



2005

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Recommended Citation

Laura D. Smolowe, *Rejecting the Cosmetic Label to Revive the Eighth Amendment*, 23 YALE L. & POL'Y REV. (2005).
Available at: <https://digitalcommons.law.yale.edu/ylpr/vol23/iss1/18>

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Rejecting the Cosmetic Label to Revive the Eighth Amendment

Laura D. Smolowe[†]

Brock v. Wright, 315 F.3d 158 (2d Cir. 2003).

In December 1998, Vincent Brock, a New York state prisoner, suffered a serious knife injury to his face. While the wound healed, the scar formed a keloid,¹ which brought daily “throbbing, burning pain.”² This pain could be “more fairly characterized as . . . *chronic*” than extreme,³ but it nonetheless interrupted such common and necessary activities as brushing teeth, eating, yawning, and smiling. Because of his inability to clean his teeth properly, Mr. Brock also suffered significant tooth decay.⁴ Although he informed medical staff on “numerous occasions” of his problems, and several doctors recommended steroid injections or other treatment,⁵ Mr. Brock never received the advised care.

The New York Department of Correctional Services (“DOCS”) refused to treat Mr. Brock because they considered his condition “cosmetic,”⁶ which to them meant medically unnecessary. The DOCS argued that the ““medical evidence does not portray plaintiff’s scar as an extremely painful one or as an urgent condition that may result in degeneration.””⁷ Even though this keloid caused Mr. Brock pain and trouble performing everyday functions, his condition was framed as “cosmetic” and thereby dismissed.⁸

Mr. Brock is not alone in his experience. In fact, the designation of a medical condition as “cosmetic” has become a common tool for denying

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1. *Brock v. Wright*, 315 F.3d 158, 161 (2d Cir. 2003). Keloids are “abnormal overgrowths of fibrous tissue that, when triggered by a skin injury, typically extend beyond the location of the original wound. They are elevated above adjacent skin and are discolored. They may continue to grow for years [and can] . . . cause disfigurement . . . ‘constant[] pain, local irritation, and paresthesias.’” *Id.*

2. *Id.*

3. *Id.* at 163.

4. *Id.* at 161.

5. *Id.*

6. *Id.* at 161-62.

7. *Id.* at 163 (citation omitted).

8. *Id.*

prisoners medical care.⁹ Correctional facilities frequently create categories of medical conditions in order to restrict access to treatment: “medically necessary” issues usually warrant care; “cosmetic” issues definitively do not. Subsequently, prisoners with “cosmetic” conditions are categorically denied treatment, and courts often accept these designations without question.¹⁰

This distinction fails to identify accurately who needs care.¹¹ The cosmetic label is often used, as it was with Mr. Brock’s painful keloid,¹² to avoid treating minor and moderate illness, to avoid treating chronic pain, and, indeed, to avoid an individualized medical determination whether treatment is necessary. When the label becomes a substitute for an individualized examination, conditions that deserve treatment can be overlooked.

This Case Comment discusses a recent Second Circuit opinion, *Brock v. Wright*,¹³ which rejects the cosmetic label as a mechanism for blanket denials of care, and demands individualized evaluations for prisoners’ non-life-threatening, chronic, and less severe medical conditions. *Brock* stands in stark contrast to approaches adopted by certain courts both within the Second Circuit and around the country that permit conditions to be boxed into the “cosmetic” category, thereby allotting treatment only to extreme medical issues. This Comment argues that the *Brock* approach is more consistent both with Supreme Court precedent and the values of a humane society, that the Second Circuit should confirm its endorsement of this approach, and that the Supreme Court should clarify its own vision of prison medical care by explicitly affirming the *Brock* framework.

9. Insurance companies also often deny coverage for “cosmetic” conditions. *See, e.g.*, *Morales v. Pentec, Inc.*, 749 A.2d 47, 57 (Conn. App. Ct. 2000) (noting that the Pentec insurance plan “excluded . . . cosmetic . . . medical expenses . . . [even] reconstructive cosmetic surgery”).

10. *See, e.g.*, *Farmer v. Moritsugu*, 163 F.3d 610, 612 (D.C. Cir. 1998) (leaving unchallenged a prison policy that equated cosmetic with medically unnecessary treatment, which would be automatically denied); *Hudgins v. DeBruyn*, 922 F. Supp. 144, 148 (S.D. Ind. 1996) (same); *Smith v. Alves*, 725 N.Y.S.2d 404 (N.Y. App. Div. 2001) (discussing the New York Department of Corrections’s denial of treatment to an inmate on the grounds that his condition was cosmetic); *Allah v. White*, 663 N.Y.S.2d 306 (N.Y. App. Div. 1997) (same); *see also Petrazzoulo v. U.S. Marshals Serv.*, 999 F. Supp. 401, 407 (W.D.N.Y. 1998) (using the line between “medical necessity” and “merely cosmetic” to evaluate whether a prisoner should receive dentures).

11. A cosmetic condition, narrowly defined, is one that affects only appearance, not health or pain, and starts with a “normal” patient who simply wants to change or improve his or her looks. Other definitions of “cosmetic,” however, can encompass a broader range of conditions that might nonetheless need treatment. Interview with John Persing, Chief of Plastic Surgery, Yale University School of Medicine, in New Haven, Conn. (Apr. 20, 2004). Presumably, the DOCS considered keloids such as Mr. Brock’s to be cosmetic because they are superficial conditions that, while painful and disruptive, affect appearance, are not life-threatening, and seldom pose risks of future significant deterioration. Because serious conditions such as Mr. Brock’s are often termed cosmetic, the cosmetic label itself should not be sufficient to show that care is unnecessary.

12. Other examples of serious conditions denied treatment because of their designation as “cosmetic” include the case of a prisoner whose crushed nose allowed him to breathe out of only one nostril. *See Wells v. Whitfield*, No. 2:00-CV-0396, 2003 U.S. Dist. LEXIS 12982 (N.D. Tex. July 19, 2003).

13. *Brock*, 315 F.3d 158.

I. *BROCK v. WRIGHT* AND THE CONFLICT OVER THE SERIOUS MEDICAL NEEDS STANDARD

In 1976, the Supreme Court explicitly affirmed that the Constitution requires prisons to provide decent medical care to inmates by holding that “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment’s prohibition on cruel and unusual punishment.¹⁴ The Supreme Court’s standard “embod[ies] both an objective and a subjective prong.”¹⁵ To prove the subjective prong the prisoner must demonstrate that the “charged official . . . act[ed] with a sufficiently culpable state of mind” in disregarding the prisoner’s serious medical need.¹⁶ To prove the objective prong the prisoner must show that he or she has a serious medical need—that the medical condition is “sufficiently serious.”¹⁷

While the language of the Eighth Amendment¹⁸ is vague, *Estelle v. Gamble* went far in interpreting it as a protector of “serious medical needs,” emphasizing that the Amendment “embodie[d] ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”¹⁹ The Constitution, said the Court, “proscribes more than physically barbarous punishments,” instead prohibiting all those which are incompatible with “the evolving standards of decency that mark the progress of a maturing society.”²⁰ Indeed, the Supreme Court explicitly rejected the notion that only the most severe ailments warrant care:

In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that “(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the

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

15. *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994).

16. *Id.* Courts have held that the standard to prove deliberate indifference is higher than negligence, see, e.g., *Estelle*, 429 U.S. at 105-06, such that general malpractice does not give prisoners a constitutional right to a remedy. The deliberate indifference prong itself is a large barrier to prisoners’ proving their cases. Judge Wayne Justice in the Southern District of Texas, for example, expressed “deep[] disturb[ance]” that, because of precedent, he could not find “systemic deficiencies” and “grossly inadequate medical and psychiatric treatment” in the Texas prison system to violate the deliberate indifference standard. *Ruiz v. Johnson*, 154 F. Supp. 2d 975, 987-88 (S.D. Tex. 2001). This Comment, however, is limited to the serious medical needs prong, and it is there that prisons and courts select the underlying ailments that warrant treatment in the first place.

17. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

18. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

19. *Estelle*, 429 U.S. at 102 (citations omitted).

20. *Id.* (citations omitted). As the District of Massachusetts further explained: “The Constitution does not protect this right because we are a nation that coddles criminals. Rather, we recognize and respect this right because we are, fundamentally, a decent people, and decent people do not allow other human beings in their custody to suffer needlessly from serious illness or injury.” *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

deprivation of his liberty, care for himself.”²¹

Accordingly, twenty-seven years later in *Brock v. Wright*,²² Judge Calabresi followed the Supreme Court’s directive that potential serious medical needs include “less serious cases” by evaluating Mr. Brock’s case under an interpretation of *Estelle*’s objective prong that prioritized the elimination of any unnecessary pain and suffering, and reversed the DOCS and the district court to hold that the keloid could pose a serious medical need.²³ In the process, the court became the first to reject the distinction between “cosmetic” and “medically necessary” conditions as a criterion sufficient to triage some to care and others to none: “Merely because a condition might be characterized as ‘cosmetic’ does not mean that its seriousness should not be analyzed using the kind of factors enumerated in our jurisprudence.”²⁴ Such factors might include “(1) whether a reasonable doctor or patient would perceive the medical need in question as ‘important and worthy of comment or treatment,’ (2) whether the medical condition significantly affects daily activities, and (3) ‘the existence of chronic and substantial pain.’”²⁵

Brock did not hold that every ailment in every situation is of constitutional proportions,²⁶ but Judge Calabresi clearly rejected an approach to interpreting the “serious medical needs” standard that would lump some conditions into categories—like “cosmetic”—that would automatically be denied care. *Brock* held that just because a condition is less severe does not mean prison staff can substitute the “cosmetic” label for an individualized evaluation that would determine whether treatment was actually needed. If treatment were necessary, the fact that the prisoner’s condition might also be cosmetic in nature would not affect his or her right to treatment. In other words, in the Second Circuit, “cosmetic” would no longer automatically equal “medically unnecessary.”²⁷

21. *Estelle*, 429 U.S. at 103-04 (citation omitted).

22. *Brock*, 315 F.3d 158.

23. Controversy over whether a condition is a serious medical need primarily surrounds less extreme medical conditions. With severe ailments, the Eighth Amendment issues usually focus on the deliberate indifference prong because the condition is obviously serious. It is when officials know of and disregard a less extreme medical need that issues surrounding the definition of a serious medical need most often arise. As Judge Calabresi pointed out, however, deliberate indifference to less extreme conditions is also unacceptable: “We would no more tolerate prison officials’ deliberate indifference to the chronic pain of an inmate than we would a sentence that required the inmate to submit to such pain.” *Id.* at 163.

24. *Id.* at 164 n.3.

25. *Id.* at 162 (citations omitted).

26. For example, in an unpublished summary order issued after *Brock*, the Second Circuit held that a prisoner’s wrist condition, self-diagnosed as carpal-tunnel syndrome and self-characterized as “paralytic,” was not a serious medical need. The court reached this conclusion not because such a condition could never pose a serious medical need or because it failed automatically to fit into a rigid category of serious medical needs, but because the facts did not support his allegations. *Green v. Senkowski*, 100 Fed. Appx. 45, 46 (2d Cir. 2004). Mr. Green, the prisoner, was only ever prescribed “mild, over-the-counter pain medication,” and the doctor, after an individualized evaluation, stated that Mr. Green had “no medical condition affecting his wrists” at all. *Id.* at 47.

27. Although other circuits also allow less severe ailments to pose serious medical needs, the

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A. *Tension Within the Second Circuit*

With its articulation of the serious medical needs standard, *Brock* entered an internal circuit split. Indeed, while Judge Calabresi's decision in *Brock* was the first to reject the cosmetic category as a means of automatically precluding certain conditions from serious medical needs, the Second Circuit had long been asserting two different interpretations of the standard. One envisions the standard as requiring a condition of impending death, degeneration, or extreme pain, while those cases in line with the *Brock* interpretation explicitly reject such intense conditions as the constitutional floor. Yet, the Second Circuit has affirmed each at times.

Soon after *Estelle*, the Second Circuit held in *Todaro v. Ward* that it understood the Supreme Court's decision to mean that "the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain. To assert otherwise would be inconsistent with contemporary standards of human decency."²⁸ Between *Todaro* and *Brock*, the Second Circuit issued several opinions holding that, under the Eighth Amendment, a serious medical need does not describe only the most extreme medical conditions.²⁹ With *Brock*, the Second Circuit thus strongly affirmed a line of cases holding that less severe conditions can also pose serious medical needs.

In 1994, however, the court introduced an alternate, more restrictive, interpretation of the "serious medical needs" standard that strays from the constitutional understanding presented in *Estelle*. In *Hathaway v. Coughlin*, the court held that a serious medical need "contemplates 'a condition of urgency,

Second Circuit is the first to challenge overtly the equation of cosmetic with medically unnecessary. Thus far, other courts wishing to grant medical treatment define cosmetic to exclude the condition at issue. The District of Massachusetts, for example, in holding Gender Identity Disorder ("GID") to be a serious medical need, stated that "sex reassignment is not 'experimental,' 'investigational,' 'elective,' 'cosmetic,' or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID." *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 167 (D. Mass. 2002) (citations omitted) (emphasis added). By insisting that GID fall outside the cosmetic label, the District of Massachusetts could strike down a rigid prison policy that considered the condition cosmetic and "effectively prohibit[ed]" appropriate treatment and "individualized medical evaluation." *Id.* at 161-62. Nonetheless, the court accepted the divide between medically necessary and cosmetic care.

While the District of Massachusetts's strategy can be effective, I would submit that Calabresi's innovative rejection of cosmetic as medically unnecessary is preferable. Conditions can be at once cosmetic and medically necessary. It is the presence of medical necessity, not the absence of cosmetic effect, that is key for treatment.

28. *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977). *Todaro* affirmed a district court's decision that a prison clinic's policies causing "delays of weeks and months in the treatment of glaucoma, chest pains, vaginal blood clots, liver disease, eye infections, hypertension and countless other serious ailments," *id.* at 53 n.6, violated the Eighth Amendment.

29. *See, e.g., Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (holding that a prisoner denied the proper eyeglass prescription had a serious medical need because, even though the "consequences" of his condition "d[id] not inevitably entail pain," they could "readily cause a person to fall or walk into objects").

one that may produce death, degeneration, or extreme pain.”³⁰ Since then, a line of cases has tracked this language. In *Morales v. Mackalm*, for example, the court held that Mr. Morales’s “constant body aches, dry throat, constant urination and severe body attacks (which cause his body to twist to [the] left side), dizziness, eye irritation, fogging of his eyes, and stomach problems” could constitute a serious medical need because his allegations of “constant, unremediated pain” fit the criteria of a condition that “may produce death, degeneration, or extreme pain.”³¹

The result of this intra-circuit vacillation has been confusion over the standard, with courts employing each one on an *ad hoc* basis. Moreover, although the Second Circuit—even when employing the restrictive criteria—has often accepted the conditions at issue as serious medical needs,³² the lower federal and state courts within the Second Circuit frequently use those same restrictive criteria to deny medical care as a matter of law. For example, in *Copeland v. Warden*³³ and *DiNoto v. Warden*,³⁴ the Connecticut Superior Court held a hip condition in the first case and gastrointestinal and foot problems in the second to fall short of serious medical needs because they failed to present “a condition of urgency, one that may produce death, degeneration or extreme pain.”³⁵

Some cases have attempted to resolve these two competing standards, one requiring a showing of extreme suffering and the other not, by combining them. For example, in *Chance v. Armstrong*, the Second Circuit held that Mr. Chance’s oral and dental problems, including a severe overbite, painful cavities, and rotting teeth, could pose serious medical needs because they caused “extreme pain” and “deterioration.”³⁶ This language seems to imply that it is the extreme pain and degeneration that made the claim cognizable; indeed, *Chance* even quoted the restrictive standard from *Hathaway*.³⁷

On the other hand, the *Chance* case also suggested that the restrictive standard did not govern the Eighth Amendment inquiry. The court listed other

30. *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (quoting *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)).

31. *Morales v. Mackalm*, 278 F.3d 126, 129-32 (2d Cir. 2002) (citations omitted). Similarly, in *Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000), the court found a cavity to be a serious medical need because it “will degenerate with increasingly serious complications if neglected over sufficient time.” In other words, Mr. Harrison’s condition met the “degeneration” criteria of *Hathaway*.

32. See, e.g., *Morales*, 278 F.3d 126; *Harrison*, 219 F.3d 132; *Hathaway*, 37 F.3d 63.

33. No. CV 010449805S, 2002 Conn. Super. LEXIS 3905 (Conn. Super. Ct. Dec. 3, 2002).

34. No. CV 000444319, 2001 WL 1516754 (Conn. Super. Ct. Nov. 8, 2001).

35. *Copeland*, 2002 Conn. Super. LEXIS 3905, at *12; *DiNoto*, 2001 WL 1516754, at *2; see also *Harris v. Warden*, No. CV 000435062S, 2000 WL 1196348, at *3 (Conn. Super. Ct. July 28, 2000) (holding that a sore and deformed leg was not a serious medical need because the condition was “not a life-threatening one,” nor was there “evidence that it creates the kind of excruciating and persistent pain that supports a finding of a constitutional deprivation”).

36. *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (Calabresi, J.).

37. See *id.* at 702.

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factors, later mentioned in *Brock*, that may be considered in evaluating the seriousness of a medical condition, including 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.”³⁸ The court then emphasized that the listed factors are “not the only ones that might be considered,”³⁹ implying that a proper, serious medical needs inquiry is not limited even to chronic or substantial pain and noting the lack of prescription eyeglasses in *Koehl v. Dalsheim*⁴⁰ as a fellow serious medical need.⁴¹

Though *Chance* presented the two interpretations side-by-side, the more expansive vision of a serious medical need is fundamentally in conflict with that requiring death, degeneration, or extreme pain. Under the *Brock* interpretation, patients like Mr. Brock are entitled to medical care; under the *Hathaway* interpretation, they are not.⁴²

Indeed, *Brock* explicitly rejected the more restrictive standard. Although Judge Calabresi’s opinion in *Brock* did not quote the *Hathaway* standard, it overruled the district’s court’s belief that “only ‘extreme pain’ or a degenerative condition would suffice to meet the legal standard.”⁴³ Calabresi thus directly rejected *Hathaway*’s extreme pain and degeneration criteria.⁴⁴ He did not lay out a strict test defining serious medical needs for courts and prison staff, but his point was clear: We may not know exactly what the constitutional floor for serious medical needs is, but, in line with *Estelle*, we do know that it is *not* death, degeneration, or extreme pain. A condition like Mr. Brock’s should not automatically fail to meet the standard for a serious medical need simply because it might be termed cosmetic.⁴⁵

38. *Chance*, 143 F.3d at 702.

39. *Id.* at 703.

40. 85 F.3d 86 (2d Cir. 1996).

41. 143 F.3d at 703.

42. Like *Brock*, *Chance v. Armstrong* was written by Judge Calabresi. *Chance* can thus be read as a transition opinion, helping the Second Circuit move from *Hathaway*’s restrictive to *Brock*’s expansive “serious medical needs” standard. To that end, in *Chance* Judge Calabresi omitted the “death” criterion when quoting the *Hathaway* standard: “The standard for Eighth Amendment violations contemplates ‘a condition of urgency’ that may result in ‘degeneration’ or ‘extreme pain.’” *Chance*, 143 F.3d at 702 (quoting *Hathaway*, 37 F.3d at 66). Nevertheless, because *Chance* incorporated both the restrictive and expansive interpretations, it left open the question of which interpretation the Second Circuit relied upon. Moreover, even without the death criterion, prisoners like Mr. Brock could be denied care under the “extreme pain” and “degeneration” criteria, as evidenced by the district court’s grant of summary judgment for DOCS in *Brock*, 315 F.3d at 160, 163.

43. *Brock*, 315 F.3d at 163.

44. By implication, Calabresi also rejects the life-threatening criterion, for if conditions neither degenerative nor extremely painful may constitute serious medical needs, they surely need not be fatal; certainly, Mr. Brock’s keloid was not life-threatening.

45. *Brock*’s rejection of the cosmetic label generates new questions as it resolves others. However legally and morally problematic the use of the “cosmetic” label to deny care may be, at least it was a means, albeit an inaccurate one, that prison staff and courts could use to determine the seriousness of a

B. *Tension Around the Country*

This intra-Second Circuit debate over the “serious medical needs” standard reflects a tension throughout the entire country about how to interpret that standard. Most courts have been reluctant to define “serious medical needs” concretely,⁴⁶ and there are conflicting interpretations over the broader meaning of the standard.

Some courts, according closely with Judge Calabresi’s *Brock* and following the Supreme Court’s language in *Estelle*, assert that less severe conditions should not be barred categorically from constituting serious medical needs. For example, the Ninth Circuit has noted that denials of medication for Gender Identity Disorder based on a “blanket rule” rather than an “individualized medical evaluation” would be unconstitutional.⁴⁷

On the other hand, some courts stand closer to *Hathaway*’s restrictive criteria. The Northern District of Texas, for example, has used the “serious medical needs” standard⁴⁸ in order to allow prisons to deny access to care as a matter of law. In *Wells v. Whitfield*,⁴⁹ the court considered the case of a prisoner whose nose was crushed in a fight, and who subsequently retained only one functioning nostril and suffered from nosebleeds and difficulty breathing. The court held that his request for reconstructive surgery was not a serious medical need because such surgery would be cosmetic: “A failure to relieve these symptoms does not constitute the unnecessary and wanton infliction of pain necessary to rise to a constitutional dimension. Further,

medical need. If, as *Brock* suggests, cosmetic conditions may or may not pose serious medical needs, how is the determination to be made? *Brock* suggests that the answer lies at least in an individualized medical evaluation, and the consideration perhaps of such factors as “(1) whether a reasonable doctor or patient would perceive the medical need in question as ‘important and worthy of comment or treatment,’ (2) whether the medical condition significantly affects daily activities, and (3) ‘the existence of chronic and substantial pain.’” *Brock*, 315 F.3d at 162 (citations omitted). However, given federal courts’ reluctance to define the “serious medical needs” standard concretely, *see, e.g., id.* (“[T]here is no settled, precise metric to guide a court in its estimation of the seriousness of a prisoner’s medical condition.”), once the cosmetic label is removed as a tool in classification, will a non-exhaustive list of factors provide enough guidance for prisons to develop a classification system that satisfies the courts and accurately provides care? Perhaps the judiciary should more fully develop methods and factors for use in identifying a serious medical need. Such a project is beyond the scope of this Comment, but will be an important future exploration.

46. James McNally, Note, *Inmate Payment of Health Care: Divisiveness in the Federal Courts in the Application of the Estelle Standard and City of Revere v. Massachusetts General Hospital*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 687, 719 (1998) (“Courts fashion standards for ‘what constitutes a serious medical need on a case-by-case basis,’ guided by those standards set by prison officials or by statute. This results in considerable ad hoc judicial discretion in situations requiring a court to determine the seriousness of a particular prisoner’s need.”) (footnote omitted).

47. *Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001).

48. The Fifth Circuit—the Northern District of Texas’s guiding court — has “no clear definition of what constitutes a ‘serious medical need,’” *Wells v. Whitfield*, No. 2:00-CV-0396, 2003 U.S. Dist. LEXIS 12982, at *15 (N.D. Tex., July 19, 2003), only that “a plaintiff must ‘prove objectively that he was exposed to a substantial risk of serious harm.’” *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2003) (quoting *Lawson v. Dallas County*, 286 F.3d 257, 262 (5th Cir. 2002)).

49. *Wells*, 2003 U.S. Dist. LEXIS 12982.

plaintiff has alleged no fact indicating that this condition will cause him any future health problems.”⁵⁰ The court accepted the “cosmetic” designation as a reason for the denial: The procedure would be “considered *cosmetic* surgery and . . . plaintiff’s case was not an emergency because he could breath through one side of his nose.”⁵¹ *Wells* thus presents an example of the consequences of not adopting the *Brock* approach, which recognizes that “cosmetic” sometimes includes serious medical needs; here, the prison and court denied treatment for a serious condition in part because of the use of the cosmetic label to preclude treatment.

The restrictive interpretation of the “serious medical needs” standard exemplifies American prisoners’ increasingly restricted rights to demand adequate health care in court.⁵² Prisoners seeking medical care must often jump through multiple hoops, meeting obscure and difficult criteria before treatment will be provided, both for chronically painful conditions like Mr. Brock’s, and for devastating illnesses as well.⁵³ Despite *Estelle*’s proclaimed protection, prisoners often do not receive the care to which they are entitled, in part because of judicial interpretations of the “serious medical needs” standard that misconstrue their precedent.

Indeed, *Brock*’s expansive conception of the “serious medical needs” standard is much more consistent with the argument in *Estelle*, allowing for “less serious cases” to pose serious medical needs,⁵⁴ than is the rigid framework used in *Hathaway* or by the Northern District of Texas in *Wells*. The restrictive interpretations of the standard, and the use of the “cosmetic” label to eliminate conditions from the serious medical needs category, cannot meet the demands of the Eighth Amendment as articulated by the Supreme Court. It is the *Brock* understanding—recognizing non-life-threatening and less severe conditions and rejecting labels under which certain cases automatically fail to pose serious medical needs—that in fact follows the letter of the law.

50. *Id.* at *16.

51. *Id.* at *2 (emphasis added).

52. Several recent federal statutes, for instance, restrict prisoner lawsuits. See, for example, the Prison Litigation Reform Act of 1995 (“PLRA”) which, *inter alia*, restricts claims arising under 42 U.S.C. § 1983 challenging prison conditions, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 11, 18, 28, 42 U.S.C.), and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which places limitations on filing federal habeas petitions, Pub. L. No. 104-132, §§ 101-07, 110 Stat. 1214, 1217-26 (codified as amended in scattered sections of 28 U.S.C.).

53. For example, Correctional Medical Services, one of the largest private prison medical care providers in the United States, discourages all treatment for Hepatitis C “[a]s a matter of formal company policy”; those prisoners who are insistent must follow a long complicated protocol, and each test for the disease must be individually approved by the regional medical director. See Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER’S MAG., Aug. 2003, at 43, 48.

54. *Estelle*, 429 U.S. at 103.

II. THE PRESCRIPTION: FUTURE WORK FOR THE COURTS

With *Brock* the Second Circuit made clear its rejection of blanket labels as a means of automatically denying care. However, not all Second Circuit courts are following these guidelines. Three months after *Brock*, the Southern District of New York held in an unpublished decision, *Rodriguez v. Westchester County Jail Correctional Department*⁵⁵ that, under the death, degeneration, or extreme pain criteria, an inmate's cut was not a serious medical need "[a]s a matter of law."⁵⁶ Mr. Rodriguez's cut may or may not in fact have needed treatment; however, by using the rigid legal standard to automatically preclude care for such a cut, and by avoiding an individualized determination of a medical necessity, the court incorrectly applied Second Circuit law.

On the other hand, other courts have internalized *Brock*, and their precedential decisions are generating progressive changes toward a better prison health care system. For example, in *Brooks v. Berg*,⁵⁷ the Northern District of New York, in holding Gender Identity Disorder to be a serious medical need, admonished prison officials for taking a request by the prisoner, Mr. Brooks, for "all of the minimal, though appropriate treatments" and "reduc[ing that request] . . . to a demand for cosmetic surgery."⁵⁸ The court emphasized that "whether a given treatment is medically necessary can be determined only by a qualified medical professional,"⁵⁹ and that "[p]rison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy" but instead must actually "determine whether [Brooks] has a serious medical need."⁶⁰

In this case, the Northern District understood *Brock*'s command that labeling a condition cosmetic does not prove it medically unnecessary, and correctly rejected DOCS's "blanket denial of medical treatment."⁶¹ By refusing

55. No. 98 Civ. 2743, 2003 U.S. Dist. LEXIS 6509 (S.D.N.Y. Apr. 17, 2003).

56. *Id.* at *16. Compounding the confusion, even after *Brock*, some unpublished summary orders issued by the Second Circuit itself still use the restrictive standard when rejecting conditions as serious medical needs. See, e.g., *Best v. Town of Clarkstown*, 61 Fed. Appx. 760, 762 (2d Cir. 2003) (holding, three months after *Brock*, that in order to demonstrate a serious medical need Mr. Best "had to prove . . . that he suffered from 'a condition of urgency, one that may produce death, degeneration, or extreme pain'" (emphasis added) (citations omitted). Although Second Circuit summary orders have no precedential value, 2D CIR. R. § 0.23, written orders that do not follow the *Brock* framework both unjustly deny prisoners care and contribute to the lack of clarity vis-à-vis the "serious medical needs" standard within the circuit.

57. *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y. 2003).

58. *Brooks*, 270 F. Supp. 2d at 305 (citation omitted).

59. *Id.* at 306.

60. *Id.*

61. *Id.* at 312. Several months later, the Northern District was able to vacate a portion of its decision because in the interim the prison changed its policy to reflect that Gender Identity Disorder ("GID") "is a serious medical need and that inmates with GID must receive *some* form of treatment." *Brooks v. Berg*, 289 F. Supp. 2d 286, 287 (N.D.N.Y. 2003). The change in policy illustrates the success of the *Brock* framework in helping prisoners access needed care.

to allow prisons to use blanket categories to deny care, courts require individualized examinations of patients, and encourage prisons to reevaluate—and sometimes alter—policies that previously failed to identify accurately the prisoners who need care.

At its first opportunity, the Second Circuit must make clear that the *Brock* analysis is correct, and repudiate such cases as *Rodriguez*⁶² that do not follow the law. Similarly, the Supreme Court must confirm that the serious medical needs standard is correctly reflected in *Brock* by affirming that case and overruling cases like *Wells*. The Court must emphasize that non-life-threatening, less severe ailments may not be automatically excluded from serious medical needs, and it must reject the use of the blanket labels that serve that purpose of exclusion.

Given the large numbers⁶³ of American prisoners, providing the care to which they are legally entitled is a task of great significance. Affirming that non-life-threatening conditions and chronic pain may pose serious medical needs, and ensuring that medical care is not denied by inflexible rules that miss serious conditions, will help shift current jurisprudence back in line with Supreme Court precedent. Perhaps more importantly, in the process, these steps will be instrumental not only in bettering prison health care, but also in humanizing the “mood and temper of the public with regard to the treatment of crime and criminals[, which] is one of the most unflinching tests of the civilization of any country.”⁶⁴

62. In June, 2004, the Second Circuit in fact did reverse and remand *Rodriguez*, but for a reason unrelated to the serious medical needs standard. *Rodriguez v. Westchester County Jail Corr. Dep't*, 372 F.3d 485 (2d Cir. 2004). The Second Circuit thus should still explicitly reject the *Rodriguez* interpretation of the serious medical needs standard.

63. The United States has the highest prison population in the world; as of mid-2003, approximately 710 per 100,000 Americans were incarcerated. By way of comparison, Russia's rate is 584 per 100,000, England and Wales's is 143, China's is 119, Canada's is 116, Australia's is 114, and India's is 29. The Sentencing Project, *New Prison Figures Demonstrate Need for Comprehensive Reform*, at <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Sept. 26, 2004).

64. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER OR LIMIT* 9 (1972) (quoting Winston Churchill).

