedure through repeatedly refusing to add Finley's name to the sick call list. Those refusals interfered with Finley's access to treatment and caused the resolution of his dental problem to be delayed" (p. 635).

In *Boretti v. Wiscomb* (1991), the Sixth Circuit reversed a nurse's summary judgment ruling, finding that there was a genuine issue of material fact as to whether the nurse failed to follow pain medication and dressing orders. Boretti had surgery in mid-December 1987 for a gunshot wound received while attempting to escape. After he was released from the hospital and completed a stay in a correctional facility infirmary, Boretti was transferred to the correctional facility on December 30, 1987. Over the next few days, Boretti stated that he told the nurse about his medical condition, need for dressing changes, and pain medication, and he submitted

numerous sick call slips requesting treatment. Boretti alleged he received no pain medication and changed his own dressing using water, soap, and toilet paper. On January 4, 1988, another health care provider at the correctional facility confirmed the infirmary's orders, provided Boretti with pain medication, and treated the wound. This case demonstrates the need to verify and then follow medical orders.

Making Medical Decisions Based on Nonmedical Factors

Health care providers cannot make medical decisions about a prisoner's medical care based on nonmedical factors. For instance, nurses cannot base their care on staffing levels, prisoners' release dates, or personal biases. *Marcotte v. Monroe Correctional Complex* (2005) provides an example of this type of deliberate indifference. Marcotte, complaining of symptoms he had experienced in the past, such as shaking, sweating, weak knees, numbness in his thighs, and visual aura, saw a physician assistant on June 12, 2001. Marcotte had a past medical history of hypertension, diabetes, and tobacco use. The physician assistant ran some tests and concluded that Marcotte had not suffered a mild stroke. Later, however, on September 11, 2001, Marcotte collapsed in his dormitory and was brought to the correctional facility infirmary by wheelchair. At the infirmary, Marcotte alleged that the nurse disregarded his symptoms and past medical history and that the nurse threatened to send him to the "hole" if he continued faking his symptoms. The nurse sent Marcotte back to his dormitory 40 minutes after arriving in the infirmary. The next morning, Marcotte awoke with left-sided paralysis and was unable to walk. He was sent to the hospital, where he was diagnosed and treated for an acute stroke. As a result of the stroke, Marcotte has impaired motor skills and functioning. Marcotte filed an Eighth Amendment claim for delaying and denying medical treatment. The district court denied the nurse summary judgment, finding that Marcotte raised a genuine factual issue. The court stated the nurse "not only challenged the veracity of Marcotte's presentation, but made threats against him if he sought further treatment" (p. 1296).

Making Medical Judgment That Is So Bad It Is Not Medical

Health care providers need a scientific basis, such as professional standards of care, to support their medical decisions. Without a scientific basis, the foundation of the health care provider's practice is something other

than medical. As long as health care providers can scientifically support their medical judgments, they should not be violating a prisoner's Eighth Amendment right. Thus, when a prisoner and health care provider disagree over the course of treatment, the health care provider normally prevails if the health care provider's treatment falls within the standard of care or possesses some other scientific basis. *Jernigan v. Steinhäuser* (2005) and *Stratton v. Spencer* (2008) are examples of this concept.

In *Jernigan v. Steinhäuser* (2005), Jernigan filed an Eighth Amendment claim against a nurse practitioner for denying and delaying surgery for a hydrocele. Jernigan submitted two requests for surgery to repair the hydrocele, the first on October 22, 2003, and the second on November 12, 2003. Responding to the first request, the nurse practitioner found surgery not medically warranted based on her professional experience and Jernigan's September 4, 2003, testicular ultrasound sound, which found that Jernigan's testicles were within normal limits and no evidence of intratesticular mass lesion. Responding to the second request, the nurse practitioner ordered Jernigan an athletic supporter to take the pressure off the hydrocele, Tylenol for pain, and monitoring of the hydrocele. The district court granted the nurse practitioner summary judgment. At most, the court found the possibility of a difference of medical opinion, "which the Supreme Court has explicitly stated will not constitute an Eighth Amendment violation" (p. 4). The court then stated that "where, as here, alternative courses of treatment are available, the plaintiff [Jernigan] is required to show that the course of treatment the doctors chose was medically unacceptable under the circumstances" (p. 4). Jernigan presented no evidence to support his claim that the nurse practitioner's treatment was medically unacceptable.

In *Stratton v. Spencer* (2008), Stratton filed an Eighth Amendment claim for failure to provide medical care when a nurse refused to allow him to see a physician for an ingrown toenail, but the court dismissed the case against the nurse. In analyzing the case, the district court stressed that "prison authorities have 'wide discretion' in the medical treatment afforded prisoners" (p. 8).

COMPLEMENTARY AND ALTERNATIVE MEDICINE

Complementary and alternative medicine (CAM) is an overarching term covering nonconventional health care approaches that purport to prevent or treat disease (Barnes, Bloom, & Nahin, 2008). "Complementary

medicine is used together with conventional medicine," whereas "alternative medicine is used in place of conventional medicine" (National Center for Complementary and Alternative Medicine, 2007). The National Center for Complementary and Alternative Medicine (2007) groups these health care practices into four domains: (a) mind-body medicine, (b) biologically based practices, (c) manipulative and body-based practices, and (d) energy medicine. The mind-body medicine domain encompasses techniques such as meditation, prayer, and music therapy to improve the mind's ability to influence bodily functions and symptoms. Dietary supplements and herbal products are examples of biologically based practices. These natural substances are used to combat disease and/or improve health. The third domain contains practices based on manipulation and/or movement of one or more body parts. Examples of therapies within this domain are chiropractic manipulation and massage. The energy medicine domain is subdivided into biofield therapies and bioelectromagnetic-based therapies. Biofield therapies, which include Reiki and therapeutic touch, influence the alleged energy fields surrounding the body. Bioelectromagnetic-based therapies use different electromagnetic fields, like pulse fields or magnetic fields.

A significant percentage of Americans use CAM as part of their health care program. Barnes et al. (2008), using the 2007 National Health Interview Survey, found that almost 4 in 10 Americans used CAM during the past 12 months. The most commonly reported CAM treatments among adults were nonvitamin, nonmineral, natural products (17.7%); deep-breathing exercises (12.7%); meditation (9.4%); chiropractic or osteopathic manipulation (8.6%); massage (8.3%); and yoga (6.1%). Among adults, CAM was most often used for back pain or problems (17.1%), neck pain or problems (5.9%), joint pain or stiffness (5.2%), arthritis (3.5%), other (3.3%), anxiety (2.8%), and cholesterol (2.1%).

With a significant percentage of Americans using CAM, the movement of CAM into correctional facilities was expected. One area of CAM encroachment is treatment for drug addiction. Drug addiction is a significant problem for many individuals in prison. In 2004, 45% of federal prisoners and 53% of state prisoners met the criteria of the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) for drug dependence or abuse (Mumola & Karberg, 2006). Moreover, 18% of federal prisoners and 17% of state prisoners reported committing their current offenses to obtain money for drugs (Mumola & Karberg, 2006). Some correctional facilities are using CAM to treat prisoners for drug addictions.

For instance, the Maryland Department of Public Safety and Correctional Services' Addicts Changing Together-Substance Abuse Program uses acupuncture in conjunction with counseling, support groups, life skills training, and education classes to treat individuals with substance abuse (Maryland Department of Public Safety and Correctional Services, 2009). Prisoners participating in this program receive 25 acupuncture sessions during the 45-day program (Brewington, 2009). These acupuncture sessions purportedly ease drug cravings, with at least one prisoner reporting that acupuncture worked better than buprenorphine or methadone (Brewington, 2009). With an annual cost of \$40,000 to treat 688 prisoners (Brewington, 2009), the acupuncture portion of the program does have its critics. One such criticism is the lack of empirical research to demonstrate acupuncture's effectiveness.

With a substantial number of Americans using CAM, a question arises as to whether prisoners have a constitutional right to CAM under the Eighth Amendment. In general, the current answer is no. First, the majority of CAM treatments lack scientific evidence to support their effectiveness or safety (National Center for Complementary and Alternative Medicine, 2007). Without this scientific evidence, health care providers are unlikely to prescribe these treatments over scientifically proven treatments when caring for prisoners. In fact, prisoners, theoretically, could claim deliberate indifference based on making a medical decision that is so bad that it is not medical if health care providers prescribed a CAM therapy without any scientific evidence to support their medical decisions. Second, prisoners who disagree with health care providers' scientifically based plans of care and/or prisoners who want to add CAM to their plans of care are unlikely to prove an Eighth Amendment claim because courts give deference to health care providers' medical decisions and prisoners are not entitled to demand treatments that health care providers deem medically unnecessary.

The cases of *Chance v. Armstrong* (1998) and *Wyatt v. Mahon* (2007) provide examples of courts giving deference to health care providers' medical decisions over the health care demands of prisoners. In *Chance v. Armstrong* (1998), Chance filed an Eighth Amendment claim against a dentist for inadequate dental treatment. The dentist's plan of care included teeth extraction. Chance disagreed with the dentist's plan of care and asserted that less invasive procedures would remedy his dental problems. The court, in discussing whether the dentist was deliberately indifferent to Chance's dental problems, stated that "mere disagreement over the proper treatment does not create a constitutional claim.

So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation" (p. 703).

In *Wyatt v. Mahon* (2007), Wyatt was diagnosed with degenerative disc disease. Wyatt strongly wanted surgery; however, the physicians, based on their examinations and results of radiology tests, decided to treat Wyatt conservatively with medication and lifestyle change. When the conservative treatment failed, the physicians ordered surgery. The court found that

[a]t most, plaintiff [Wyatt] has established that he disagreed with the decision to treat his condition conservatively until surgery became necessary. However, mere disagreement between an inmate and a physician as to the proper course of treatment does not rise to a level of a constitutional violation. (p. 17)

In the future, it is uncertain whether prisoners will have a constitutional right to CAM under the Eighth Amendment. If a CAM treatment is added to the standard of care for a particular disease, then prisoners denied the CAM treatment will have a stronger Eighth Amendment case. The more interesting hypothetical occurs, however, if the CAM treatment is a suggested treatment and not a standard treatment for a particular disease. Will the scope of the Eighth Amendment be broad enough (or broaden enough over time) to entitle prisoners to CAM? This is a question that only time will answer, but factors that will impact the answer concern the ideological majority of the Supreme Court and federal and state legislatures, available scientific evidence to support or refute the effectiveness and safety of CAM, the percentage of Americans using CAM, and the percentage of public and private health care insurance companies willing to cover CAM.

CONCLUSION

Correctional nurses are the health care providers who supply a substantial part of the health care that prisoners receive. Therefore, is it imperative that these individuals understand how to provide care that does not fall into the category of cruel and unusual punishment. The *Estelle* test is a two-prong test for determining when a health care provider has violated the Eighth Amendment—a health care provider cannot be (a) deliberately indifferent to a prisoner's (b) serious medical need. By understanding these two prongs, health care providers can avoid violating a prisoner's constitutional right to health care.

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- Biographical Data.** Victoria A. Kellogg is a third year law student at The Pennsylvania State University, Dickinson School of Law, and an adjunct faculty member at the Pennsylvania College of Technology. She holds a PhD and MBA from The Pennsylvania State University and a MSN and BSN from the University of Pennsylvania. Prior to law school, Dr. Kellogg was an Assistant Director of a nursing school, a women's health practitioner, and a Director of Nursing at a correctional facility.
- Correspondence regarding this article should be directed to Victoria A. Kellogg, PhD, CRNP, MBA, Pennsylvania State University, Dickinson School of Law, Lewis Katz Building, University Park, State College, PA 16802. E-mail: vak107@psu.edu

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