A CRUEL AND UNUSUAL SYSTEM: THE INHERENT PROBLEMS OF THE PRACTICE OF OUTSOURCING HEALTH CARE OF PRISONS AND JAILS

*Doug Jones**

I. Introduction

The prison and jail population in the United States is enormous, and is growing larger every day. "The United States has about 2.1 million people behind bars, a larger proportion of its population than any other nation in the world."[1] The inmate population has grown an average of 3.8% each year from 1995 to 2002.[2] By the end of 2001, "State prisons operat[ed] between 1% and 16% above capacity, and Federal prisons operat[ed] [at] 31% above capacity."[3] Such a large correctional system currently costs more than $60 billion a year, up from just $9 billion two decades ago.[4] In 2005, the rate of incarceration in the United States grew to 737 per 100,000 persons.[5] In comparison, the United States' closest competitor in this field is the Russian Federation, whose imprisonment rate is 611 per 100,000 persons.[6] Prisons and jails in the United States are overcrowded and many strain to handle the vast number of inmates they detain. In fact, the increase in the rate of imprisonment in America far exceeds the rate of increase in the general population.[7] Additionally, the majority of inmates are black or Hispanic.[8] The impact of the growth of im-

* J.D., Pace Law School, 2007; B.A., Washington University in St. Louis, 2003.

1. Editorial, *Death Behind Bars*, N.Y. Times, Mar. 10, 2005, at A26.
2. Paige M. Harrison & Jennifer C. Karberg, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2002* 2 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf.
3. *Id.* at 1.
4. *Id.*
5. The Sentencing Project, New Incarceration Figures: Thirty-Three Consecutive Years of Growth 5 (2006), http://www.sentencingproject.org/tmp/File/Incarceration/inc_newfigures.pdf.
6. *Id.*
7. *See* Marc Mauer, Race to Incarcerate 17 (1999).
8. *See* Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2003* 9 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf.

prisonment has been most severe on black men.[9] Almost three in ten black males will be incarcerated at some point in their lives.[10] That figure is three in twenty for Hispanic men and less than one in twenty-five for white men.[11]

The prison population in America is not only vast and rapidly expanding, but also "the prevalence of chronic illness, communicable diseases, and severe mental disorders among people in jail and prison is far greater than among other people of comparable ages."[12] Specifically, the "[s]ignificant illnesses afflicting corrections populations include coronary artery disease, hypertension, diabetes, asthma, chronic lung diseases, HIV infection, hepatitis B and C, other sexually transmitted diseases, tuberculosis, chronic renal failure, physical disabilities and many types of cancer."[13] Some have argued that the high concentration of the very sick in prisons and jails presents a public health opportunity. For example, Zielbauer argues that "[t]he vast jail complex at Rikers Island is New York's crucible of public health, where doctors have a chance to treat some of the city's sickest and most troubled people before they return to the street."[14]

Throughout the country, health care costs have skyrocketed in recent years.[15] The correctional system has not been immune to the rising cost of health care since "[i]n the last decade, state and local government spending for inmate health care has tripled nationwide, to roughly $5 billion a year."[16] Not only are the costs of prison health care rising quickly, but many correctional systems find it difficult to find qualified and experienced medical staff because prisons and jails are not viewed as prestigious places to work and tend not to pay very well.[17] In response to these fiscal and staffing dilemmas, many correctional systems outsource prison medical services to for-profit medical service

9. *See* Thomas P. Bonczar & Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Lifetime Likelihood of Going to State or Federal Prison* 3 (1997), http://www.ojp.usdoj.gov/bjs/pub/pdf/llgstp.pdf.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Paul von Zielbauer, *Evaluation of Medical Care Provider in the City's Jails Is Questioned*, N.Y. TIMES, Dec. 26, 2005, at B1.

15. Sarah Max, *Health Costs Skyrocket*, CNNmoney.com, Sept. 22, 2003, http://money.cnn.com/2003/09/09/pf/insurance/employerhealthplans/ (last visited Aug. 1, 2007); Hewitt Associates, Hewitt Health Value Initiative, Annual Health Care Cost Increases National Averages (2007), http://www.hewittassociates.com/_MetaBasicCMAssetCache_/Assets/Press%20Release%20PDFs/2007/2007_Health_Care_Costs-Charts.pdf.

16. Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days can be a Death Sentence*, N.Y. TIMES, Feb. 27, 2005, at A1 [hereinafter Zielbauer I].

17. *Id.*

corporations.[18] These for-profit companies, in addition to claiming that they save taxpayer money by reducing the costs of prison health care, "claim to provide many advantages over government-run correctional health agencies by offering, for example, reform of on-site health care operations and reduction in the need for hospital visits."[19] Additionally, these for-profit corporations argue that "[p]rivate contracts allow easier prediction of costs and provide an available pool of doctors, nurses and other workers who can address gaps in staffing more quickly than 'government bureaucracies'."[20]

Interestingly, there is a long history of prison privatization in this country. The practice developed as early as the eighteenth century when government-appointed jailers ran jails for profit.[21] While many kinds of prison services, such as security or meals, can be contracted out, the most commonly outsourced prison services are medical and mental health care.[22] Supporters of the outsourcing of prison services claim that the major advantage of the practice is that it lowers costs.[23] For example, one study examined a privately run prison farm, and with conservative estimates, concluded that the private operation saved the local government between 4% and 15% annually.[24] One of these for-profit corporations is Prison Health Services, Inc. (PHS). PHS is based outside of Nashville, Tennessee, and its stated purpose is "to provide quality, cost-effective healthcare services to prisons and jails at the local, county, state, and federal levels nationwide."[25] PHS holds a contract with New York City's Rikers Island and claims that it has saved the city hundreds of thousands of dollars by holding increases in medical expenses below the national average.[26]

However, despite all the benefits that corporations like PHS claim they bestow on state and local governments, there is a dark underside to the practice of outsourcing prison and jail health

18. Chadwick L. Shook & Robert T. Sigler, Constitutional Issues in Correctional Administration 118 (2000).

19. Richard Siever, *HMOs Behind Bars: Constitutional Implications of Managed Health Care in the Prison System*, 58 Vand. L. Rev. 1365, 1378-79 (2005) (citing William Allen & Kim Bell, *Death, Neglect and the Bottom Line: Push to Cut Costs Poses Risks*, St. Louis Post-Dispatch, Sep. 27, 1998, at G1.).

20. *Id.*

21. David Yarden, *Prisons, Profits, and the Private Sector Solution*, 21 Am. J. Crim. L. 325, 326 (1994).

22. *Id.* at 326-27.

23. *Id.* at 327.

24. *Id.*

25. Prison Health Services, Inc., Company Overview, http://www.prisonhealth.com/overview.html (last visited Mar. 19, 2006).

26. Paul von Zielbauer, *Lost Files, Lost Lives: Missed Signals in New York Jails Open Way to Season of Suicides*, N.Y. Times, Feb. 28, 2005, at A1 [hereinafter Zielbauer II].

care. Critics of outsourcing prison health care claim that the industry "takes advantage of the public's ill will toward inmates to give poor care while making a profit."[27] Despite the public relations façade that corporations like PHS put forward, there are numerous horror stories which reveal the true nature of the practice of outsourcing prison and jail health care. In general, inmates' complaints about medical treatment received from these for-profit corporations have included claims about the adequacy and nature of the medical care received (including denial, improper, and inadequate care).[28] The story of PHS's treatment of Brian Tetrault is illustrative.

Brian Tetrault was confined in a county jail in Schenectady, New York in 2001.[29] The former nuclear scientist had been charged with taking skis from his ex-wife's home.[30] Despite the fact that he had long struggled with Parkinson's disease, "the jail's medial director [an employee of PHS] cut off all but a few of the 32 pills he needed each day to quell his tremors."[31] Over the next ten days, Tetrault's condition rapidly deteriorated.[32] Without his normal medications, his physical mobility and mental capacities quickly began to fail him, reaching the point where, unable to move, he lay trapped in his own sweat and urine.[33] Shockingly, jail nurses dismissed Tetrault as a "faker" and ignored his rapidly deteriorating medical condition.[34] He never saw the jail doctor or psychiatrist again. After ten long days of being under-medicated, Tetrault died of septic shock.[35] In an effort to avoid responsibility, correctional officers at the Schenectady jail altered records to make it appear that Tetrault died after he had been released.[36]

Unfortunately, this example is not an isolated incident. Two months after Tetrault's death, Victoria Williams Smith was booked into a Duchess County jail.[37] This jail's health care services were also outsourced to PHS.[38] Smith was the mother of a teenage boy and was charged with smuggling drugs to her husband in prison.[39] She complained of chest pains to the jail's medi-

27. Siever, *supra* note 19, at 1379.
28. *See* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 226-35 (Anderson Publishing Co. 5th ed. 1997).
29. Zielbauer I, *supra* note 16.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

cal staff, but her complaints were dismissed as an attempt to receive drugs.[40] The only thing she was prescribed was Bengay.[41] Ten days later, Smith suffered a heart attack.[42] It was at this point that the jail medical staff called an ambulance, but it arrived too late to save her life.[43] Later, New York state investigators concluded that the blame for both of these tragic and unnecessary deaths lie with PHS.[44]

PHS moved into the business of providing jail health care in upstate New York with an ambitious proposal. PHS proposed to "take the messy and expensive job of providing medical care from overmatched government officials, and give it to an experienced nationwide outfit that could recruit doctors, battle lawsuits and keep costs down."[45] Michael Catalano, the chairman of PHS, stated, "what we do, is provide a public health service that many others are unable or unwilling to do."[46] Enchanted by the prospect of curbing jail heath care spending, state and local governments nationwide decided to outsource their jail heath care systems and award PHS contracts worth hundreds of millions of dollars.[47] However, in the wake of the tragic deaths that occurred in upstate New York, PHS no longer maintains contracts with most of the upstate New York jails.[48]

The New York State Commission of Correction, which is appointed by the Governor to, *inter alia*, investigate every death in jail, has repeatedly criticized PHS for its refusal to admit or rectify deadly mistakes.[49] The Commission has faulted company policies or mistakes or misconduct by it employees in 23 deaths of inmates in New York City and six in upstate counties.[50] Fifteen times in the last four years the commission has recommended discipline for PHS doctors and nurses.[51] In very strong language, one commission report described PHS as "reckless and unprincipled in its corporate pursuits, irrespective of patient care."[52] The report continued that "[t]he lack of credentials, lack of training, shocking incompetence and outright misconduct of the doctors and nurses . . . was emblematic of PHS's conduct as a business

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

corporation, holding itself out as a medical care provider while seemingly bereft of any quality control."[53]

New York is not the only state that has had problems with PHS. Georgia and Maine prisons replaced the company when its contract ran out, complaining of understaffed prison clinics.[54] In Philadelphia's jails, state and federal court monitors reported dangerous delays and gaps in treatment and medication for inmates.[55] However, despite all the criticisms and controversies surrounding the company, it is still alive and well. PHS now serves more than 310 jail and prison sites around the country, covering approximately 214,000 inmates in 37 states.[56] In fact, even though New York state investigators faulted PHS for the deaths in the upstate jails and New York's Commission of Correction has regularly criticized PHS, PHS renewed a three year, $254 million contract with the Rikers Island jail complex in New York City in January of 2005.[57]

The aim of this paper is to show that at a systemic level, the outsourcing of health care in prisons and jails has or will soon provide such a paucity of health care that the level of care could be considered cruel and unusual punishment and thus be unconstitutional.[58] This result is inevitable considering the race to the bottom that occurs when several for-profit companies compete for a correctional system's health care contract, and considering that the prison population has little or no power as a social or political constituency. Section II will examine the legal standards under which inmates may bring actions alleging paucity of health care. Section III will argue that the practice of outsourcing prison and jail health care inexorably leads to a violation of inmates' Constitutional rights. Section IV will suggest ways to improve correctional institutions' health care systems.

II. Legal Standards Regarding Inmate Health Care

Generally, for a federal court to adjudicate an inmate's complaint about medical treatment, the inmate must allege that a federal right was implicated.[59] A common right that inmates allege in medical treatment cases is the right to due process of law under the Fifth or Fourteenth Amendments.[60] The due process

53. *Id.*
54. *Id.*
55. *Id.*
56. Prison Health Services, Inc., *supra* note 25.
57. Zielbauer I, *supra* note 16.
58. *But see* Siever, *supra* note 19, at 1404 (analyzing whether outsourced prison health care is unconstitutional and concluding that it is unlikely that a court will ever find the practice unconstitutional).
59. Palmer, *supra* note 28, at 184.
60. *Id.*

right has been interpreted to guarantee the inmate's right to be free from abuse of discretion on the part of the prison's administrators.[61] Another common right that inmates allege to be violated in medical treatment cases is the right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment.[62] In general, courts find a violation of Eighth Amendment rights when there is an intentional denial of needed care, or when a prison official's conduct indicates deliberate indifference to the medical needs of an inmate.[63]

There are limits as to what inmates can expect to accomplish through the courts.[64] In *Priest v. Cupp*, the court held that the constitutional prohibition of cruel and unusual punishment does not guarantee an inmate that he will be freed from or cured of all real or imagined medical disabilities while he is in prison.[65] Instead, all that is required is that the inmate be given such care, in the form of diagnosis and treatment, as is reasonably available considering the circumstances of the inmate's confinement and medical condition.[66] Considering this standard, a balance must be struck between the reality of the inmate's confinement and his need for medical attention.[67] Accordingly, much of the litigation in this area has focused on the "nature of so-called adequate or reasonable medical care."[68] Additionally, some courts reason that a certain amount of deference must be given to prison administrators and hold that what constitutes an adequate prison health care system, in the absence of allegations of *intentional negligence or mistreatment*, must be left to the medical judgment of the prison physician.[69]

Whether a prison's medical system is adequate or not depends upon the facts and circumstances of each case.[70] Therefore, there are many cases that explain in detail what an adequate prison health system is and is not.[71] It is worth noting

61. *Id.* (citing Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975); Derrickson v. Keve, 390 F. Supp. 905 (D. Del. 1975); Nickolson v. Choctaw County, Alabama, 498 F. Supp. 295 (S.D. Ala. 1980); Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), *modified in*, 651 F.2d 96 (2d Cir. 1981)).

62. U.S. CONST. amend. VIII.

63. PALMER, *supra* note 28, at 184.

64. *Id.*

65. 545 P.2d 917 (Or. Ct. App. 1976).

66. *Id.*

67. PALMER, *supra* note 28, at 185.

68. *Id.*

69. *Id.* at 186 (citing United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970)).

70. *Id.* at 185.

71. *Id.*

that most cases hold that a prison's lack of funds is neither a defense nor an excuse for failure to provide adequate health care.[72]

In *Gates v. Collier,* the Fifth Circuit reviewed the prison health system of the Mississippi State Penitentiary.[73] For over 1,800 inmates, the prison's sparse health system included one full-time physician, several inmate assistants, and what the court referred to as a "substandard hospital."[74] The court held that to raise the prison's health system to an adequate level, the prison would have to implement numerous changes.[75] First, the prison would have to increase the medical staff to *at least* three full-time physicians, one of whom must be a psychiatrist, two full-time dentists, two full-time trained physician's assistants, six full-time registered or licensed practical nurses, one medical records librarian, and two medical clerical personnel. Moreover, the prison was ordered to obtain the consulting services of a radiologist and a pharmacist.[76] Next, the court required the prison to comply with the general standards of the American Correctional Association relating to medical services for prisoners.[77] Additionally, the prison hospital would have to be brought up to state licensing requirements, and the prison would not be able to use inmates to fill any of the above required medical staff positions.[78] However, if an inmate was qualified to perform health care services, that inmate could be used to supplement the required staff.[79]

In contrast, the court in *Miller v. Carson* found the health care system of a Florida county prison, with a maximum capacity of 432 inmates, to be adequate.[80] There, the medical staff included only one full-time physician, a licensed physician's assistant, and 13 nurses.[81] The court found it significant that the medical staff's work schedule allowed for a crisis intervention desk to be staffed 24 hours a day, and that either the physician or the physician's assistant was on call 24 hours a day.[82] Additionally, the court reasoned that the prisons' proximity to a university hospital made such sparse staffing adequate.[83]

The landmark case in the area of prisoner's constitutional rights to health care is *Estelle v. Gamble.*[84] The standard which

72. *Id.*
73. 501 F.2d 1291, 1300 (5th Cir. 1974).
74. *Id.*
75. *Id.* at 1303.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. 401 F. Supp. 835 (M.D. Fla. 1975).
81. *Id.*
82. *Id.*
83. *Id.*
84. 429 U.S. 97 (1976).

Estelle sets forth is the lens through which all issues of prison health care must be viewed. In *Estelle*, the Supreme Court held that for there to be a violation of the Eighth Amendment prohibition against cruel and unusual punishment, the inmate must prove facts and evidence that show a deliberate indifference to serious medical needs.[85] Simple negligence is insufficient; the lack of medical treatment must be intentional.[86] Later cases clarified that the deliberate indifference standard encompasses both objective and subjective prongs.[87]

The first, objective prong is that the alleged deprivation must be, in objective terms, sufficiently serious.[88] This objective prong has also been formulated as requiring the inmate to demonstrate a "serious medical need," which is a standard not so high as to embrace only life-threatening situations but not so low as to include minor medical conditions.[89]

The second, subjective prong was laid out in *Farmer v. Brennan*.[90] This prong requires that the prison official charged with violating an inmate's rights must be shown to have acted with a sufficiently culpable state of mind.[91] A sufficiently culpable state of mind requires more than mere negligence or malpractice, but less than conduct undertaken for the very purpose of causing harm.[92] Specifically,

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; *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.*[93]

In *Farmer*, the Court expressly rejected an objective, recklessness standard because recklessness is not a self-defining standard and cannot answer the question about the level of culpability that deliberate indifference requires.[94] The Court continued that the subjective standard was adopted because the Constitution does not outlaw cruel and unusual conditions; it outlaws cruel and un-

85. *Id.* at 106.
86. *Id.*
87. PALMER, *supra* note 28, at 186.
88. Wilson v. Seiter, 501 U.S. 294 (1991).
89. SUSAN L. KAY, THE CONSTITUTIONAL DIMENSIONS OF AN INMATE'S RIGHT TO HEALTH CARE 4, n.43 (1991) (citing Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980); Golf v. Bechtold, 632 F. Supp. 697, 698 (S.D. W. Va. 1986)).
90. 511 U.S. 825 (1994).
91. *Id.*
92. *Id.*
93. *Id.* at 837 (emphasis added).
94. *Id.* at 836.

usual punishments.[95] Therefore, by adopting a subjective prong to the *Estelle* analysis, the Court refused to impose liability on prison officials solely because of the presence of objectively inhumane prison conditions.[96] Moreover, *Farmer* requires consciousness of the risk in addition to the objectively inhumane or risky conditions.[97] Ultimately, the Court defined the subjective second prong by stating that a prison official may be held liable under the Eighth Amendment "for denying humane conditions of confinement *only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it*."[98]

In explaining how the subjective second prong is to be applied, the Court stated that a claimant need not show that a prison official acted or failed to act while believing that harm would actually come to an inmate.[99] Rather, "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[100] For example, if an inmate presents facts and evidence that a substantial risk of inmate harm is "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," and the evidence suggests that the official has received information relating to the risk and therefore "must have known about it," then such evidence is "sufficient to permit a trier of fact to find the defendant-official had actual knowledge of the risk."[101] In a concurring opinion, Justice Blackmun stated that *Farmer* "sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly."[102]

A case where this two-pronged test was applied was *Ancata v. Prison Health Services, Inc.*[103] There, the court considered a county's policy of requiring inmates to obtain a court order before referring them to a non-staff medical specialist.[104] The court held that this practice could constitute deliberate indifference.[105] The court reasoned that "if necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out," including where defendants

---

95. *Id.*
96. *Id.* at 838.
97. *Id.* at 839.
98. *Id.* at 847 (emphasis added)
99. *Id.* at 842.
100. *Id.*
101. *Id.* at 842-32.
102. *Farmer*, 511 U.S. at 852 (Blackmun, J., concurring).
103. 769 F.2d 700 (11th Cir. 1985).
104. *Id.*
105. *Id.*

place "financial interests . . . ahead of the serious needs [of an inmate]."[106]

Another case where the two-pronged test was applied is *Hathaway v. Coughlin*.[107] There, the court held that a prison doctor was deliberately indifferent to an inmate's serious medical needs when the doctor knew of and disregarded an excessive risk to the inmate's health.[108] Specifically, the doctor discovered that the inmate had two broken pins in his hip, but then waited two years before recommending that the inmate be re-evaluated for surgery.[109] The first prong was satisfied because the deprivation of care was sufficiently serious in objective terms.[110] The second prong was satisfied because the doctor demonstrated a sufficiently culpable mental state in waiting two years to recommend that the inmate be re-evaluated for surgery.[111]

III. Outsourcing Prison Health Care is Unconstitutional

For an inmate to show that the practice of outsourcing prison health care is unconstitutional, he would have to satisfy the two prong test discussed above.[112] Specifically, the inmate's injury would have to be, in objective terms, sufficiently serious and the inmate would have to show a culpable mental state in the prison official. In other words, the inmate would have to show that when the prison chose to outsource health care, the prison official was deliberately indifferent in that he knew "that inmates face[d] a substantial risk of serious harm and [he] disregard[ed] that risk by failing to take reasonable measures to abate it."[113] In essence, the inmate would have to show that prison officials intentionally chose to implement a system which they knew would lead to such a degradation in health care, that the act of choosing to outsource health care was a deliberately indifferent act.

The first, objective prong will not be hard to satisfy. The Supreme Court has specifically held that the Eighth Amendment protects against future inmate harm.[114] The Court has given the example that "a prison inmate could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."[115] Therefore, an inmate could bring an action

106. *Id.* at 704.
107. 37 F.3d 63 (2d Cir. 1994).
108. *See id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* Siever, *supra* note 19, at 1401.
113. *Farmer*, 511 U.S. at 847.
114. Helling v. McKinney, 509 U.S. 25, 32-33 (1993).
115. *Id.* at 33.

alleging that the practice of outsourcing health care in prison is unconstitutional without waiting around to be injured by the dangerously sub-standard care. Although an actual injury may not be necessary in theory, however, considering the number of inmates who have actually been injured by the sub-standard care provided by PHS and corporations like it, it would not be hard to find a sympathetic plaintiff with a sufficiently serious injury.[116]

The second, subjective prong is more problematic. No court has ever found that the practice of outsourcing prison health care violates the Eighth Amendment.[117] However, courts have found health care delivery systems within specific prisons to be deliberately indifferent.[118] Fortunately, it is not a huge jump from finding that a specific prison's health care system is deliberately indifferent to finding that prisons' outsourcing to for-profit, health care corporations is deliberately indifferent.[119]

The case of *Todaro v. Ward* is illustrative.[120] There, the Second Circuit wrote, "the record leaves no doubt that the medical practices and procedures at Bedford Hills were constitutionally infirm."[121] The court found that "existing prison procedures resulted in interminable delays and outright denials of medical care to suffering inmates."[122] In reaching its holding, the court found not only that the prison committed individual acts of deliberate indifference, but that the act of adopting such a dangerously substandard health care system was deliberately indifferent.[123] Specifically, the court reasoned that "[w]hile a single instance of medical care denied or delayed . . . may appear to be the product of mere negligence when viewed, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures."[124] In fact, "a series of incidents closely related in time . . . may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners."[125] Using strong language, the court stated that "the Constitution does not stand in the way of a broader attack on the adequacy of an institution's

116. *See, e.g.*, Zielbauer I, *supra* note 16.

117. Siever, *supra* note 19, at 1393.

118. *See, e.g.,* Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).

119. *But see* Siever, *supra* note 19, at 1395, 1404 (discussing that a plaintiff could make this argument and concluding that she would be unlikely to ultimately prevail).

120. *Todaro*, 565 F.2d at 48.

121. *Id.* at 53.

122. *Id.*

123. *Id.* at 52.

124. *Id.*

125. *Id.* (quoting Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974)).

entire health care system which threatens the well-being of many individuals."[126]

Todaro was decided before *Farmer*, but its facts and holding can still be analyzed under the objective and subjective two-pronged analysis. As to the objective prong, the delays and denials of care caused by the inadequate system were sufficient serious harms.[127] Specifically, the prison's medical intake system was deficient.[128] Under this system, a single nurse listened to inmates' medical requests and dispensed medication.[129] To prevent theft of drugs, the nurse was locked in a small room, and observed inmates through a small, locked and barred cashier's window.[130] Observing inmates in this way completely prevented the nurse from performing any physical examination.[131] To make matters worse, intake sessions lasted only between fifteen and twenty seconds.[132] Under this system, inmates often waited months for the medical care they required, and some never received it at all.[133] The court found that this intake system caused delays and denials of medical care which in turn caused sufficiently serious inmate harms.[134] The second, subjective prong of the analysis is satisfied because prison officials knew that implementing an inadequate health care delivery system would create a risk of serious harm to inmates. They also knew that they could have implemented a system without this risk. Finally, they chose to implement the inadequate system anyway. While this case did not specifically deal with the practice of outsourcing health care in prisons, it does clearly show that prison health care is vulnerable to a systemic attack.[135]

Todaro shows that a prison official can be deliberately indifferent when choosing to adopt a dangerously inadequate prison health care system. Outsourced health care in prisons and jails, as a system, is plagued by fundamental and inherent problems which make the system dangerously inadequate. Furthermore, the court in *Farmer* quoted the Respondent's Brief to point to the problems as "longstanding, pervasive, [and] well-documented" and that prison officials either knew or should have

126. *Id.*
127. *See* Wilson v. Seiter, 501 U.S. 294 (1991).
128. *Todaro*, 565 F.2d at 50.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* Siever, *supra* note 19, at 1395.

known of the substantial risks of serious harm that outsourcing health care to for-profit corporation poses to inmates.[136]

A. *Profit as the First Priority*

When a prison outsources its health care, it gives the contract to a for-profit corporation.[137] The New York State Commission of Corrections is an outspoken critic of PHS.[138] The Commission has said that "[o]ur sense was that what we were dealing with was not clinical problems but business practices."[139] Specifically, the troublesome business practice was that PHS would run the prison's health care system at as low a cost as possible in an effort to make a profit.[140] In fact, the commission noticed that low level employees were routinely doing work normally done by more credentialed people.[141] For example, nurses were making medical decisions and pronouncing people dead.[142] Additionally, one study performed by the Commission in 2001 found that the doctor overseeing care in several upstate jails regularly overruled the doctors at the jails and regularly refused drugs and treatments.[143] Amazingly, this doctor was not licensed to practice in New York and performed his job over the phone from Washington.[144]

The simple fact of the matter is that the first priority of a for-profit corporation is to make a profit. By definition, the priority of providing decent health care will always be subservient to the corporation's drive to make a profit. In this way, the system of outsourcing health care in prisons encapsulates an inherent conflict of interest, where the entity charged with providing health care to inmates serves its own best interest by providing as little care as possible. Indeed, one could reasonably speculate that all of the specific problems inherent in the system of outsourcing prison health care stem from the fact that PHS's motivation is not to provide decent health care to inmates, but to simply make a profit.

B. *Poor Checking of Doctor's Credentials*

In 2001, the New York State Commission of Correction issued a report stating that PHS was practicing dangerously sub-

136. *Farmer*, 511 U.S. at 842-43.
137. *See, e.g.*, Zielbauer I, *supra* note 16.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

standard medicine by hiring doctors and nurses with questionable credentials.[145] Specifically, PHS employed five doctors with criminal convictions, including one who sold human blood for phony tests to be billed to Medicaid.[146] Also, at least fourteen doctors who have worked for PHS have state or federal disciplinary records, including a psychiatrist who is forbidden to practice in New Jersey where state officials have held him responsible for a patient's fatal drug overdose.[147] Additionally, doctors who have worked for PHS have stated that they make more money by working less hours with other employers.[148] Accordingly, it is not hard to see why PHS employs less desirable doctors, and why PHS may be less than thorough when checking the credentials and background of the doctors it ultimately hires.

C. *Understaffing*

In New York City, government officials and monitors have repeatedly complained about PHS's understaffing on Rikers Island.[149] For example, the New York City Board of Corrections found that PHS severely understaffed psychiatrists on Rikers Island.[150] Ten of PHS' full time psychiatrists had foreign medical degrees.[151] The company allowed them to continue practicing for a year after they failed to pass the state certification test.[152] PHS shuffled its doctors from building to building on Rikers Island to avoid city fines and to create the illusion that each building was properly staffed.[153] The mental health staff at Rikers even had a name for this practice — "floating."[154] The rate of suicides in jails is seen as a barometer of how the jail's psychiatric services are performing, and in 2003, when PHS was providing psychiatric services to Rikers Island, there were six suicides in six months.[155] By way of comparison, mental health staff at Rikers Island has shrunk by almost twenty percent since PHS took over the job of providing prison health care from it predecessor.[156] PHS is always looking for more psychiatrists, and is often forced to plug gaps with part-time staff or with staff from temporary agencies.[157] More than one third of the mental health staff on Rikers

145. *Id.*
146. Zielbauer II, *supra* note 26.
147. *Id.*
148. *Id.*
149. Zielbauer I, *supra* note 16.
150. Zielbauer II, *supra* note 26.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

is part time.[158] This problem becomes more acute considering that one in four of the 14,000 inmates in New York City jails is in need of mental health care.[159]

Adult inmates were not alone in receiving severely understaffed medical care. In 2000, PHS had only one full-time doctor for 19 separate juvenile detention centers scattered across New York City.[160] Five thousand children passed through these 19 centers each year.[161]

D. *Poor Training of Staff*

In 2001, Aja Venny was booked into a Bronx jail where PHS ran the health services.[162] She was six months pregnant, but she never saw the jail's obstetrician.[163] The only concession to her condition was to put her in a maternity unit of the jail.[164] One night, Venny was woken by severe cramps and she called for a guard to get a nurse.[165] The nurse who responded, Donna Hunt, found Venny sitting on the toilet with "blood everywhere."[166] The nurse later said that she assumed Venny had miscarried and saw no reason to check the toilet.[167] However, when ambulance technicians arrived they checked the toilet and found an infant lying in the bowl.[168] Three days later, the infant died.[169] The State Commission of Corrections investigated this incident and found that this tragedy arose from a deep-seated failure to train prenatal staff.[170] Apparently, the prenatal training for the nurse working at that jail consisted of e-mail messages with instructions copied from a university web site.[171]

E. *Error Hiding*

In an attempt to avoid fines and criticism, PHS and other corporations often hide the medical errors they make. For example, Dr. Douglas Cooper, PHS's former assistant supervising psychiatrist on Rikers Island, stated that an unwritten policy of the

158. *Id.*
159. *Id.*
160. Paul von Zielbauer, *Mistreating Tiffany: A Spotty Record of Health Care for Children in City Detention*, N.Y. TIMES, Mar. 1, 2005, at A1 [hereinafter Zielbauer III].
161. *Id.*
162. Zielbauer I, *supra* note 19.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

company was to "[p]ut your best face forward, hide as many problems as you can and hang on to the contract for as long as you can."[172] Some former employees of PHS alleged that to sidestep an understaffing fine, PHS employees would sign in at one jail and then work at another.[173] Additionally, the policy of hiding errors is evidenced in a practice where PHS supervisors fix errors and omissions on inmate medical forms to avoid fines.[174]

No doubt, PHS believes that hiding errors will help its bottom line in the short run by avoiding fines. However, in the long run, this policy may be detrimental to both inmates and the corporation. If errors are not reported, no lessons will be learned from mistakes. If no lessons are learned, then the system will remain stagnant, and the level of care will not improve. Clearly this stagnant level of care is detrimental to inmates, but it is detrimental to the corporation as well. If the corporation did not hide errors, and instead attempted to learn from its mistakes, then it could find more efficient ways to deliver health care. This would help the bottom line by reducing the cost of providing health care, and by reducing the costs associated with providing inadequate health care, such as fines and legal fees.

F. *State and Local Government Quick Fixes*

It is easy to imagine a legislator in a love-hate relationship with the practice of outsourcing health care in prisons and jails. They love the company's promise that it will save taxpayer dollars, but they hate the scandals that occur when newspaper reporters discover just how awful prison health care actually is.[175] In response to these scandals, many politicians attempt to put superficial, quick fixes on the system. The problem with these quick fixes is that they are not effective. The real remedy is to stop the practice of outsourcing prison health care to for-profit corporations.

For example, the New York State Commission of Correction has urged the New York Attorney General to halt PHS's operation in New York. The Commission claims that PHS has no legal authority to practice medicine in New York because business executives are in charge of the company.[176] New York, like most states, requires for-profit corporations that provide medical services to be owned and controlled by doctors.[177] This ensures that

172. Zielbauer II, *supra* note 26.
173. *Id.*
174. Zielbauer, *supra* note 14.
175. *See, e.g.*, Zielbauer I, *supra* note 16; Zielbauer II, *supra* note 26; Zielbauer III, *supra* note 160.
176. Zielbauer I, *supra* note 16.
177. *Id.*; N.Y.COMP. CODES R. & REGS. tit. 10, § 600.9(c) (2005).

business calculations of profit do not drive medical decisions.[178] Requiring that PHS, and companies like it, be run by doctors is at best a superficial and ineffective remedy. By definition, every decision that a for-profit corporation makes will factor in cost, profit and the bottom line. This will be true regardless of whether the company is run by businessmen or by doctors. Either way, a for-profit corporation's goal is to make a profit. Therefore, merely requiring that these companies must be run by doctors will not fix the system and, instead, the system should be abandoned or changed on a fundamental level.

Indeed, the ease with which PHS bypassed this requirement shows how ineffective a remedy it is. In New York, PHS set up two corporations, run by doctors, which handle the medical care for prisons and jails in New York.[179] State investigators have called these corporations shams.[180]

G. *A Deliberate Indifference to These Problems*

Farmer explained "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[181] A prison official who chose to implement a system of outsourcing prison health care could be held liable under that standard.

First, in choosing whether to implement a system of outsourced prison health care, a prison official would know that implementation of such a system would expose inmates to a substantial risk of serious harm. No prison official would arbitrarily choose one prison health care system over another. In the act of choosing a system, the official would research the various options. Therefore, as in *Farmer*, the evidence of the risk of outsourcing health care to a for-profit corporation would be "longstanding, pervasive [and] well-documented" such that a jury could find that the official had actual knowledge of the risk.[182] Thus, in choosing to implement a system of outsourced health care, the prison official would know of the horrible reputation for-profit prison health care providers. Because of this knowledge, the official would know he is exposing inmates to a substantial risk of serious harm.

178. Zielbauer I, *supra* note 16.
179. *Id.*
180. *Id.*
181. *Farmer*, 511 U.S. at 847.
182. *Id.* at 842-43.

Second, if the prison official chose to outsource the prisons' health care, the official would be disregarding the substantial risk of serious harm, and would thus be deliberately indifferent. The standard set forth in *Farmer* requires the prison official to take reasonable steps to abate any substantial risk to inmate health.[183] By simply choosing to outsource prison health care, even though the official knows of the risk, the official would fail to take reasonable steps to abate the risk. If the official knows of the risk, and disregards it, he could be held liable for providing such a paucity of care that it is a cruel and unusual punishment.

A counterargument to this position could be that despite salacious media stories about health care in prisons and anecdotal horror stories, corporations that provide health care in prisons are taking on a difficult job, and doing the best anyone could do given the realities of the correctional environment. No one would argue that PHS and corporations like it are doing a perfect job, but critics of my position could argue that they are doing the best anyone could under the circumstances. This counterargument could hold water if, at the very least, the level of health care behind bars gets no worse, yet, the nature of the system of outsourcing health care in prison ensures that the level of health care behind bars will inexorably decline as I have detailed in previous sections.

H. *Race to the Bottom*

There are approximately half a dozen companies who offer outsourcing for prison health care, and they often compete with each other, "jockey[ing] to underbid each other to promise the biggest savings."[184] The bids get lower and lower, but the prison population rises.[185] The inevitable result of this is the level of care drops further and further.

The infinitesimal power of inmates as a social or political constituency makes this problem even worse. Normally, the process of service providers competing with each other results in consumers receiving the best quality service at the best price. However, achieving this result presupposes an informed consumer who can make an informed choice. This presupposition is not valid for corrections. Prisoners have no choice in who provides their health care; instead, that choice lies with prison officials. Prisoners must rely on elected officials or prison officials to look out for their best interest in this area. The problem is that because prisoners have little to no power as a social or political

183. *Id.* at 847.
184. Zielbauer I, *supra* note 16.
185. *See, e.g.*, Harrison & Karberg, *supra* note 2, at 2.

constituency, prison officials or elected officials often do not look out for the best interests of prisoners. Simply put, because prisoners have little to no political power, politicians have no incentive to look out for their best interest. Outsourcing health services to the private sector makes sense only if there is a strong constituency that cares deeply about the people receiving the service and if the enterprises involved are held accountable for service quality.[186] The problem is that such accountability does not exist for prison inmates.[187]

One glaring example of this lack of accountability is the system New York City uses to monitor PHS's performance. New York City creates a report card for PHS every quarter where it judges PHS's performance, and can fine PHS if its performance is lacking in any area.[188] The city bases this report on a review of inmates' medical records.[189] The problem is that the city "lets Prison Health [PHS] pull the charts itself — a practice that has allowed company employees to fix errors or omissions before city auditors could see the files."[190] Additionally, some see a potential conflict of interest in that the city agency that monitors PHS's performance is the same agency that awarded PHS its contract in the first place.[191] This conflict is evident when considering that "[a]t least 19 times since 2001, the [city's] medical director has excused enough deficiencies in Prison Health's work that a failing score became a passing one," allowing PHS to avoid fines.[192]

Another problem with the practice of outsourcing prison health care is that there are few corporations that provide such services. About 40 percent of all inmate health care in America is now contracted to for-profit companies.[193] The largest is PHS, followed by it closest rival, Correctional Medical Services and four or five others.[194] Thus, there are only a handful of companies whose business is to contract with state and local governments for the outsourcing of prison and jail health care. Nevertheless, the field is very competitive as these companies compete with each other to offer the lowest bids and win contracts.[195] In this field, it is a regular practice for companies to

186. Robert Simmons, Harvard Business School, Letter to the Editor, *For-Profit Health Care Penalizes Prisoners*, N.Y. TIMES, Mar. 13, 2005 at 4-10.
187. *Id.*
188. Zielbauer, *supra* note 14.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. Zielbauer I, *supra* note 16.
194. *Id.*
195. *Id.*

move from "jail to jail, and scandal to scandal — often disliked but always needed."[196] In fact, because the field of corporations that provide prison health services is so small, it is not uncommon for a government to hire the same corporation that they fired for cause years earlier.[197] This revolving door effect is made even worse considering that many states have legislative mandates requiring prisons to accept the lowest bidder.[198] These mandates provide few incentives for quality and contribute toward the frequent turn-over of contractors because of poor profitability.[199]

Therefore, the combination of a race to the bottom, a small field of competitors, high demand for their services, and complete lack of inmate social or political power ensures that if the system of outsourcing prison health care does not change, the level of care provided to inmates will continue to get worse. If the level of care is not already at the level of cruel and unusual punishment, then, absent a significant change in the system, it soon will be.

IV. Suggestions For Improvement

It is time to face facts: America has the largest prison population in the world and it is getting larger.[200] Moreover, our prison population is the sickest population in our society,[201] and rare is the politician who is not tough-on-crime.[202] If we are going to live in a society with a tough-on-crime attitude, then the simple fact of the matter is that we as a society are going to have to pay substantially for our prison system.

One commentator has argued that the humanitarian basis for prison reform, to treat prisoners better simply because they are people and it is the right thing to do, is the morally correct view.[203] However, if the free population is to "open its purse stings for the benefit of prisoners" it must have a pragmatic argument directed towards the free population's self-interest.[204] Luckily, there is such a pragmatic argument: "treat prisoners well

---

196. *Id.*
197. *Id.*
198. Harold Pollack et al., *Health Care Delivery Strategies for Criminal Offenders*, 26 J. Health Care Fin. 63, 64 (1999).
199. *Id.*
200. Editorial, *supra* note 1.
201. *See* Re-Entry Policy Council, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community 150-73 (2005)
202. *See, e.g.*, Issues 2000, *George W. Bush on Crime*, http://www.issues2000.org/George_W__Bush_Crime.htm (last visited Apr. 2, 2006).
203. John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 Am. J. L. & Med. 447, 463-64 (2005).
204. *Id.*

and we all benefit by avoiding the personal health and financial consequences of releasing sick prisoners into the community."[205] Considering that there is both a humanitarian and pragmatic argument for spending more on prison health care, it may be possible for advocates to convince state and local governments that society no longer wants sick prisoners released into the community. Therefore, advocates can argue that the practice of outsourcing prison health care, which inevitably leads to sicker prisoners, must stop.

Some prison officials have stated that despite slashing the level of care given to inmates, for-profit corporations like PHS save prison systems little money in the end.[206] Indeed, when one factors in the attorneys fees and the costs of settlement and judgments against prison systems when inmates are injured by substandard care, it may be that outsourcing prison health care is more expensive than if the state or local government simply provided it themselves. Therefore, it may be more economical to find another way to deliver health care to prisons and jails.

Some large city hospitals and other non-profit enterprises have entered the arena of providing health care to inmates, and many consider them to provide the best care to inmates.[207] They often cost more than the for-profit corporations like PHS,[208] but it is in society's best interest to provide better health care to its prisoners. Some New York lawmakers have called for a change to the system. New York Assemblyman Richard N. Gottfried has pressed state lawmakers to create a public corporation, like the city's Health and Hospital Corporation, that would be responsible for health care for prison inmates.[209] Doctor Thomas R. Frieden, New York City's health commissioner, has stated that he would prefer to have a public hospital provide inmate health care, but that none bid for the job despite his personal appeal to hospital executives to do so.[210]

The practice of outsourcing prison health care to for-profit corporations is fundamentally broken. The financial incentive for these corporations to provide inadequate care to prisoners is huge, and because prisoners do not have any political clout, these corporations can profit off the public apathy towards prisoners. Therefore, the type of organization best suited to provide health care to prisons and jails is a government created non-profit or-

205. *Id.*
206. Zielbauer I, *supra* note 16.
207. *Id.*
208. *Id.*
209. Paul von Zielbauer, *Investigators Called Rikers Medical Contract Illegal, State Panel Says*, N.Y. TIMES, Nov. 22, 2005, at B1.
210. *Id.*

ganization. With a non-profit organization, the driving motivation would not be profit, but a sense of mission to provide health care to a vulnerable population.

Unfortunately, the goal of completely ending the practice of outsourcing prison health care to for-profit corporations may be a bit ambitious. Keeping that in mind, if a prison system is going to outsource its health care to a for-profit corporation, there is a responsible way to do it. One vital element of a responsible outsourcing system is a comprehensive monitoring process. For example, New York City health officials set up an elaborate performance evaluation system to monitor the effectiveness with which PHS provides health care to inmates on Rikers Island.[211] There is a quarterly report card with 35 standards that the company must adhere to.[212] If they do not, they are subject to hefty fines.[213] For example, during the first year the company ran health services on Rikers they failed to meet thirty-nine percent of the standards on the report and were fined $568,000.[214] An essential component of the monitoring process is to make sure it is done objectively. The medical reports on which the corporation is graded should be pulled by state employees, not employees of the corporation. Additionally, to avoid conflict of interest, the state entity that carries out the grading should be separate from the entity that awarded the contract to the corporation. Finally, it would be prudent to require the entity that does the monitoring to rank the corporation's performance on some kind of standardized scale and to make this rank readily available. This way, other prison systems who are shopping around for a corporation to provide health care will be able to compare different corporations on the standardized scale. This will place market pressure on the corporations to provide better care at a more efficient price.

V. Conclusion

The practice of outsourcing health care in prisons and jails to for-profit corporations is fundamentally broken. The level of care these corporations provide inmates is dangerously inadequate and considering the race to the bottom that occurs when several of these corporations compete for the same contract, the level of care can only get worse. Because prison officials know of the substantial risk to inmate health that outsourcing prison health care can cause, when a prison official chooses to implement a prison

211. Zielbauer I, *supra* note 16.
212. *Id.*
213. *Id.*
214. *Id.*

health care system that is outsourced to a for-profit corporation, that prison official is deliberately indifferent to the health care rights of inmates. Therefore, that prison official could be held liable for violating the Constitutional rights of inmates by implementing a prison health care system that is the equivalent of cruel and unusual punishment.

Correctional systems must stop the practice of outsourcing prison health care to for-profit corporations. It is proposed that a practicable alternative is to place the responsibility of providing inmate health care on government-created, non-profit organizations. This would eliminate the dangerous conflict of interest that is fundamentally encapsulated in the practice of outsourcing prison health care to for-profit corporations. Simply put, it is in a for-profit corporation's best interest to provide as little care as possible. In the alternative, it is proposed that if the practice of outsourcing prison health care to for-profit corporations cannot be completely halted, then instead, independent entities should closely and frequently scrutinize and evaluate the performance of these for-profit corporations. The results of these strict evaluations should be made readily available. This will place market pressure on these for-profit corporations to provide quality health care to inmates at a reasonable cost.