The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare

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The following are tragic stories of prisoners subjected to irresponsible privatized healthcare companies, along with the many cases of neglect that have been deliberated by the United States Supreme Court. This Note concerns the privatization of healthcare within the nation's prison systems, and addresses the effects of privatized prisons on prisoner's rights under the Eighth Amendment's prohibition of cruel and unusual punishments. This Note also presents current facts about the companies that are contracted by the government to provide healthcare and/or prison facilities. Finally, this Note addresses the possible remedies to the current failings, and highlights the ability of the courts to intervene on prisoners' behalf through § 1983 Bivens claims of Eighth Amendment violations.

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I. INTRODUCTION

The constitutional right to be free from cruel and unusual punishment within the Eighth Amendment derives its meaning from the "evolving standards of decency that mark the progress of a maturing society."\(^1\) The prohibition on cruel and unusual punishment is not an invention of the United States Constitution, but rather a concept of punishment that can be traced back to Hammurabi's Code in the 1700s b.c. calling for "an eye for an eye, a tooth for a tooth." In other words, the punishment should be of equal weight to the crime committed.\(^2\) The drafters of the Constitution were focused on deterring the common torturous and barbaric capital punishments, such as quartering, beheading, disembowelment, and flaying.\(^3\) America was founded on the notion that these barbaric forms of punishment are not compatible with our concept of a civilized society.\(^4\) While the Eighth Amendment operates as a negative right to prohibit the government from imposing certain penalties, it has progressed into a flexible principle the United States Supreme Court uses to impose affirmative duties on the government to ensure criminal penalties do not deteriorate to the level of cruel and unusual treatment.\(^5\) Cruel and unusual punishment, as a standard, continues to evolve with the contemporary views of society.\(^6\)

*Estelle v. Gamble*\(^7\) and *Farmer v. Brennan*\(^8\) are the first key cases that tie the Eighth Amendment into the constitutional rights prisoners have that involve healthcare and other necessities.\(^9\) In *Estelle*, the Court found that indifference to medical needs rises to the level of cruel and unusual punishment prohibited by the Eighth Amendment and validated prisoners' rights to humane confinement.\(^10\) In *Farmer*, the Court stated that the Constitution "does not outlaw cruel and unusual 'conditions'; it outlaws

\(^3\) See Siever, *supra* note 2, at 1368.
\(^4\) Id. at 1367-68.
\(^5\) Id. at 1368.
\(^6\) Id. at 1369.
\(^10\) See *Estelle*, 429 U.S. at 104-05 (holding that deliberate indifference to medical needs is considered a cruel and unusual punishment prohibited by the Eighth Amendment).
cruel and unusual 'punishments.'"\(^\text{11}\) A prisoner's state of confinement is, in itself, punishment enough—the confinement does not diminish prisoners' right to good health to the point where prisoners should suffer physically from a lack of care they cannot obtain on their own due to confinement.\(^\text{12}\)

In \textit{Bivens v. Six Unknown Named Agents of Federal Bureau Of Narcotics}, the Court ruled that Fifth Amendment due process authorizes a court to order a government employee to pay damages to a plaintiff if the government employee, while acting under color of government authority, injures another person by violating constitutional strictures.\(^\text{13}\) The Court brought the privatization of prison healthcare under the realm of the Eighth Amendment's prohibition of cruel and unusual punishment in \textit{West v. Atkins}.\(^\text{14}\) The Court found there was state action where a private physician had contracted with the state to provide medical care for prisoners.\(^\text{15}\) The doctor, in treating inmates, was acting "under color of state law" for purposes of § 1983 as a State employee.\(^\text{16}\) It logically follows that any company that is hired by a state to supply healthcare would be acting in that duty "under color of state law."

The current problem of inadequate prison healthcare is boiling beneath the surface of the current trend of healthcare outsourcing and other prison resources in the name of cost efficiency, but prison privatization can be useful when an effective standard is maintained.\(^\text{17}\) Part II of this Note reviews the development of the Eighth Amendment into the flexible affirmative duties the judiciary has created in response to society's evolving perspective on punishment. Part III assesses the current state of for-profit healthcare in private and public prison systems. Finally, Part IV argues that the current state of the law is not sufficient to ensure that private healthcare systems provide an acceptable quality of care given current financial

\(^{11}\) \textit{Farmer}, 511 U.S. at 837.

\(^{12}\) \textit{See} Priest v. Cupp, 545 P.2d 917, 918 (Or. Ct. App. 1976); \textit{see also} \textit{John W. Palmer, Constitutional Rights of Prisoners} 184 (Elisabeth Roszmann Ebben ed., 5th ed. 1997).

\(^{13}\) Bernard J. Pazanowski, \textit{Federal Inmate Can't Pursue Bivens Action Against Employees of Privately Run Facility}, 90 BNA CRIM. L. REP. 447 (Jan. 11, 2012); \textit{see also} \textit{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics}, 403 U.S. 388, 396-97 (1971) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (citing \textit{Bell v. Hood}, 327 U.S. 678, 684 (1946)).


\(^{15}\) \textit{Id.}

\(^{16}\) \textit{Id.}

\(^{17}\) \textit{See infra} Part IV.
II. CONSTITUTIONAL MANDATES FOR PRIVATIZED PRISONS

A. Eighth Amendment General Requirements

In Weems v. United States, the Court paved the way for an expansive view of the Eighth Amendment beyond restrictions on certain types of punishment in the wake of public concern about harsh prison conditions.\(^\text{18}\) The Weems Court admonished the punishment handed down by the court in the Philippines that subjected the accused not only to hard labor and permanent ankle chains, but also forever restricted the accused's personal liberties for a violation that could have resulted from a simple bookkeeping error.\(^\text{19}\) The Court reiterated the American belief that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."\(^\text{20}\)

The Court went even further and established a two-part test in Gregg v. Georgia prohibiting punishments "grossly out of proportion to the severity of the crime" and "the unnecessary and wanton infliction of pain."\(^\text{21}\) A jury sentenced the defendant, Gregg, to death for armed robbery and murder.\(^\text{22}\) The Court affirmed the sentence by analyzing rights granted under the Eighth and Fourteenth Amendments.\(^\text{23}\) In Weems, the Court revisited the same concept of the Eighth Amendment where the amendment went beyond its simple torture origin and was interpreted in a "flexible and dynamic manner."\(^\text{24}\) In Gregg, the Court established that the legislature is able to determine punishments because democracy allows the people to set the standard of what punishments are socially acceptable.\(^\text{25}\) The jury's determination on the death sentence was consistent with state law and the evidence presented.\(^\text{26}\) Furthermore, the jury's finding did not violate the Court's two-prong test determining whether the sentence was "grossly out of proportion to the severity of the crime" or "the unnecessary and wanton

\(^{18}\) Weems v. United States, 217 U.S. 349, 382 (1910) (striking down a punishment under \textit{cadena temporal} for defrauding the United States as "repugnant to the Bill of Rights.").

\(^{19}\) \textit{Id.} at 366.

\(^{20}\) \textit{Id.} at 367.

\(^{21}\) Siever, \textit{supra} note 2, at 1370 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

\(^{22}\) Gregg, 428 U.S. at 160-61.

\(^{23}\) \textit{Id.} at 207.

\(^{24}\) \textit{Id.} at 171.

\(^{25}\) \textit{Id.} at 175.

\(^{26}\) \textit{Id.} at 206-07.
infliction of pain."

Though the Eighth Amendment has been used to prohibit sentences and imprisonment that rise to the level of cruel and unusual punishment, it does not address those who can be held liable for constitutional violations within the prison system. In West, almost two decades after Bivens, the Supreme Court found that a physician who is employed by the state to furnish medical care to state prison inmates has taken on a distinctly governmental function and is therefore acting "under color of state law for purposes of § 1983." Bivens and West bring the Eighth Amendment full circle to its current role as a principal theory in cases of inadequate medical care in private prisons.

The Eighth Amendment's prohibition on the federal government's use of cruel and unusual punishment is applied to the states through the Fourteenth Amendment Due Process Clause, which regulates the conduct of the states in accordance with the Constitution. These constitutional rights are not only applied to prisoners' healthcare, but also to the privatization of prisons in general. In the wake of prison privatization, the Eighth Amendment is vital to prisoner rights because it holds private prison entities to the same minimum standards required under the Constitution as prisons run by state governments. The Eighth Amendment imposes a duty on the states to ensure prisoners receive adequate medical care, which prisoners are not able to provide for themselves due to their confinement, but this can also apply to private entities in limited circumstances.

B. To Whom the Eighth Amendment Applies

The Court has previously determined that private entities are acting under color of state law by using either the public function doctrine or the nexus test. The public function doctrine is used to show state action is present when the State has contracted a private party to do work for which the State has historically taken the responsibility. In Medina v. O'Neill, 487 U.S. 42, 56-57 (1988); Ira P. Robbins, Managed Health Care in Prisons as Cruel and Unusual Punishment, 90 J. CRIM. L. & CRIMINOLOGY 195, 211 (1999).

27. Id at 173.
33. Id.
the Fifth Circuit pointed to Supreme Court guidance that "the relevant question is not whether a private group is serving a 'public function'... the question is whether the function performed has 'traditionally been the exclusive prerogative of the State.'"\textsuperscript{34}

The nexus test "seeks to identify sufficient points of contact between private parties and the state to justify imposing constitutional limitations on those parties."\textsuperscript{35} The Tenth Circuit used the nexus test in \textit{Milonas v. Williams} to find a close nexus between the government and a private school for maladjusted children in order to invoke constitutional protections for the youths held within the institution.\textsuperscript{36} The court highlighted certain factors that proved a nexus existed between the private organization and the government: the involuntary placement of the youths into the institution; the detailed contract between the government and the private organization; the extensive government funding of the private institution; and the meticulous government regulations of the institution.\textsuperscript{37} The court found the factors culminated into the logical determination that the State had so "insinuated itself" into the business of the institution that the institution's actions could be considered state action.\textsuperscript{38} When the nexus test is applied to private prisons the same result can be obtained. Private prison institutions have extensive contracts with the state, are regulated according to the standards of the state, and are completely funded by the state.\textsuperscript{39}

Once a private institution is considered to be operating under color of state action, the private institution is open to a § 1983 claim.\textsuperscript{40} Whether the private institution is supplying healthcare or running the prison facility itself, the employees working for the private institution can still be held liable for a § 1983 claim if their actions rise to the level of "deliberate
indifference. The Court has developed a two-pronged subjective and objective test to evaluate the merits of a § 1983 claim brought instead of an Eighth Amendment violation.

C. Specific Rights of Prisoners Afforded by the Eighth Amendment

1. Generally

Prisoners do not have the same extensive constitutional rights as those who are not incarcerated, but they do possess a right to humane treatment. In Wolff v. McDonnell, the Court stated there is not an "iron curtain" cutting inmates off from all constitutional rights. The Due Process Clauses of the Fifth and Fourteenth Amendments and the Eighth Amendment's protection against cruel and unusual punishment are distinct rights of the prisoners and pre-conviction detainees, protecting them from inhumane treatment while incarcerated post, as well as prior to, conviction. When an individual liberty is at risk due to an administrative proceeding, the right to due process of law within the Constitution mandates safeguards to ensure the proceeding is fair. Substantive due process also requires decisions that are based on substantial evidence concerning the fair treatment of those incarcerated by "scrutinizing the merits underlying administrative decisions and outcomes."

When a government maintains justice within a society by imprisoning offending citizens, it then also takes on the resultant inmates' care, because this system limits the prisoners' ability to care for themselves. In Estelle, the Court concluded that the treatment of inmates must be compatible with

41. Id. at 206-07.
42. Id.; see supra Part II.B.
43. Dunham, supra note 32, at 1481.
44. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974);
45. Petitioners assert that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that the prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime.
46. Dunham, supra note 32, at 1482.
47. Id.
"contemporary standards of decency."\textsuperscript{49} Most would agree the "contemporary standards of decency" require prisons to meet inmates' basic needs: food, medical care, and reasonable physical safety.\textsuperscript{50}

2. Healthcare in Prison

The common law obligation to provide prisoners with healthcare developed out of \textit{Spicer v. Williamson}.\textsuperscript{51} The court ruled that the public should supply medical care to prisoners because incarceration for the protection of the public deprives prisoners of the ability to obtain medical care they need.\textsuperscript{52} In \textit{Estelle} the Eight Amendment right as a freedom from cruel and unusual punishment, is interpreted by the Court to impose a duty on the government to provide a minimal standard of medical care.\textsuperscript{53}

\textit{Estelle} was instrumental in challenging the old tradition of the "hands-off" doctrine, in which courts deferred to prison administrators' internal actions and decisions within prison facilities.\textsuperscript{54} In \textit{Estelle}, the respondent, J.W. Gamble, complained of the poor medical treatment he received after suffering an injury sustained while working on a prison project.\textsuperscript{55} Gamble filed a \textit{Bivens} civil rights action against the prison under 42 U.S.C. § 1983.\textsuperscript{56} The Court established the "deliberate indifference" standard, which requires that the complainant show the physician or prison official displayed deliberate indifference to the needs of the prisoner and failed to respond to medical needs that were sufficiently serious.\textsuperscript{57} However, the Court expressly stated its intention not to construe the "deliberate indifference" standard as creating a constitutional tort claim.\textsuperscript{58}

The standard set out in \textit{Estelle} was further defined in \textit{Wilson v. Seiter}.\textsuperscript{59}

\begin{thebibliography}{99}
\bibitem{49} Estelle v. Gamble, 429 U.S. 97, 103 (1976).
\bibitem{50} Dunham, supra note 32, at 1483.
\bibitem{51} Siever, supra note 2, at 1370 (citing Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).
\bibitem{52} \textit{Spicer}, 132 S.E. at 293.
\bibitem{53} Siever, supra note 2, at 1370.
\bibitem{55} Robbins, supra note 28, at 206 (citing Estelle v. Gamble, 429 U.S. 97, 98 (1976)).
\bibitem{56} \textit{Estelle}, 429 U.S. at 101; \textit{Bivens} v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that federal agents acting under color of the federal government can be held personally liable for tort actions brought by individuals harmed by the agent's violation of the individual's constitutional rights).
\bibitem{57} Friedman, supra note 54, at 929 (citing \textit{Estelle}, 429 U.S. at 104).
\bibitem{58} \textit{Id.} (citing \textit{Estelle}, 429 U.S. at 107-08).
\end{thebibliography}
In *Wilson*, the Court expanded the deliberate indifference standard to encompass all conditions of confinement. The Court also further refined the standard into a two-prong test. The objective prong of the test requires the prisoner to prove existence of a "serious medical need." The subjective prong of the test was outlined in *Farmer v. Brennan*, requiring proof that the prison official, showing deliberate indifference to the prisoner's safety, acted with a sufficiently culpable state of mind. Sufficiently culpable state of mind requires more than negligence or malpractice, but less than intentional harmful conduct.

D. Whom Does the Eighth Amendment Regulate?

The Court found an affirmative duty under the Eighth Amendment that requires prison officials to remedy the lack of care and blatant risk of harm. To be held liable for a violation of this duty under the Eighth Amendment, the prison official must know of and disregard an excessive risk to an inmate's health or safety. The showing of proof required must establish that the official was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, as well as evidence the inference was actually drawn. The heavy burden of proof on the prisoner to prove a prison official's subjective state of mind blocks many legitimate claims from surviving summary judgment.

Recently, in *Minneci v. Pollard*, the Court made the distinction between seeking a federal remedy when there is no state remedy for a wrong suffered, and dodging a state remedy that is available in an attempt to receive damages from the federal government. The Court explained that Pollard's claim:

focuse[d] upon a kind of conduct that typically falls within the scope of

61. *Id.* at 206-07 (citing *Wilson*, 501 U.S. at 302-03).
63. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 824, 826-27 (1994)).
64. *Id.* (citing *Farmer*, 511 U.S. at 842).
65. Siever, *supra* note 2, at 1376-77 (citing *Farmer*, 511 U.S. at 858 (Blackmun, J., concurring) (stating "[t]he opinion's clear message is that prison officials must fulfill their affirmative duty under the Constitution to prevent inmate assault").
traditional state tort law, and in the case of a privately employed
defendant, state tort law provides an "alternative, existing process" capable of protecting the constitutional interests at stake... existence of that alternative here "constitutes a convincing reason for the Judicial Branch to refrain from providing a new freestanding remedy in damages."70

The Supreme Court has previously recognized Bivens claims for damages that occurred as a result of inadequate medical care.71 The current expectation of procuring a state remedy for constitutional violations of the Eighth Amendment is determined by the availability of a state remedy and its ability to properly address the circumstances. The Minneci Court found that state tort law provided an "alternative and existing process capable of protecting the constitutional issues at stake."72 The Court concluded that where there is no prevailing reason for the federal government to remedy the violation of a prisoner's constitutional rights, the Court should leave the remedial measures to state courts.73

III. CURRENT STATE OF HEALTHCARE IN PRIVATE PRISON SYSTEMS

Privatization in prison medical services grew rapidly after the Supreme Court decided Estelle.74 The number of prisoners and the cost of healthcare both skyrocketed, forcing the prison systems to seek out alternatives to excessive healthcare costs.75 The most common outsourced prison services are medical and mental healthcare.76 In the same timeframe where the total number of people in prison increased less than 16%, the number of people held in private federal and state facilities increased by 120% and 33% respectively.77 Between 1991 and 2007, government spending on corrections increased to $74 billion.78

70. Minneci, 132 S. Ct. at 623 (citation omitted).
73. Id. at 622; Pazanowski, supra note 13.
74. Siever, supra note 2, at 1377; see Stephen R. Latham, Regulation of Managed Care Incentive Payments to Physicians, 22 AM. J.L. & MED. 399, 400-01 (1996).
75. Siever, supra note 2, at 1377; Jones, supra note 9, at 180.
76. Jones, supra note 9, at 181.
The three major components of a managed healthcare system are: the managed care organization (MCO), the healthcare provider, and the health plan patient (the prisoner). Managed care is an administrative and medical treatment practice motivated by the desire or need to improve the quality, efficiency, and cost effectiveness of healthcare. The most common form of MCO consists of for-profit organizations that are always trying to balance low healthcare costs with the paying member's expectations of quality healthcare. Most operate by contracts with employers for a fixed per-patient or per-incident fee, and the MCO assumes the financial risk if costs exceed the fixed amount the employer is contracted to pay. However, in a prison system, the prisoners do not have a choice in the healthcare they receive, and therefore the counter balance of the MCO seeking lower priced care is not over-taken by the demands of the consumer for quality care. Often the result is low quality care that is solely focused on keeping the cost as low as possible.

MCOs have a large incentive to minimize high-cost treatments, such as specialist visits, adequate testing, or emergency room care. In Ancata v. Prison Health Services, Inc., the Court ruled that where the county's policy requiring court orders for an inmate to be referred to a non-staff specialist and "necessary medical treatment ha[d] been delayed for non-medical reasons, a case of deliberate indifference ha[d] been made out." In Ancata, the Court applied the two-prong test to find the policy was in violation of the prisoner's Eighth Amendment right. In Covington v. Westchester County Jail, the district court found municipalities' liability need not be based on any particular action, as long as the municipality "promoted a policy which sanctioned the type of action which caused the violations." In Todaro v. Ward, the Second Circuit found that not only were the hospital's "individual acts," deliberately indifferent, but that its dangerously substandard health care system was itself "deliberately indifferent." The court stated, "a series of incidents closely related in

80. Id. at 199.
81. Id.
82. Id.
84. Robbins, supra note 28, at 199.
85. Id.
86. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985).
87. Id. at 705.
88. Robbins, supra note 28, at 212-13 (citing Covington v. Westchester County Jail, 505 S.E.2d 4442, 4446 (W. Va. 1998)).
89. Jones, supra note 9, at 190 (citing Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)).
time... may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners."90 Courts have also recognized Eighth Amendment violations where prison doctors "manifested deliberate indifference by selecting easy and less efficacious treatment methods, or by delaying or denying treatment."91

Privatization of healthcare has created MCOs that have gone so far as to create physician incentive plans to encourage doctors to minimize monthly 911 calls.92 These types of incentive schemes reward physicians for reducing costs by reducing the number of referrals and requests for specialty care.93 In one Florida contract with Emergency Medical Services Authority, a $250 bonus was supplied to the medical director for every emergency 911 call that was avoided.94

The push for the lowest cost is exacerbated by the medical bidding wars between private MCOs for contracts with the states and the federal government.95 The bids are a constant fight to be the lowest number possible while the costs of prison care continues to rise with the ever-increasing prison population.96 Since prisoners have little-to-no social or political power within the prison system to assert their right to acceptable quality healthcare, this results in a drop in the quality of medical care.97 These competing forces are further frustrating the possibility of an acceptable healthcare system for prison populations.

The number of privatized healthcare companies addressing the needs of correctional facilities is relatively small compared to the number of prisons seeking cost-effective care.98 The practice of outsourcing healthcare in

90. Jones, supra note 9, at 190 (internal quotation marks omitted) (alteration in original) (quoting Todaro, 565 F.2d at 52).

91. Friedman, supra note 54, at 938 (citing examples of Eighth Amendment violations that manifested from delayed treatment or denying treatment; Williams v. Vincent, 508 F.2d 541, 543-44 (2d Cir. 1974); Roger v. Evans, 792 F.2d 1052, 1057 (2d Cir. 1986)).

92. Robbins, supra note 28, at 223.

93. Latham, supra note 74, at 399.

94. Robbins, supra note 28, at 223.

95. Jones, supra note 9, at 198.

96. Id. at 198.

97. Id. at 197-98.

prisons to private companies is a multi-billion dollar industry.\textsuperscript{99} The recent merger that created Corizon Healthcare combined Prison Health Services (PHS), which had fifty-seven contracts in 150 jails in over nineteen states, and Correctional Medical Services which served 250,000 inmates in nineteen states.\textsuperscript{100} Corizon now boasts providing healthcare to 271,100 inmates in twenty-nine states at over 285 correctional facilities across the country.\textsuperscript{101}

The bidding is very competitive because these companies compete with each other to offer the lowest bid in order to win contracts.\textsuperscript{102} The fight for the lowest bid has caused an industry trend of cutting corners wherever possible in order to keep costs low, including denying care to prisoners who are obviously in need.\textsuperscript{103} There are two fundamental models for healthcare in prisons: the cost-plus model where the vendor is reimbursed at a specific rate including costs and profit, and the flat-fee model where a company is given a flat-rate amount of money and everything they do not use is profit, creating more incentive to cut costs.\textsuperscript{104}

PHS has been repeatedly investigated for its practices in New York prisons.\textsuperscript{105} In 2001, Brian Tetrault was confined in a county jail in Schenectady, New York for stealing his ex-wife's skis from her home.\textsuperscript{106} He suffered from Parkinson's disease for many years before his incarceration.\textsuperscript{107} Once Tetrault was incarcerated, the jail's medical director, a PHS employee, cut off almost all of the thirty-two pills he took to quell his tremors.\textsuperscript{108} Over the next ten days, without his medications, Tetrault quickly lost his physical mobility and mental capacity to the point that he was unable to move.\textsuperscript{109} As he lay soaking in his own urine and unable to

\textsuperscript{99} Jones, supra note 9, at 198; \textit{The Washington Independent}, supra note 98.
\textsuperscript{100} \textit{The Washington Independent}, supra note 98.
\textsuperscript{102} Jones, supra note 9, at 198.
\textsuperscript{103} Robbins, supra note 28, at 216-18 (summarizing complaints of deliberate indifference, including evidence of cost cutting measures that survived defendants' motions for summary judgment).
\textsuperscript{104} \textit{The Washington Independent}, supra note 98.
\textsuperscript{105} Jones, supra note 9, at 182.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textit{Id}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
move, jail nurses dismissed Tetrault as a "faker" and ignored his severe medical condition. After only ten days without proper medication or further medical attention, Tetrault died of septic shock. PHS not only denied any responsibility, but also doctored records to make it appear as though Tetrault died after he was released. Two months later, PHS employees at a Duchess County jail refused to address the medical needs of a female prisoner complaining of severe chest pains because they assumed it was an attempt to receive drugs. The prisoner died of a heart attack ten days later. New York State investigators concluded that both of these unnecessary deaths were the fault of PHS employees.

Despite repeated scandals, Rikers Island Prison in New York renewed its contract with PHS for another three years in 2005. This is not uncommon. "It is a regular practice for these companies to jump from jail to jail and scandal to scandal." The private prison healthcare field is small, so prisons often end up contracting with companies they previously fired for cause, a cycle exacerbated in states with mandates to accept the lowest bidder.

Many companies also cut corners by hiring medical professionals with questionable credentials, which further develops a practice of allowing substandard medicine in order to save a buck. Unlicensed doctors, medical students, graduates of foreign medical schools, and doctors with a history of substance abuse problems frequently find employment in correctional medical services. Low quality care also results from a high rate of turnover because of the nature of the patient care in a prison facility.

Prison medical care is not attractive to most doctors due to the negative social stigma, difficulty establishing a professional reputation, and a lower pay scale than that of doctors in the same field of medicine in the outside community. The ability to hire medical professionals was also made

110. Id.
111. Id.
112. Id.
113. Id. at 182-83.
114. Id. at 183.
115. Id.
116. Id. at 184.
117. Id. at 198-99.
118. Id. at 199.
119. Siever, supra note 2, at 1379-80; Jones, supra note 9, at 199.
120. Jones, supra note 9, at 192-93.
121. Friedman, supra note 54, at 942.
122. Siever, supra note 2, at 1380.
123. Friedman, supra note 54, at 942.
much more difficult when the National Health Service Corps, "which allowed doctors to pay off their educational loans through work in prisons," was dismantled.\textsuperscript{124} Prisoners tend to have an above-average incidence of illness, as well as being prone to hypochondria and malingering out of boredom or loneliness.\textsuperscript{125} The typical illnesses that plague corrections facilities include: "coronary heart disease, hypertension, diabetes, asthma, chronic lung diseases, HIV infections, hepatitis B and C, other sexually transmitted diseases, tuberculosis, chronic renal failure, physical disabilities, and many types of cancer."\textsuperscript{126} The working conditions are also unattractive to doctors due to the possibility of being assaulted or even being taken hostage by an inmate.\textsuperscript{127} Furthermore, "[p]rison health facilities are typically poorly equipped, poorly ventilated, poorly lit, and run-down."\textsuperscript{128} This creates a miserable working environment that many do not want to endure, causing "burnout," or inducing doctors to take up a private practice on the side, which can further degrade the level of care given to the inmates.\textsuperscript{129}

Overcrowding is another chronic issue for many prisons and creates further pressure for those providing medical care.\textsuperscript{130} Though not itself a violation of the Eighth Amendment, overcrowding can create conditions that do rise to the level of cruel and unusual punishment prohibited by the Eighth Amendment.\textsuperscript{131} The United States has about 2.4 million people behind bars, making it the largest prison population in the world, despite a 40\% drop in the U.S. crime rates over the past twenty years.\textsuperscript{132} The incarceration rate is one in every one hundred Americans.\textsuperscript{133} The federal

\textsuperscript{124} Id.\textsuperscript{125} Id. at 943.\textsuperscript{126} Jones, supra note 9, at 180 (citation omitted).\textsuperscript{127} Friedman, supra note 54, at 942-43.\textsuperscript{128} Id. at 942.\textsuperscript{129} Id. at 943.\textsuperscript{130} Id. at 940; see Solomon Moore, The Prison Crowding Fix, N.Y. TIMES (Feb. 10, 2009), available at http://www.nytimes.com/2009/02/11/us/11prisons.html?_r=1&emc=eta 1; Sherrilyn A. Ifill, Keeping America's Prisons Overcrowded, THE ROOT (Nov. 29, 2010), http://www.theroot.com/views/keeping-americas-prisons-overcrowded.\textsuperscript{131} Friedman, supra note 54, at 940.\textsuperscript{132} The Cost of a Nation of Incarceration, CBS NEWS (Apr. 22, 2012), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration/ ("The United States has about 5 percent of the world's population, but we have 25 percent of the world's prisoners – we incarcerate a greater percentage of our population than any country on Earth.").\textsuperscript{133} Adam Liptak, 1 in 100 U.S. Adults Behind Bars, New Study Says, N.Y. TIMES (Feb. 28, 2008), http://www.nytimes.com/2008/02/28/us/28cnd-prison.html.
prison system is overpopulated at approximately 172% capacity,\textsuperscript{134} while state prisons have also reported being consistently overpopulated.\textsuperscript{135} In \textit{Brown v. Plata}, the Court found that overpopulation is directly responsible for the failure of the California system to provide inmates with adequate physical and mental health services.\textsuperscript{136} The nation's prison population costs have reached around $60 billion annually, a figure, which was only an estimated $9 billion two decades ago.\textsuperscript{137} This creates an intense strain on medical care that is needed to sustain the high number of current prisoners.\textsuperscript{138} Despite the barrage of complaints companies like PHS receive, they still continue to grow.\textsuperscript{139} Though disliked for their practices, there is an obvious need to fulfill the growing demand that many states are not fiscally able to meet. Michael Catalano, the chief executive of ASGR, owner of PHS,\textsuperscript{140} claims the company's annual growth rate is nearly 30% with revenue growth from existing contracts increasing to 5.2% in the 2004 first fiscal quarter alone.\textsuperscript{141}

IV. ANALYSIS

The privatization of healthcare has a strong footing in the world of America's prison systems, and is continually growing. Despite the tragic stories and many failings of the current companies, these MCOs are meeting a vital need in a situation where many do not have other viable alternatives. MCOs should be heavily regulated and monitored consistently by the government entities that are employing and funding them. The use of contractors to fulfill state needs is not a new concept for prison services,\textsuperscript{142} and may be a good alternative as long as certain key factors are maintained. Nineteenth century America saw states contracting with private interests for the use of convict labor in efforts to achieve financial gains.\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{134} Friedman, \textit{supra} note 54, at 940.
  \item \textsuperscript{135} Jones, \textit{supra} note 9, at 179.
  \item \textsuperscript{136} Brown v. Plata, 131 S. Ct. 1910, 1925 (2011).
  \item \textsuperscript{137} Jones, \textit{supra} note 9, at 179. Please note this number has not been adjusted for inflation; \textit{see also}, \textit{The Cost of a Nation of Incarceration}, CBS NEWS (Apr. 22, 2012), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-ofincarceration/.
  \item \textsuperscript{138} See Peter Wagner, "\textit{Do No Harm} or "\textit{Do No Expense}": Ohio's Prisoners Are Dying from Inadequate Medical Care, \textit{Prison Policy Initiative}, http://www.prisonpolicy.org/articles/ohiohealth112403.html (last visited Feb. 22, 2013).
  \item \textsuperscript{139} \textit{Prison Health Services' Hard Time}, \textit{BusinessWeek} (May 18, 2005) http://www.businessweek.com/bwdaily/dnflash/may2005/nf20050518_2061_db008.htm.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{143} Sharon Dolovich, \textit{State Punishment and Private Prisons}, 55 DUKE L.J. 437, 451
\end{itemize}
Convict leasing was used through the nineteenth century, most prevalently in the South after the Civil War. In Louisiana, the state leased its entire penitentiary system to a private contractor, who assumed the cost of running the facility.

The judiciary is the most likely source of a constitutionally rooted solution to remedy violations, as it has historically played a larger role in preserving the rights of prisoners. The federal and state court systems are able to monitor, through prisoners' legal claims, the reasonable quality of treatment and attention to medical needs, access to specialists and outside evaluation aiding diagnosis, and the maintenance of preexisting conditions. Though there are many avenues of regulation to consider, this Note is concerned with the judiciary's role in preserving inmate rights. Inmates should have the ability to bring legitimate Bivens claims in order to keep outside unbiased authorities aware of the practices of private companies operating within the prison systems. The court can set regulations on a case-by-case basis, because the amount of cases that survive summary judgment will only be the claims with "deliberate indifference."

The many blatant wrongs that have been allowed by lax regulations on private entities in the penal system can be remedied under the "deliberate indifference" standard. Prisons are not meant to be comfortable and even the Court has said the Constitution does not outlaw cruel and unusual conditions, but only cruel and unusual punishments. Thus, constitutionally, private entities only need to stay within a flexible range of quality to ensure lives of prisoners are not at risk. It is when private companies stop supplying even decent care, that the courts should step in and draw the line saying it is too minimal and egregious.

It is an uphill battle to get an Eighth Amendment Bivens claim into court because the state of mind necessary to prove "deliberate indifference" must be blatant. Some argue that the standard of "deliberate indifference" is hard to apply and has produced inconsistent results. Though the standard may be tough to meet, the gravest of issues can survive its elemental requirements, and those are the cases that are so vital to changing the way in which business is done in private prisons. The first prong establishes that

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144. Id.
145. Id.
146. Supra Part II.
148. See id. at 105-06.
149. Friedman, supra note 54, at 946-47.
150. Id. at 947.
the injury or deprivation is sufficiently serious. The second prong is a heightened standard that "requires some subjectively intended act of punishment." A healthcare policy evaluated under the second prong must survive proof that the medical care supplied was at least "adequate," whereas, a claim against a particular officer or employee would have to show proof of a subjective state of mind that the employee knew or should have known the harm would result and was indifferent to it. Though this may be a difficult prong to overcome, many plaintiffs who have established "deliberate indifference" have impacted the business of privatized healthcare in prisons by the tests and standards that the court has developed in ruling on their respective cases. These standards are the framework for the companies to be able to maintain their position of profit and the contracts with the government. The Court has suggested that if prison officials were aware of a particular condition and chose to ignore it, their act would violate the standard, and heavy damages would result. These healthcare companies endeavor to operate efficiently and cost effectively, and hefty damages weigh heavily against that goal. The implementation of heavy damages could force companies to rethink their provisions of care to avoid liability, similar to how laws and regulations have influenced federal and state prisons to strive for acceptable standards. However, this means the judiciary would be taking on a regulatory role, which has traditionally been a legislative function. Furthermore, states can implement further protections for prisoners through their state representatives by passing legislation to protect and enforce minimum health and safety requirements for prisons specifically run by private institutions, such as the necessary implementation of rehabilitation programs or educational programs within private prisons to decrease recidivism.

In Lewis v. Casey, the Court noted that rather than creating an affirmative right, the Eighth Amendment creates a negative right that is a duty on the government. "Prisoners, like all Americans [at least

151. Siever, supra note 2, at 1401.
152. Id. at 1401-02.
153. Id. at 1401.
155. Siever, supra note 2, at 1402.
156. Supra infra Part III.
157. See generally Brown v. Plata, 131 S. Ct. 1910 (2011) (holding that a mandated population limit was necessary to ensure a prisoner's Eighth Amendment Right is not violated).
158. Lewis v. Casey, 518 U.S. 343, 350 (1996) (analogizing access to legal services in prison to access to health care, noting that the Court never established an affirmative right to a prison hospital).
currently] have no 'affirmative right' to medical treatment; [but the government does have an obligation to supply an adequate level of healthcare that] manifests itself in a negative right[...]

A cruel and unusual punishment standard imposes a responsibility that employees and officials not disregard the medical and basic needs of prisoners. The quest for profit and cost-efficient care is not necessarily indicative of poor services. The quality of medical care provided by for-profit hospitals is equal to that provided by nonprofit hospitals. The only difference between for-profit and nonprofit hospital care and for-profit prison healthcare is patients' inability to weigh in on the quality of care they receive. Alex Friedman, an associate editor of Prison Legal News recently spoke to this very point, "If you take all the bad parts of the HMO and put it in a monopoly situation, then you have the private prison medical-care industry... but prisoners can't go to another clinic, can't pick a plan." The record of for-profit hospitals demonstrates that a private organizations' quest for profits does not lead necessarily to poor services: the quality of medical care provided by for-profit hospitals is equal to that provided by nonprofit hospitals. There needs to be a balance between profitable bottom lines and quality healthcare services provided within the prison private healthcare system.

The courts are able to step in for prisoners in the most severe cases to set a minimum standard that all prisons have to meet under the Eighth Amendment. The duty on the government is at least adequate, and that standard is evolving in the courts and will continue to do so under the high but not impossible two-prong test. Furthermore, contracts the government or state agencies make with for-profit companies should specify standards for inmate care and staff training. Contracts that further stipulate the necessity of certain constitutional guarantees of treatment can put companies on notice of the Court's expectations, just as public prisons are expected to be on notice as to constitutional guarantees.

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159. Siever, supra note 2, at 1404.
160. Id. at 1390.
161. See id. at 1391.
162. Savas, supra note 30, at 898.
163. THE WASHINGTON INDEPENDENT, supra note 98 (quoting Alex Friedman, associate editor of Prison Legal News).
164. Savas, supra note 30, at 898.
165. Id.
166. Id.
V. CONCLUSION

Through the protections of the Eighth Amendment and the due process requirements of the Fifth and Fourteenth Amendments, prisoners have a right to humane treatment and the supply of adequate medical care while incarcerated. Many states struggle with the rising costs of healthcare and prison maintenance, causing several states to turn to private entities to lower costs and utilize the private market model approach to healthcare. Though private entities have been plagued with failings, there is hope within the concept of privatization. Companies that have stepped to the forefront in the wake of the privatization of prisons can increase medical and other resources currently available to many prisoners, who would otherwise be largely neglected by society. Privatization of services within the prison system will be far more likely to operate at a standard that is constitutionally acceptable if it is highly regulated by federal and state governmental officials through detailed contracts and state constitutions, as well as having the court system address the constitutionally rooted issues on a case-by-case basis.