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Hepatitis C: There's a Cure, But Who Will Bail Out the Department of Corrections?

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HEPATITIS C: THERE'S A CURE, BUT WHO WILL BAIL OUT THE DEPARTMENT OF CORRECTIONS?

Monica K. Houston*

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INTRODUCTION

In *Estelle v. Gamble*¹, the United States Supreme Court recognized that “[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” The Court held that the State has a constitutional obligation under the Eighth and Fourteenth Amendments to provide adequate medical care to those whom it has incarcerated.² However, *Estelle* did not set forth exactly what qualifies as “adequate” medical care. Does this mean that the State must supply the latest standard of medical care? This paper will address the seriousness of Hepatitis C if left untreated; the current standard of medical care provided for the treatment of Hepatitis C, which has a cure rate of ninety percent; and whether or not the State is required to supply that treatment to prison inmates to satisfy the constitutional obligations of providing adequate medical care.

Today courts are reviewing class action lawsuits that have been filed by prison inmates seeking the current standard of medical care for their Hepatitis C.³ In reaching a ruling, the courts will need to determine whether the Department of Corrections is required to provide inmates the new standard of care for the treatment of Hepatitis C, which is a very costly drug. This new wave of drugs for the treatment of Hepatitis C can cost anywhere from \$89,000 to a discounted rate of \$40,000 per inmate, which could potentially undermine the budgets of the Department of Corrections nationwide.⁴

This article will first briefly set forth a general background of Hepatitis C, including what it is, how it is diagnosed and treated. Part II of this article will explain the current standard of medical care and the treatment developments. Part III of this article will address whether or not the Department of Corrections should be constitutionally required to treat all inmates currently diagnosed with Hepatitis C with the latest developed drugs, based off of three pending class action lawsuits brought by prisoners against the state Department of Corrections. Part IV of this article will discuss possible policy implications by examining the Wyoming Department of Corrections Policies, and finally this article will conclude by finding that absent a diagnosis of an advanced stage of Hepatitis C, the states’ Department of Corrections should not be mandated to provide this costly treatment to inmates.

¹ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (arguing that inmate did not receive proper medical care from the corrections department).

² *Id.* at 104. See also *Spicer v. Williamson*, 191 N.C. 487, 490 (1926).

³ See *Chimenti v. Pennsylvania Dept. of Corrections*, No. 15-3333, 2016 U.S. Dist. LEXIS 36682 (E.D. Pa. Mar. 21, 2015); *Paszko v. O’Brien*, No. 1-15-cv-12298-NMG (D. Mass. June 10, 2015); *Lignons v. Minnesota Dept. of Corrections*, No. 15-cv-02210-PJS-BRT (D. Minn. filed May 1, 2015).

⁴ SAM P.K. COLLINS, *Prisoners in Massachusetts Sue for Access to Hepatitis C Medication*, THINK PROGRESS (June 16, 2015), <https://thinkprogress.org/prisoners-in-massachusetts-sue-for-access-to-hepatitis-c-medication-b77cd147fc6b#.dzqt3r3wl> (last visited Oct. 5, 2016) (noting that the newest treatment can cost up to \$90,000). See also Kathleen Doheny, *FAQ: The High Cost of Hepatitis C Drugs (April 14, 2014)* <http://www.webmd.com/hepatitis/news/20140414/high-cost-hepatitis-c-drugs#1> (last visited Jan. 20, 2017) (stating the \$1,000 a-pill price and the success rate of newer treatments to be at rates of 90% or more).

I. BACKGROUND

A. What is Hepatitis C?

First, it is important to understand what Hepatitis C is and how it affects the body. Hepatitis C is the most common chronic blood-borne infection in the United States with about 4 million people diagnosed with chronic Hepatitis C.⁵ This disease is caused by a virus that infects and inflames the liver.⁶ For some people the infection lasts only a short time, and the body is able to clear the virus.⁷ However, most people infected with Hepatitis C develop chronic Hepatitis C.⁸ Chronic Hepatitis C is a long-term illness that happens when the virus stays in the body.⁹ The majority of people who have chronic Hepatitis C are not even aware that they carry the disease because symptoms often do not develop for many years until the infection has started to damage their liver.¹⁰ According to the Center for Disease Control and Prevention (CDC), nearly eight in ten untreated people will remain infected for life.¹¹ CDC provides annual reports that break down the number of people infected into age groups.¹²

The largest category of those infected fall into the baby boomer era (those born from 1946 to 1964).¹³ The CDC states that this may be due to these people becoming infected before the virus was identified and blood was tested for the disease.¹⁴ According to the United States Census Bureau, there are currently 76.4 million baby boomers living in the United States,¹⁵ which increases the importance of testing individuals in this category.¹⁶ The CDC has even stated that baby boomers are five times more likely to have Hepatitis C.¹⁷ Additionally, the CDC reports that there has been a steady increase in the number of cases reported since 2009, at least through

⁵ FDA Consumer Updates, *Faster, Easier Cures for Hepatitis C*, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm405642.htm> (last visited Nov. 13, 2015).

⁶ *Id.*

⁷ Nat'l Ctr. for Biotechnology Info., U.S. Nat'l Library of Med., *Hepatitis C*, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0022399/> (last visited Sept. 12, 2015)[hereinafter NIH Hepatitis C].

⁸ *Id.*

⁹ Nat'l Ctr for Biotechnology Info., U.S. Nat'l Library of Med., *Chronic Hepatitis*, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0023081/> (last visited Sept. 15, 2015).

¹⁰ *Id.*

¹¹ *Id.* (causing those people to develop chronic Hepatitis C).

¹² *See, e.g.*, Center for Disease Control and Prevention, *Surveillance for Viral Hepatitis- United States, 2013*, <http://www.cdc.gov/hepatitis/statistics/2013surveillance/commentary.htm#hepatitisC> (last visited Sept. 10, 2015) [hereinafter CDC Surveillance].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Kelvin Pollard & Paila Scommegna, POPULATION REFERENCE BUREAU, *Just How Many Baby Boomers Are There*, <http://www.prb.org/Publications/Articles/2002/JustHowManyBabyBoomersAreThere.aspx> (last visited Sept. 15, 2015).

¹⁶ Center for Disease Control and Prevention, *Hepatitis C, Testing Baby Boomers Saves Lives*, (May 2013) <https://www.cdc.gov/vitalsigns/hepatitisc/> (noting that many baby boomers became infected before the dangers of Hepatitis C were well known).

¹⁷ *Id.*

the 2013 reports.¹⁸ Moreover, in 2013, forty-one states reported an estimate of 29,718 cases of acute Hepatitis C across the United States.¹⁹

If Hepatitis C is left untreated, over time (up to twenty years or longer in some people) the infection could damage the liver.²⁰ Untreated Hepatitis C could also cause cirrhosis (scarring of the liver that makes the liver not function correctly), liver cancer, liver failure, and potentially even death.²¹ Hepatitis C is a leading cause of liver cancer and the most common reason for liver transplants in the United States.²² Recent studies reflect about 15,000 deaths in the United States each year are due to Hepatitis C.²³

B. How is Hepatitis C Transmitted?

Hepatitis C is an infectious and contagious liver disease that spreads through blood-to-blood contact with an infected person.²⁴ Hepatitis C may be spread by sharing razors, toothbrushes, needles, syringes or other equipment that is used to inject drugs.²⁵ Individuals may also be put at risk simply by getting a tattoo with unsterilized tools, receiving a blood transfusion prior to 1992, or even being born to a mother infected with Hepatitis C.²⁶ Other occupational hazards may present risks to exposure, especially in the medical and dental fields.²⁷ Finally, adults that are incarcerated in correctional facilities are at risk because many inmates already have Hepatitis C.²⁸ It can be difficult to eliminate exposure because bleaching, boiling, heating with a flame,

¹⁸ See CDC Surveillance, *supra* note 12.

¹⁹ *Id.* (The CDC's National Notifiable Disease Surveillance System (NNDSS), viral hepatitis case-reports are received electronically from state health departments via CDC's National Electronic Telecommunications System for Surveillance (NETSS), a computerized public health surveillance system that provides the CDC with data regarding cases on a weekly basis. Although surveillance infrastructure is in place, reports are not submitted by all states. As noted in a recent report from the Institute of Medicine (Institute of Medicine, *Hepatitis and liver cancer: a national strategy for prevention and control of hepatitis B and C*. Washington, DC: The National Academies Press, 2010: 1-232.), surveillance capacity to monitor viral hepatitis is limited at the state and local levels, resulting in underreporting. To account for under-ascertainment and under-reporting, an estimation method was developed in 2011 to better quantify the number of new cases of hepatitis A, B, and C from the actual number of cases reported for each disease. (Klevens RM, Liu SJ, Roberts H, Jiles RB, Holmberg SD. *Estimating acute viral hepatitis infections from nationally reported cases*. *Am J Public Health*. 2014;104(3):482-7).)

²⁰ See NIH Hepatitis C, *supra* note 7.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, HEPATITIS C AND INCARCERATION (Oct. 2013), <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCIncarcerationFactSheet.pdf> [hereinafter HEPATITIS C AND INCARCERATION].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (stating that eliminating Hepatitis C exposure is difficult in general, but especially so in prisons with high volume of infected persons).

or using a common cleaning fluid (such as alcohol or peroxide) is not strong enough to kill the virus.²⁹

The CDC breaks down the 2013 reported risk exposure and behavior cases and their transmission into the following groups: (1) 61.6% indicated use of injection drugs; (2) 16.4% of males indicated sex with another male; (3) 18.4% reported sexual contact with a person confirmed or suspected to have Hepatitis C;³⁰ (4) 1 % reported occupational exposures, including employment in a medical, dental, or another field involving contact with human blood; (5) 12.2% indicated having surgery; and (6) 7.7% indicated having an accidental needle stick or puncture.³¹ This breakdown is only derived from reported cases.³²

Most people do not notice any symptoms of Hepatitis C for many years until the virus begins to damage their liver.³³ When symptoms of Hepatitis C do appear, they often appear as symptoms caused by common illnesses and go undiagnosed until they manifest as liver damage.³⁴ These symptoms include: fever, upset stomach and nausea, diarrhea, loss of appetite, feeling exhausted, yellowed eyes and skin called “jaundice”, swelling of the belly, easy bruising, and taking longer for bleeding to stop.³⁵

C. Information on Testing for Hepatitis C

According to the CDC, the only way to know if someone has Hepatitis C is to get tested. Doctors use a blood test, called a Hepatitis C Antibody Test, which will identify antibodies to the virus and reveal if a person has ever been infected with Hepatitis C.³⁶ Antibodies are chemicals released into the bloodstream when someone gets infected.³⁷ Test results may take anywhere from a few days to a few weeks to come back, and can either produce a non-reactive or negative result (meaning that a person does not have Hepatitis C, or that they have not been infected for a period long enough to be detected) or a reactive/positive result (meaning that antibodies were found in the blood).³⁸ A reactive antibody test does not necessarily mean a person still has Hepatitis C.³⁹ Once a person has been infected, they will always have antibodies in their blood, even if they

²⁹ See HEPATITIS C AND INCARCERATION, *supra* note 24.

³⁰ See CDC Surveillance, *supra* note 12, at Fig. 4.6a.

³¹ *Id.*

³² *Id.*

³³ See NIH Hepatitis C, *supra* note 7.

³⁴ *Id.*

³⁵ Robin Madell, Medically Reviewed by University of Illinois-Chicago, College of Medicine on July 8, 2016, *What Are the Symptoms and Warning Signs of Hepatitis C?*, <http://www.healthline.com/health/hepatitis-c/symptoms#Types2> (last visited on Jan. 30, 2017); See generally HEPATITIS C AND INCARCERATION, *supra* note 24.

³⁶ See *Hepatitis C and Baby Boomers (1945-1965)*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 27, 2015), <http://www.cdc.gov/knowmorehepatitis/LearnMore.htm>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

have cleared the Hepatitis C virus.⁴⁰ A reactive antibody test requires an additional, follow-up test to determine if a person is currently infected with Hepatitis C.⁴¹

D. The Prevalence of Hepatitis C in Correctional Facilities

A significant number of people who enter the prisons and jails are already suffering from serious health conditions.⁴² The correctional system becomes responsible for an inmate's health care and treatment during incarceration.⁴³ It is pertinent to note the difference between jails and prisons to better understand the duration that an inmate may be under the care and control of the facility.⁴⁴ Because there is a rapid turnover within the incarcerated population, the funding for correctional health and prevention services often limits the correctional system in providing both curative and preventative care.⁴⁵

According to the CDC, in 2013, there were 2.2 million people in the United States jails and prisons, and one in three had Hepatitis C.⁴⁶ However, a 2014 report indicates that the rate of infected inmates "declined to 17.4%"⁴⁷, with those diagnosed with chronic infection "estimated to be between 12 and 35%."⁴⁸ The inmate population diagnosed with Hepatitis C represents about one-third of the total cases in the United States.⁴⁹

The CDC notes that Hepatitis C poses a serious health problem for those incarcerated, because many inmates already have the virus, and Hepatitis C is the most common type of hepatitis in jails and prisons.⁵⁰ Accordingly, the CDC recommends universal

⁴⁰ *Id.* (See also MAYO CLINIC, MAYO MEDICAL LABORATORIES, *Test ID: HCVL, Hepatitis C Virus Antibody Confirmation, Serum*, <http://www.mayomedicallaboratories.com/test-catalog/Overview/63063>, (last visited on Jan. 30, 2017).

⁴¹ *Id.*

⁴² NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Chapter 9, Pg. 221 (2014). <https://www.nap.edu/read/18613/chapter/9#221>

⁴³ *Id.*

⁴⁴ See *Management of Hepatitis C in Jails versus Prisons*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 4, 2017), <http://www.hepatitisc.uw.edu/pdf/special-populations-situations/treatment-corrections-core-concept/all> (noting that a person is jailed upon arrest for allegedly committing a crime. Most states will hold individuals in jail for sentences up to 1 year, although this may be extended to include longer sentences. Jails are typically operated and funded by local cities or counties, whereas prisons are part of either a state or federal system, and house persons convicted of felonies.)

⁴⁵ *Id.*

⁴⁶ See HEPATITIS C AND INCARCERATION, *supra* note 24.

⁴⁷ Varan et al. Hepatitis C Seroprevalence Among Prison Inmates Since 2001: Still High but Declining. *Public Health Reports*, 2014; 129: 187-195

⁴⁸ National Hepatitis Corrections Network, *An Overview of Hepatitis C in Prisons*, (Feb. 22, 2016, http://www.hcvinprison.org/resources/71-main-content/content/191-hepcprison#_edn2)

⁴⁹ *Id.* (citing Varan et al. Hepatitis C Seroprevalence Among Prison Inmates Since 2001: Still High but Declining. *Public Health Reports*, 2014; 129: 187-195.).

⁵⁰ *Id.*

Hepatitis C screening for all incarcerated inmates.⁵¹ The National Hepatitis Corrections Network states that high prevalence of Hepatitis C within the prison system may also be attributable to the populations who are most affected by incarceration (such as the poor, injection drug users, and the mentally ill), who are more likely to have Hepatitis C⁵². The most common ways inmates transmit Hepatitis C include sharing equipment used for injecting drugs, tattooing and piercing with those individuals that are already infected with the virus.⁵³ Since correctional health facilities pose a high risk for contracting the virus, the CDC recommends counseling and testing to prevent spreading the infection.⁵⁴

II. STANDARD OF MEDICAL CARE

A. Treatment Options for Hepatitis C

Due to recent medical developments, if a person today is diagnosed with Hepatitis C, it no longer means months and months of painful drug injections, which was the only treatment option available for decades.⁵⁵ Science is continually developing new means and methods for treating all medical diseases and illnesses, the treatment for Hepatitis C is no different.⁵⁶ In fact, science has made leaps and bounds in the development for a cure.⁵⁷ The first “curing” oral treatment regimen (Sovaldi) was approved by the FDA late in December, 2013.⁵⁸ Today, there are even more medications that have been approved by the FDA to treat the various genotypes of Hepatitis C, and have been proven to have successful cure rates.⁵⁹

⁵¹ *Management of Hepatitis C in Jails versus Prisons*, <http://www.hepatitisc.uw.edu/pdf/special-populations-situations/treatment-corrections/core-concept/all>

⁵² Nat’s Hetatitis Corrections Netrowk, *An Overview of Hepatitis C in Prisons and Jails*, (02/22/2016), <http://www.hcvinprison.org/resources/71-main-content/content/191-hepcprison>

⁵³ *Id.*

⁵⁴ *See generally* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, MMWR No. 47RR-19, RECOMMENDATIONS FOR PREVENTION AND CONTROL OF HEPATITIS C VIRUS (HCV) INFECTION AND HCV-RELATED CHRONIC DISEASE, (1998), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00055154.htm>.

⁵⁵ *See* FDA Consumer Updates, *supra* note 5.

⁵⁶ *See generally* Anne Harding, *Pros and Cons of New Hepatitis C Drugs*, EVERYDAY HEALTH, <http://www.everydayhealth.com/news/pros-cons-new-hepatitis-treatments-patients/> (page last updated: April 7, 2015); American Liver Foundation, *Advances in Medication to Treat Hepatitis C*, (October 2016), <http://hepc.liverfoundation.org/treatment/the-basics-about-hepatitis-c-treatment/advances-in-medications/>

⁵⁷ American Liver Foundation, *Can hepatitis C Be Cured?*, (October 2016), (The Hepatitis C virus is considered cured if the virus is not detected in your blood 3 months after treatment is completed)

⁵⁸ *Id.* (Sovaldi (sofosbuvir)), a once-daily pill, was approved to treat HCV genotypes 1, 2, 3 and 4. This was the first drug that allowed genotype 2 and 3 patients to be treated with pills only, offering an interferon-free regimen with ribavirin.

⁵⁹ American Liver Foundation, *Advances in Medication to Treat Hepatitis C*, (October 2016), <http://hepc.liverfoundation.org/treatment/the-basics-about-hepatitis-c-treatment/advances-in-medications/> (Harvoni, which is a once-daily pill that combined sofosbuvir (Sovaldi) and a new drug called ledipasvir was approved in October, 2014; In November, 2014, the FDA granted simeprevir (Olysio) an additional approval to be used in combination with sofosbuvir (Sovaldi) as a once-daily, all-oral, interferon and ribavirin-free treatment for adults with genotype 1 HCV infection. This

Prior to 2013, Interferon-based injections were the only option for treatment.⁶⁰ Interferon was approved in the 1990s, and when later combined with Ribavirin (another drug that fights the virus) the cure rate jumped from less than 5% in the 1980s to about 50% by the early 2000s.⁶¹

However, Interferon and Ribavirin cause many side effects including muscle aches, fever, nausea, anxiety, and trouble sleeping.⁶² These medications often need to be taken for forty-eight weeks to see results, and in some instances have required taking the regimen for up to a year without results.⁶³

In 2011, the United States Food and Drug Administration (FDA) approved two new drugs: boceprevir (Victrelis) and telaprevir (Incivek), which stop the virus from making a copy of itself.⁶⁴ Combining telaprevir or boceprevir with interferon and ribavirin pushed success rates as high as 70%.⁶⁵ However, the drug combination still was not ideal; as the additional drugs increased so did the side effects.⁶⁶ In 2013 and 2014, the FDA approved three new drugs: (1) Simeprevir (Olysio), (2) Sofosbuvir (Sovaldi), and (3) Ledipasvir-sofosbuvir (Harvoni).⁶⁷ The combination of Simeprevir with interferon and ribavirin clears the Hepatitis C virus in up to 80% of people who take it.⁶⁸ According to the FDA, Ledipasvir-sofosbuvir can be taken without interferon and ribavirin.⁶⁹ Sofosbuvir can also be used without interferon for people with some

approval gave people with genotype 1 another all-oral treatment option; December, 2014, the FDA approved a new combination medicine called Viekira Pak (ombitasvir/paritaprevir/ritonavir tablets; dasabuvir tablets), which can be given with or without Ribavirin, to treat adults with genotype 1 infection; then in July, 2015, the FDA approved two new drugs – Technivie for the treatment of genotype 4 and Daklinza for the treatment of genotype 3. Further developments were approved in 2016, with Zepatier ((elbasvir 50 mg/grazoprevir 100 mg) being approved in January to treat adults with chronic HCV genotypes 1 or 4 infection, including those with compensated cirrhosis, HIV-1 co-infection, or severe kidney disease and on dialysis, and most recently in June, 2016, Epclusa (sofosbuvir 400mg/velpatasvir 100 mg) which is a new combination medicine, was approved to treat genotypes 1, 2, 3, 4, 5, or 6. It is also the first single tablet regimen approved for the treatment of patients with HCV genotype 2 and 3, without the need for ribavirin.) (October, 2016).

⁶⁰ See FDA Consumer Updates, *supra* note 5. See also American Liver Foundation, *Advances in Medication to Treat Hepatitis C*, (October 2016), <http://hepc.liverfoundation.org/treatment/the-basics-about-hepatitis-c-treatment/advances-in-medications/> (last visited Feb. 8, 2017)

⁶¹ U.S. Dept. of Veterans Affairs, *Interferon and Ribavirin Treatment Side Effects*, TOPIC REVIEW, <http://www.hepatitis.va.gov/provider/reviews/treatment-side-effects.asp> (page last updated: Aug. 26, 2016).

⁶² *Id.*

⁶³ U.S. Dep't of Veteran Affairs, *Hepatitis C Genotypes and Quasispecies*, TOPIC REVIEW (2005), <http://www.hepatitis.va.gov/provider/reviews/genotypes.asp>.

⁶⁴ Alan Francisus, *A Brief History of Hepatitis C*, 4.3 HCV Advocate 1, 5-6 (2015), http://hcvadvocate.org/hepatitis/factsheets_pdf/Brief_History_HCV.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

types of Hepatitis C.⁷⁰ Sofosbuvir, which seems to be the most ideal choice for a cure, comes in an easy once-a-day pill.⁷¹ It takes as few as twelve weeks to work, and has a cure rate of up to 90%.⁷²

In January 2014, the Infectious Disease Society of America and the American Association for the Study of Liver Disease issued guidelines recommending treatments by genotype, including prescribing sofosbuvir and similar drugs as the first line of therapy to replace Interferon injections entirely.⁷³ The HCV Guidance has since been updated to reflect developments and FDA approvals as of July 6, 2016.⁷⁴ Recent clinical trials with the breakthrough drugs (instead of interferon), have been found to have even higher rates of “virologic success” and fewer side effects,⁷⁵ which should lead to even more widespread success.⁷⁶

All of these new drugs allow a shorter treatment span without injections and produce a higher cure rate.⁷⁷ There is no wonder that many people diagnosed with the disease want to have access to them. This has recently prompted the filing of class action lawsuits from prison inmates alleging that they have been denied access to “adequate” medical care, in violation of their Constitutional rights under the Eighth and Fourteenth Amendments.⁷⁸

B. Just What Does This Cure Cost?

One can easily say that the new drugs are not cheap. The cost is a daunting \$84,000 for a 12-week course of Sofosbuvir, or approximately \$1,000 per pill.⁷⁹ Even with this high price, prison providers are starting to use this next generation of agents, in certain instances.⁸⁰

⁷⁰ See Francisus, *supra* note 64.

⁷¹ See American Liver Foundation, *supra* note 63

⁷² *Id.*

⁷³ American Association for the Study of Liver Diseases and Infectious Diseases Society of America (AASLD), HCV Guidance: Recommendations for Test, Managing and Treating Hepatitis C, <http://hcvguidelines.org/> (last visited Feb. 8, 2017).

⁷⁴ *Id.* See <http://hcvguidelines.org/full-report/initial-treatment-box-summary-recommendations-patients-who-are-initiating-therapy-hev> for the latest recommendations for patients who are initiating therapy.

⁷⁵ See generally Kowdley et al., *Lawitz E, Ledipasvir and Sofosbuvir for 8 or 12 weeks for chronic HCV without cirrhosis*, 370(20) N Engl J Med. 1879 (2014), <http://www.nejm.org/doi/pdf/10.1056/NEJMoa1402355>.

⁷⁶ See Feld et al., *Treatment of HCV with ABT-450/Rombitasvir and Dasabuvir with Ribavirin*. 370 N Engl J Med. 1594 (2014), <http://www.nejm.org/doi/pdf/10.1056/NEJMoa1315722>.

⁷⁷ See American Liver Foundation, *supra* note 63

⁷⁸ See *Chimenti v. Pennsylvania Dept. of Corrections*, No. 15-3333, 2016 U.S. Dist. LEXIS 36682 (E.D. Pa. Mar. 21, 2015); *Paszko v. O'Brien*, No. 1-15-cv-12298-NMG (D. Mass. June 10, 2015); *Ligons v. Minnesota Dept. of Corrections*, No. 15-cv-02210-PJS-BRT (D. Minn. filed May 1, 2015).

⁷⁹ Charles Ornstein, *New Hepatitis C Drugs are Costing Medicare Billions*, THE WASH. POST (March 29, 2015), https://www.washingtonpost.com/national/health-science/medicare-spent-45-billion-on-new-hepatitis-c-drugs-last-year-data-shows/2015/03/29/66952dde-d32a-11e4-a62f-ee745911a4ff_story.html.

⁸⁰ Federal Bureau of Prisons, *Interim Guidance for the Management of Chronic Hepatitis C Infection*, (2014), http://www.bop.gov/resources/pdfs/hepatitis_c_current.pdf.

Other government-managed programs like Medicaid and Medicare are still working out the standards for people who want to take the new medications.⁸¹ The Washington Post reported that Medicare spent over \$4.5 billion dollars of federal taxpayer money on treating Hepatitis C alone, which included the elevated costs for the newly approved drugs.⁸² Medicaid on the other hand was much more restrictive with providing the drugs, and often required the patients to have advanced liver disease to be eligible for the newly approved pills.⁸³ However, it is reported that Medicaid acknowledges that “anticipated legal challenges may compel state Medicaid programs to stop rationing the new drugs.”⁸⁴ As the prison systems are also publicly funded, the high cost of these drugs could have detrimental effects on Department budgets, in the event that they are required to pay for the treatment of all inmates⁸⁵. In fact, the new treatment options could cost six to eight times more than prescribing Interferon.⁸⁶

Recent reports show that despite the high costs of treatment, some prison systems are offering the new drugs to inmates,⁸⁷ the most notable is the Federal Bureau of Prisons.⁸⁸ However, the Federal Bureau of Prisons, which oversees the federal prison system, is reported to be receiving a 44% discount on the new drugs, enabling it to provide the treatment to inmates.⁸⁹

C. How Will This Cure Affect Correctional Facilities?

In order for the United States to effectively eliminate Hepatitis C, this would require providing treatment to prisoners. As described above, there is an overwhelming percentage of inmates who currently have Hepatitis C, and the cost of treating and curing this disease is expensive. At costs of approximately \$84,000 per person, without

⁸¹ Medicaid.gov, Keeping America Healthy, *HCV Communication*, <https://www.medicaid.gov/medicaid/prescription-drugs/hcv/index.html> (last visited Feb. 8, 2017) See Ornstein, *supra* note 79.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Peter Loftus and Gary Fields, *High Cost of New Hepatitis C Drugs Strains Prison Budgets, Locks Many Out of Cure*, The Wall Street Journal, September 12, 2016, <https://www.wsj.com/articles/high-cost-of-new-hepatitis-c-drugs-strains-prison-budgets-locks-many-out-of-cure-1473701644>

⁸⁶ Ann Harding, Medically reviewed by Matthew Vosanger, MD, *Pros and Cons of New Hepatitis C Drugs*, Everyday Health, (April 7, 2015), <http://www.everydayhealth.com/news/pros-cons-new-hepatitis-treatments-patients/>

⁸⁷ Dave Boucher, USA Today Network, The Tennessean, *Gov. Bill Haslam to fund half of Tennessee prison Hepatitis C request* (Jan. 31, 2017), <http://www.tennessean.com/story/news/politics/2017/01/31/bill-haslam-fund-half-prison-hepatitis-c-request/97249268/>; See also Anna Maria Barry-Jester, *Prisoners with Hep C Get Cured in Some States But Not in Others* (Oct. 13, 2016), <https://fivethirtyeight.com/features/prisoners-with-hep-c-get-cured-in-some-states-but-not-others/>; See also CBS NEWS, *\$1000-a-day Hepatitis C Drug Approved to Treat Prison Inmates in Illinois*, (April 18, 2014), <http://www.cbsnews.com/news/1000-a-day-hepatitis-c-drug-approved-to-treat-prison-inmates-in-illinois/>

⁸⁸ See Federal Bureau of Prisons, *supra* note 80 at 1.

⁸⁹ Victoria Law, *Hepatitis C is Common in Prison, but Treatment is Rare, Hepatitis C Serious but Curable*, THE BODY, August 24, 2015, <http://www.thebody.com/content/76327/hepatitis-c-is-common-in-prisons-but-treatment-is-.html> (last visited Sept. 23, 2015).

any discount such as that which the Veterans Affairs or the Federal Bureau of Prisons is reported to receive — this cure would potentially undermine the Department of Corrections' budgets.⁹⁰ Recent reports indicate that it would take an estimated \$33 billion dollars to treat all of the incarcerated people, which is more than four times the total health spending by state prison systems.⁹¹

Although United States prisons offer routine screenings for HIV, not all prisons offer screenings for Hepatitis C, which may provide an explanation for the spreading of the virus within the prisons. The Federal Bureau of Prisons published an Interim Guidance for the Management of Chronic Hepatitis C Infection in June, 2014.⁹² This guideline specifically acknowledges the advancing treatments and rapidly changing clinical guidelines with the progression of science.⁹³ The guideline sets forth a prioritized treatment plan beginning with those diagnosed with advanced stages of the virus and liver transplant recipients, then moving down the list to inmates that are also HIV co-infected, and lastly to those newly incarcerated inmates who were being treated at the time of incarceration.⁹⁴ Perhaps the most on target issue can be found in the guideline outlining the recommended treatment regimens.⁹⁵ Although the treatment is evaluated on a case-by-case basis, the “Preferred regimen” is the sofosbuvir + ribavirin 12-week program.⁹⁶ The guideline also specifically categorizes treatment regimens that are no longer recommended, which includes Interferon, unless an inmate is completing a course of treatment that has already been started with Interferon.⁹⁷

Prisoners have a constitutional right to healthcare, even beyond that of the general population.⁹⁸ This right falls within the Eighth and Fourteenth Amendments, and requires the correctional facilities to provide adequate medical care.⁹⁹ *Estelle v. Gamble* established that the Eighth Amendment “imposes duties on [prison] officials, who must . . . ensure that inmates receive adequate . . . medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”¹⁰⁰

With the excessive costs of treatment, correctional facilities have yet to provide this treatment for all individuals diagnosed with the disease, but instead have tried to focus on those with advanced stages of the disease, and the duration an inmate will be in

⁹⁰ See Anna Maria Barry-Jester, *Eliminating Hepatitis C Means Treating Prisoners*, FIVE THIRTY EIGHT, August 31, 2015, <http://fivethirtyeight.com/features/eliminating-hepatitis-c-means-treating-prisoners/>.

⁹¹ *Id.*

⁹² See Federal Bureau of Prisons, *supra* note 80 at 1.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2.

⁹⁶ *Id.*

⁹⁷ See Federal Bureau of Prisons, *supra* note 80 at 3.

⁹⁸ *Estelle v. Gamble*, *supra* note 1, at 103.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 101-102.

custody.¹⁰¹ Within the last year, class action lawsuits in three states have been filed to put pressure on the correctional facilities to provide these new drugs, which may provide a cure for Hepatitis C. These class actions were filed on behalf of prisoners in Minnesota, Pennsylvania and Massachusetts.¹⁰² These suits were brought under the Eighth and Fourteenth Amendments under the United States Constitution, for which 42 U.S.C. §1983 provides declaratory, equitable and legal remedies.¹⁰³ The complaints also include allegations under Title II of the Americans with Disabilities Act as Amended and §504 of the Rehabilitation Act of 1973.¹⁰⁴ Jurisdiction is argued by the plaintiffs in those suits to be established under both a federal question and a federal civil rights question.¹⁰⁵

The complaints filed in each of these three cases set out the same basic principles: (1) the prisoners suffer from serious medical need, disability and a life-threatening viral disease known as Hepatitis C, (2) the acknowledgement of the FDA “breakthrough” drugs twelve week daily-pill therapy protocol approved to cure Hepatitis C at a 95% rate as the community standard of care, and (3) the failure, through non-medical reasons on the defendants’ part¹⁰⁶ to provide the community standard of care to cure inmates and prevent the spreading of this infectious disease.¹⁰⁷ The non-medical reasons argued by the plaintiffs include: (1) the administrative convenience, (2) cost, and (3) correctional policies designed to ration medication to a limited number of inmates.¹⁰⁸ The lawsuits state that the Federal Bureau of Prisons, the CDC, the United States Public Health Service (Surgeon General), the FDA, and the United States Department of Veterans Affairs (VA) have all recognized this twelve week treatment program as the new standard of care within the medical community for the treatment of Hepatitis C.¹⁰⁹

In all three pending class action lawsuits, the various departments of corrections have filed similar answers raising parallel affirmative defenses. In response to the complaint filed by inmates, the Minnesota Department of Corrections asserts the following affirmative defenses in its Answer: (1) failure to state a claim under 42 U.S.C. §1983; (2)

¹⁰¹ Federal Bureau of Prisons, Clinical Guidance, *Evaluation and Management of Chronic HCV Infection*, October, 2016.

¹⁰² See *supra* note 78.

¹⁰³ *Id.*

¹⁰⁴ See Amended Complaint pg. 4, *Lignons v. Minnesota Dept. of Corrections*, U.S.D.C. (D. Minn.), Case No. 15-cv-02210-PJS-BRT (2015).

¹⁰⁵ *Id.*

¹⁰⁶ Defendants include not only the Department of Corrections, but also name prison and medical officials in their individual and official capacities.

¹⁰⁷ See *Chimenti v. Pennsylvania Dept. of Corrections*, No. 15-3333, 2016 U.S. Dist. LEXIS 36682 (E.D. Pa. Mar. 21, 2015); *Paszko v. O’Brien*, No. 1-15-cv-12298-NMG (D. Mass. June 10, 2015); *Lignons v. Minnesota Dept. of Corrections*, No. 15-cv-02210-PJS-BRT (D. Minn. filed May 1, 2015).

¹⁰⁸ Greg Dober, *Minnesota DOC Sued Over Failure to Provide New Hepatitis C Treatment Protocol*, Prison Legal News (Oct. 15, 2016), <https://www.prisonlegalnews.org/news/2015/jul/31/minnesota-doc-sued-over-failure-provide-new-hepatitis-c-treatment-protocol/> (last visited January 30, 2017).

¹⁰⁹ See Amended Complaint at 2–3, *Lignons*, *supra* note 4; Complaint at 13, *Paszko*, *supra* note 4; Complaint at 9, *Chimenti*, *supra* note 4.

claims may be barred by the statute of limitations; (3) claims may be barred by qualified immunity and the Eleventh Amendment; (4) sovereign immunity, official immunity, vicarious official immunity, statutory immunity and/or discretionary immunity; (5) such damages and/or injuries are the result of the plaintiff's own conduct and actions and/or actions of third person(s) over whom the Department of Corrections exercises no control; (6) the damages were caused by risks known to or primarily assumed by the plaintiffs; (7) plaintiffs' damages were the result of a natural disease process, pre-existing medical conditions, pre-existing medical disabilities, a superseding cause, an act of nature and/or the act or omission of persons over whom the Department of Corrections does not have control; and (8) the Department's actions or conduct was authorized by law, was reasonable and was taken in good faith.¹¹⁰

In her Answer, Commissioner Higgins O'Brien admits that over 1,500 patients in the custody of the Massachusetts Department of Correction are known to have Hepatitis C.¹¹¹ The Massachusetts Partnership for Correctional Healthcare, LLC's Answer contains similar defenses to those raised by the Minnesota Department of Corrections, listed above. One distinct difference raised in Massachusetts Partnership's answer is that the defendants' actions do not rise to the level of a constitutional violation; and therefore, the plaintiffs cannot recover.¹¹² Defendants specifically note that they were not deliberately indifferent to the serious medical needs of the inmates.¹¹³

In *Chimenti v. Pennsylvania Dept. of Corrections* the Department of Corrections has filed a Motion to Dismiss based on a failure to state a claim and a Motion to Sever. The Department's Motion to Dismiss was granted in part and denied in part. The motion was granted pursuant to certain counts alleged against certain Defendants named in the suit; however, the Motion to Dismiss was denied in all other respects.¹¹⁴ Additionally, the Motion to Dismiss and Sever filed by the Medical Defendants was granted in part and denied in part.¹¹⁵ The granted portion of the motion pertained to the claims asserted in Count I against Defendants Andrew Dancha, Dr. John Hochberg, Dr. Nicholas Scharff, Dr. Thomas Lehman, and Correct Care Solutions, which count has been dismissed against the above referenced Defendants.¹¹⁶

¹¹⁰ See Defendant's Minnesota Department of Corrections Roy, Paulson and Larson's Answer to Plaintiff's First Amended Complaint at 20–22, *Ligons v. Minnesota Dept. of Corrections*, U.S.D.C. (D. Minn.), Case No. 15-cv-02210-PJS-BRT (2015).

¹¹¹ Answer of Defendant Carol Higgins O'Brien, 5, *Paszko v. O'Brien*, U.S.D.C. (D. Mass.), Case No. 1-15-cv-12298-NMG (2015).

¹¹² Massachusetts Partnership for Correctional Healthcare, LLC Answer and Jury Demand to Plaintiff's Complaint at 8–9, *Paszko v. O'Brien*, U.S.D.C. (D. Mass.), Case No. 1-15-cv-12298-NMG (2015).

¹¹³ *Id.*

¹¹⁴ Order dated March 21, 2016, *Chimenti*, *supra* note 4.

¹¹⁵ See *id.* (explaining that count I asserts an Eighth Amendment deliberate indifference claim pursuant to 42 U.S.C. § 1983 against twelve of the Defendants, including all six of the DOC Defendants: the DOC; John Wetzel, the Secretary of the DOC; Paul Noel, Chief Medical Director of the DOC; Oppman; Dreibelbis; and Korszniak).

¹¹⁶ See *id.*

A series of articles have been published bringing national attention to the issue of whether prison authorities have the right to deny prisoners life-saving medical care based on the price tag of treatment.¹¹⁷ Although the price tag of the curing treatment is an issue raised by the inmates, the specific issue that the courts will have to answer in these class action suits, which will set precedent for the Department of Corrections nationwide, is whether the Department of Corrections is required to provide the latest standard of care to avoid a constitutional violation of failing to provide adequate care to inmates.

III. JUDICIAL SOLUTION

A. How Should The Courts Address This Matter?

Section 1983 provides remedies for deprivations of rights established in the Constitution or federal laws.¹¹⁸ 42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...¹¹⁹

To establish a 42 U.S.C. § 1983 claim, a plaintiff must demonstrate (1) that he has been deprived of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law.¹²⁰

All three class action complaints allege, the Department of Corrections, through its officials and medical providers, have violated these prisoners' rights under the Eighth Amendment to be free from cruel and unusual punishment. A prisoner's treatment and the conditions of imprisonment are subject to Eighth Amendment scrutiny.¹²¹ However, courts have held that "the duty to provide a certain level of health care to incarcerated offenders under the Eighth Amendment is a limited one."¹²² "Not 'every ache and pain or medically recognized condition involving some discomfort can support an Eighth Amendment claim.'"¹²³ The United States Supreme Court has found that a

¹¹⁷ See Peter Loftus, *Prisoners Sue Massachusetts for Withholding Hepatitis C Drugs*, THE WALL STREET J. (June 11, 2015), blogs.wsj.com/pharma/lot/2015/06/11/prisoners-sue-massachusetts-for-withholding-hepatitis-c-drugs; see also Shira Schoenberg, *Inmates' Suit Claims Massachusetts Denies Prisoners Hepatitis C Drugs*, MASS LIVE (June 15, 2015), http://www.masslive.com/politics/index.ssf/2015/06/inmates_sue_massachusetts_for.html; see also *Lawsuits Regarding Hep C Treatment*, FREE MUMIA (Sept. 16, 2015), <http://www.freemumia.com/2015/09/lawsuits-regarding-hep-c-treatment/>; see also Greg Dober, *Minnesota DOC Sued Over Failure to Provide New Hepatitis C Treatment Protocol*, PRISON LEGAL NEWS (Aug. 2015), <https://www.prisonlegalnews.org/news/2015/jul/31/minnesota-doc-sued-over-failure-provide-new-hepatitis-c-treatment-protocol>.

¹¹⁸ See *Baker v. McCollan*, 443 U.S. 137, 145, at 3 (1979).

¹¹⁹ 42 U.S.C.A. § 1983 (2015).

¹²⁰ *D.T. v. Independent School Dist.*, 894 F.2d 1176, 1186 (10th Cir.).

¹²¹ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

¹²² *Sarah v. Thompson*, No. 03–2633, 2004 WL 2203585 (6th Cir. Sept.15, 2004).

¹²³ *Id.* (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1372 (7th Cir.1997)).

“deliberate indifference to serious medical needs of prisoners violates the [Eighth] Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency.”¹²⁴ Thus, a plaintiff must show both “deliberate indifference” and a “serious medical need.”¹²⁵ The first test is subjective, the second is objective.¹²⁶

A plaintiff must show that the defendant knew of a substantial risk of serious harm to the plaintiff and still refused medical assistance.¹²⁷ 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.”¹²⁸

[The test for deliberate indifference] affords considerable latitude to prison medical authorities in the diagnosis and treatment of medical problems of inmate patients. Courts will ‘disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment ... [which] remains a question of sound professional judgment.’ *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir.1977). Implicit in this deference to prison medical authorities is the assumption that such an informed medical judgment has, in fact, been made. When, however, prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment, the constitutional standard of *Estelle* has been violated.¹²⁹

Questions of medical judgment, disagreement between an inmate and medical personnel regarding diagnosis and course of treatment, and mere malpractice do not constitute deliberate indifference.¹³⁰ However, a delay in medical treatment may constitute deliberate indifference.¹³¹ A constitutional violation only occurs if the delay results in some “substantial harm” to the patient.¹³²

In addition to “deliberate indifference,” the plaintiff must also show that such indifference was directed to a “serious medical need.”¹³³ Because society does not expect that prisoners will have unqualified access to healthcare, ‘ a prisoner must first

¹²⁴ *Helling v. McKinney*, *supra* note 121, at 32, (quoting *Estelle*, *supra* note 1, at 104).

¹²⁵ *Estelle*, *supra* note 1, at 106.

¹²⁶ See *Parks v. Blanchette*, No. 3:09-CV-604 (VAB), 2015 WL 6755208, at *17 (D. Conn. Nov. 4, 2015); see also *Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d Cir.2006); see also *Handy v. Price*, 996 F.2d 1064, 1066-67 (10th Cir.1993) (quoting *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir.1991)).

¹²⁷ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

¹²⁸ *Cloyd v. Delaware Cnty.*, No. CV 14-4833, 2015 WL 5302736, at *4 (E.D. Pa. Sept. 10, 2015) (quoting *Farmer v. Brennan*, *supra* note 127, at 834).

¹²⁹ *Gomm v. DeLand*, 729 F. Supp. 767, 779 (D. Utah 1990) (quoting *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3rd Cir. 1979)).

¹³⁰ See *Viands v. Laybourn*, No. L:14CV506 GBL/MSN, 2015 WL 5277202, at *4 (E.D. Va. Sept. 8, 2015) (quoting *Davis v. Lester*, 156 F.Supp.2d 588, 598 (W.D.Va.2001)).

¹³¹ See *Smith v. Smith*, 589 F.3d 736, 739 (4th Cir.2009) (citing *Estelle*, *supra* note 1, at 104-05).

¹³² *Viands v. Laybourn*, *supra* note 130

¹³³ *Id.* (citing *Estelle*, *supra* note 1, at 105).

make [a] threshold showing of serious illness or injury” to state a cognizable claim.”¹³⁴ On the other hand, courts have recently held that when deliberate indifference relates to medical care “[t]he requirement of deliberate indifference is less stringent ... than in other Eighth Amendment contexts because the responsibility to provide inmates with medical care does not generally conflict with competing penological concerns.”¹³⁵ Generally, deliberate indifference to serious medical needs may be manifested in two ways: “when prison officials deny, delay, or intentionally interfere with medical treatment, or ... by the way in which prison physicians provide medical care.”¹³⁶ The Tenth Circuit has found that prison officials may be liable for an Eighth Amendment violation for “indifference ... manifested ... in their response to the prisoner’s needs or by ... intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed.”¹³⁷

“Serious medical needs” are those diagnosed by a physician as mandating treatment or those that are so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.¹³⁸ Courts have found a serious medical need “if the failure to treat the prisoner’s condition could result in further significant injury or [if] [there] [is] the ‘unnecessary and wanton infliction of pain’” it may qualify as a serious medical need.¹³⁹ Indications may include “[t]he 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.”¹⁴⁰

In addition to demonstrating that the medical need is objectively serious, the plaintiff must also show that the delay in the provision of medical care resulted in objectively “substantial harm” in order to establish an Eighth Amendment violation.¹⁴¹ “The

¹³⁴ *Miller v. Ramineni*, 9:14-CV-1351 (N.D. New York, Feb. 29, 2016) (citing *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir.2003) (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)); see *Wilson v. Prison Health Services*, 406 Fed. App’x 671 (unpublished opinion) (“[P]risoners do not have a constitutional right to limitless medical care, free of the cost constraints under which law-abiding citizens receive treatment.”).

¹³⁵ See *Holliday v. Naku*, 2009 U.S. Dist. LEXIS 55757, at *5 (E.D. Cal. June 26, 2009) (citing *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir.1991).

¹³⁶ See *Scanlan v. Tran*, No. 1:15-CV-00282-LJO, 2015 WL 5178387, at *5 (E.D. Cal. Sept. 4, 2015) (citing *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir.1988)); see also *Smith v. Carpenter*, 316 F.3d 178, 183-84 (2d Cir.2003) (quoting *Salahuddin*, *supra* note 126, at 279-80) (describing that when assessing the objective prong, the Court must determine (a) “whether the prisoner was actually deprived of adequate medical care,” and (b) “whether the inadequacy in medical care is sufficiently serious” to constitute a constitutional violation”).

¹³⁷ See *Brooks v. Oba*, No. 13-CV-02894-CBS, 2015 WL 4036189, at *4 (D. Colo. July 1, 2015) (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir.2014)).

¹³⁸ See *id.* at 1202 (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir.1980)).

¹³⁹ See *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1991) (quoting *Estelle*, *supra* note 1, at 104).

¹⁴⁰ *Scanlan*, *supra* note 136, at *4 (citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir.1990)).

¹⁴¹ See *Webb v. Hamidullah*, 281 Fed. App’x. 159, 166-67 (4th Cir.2008) (unpublished decision); see also *Shabazz v. Prison Health Servs.*, No. 3:10cv190, 2011 WL 2489661, at *5-6 (E.D.Va. Aug.

substantial harm requirement may be satisfied by lifelong handicap, permanent loss, or considerable pain.”¹⁴²

Courts have recently upheld the notion that Hepatitis meets the requirement of being an objectively serious medical condition.¹⁴³ Therefore, the main hurdle that plaintiffs will face in these recent suits is establishing the subjective test of deliberate indifference. The Sixth Circuit has recently held that for a corporation to act with the requisite level of subjective intent, it must do so through its policies and customs.¹⁴⁴ This notion was directly applied in the context of a correction facility. The court found that “[p]laintiff must allege that the employees acted in accordance with some official policy or custom of [the Department of Corrections], or that [the Department of Corrections] encouraged the specific misconduct or in some way directly participated in it.”¹⁴⁵ Although the case was dismissed for failure to state a claim, it was filed in the context of an inmate alleging an Eighth Amendment violation for the failure of a correctional facility to provide the drug Sovaldi to treat the inmate’s Hepatitis C.

The most relevant finding of the Sixth Circuit Court is as follows:¹⁴⁶

[t]he question is not whether a prisoner is receiving the medication or treatment of his choosing, or whether he is receiving the best health care available for his condition. Instead, the inquiry for Eighth Amendment purposes is whether the course of treatment he is receiving is “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.”¹⁴⁷ The relevant inquiry to determine whether the Defendant provided grossly inadequate care is “whether a reasonable doctor ... could have concluded his actions were lawful.”¹⁴⁸

Although the representatives in the class actions lawsuits have set forth advanced stages of the virus, recent case law may foreclose relief to those who cannot show such advanced stages.¹⁴⁹ The Tennessee Department of Corrections recently prevailed over an inmate’s claim alleging that he was denied medical care, even though the facility was aware that he tested positive for the Hepatitis C.¹⁵⁰ The plaintiff in that case was diagnosed with Hepatitis C, Genotype 1.¹⁵¹ The court focused on the primary indicator of whether treatment of Hepatitis C is warranted as being the regular and consistent monitoring

9, 2011).

¹⁴² *Shabazz*, *supra* note 141, at *6.

¹⁴³ *Garrison v. Corr. Corp. of Am.*, No. 1:15 CV 177, 2015 U.S. Dist. LEXIS 87309, at *3 (N.D. Ohio July 6, 2015).

¹⁴⁴ *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978).

¹⁴⁵ *Garrison*, *supra* note 143, at *3 (citing *Monell*, *supra* note 144, at 690–91).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (quoting *Terrance v. Northville Regional Psychiatric Hosp.*, 286 F.3d 834, 844 (6th Cir.2002)).

¹⁴⁸ *Id.*

¹⁴⁹ *Parks*, *supra* note 126, at 306 (explaining that these inquiries are highly fact-specific).

¹⁵⁰ *Shabazz v. Schofield*, No. 3:13-0091, 2015 U.S. Dist. LEXIS 113082, at *1212 (M.D. Tenn. Aug. 26, 2015).

¹⁵¹ *Id.* at *2.

of liver enzyme levels, specifically the SGOT/AST and SGPT/ALT levels.¹⁵² Both of these tests indicate specific liver enzyme production or a lack thereof.¹⁵³ The Tennessee Department of Corrections implemented a policy where all inmates in custody, who have been diagnosed with Hepatitis C, are monitored for increased liver enzyme levels on a regular basis.¹⁵⁴ They are also assessed by physical exam to evaluate for any symptoms at regularly scheduled intervals.¹⁵⁵

The plaintiff's medical records show that lab work has been conducted at least thirteen times since January, 2013.¹⁵⁶ The latest lab work revealed that the plaintiff's liver was functioning normal, and in the same range as individuals who did not have Hepatitis C.¹⁵⁷ Additionally, the plaintiff's liver enzyme levels indicated that his liver was not in active cirrhosis.¹⁵⁸ Since the plaintiff's Hepatitis C was stable and he was not in any way in an acute phase, the court found that the Department's general policy of monitoring enzyme levels at least every three months for all inmates diagnosed with Hepatitis C was sufficient, because the policy was consistent with generally accepted medical practices, regardless of whether the patient was incarcerated or not.¹⁵⁹

The *Garrison* case limited relief available to an inmate and did not require the Tennessee Department of Corrections to provide the latest drug breakthrough to all inmates, unless they could show the medical standard of care for the level of advanced virus they have. This holding is consistent with *Graham v. Wright* where a prisoner complained of delay in providing treatment for Hepatitis C.¹⁶⁰ In *Graham* the court held that the objective element of deliberate indifference standard must be satisfied by "harm that resulted from the delay."¹⁶¹

Further, the CDC has found that not everyone requires treatment or can benefit from treatment.¹⁶² This determination should be made by after being checked by a doctor experienced in treating chronic Hepatitis C.¹⁶³ He or she can determine the most appropriate medical care.¹⁶⁴ Decisions about starting treatment are based on many factors, such as the type of virus, the condition of the liver, and other health conditions.¹⁶⁵

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Shabazz*, *supra* note 141 at *2.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See Graham v. Wright*, No. 01 Civ. 9613 (NRB), 2004 U.S. Dist. LEXIS 15738, at *5 (S.D.N.Y. Aug. 10, 2004).

¹⁶¹ *Id.* at *7.

¹⁶² *See Hepatitis C and Baby Boomers (1945-1965)*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 27, 2015), <http://www.cdc.gov/knowmorehepatitis/LearnMore.htm>.

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*; *see also* *Watson v. Wright*, No. 08-CV-00960(A)(M), 2011 U.S. Dist. LEXIS 30874, at *10 (W.D. N.Y. Jan. 11, 2011) (finding that many courts in this circuit have held that

In expanding beyond a determination of each individual on a case-by-case basis, the issue of adequate medical care versus the community standard of medical care has directly been addressed across the jurisdictions. In October 2015, the United States District Court for the Central District of California specifically found that “the Eighth Amendment does not require optimal medical care or even medical care that comports with the community standard of medical care.”¹⁶⁶ This same concept has been upheld in the District of Nevada by finding “[o]nly where the prison’s chosen course of treatment is ‘medically unacceptable under the circumstances’ are the officials’ medical choices constitutionally infirm.”¹⁶⁷

Additional case law from the Eastern District of Wisconsin¹⁶⁸ has held:

[t]o establish deliberate indifference, the prisoner must demonstrate “that the treatment he received was ‘blatantly inappropriate,’” *id.* (quoting *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir.2005)); or, stated another way, that the treatment decision “represents so significant a departure from accepted professional standards or practices that it calls into question whether the [medical professional] was actually exercising his professional judgment,” *id.* (citing *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir.2011) and *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir.2008)); *Gayton*, 593 F.3d at 622–23. (Emphasis added).

However, because there is more than one treatment option for Hepatitis C, which may be determined based on a number of factors presented by each individual, New York courts have held that determinations specifically pertaining to the treatment of Hepatitis C and compliance with “[Department of Correctional Services] Guidelines, reflect medical judgments, not ‘deliberate indifference’ under the Eighth Amendment.”¹⁶⁹ Additionally, the Third Circuit recently held that in making the determination of prescribing certain drugs or treatment, the Eighth Amendment does not completely bar medical professionals and healthcare administrators from considering cost as a factor when evaluating treatment options.¹⁷⁰

“determinations as to whether to treat Hepatitis-C., pursuant to [Department of Correctional Services] Guidelines, reflect medical judgments, not ‘deliberate indifference’ under the Eighth Amendment”).

¹⁶⁶ *Dancy v. Johnson*, No. EDCV 15-1463-AG (JEM), 2015 U.S. Dist. LEXIS 142034, at *5 (C.D. Cal. Oct. 19, 2015).

¹⁶⁷ *Pattison v. Nevada*, No. 3:14-CV-00020-MMD-VPC, 2015 U.S. Dist. LEXIS 127697, at *3 (D. Nev. Sept. 23, 2015).

¹⁶⁸ *Locke v. Ritter*, No. 14-CV-1143-JPS, 2015 U.S. Dist. LEXIS 131504, at *6 (E.D. Wis. Sept. 29, 2015) (emphasis added).

¹⁶⁹ *Watson*, *supra* note 165, at *10.

¹⁷⁰ *Viera v. Williams*, No. 1:13-CV-02424, 2015 U.S. Dist. LEXIS 136693, at *5 (M.D. Pa. Oct. 7, 2015) (citing *Winslow v. Prison Health Servs.*, 406 F. App’x 671, 674 (3d Cir.2011)).

IV. AN ANALYSIS OF THE WYOMING STATE POLICY AND POTENTIAL IMPLICATIONS

This section will provide an illustration of the Wyoming Department of Corrections health policy as it relates to Hepatitis C, and is intended only to serve as a practical example. The Wyoming Department of Corrections currently has a policy and procedure that provides for health screens and a health appraisal of all inmates. Policy 4.305(II) provides:

- A. Health Screens. It is the policy of the WDOC that all inmates receive an intake health screen performed by health-trained or qualified health care personnel upon arrival to WDOC facilities and that all findings of these health screens are recorded on a screening form approved by the health authority.
- B. Health Appraisal. It is the policy of the WDOC that all inmates (excluding intra-system transfers) receive a comprehensive health appraisal, unless there is documented evidence of a health appraisal within the previous ninety (90) days.¹⁷¹

Under this policy, health screens shall be performed within the first few hours of arrival.¹⁷² The screenings should include an inquiry into any past history of serious infectious communicable illnesses and medications, current illnesses and health problems which specifically include communicable diseases, encompassing Hepatitis C.¹⁷³ Under the requirements for the health appraisal, the facility staff and the qualified health care professionals shall perform laboratory and/or diagnostic tests to detect communicable diseases within seven days of arrival.¹⁷⁴

The Wyoming Department of Corrections has even gone one step further and implemented an Exposure Control Plan to protect staff members and inmates from blood-borne pathogens.¹⁷⁵ The plan identifies and addresses the following criteria: “individuals and types of contact, precautions, protection, handling, housekeeping, proper disposal and training of individuals.”¹⁷⁶ This plan is specifically designed to meet federal, state and local regulations and guidelines with an emphasis on the Wyoming Occupational Safety and Health Rules and Regulation as they apply to correctional facilities.¹⁷⁷ This policy further requires that the contracted medical service providers create and implement procedures to comply with this policy, OSHA standards and the Department of Correction’s standards. Lastly, the Department of Corrections has

¹⁷¹ WYOMING DEPARTMENT OF CORRECTIONS, POLICY AND PROCEDURE #4.305, at 2 (July 29, 2016), corrections.wy.gov/Media.aspx?mediaId=43.

¹⁷² *Id.* at 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 6.

¹⁷⁵ WYOMING DEPARTMENT OF CORRECTIONS, POLICY AND PROCEDURE #3.210 (December 1, 2016), corrections.wy.gov/Media.aspx?mediaId=537

¹⁷⁶ *Id.* see also WYOMING DEPARTMENT OF CORRECTIONS, POLICY AND PROCEDURE #4.303, at 3 (Nov. 15, 2015), corrections.wy.gov/Media.aspx?mediaId=41; see also WYOMING DEPARTMENT OF CORRECTIONS, POLICY AND PROCEDURE, *supra* note 161, at 2.

¹⁷⁷ *Id.* at 2.

implemented a policy addressing the management of Hepatitis C, including procedures for when and where inmates are to be tested/screened and under what conditions inmates are to be separated from the general population.¹⁷⁸ The only concerning implication is the testing of inmates. Under Policy and Procedure # 4.312(B)(5), inmates shall be tested *if* they show symptoms associated with the disease; whereas the testing for HIV is mandatory during the initial screening of all inmates.¹⁷⁹

CONCLUSION

Hepatitis C poses a substantial risk not only to prisoners, but also to the general population. Statistics show that at least “95% of all state prisoners will be released from prison at some point.”¹⁸⁰ However, just as any medical professional would examine each patient diagnosed with cancer individually, the same concept should be applied to those diagnosed with Hepatitis C. Because the disease affects each person differently, and advances at different intervals in every person diagnosed, medical care should be provided to inmates just as it would be to the general community population. In the event that the newly approved curing treatment is found to be the accepted professional standard or practice of care for all stages of the disease, then such treatment would be required to be provided to not only inmates diagnosed with Hepatitis C, but also to all individuals contracted with Hepatitis C. However, at this time, this is not the current practice or professional standard. Because a treating physician evaluates numerous factors to determine the appropriate method of treatment, including the cost of such treatment, the advanced stage of the disease, and each patient on a case-by case bases; the current class actions should not succeed in seeking to have the latest development in drugs for treating Hepatitis C made available to every prison inmate. Finally, because the latest recognized standard of care drugs are not required to provide “adequate” medical treatment to satisfy the Eight Amendment, absent a diagnosis of an advanced stage of Hepatitis C, the states’ Department of Corrections should not be mandated to provide this costly treatment to inmates, and the class actions should not prevail.

¹⁷⁸ See WYOMING DEPARTMENT OF CORRECTIONS, POLICY AND PROCEDURE #4.312, at 1 (July 29, 2015), corrections.wy.gov/Media.aspx?mediaId=511.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ Timothy Hughes & Doris James Wilson, *Reentry trends in the United States*, BUREAU OF JUSTICE STATISTICS (Oct. 27, 2016), <http://www.bjs.gov/content/reentry/reentry.cfm>.