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HMOs Behind Bars: Constitutional Implications of Managed Health Care in the Prison System

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I. INTRODUCTION

In 1991, the Correctional Corporation of America (CCA) entered into a contract with the State of Tennessee to house and treat state prisoners at CCA facilities.[1] In response to increased costs, CCA negotiated a contract with a physician to be the exclusive provider of medical services for one of its facilities.[2] Essentially, this contract formed a managed health care system: the doctor's payment structure included a base salary, but it also incorporated financial incentives that could increase his overall compensation if he were to provide less care to inmates.[3]

Later, Anthony Bowman, a prison inmate with sickle cell anemia,[4] died when prison health officials failed to transfer him for medical treatment.[5] Bowman's mother sued CCA, asserting that the contract between the doctor and CCA violated CCA's Eighth Amendment obligation to provide adequate medical care.[6] Furthermore, Ms. Bowman claimed that the financial incentive provisions of the contract motivated the doctor to delay transfer of the inmate to an outside hospital—the proximate cause of his death.[7]

The *Bowman* case, recently decided by the Sixth Circuit Court of Appeals on jurisdictional grounds, left unanswered an important question regarding the scope of the Eighth Amendment and application of the Cruel and Unusual Punishment Clause. The United States Supreme Court recently readdressed the Clause's scope and the Constitutional standard, again affirming an ambiguous duty on the part of government.[8] Problems concerning health care in the prison context, and the nature of this "duty" imposed upon the prison system remain unsolved given the subsequent advent of managed health care. How should the Court's standard apply to *Bowman* and future cases, given the managed care organization that allegedly failed to properly care for an inmate?

Part I of this Note describes the history and evolution of the Eighth Amendment prohibition of cruel and unusual punishment and its development within the context of prison health care. Part I also briefly discusses the current state of prison health care as it relates to

1. Bowman v. Corrections Corp. of Am., 188 F. Supp. 2d 870, 879 (M.D. Tenn. 2000).
2. *Id.* at 879.
3. *Id.*
4. *Id.* at 877.
5. *Id.* at 882.
6. *Id.* at 874.
7. *Id.* at 822.
8. Farmer v. Brennan, 511 U.S. 825, 833-35 (1994).

the current problem. Because courts have never applied the Eighth Amendment to managed health care,[9] Part II analyzes the most recent interpretations of the Court's Eighth Amendment jurisprudence, the nature of its obligation on the government, and applications of the right in circumstances analogous to managed health care. This Note also examines *Bowman v. CCA*, a contemporary case implicating the potential constitutional problem presented by managed care in prisons. Part III concludes that given the current case law surrounding the Eighth Amendment, and the nature of the prison's duty, an inmate could raise a valid constitutional claim. Finally, this Note proposes an analysis for courts to use in such circumstances, applicable to various forms of managed health care.

II. DEVELOPMENT OF THE EIGHTH AMENDMENT & THE REALITY OF PRISON HEALTH CARE

The government's responsibility to provide health care to prisoners arises under the Eight Amendment to the Constitution, which provides that "cruel and unusual punishment [shall not be] inflicted."[10] Analysis of the Eighth Amendment's prohibition on cruel and unusual punishment demands a brief review of its history and continuing development. Critical to understanding current application of the right is acknowledging the fluid nature of the Eighth Amendment, which manifests itself in an "evolving standard of decency."[11]

A. Historical Evolution of Eighth Amendment

The Eighth Amendment's restriction regarding punishment stems from concerns that originated with the Code of Hammurabi, the earliest written code of laws, and the most famous of the Old Babylonian kings of Mesopotamia.[12] Such ancient codes incorporated the "lex talionis," or "law of retaliation," the infamous rule

9. With the exception of the District Court in *Bowman*, 188 F. Supp. 2d 870, 879 (M.D. Tenn. 2000).

10. U.S. CONST. amend. VIII. (The Eighth Amendment mandates that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

11. Trop v. Dulles, 356 U.S. 86, 101 (1958).

12. Keith D. Nicholson, *Would You Like More Salt With That Wound?: Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1109 (1995); *see also* Furman v. Georgia, 408 U.S. 238, 333 n.41 (1972) (Marshall, J., concurring) (commenting that the Code of Hammurabi was one of first legal systems to use "eye for an eye" methodology).

proclaiming, "[e]ye for eye, tooth for tooth."[13] Western civilization later adopted this standard in its vision of punishment that reflects the crime.[14] Later drafted by Parliament at the accession of William and Mary, the phrase, "cruel and unusual punishment" first appeared in the English Bill of Rights of 1689.[15] The English version of the language appears to have been directed at unauthorized punishments prohibited by statute and outside the jurisdiction of the sentencing court, as well as those "disproportionate to the offense involved."[16] The American officials who drafted the Eight Amendment adopted the English phrasing—although primarily concerning themselves with forbidding " 'tortures' and other 'barbarous' methods of punishment."[17] Consequently, the United States protected its prisoners from the outrageous European punishments historically imposed.[18]

The earliest courts reviewing Eighth Amendment claims focused on particular methods of capital punishment in determining whether executions were too cruel to satisfy constitutional rights; general standards relied upon "barbarous" and "tortuous" criterions.[19] Obviously, subsequent courts have not limited Eighth Amendment application to the "barbarous" methods, most of which were outlawed before the 19th century.[20] The United States Supreme Court, rather, has applied the Eighth Amendment in a flexible manner, acknowledging that for "a principle to be vital, it must be capable of wider application than the mischief that gave it birth."[21] In this sense, the "cruel and unusual punishment" language has not become obsolete, but has acquired new meaning as public opinion has become more "enlightened by a humane justice."[22]

Courts, then, have not applied the Eight Amendment in any consistent way, as evidenced by the foregoing precedent.[23] In a

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13. *Exodus* 21:24; *see also* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969).

14. Granucci, *supra* note 13, at 844.

15. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

16. *Id.*

17. *Id.* at 170.

18. Granucci, *supra* note 13, at 865; *see also* Wesley P. Shields, Comment, *Prisoner Health Care: Is it Proper to Charge Inmates for Health Services?*, 32 HOUS. L. REV. 271, 276 (1995) (noting prisoners in the U.S. have enjoyed greater protection than early prisoners in Europe).

19. *Gregg*, 428 U.S. at 170.

20. *Id.* at 171.

21. Weems v. U.S., 217 U.S. 349, 373 (1910); *Gregg*, 428 U.S. at 171 (quoting Weems, 217 U.S. at 373).

22. Trop v. Dulles, 356 U.S. 86, 100-101 (1958); *Gregg*, 428 U.S. at 171 (quoting *Weems*, 217 U.S. at 373).

23. *See Greggs*, 428 U.S. at 171 (noting "the amendment has been interpreted in a flexible and dynamic manner").

frequently cited opinion[24], Chief Justice Earl Warren concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[25] Because of this developing standard of cruel and unusual punishment, contemporary societal values have a profound effect on the application of the Eighth Amendment.[26] Despite the difficulty in forecasting society's standards of decency with regard to criminal sanctions, the United States Supreme Court has attempted to adapt the Eighth Amendment to modern values. The Court again noted that the Eight Amendment ban on cruel and unusual punishment will adapt to public sentiment as humane justice enlightens society, rather than lay fixed in the past.[27]

B. Estelle v. Gamble*: Deliberate Indifference Standard*

The prohibition on cruel and unusual punishment has developed, in recent years, to impose affirmative duties on government, including the provision of services such as medical care to prisoners.[28] The Supreme Court has extended its definition of cruel and unusual punishment beyond mere penalty consideration, and in *Weems v. United States*, it paved the way for expansive use of the Eighth Amendment.[29] *Weems* initiated judicial expansion of the cruel and unusual punishment clause in response to public sentiment concerning harsh prison conditions.[30]

Twentieth century development of Eighth Amendment jurisprudence continued in *Trop v. Dulles*, in which the Supreme Court again broadened the Eighth Amendment's protection.[31] In *Trop*, the Court asserted that "[t]he basic concept underlying the

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24. *Trop*, 356 U.S. at 86.

25. *Id.* at 101.

26. *See Gregg*, 428 U.S. at 173 (noting that in assessing a sanction, the "public attitude" towards a given sanction should be considered).

27. Carlene Gatting Carrabba, Note, *Prisoners' Constitutional Right to Medical Treatment: A Right Without Substance?*, 7 NEW ENG. J. ON PRISON L. 341, 378 (1981) (citing *Weems*). Additionally, the Eighth Amendment is applicable to the state through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962).

28. Marc J. Posner, *The Estelle Medical Professional Judgment Standard: The Right of Those in State Custody to Receive High Cost Medical Treatments*, 18 AM. J.L. & MED. 347, 348-349 (noting that recent constitutional jurisprudence on the Eighth Amendment suggests states are required to provide medical care to prisoners); Shields, *supra* note 18, at 36 (noting the U.S. government has a duty, under the Eighth Amendment, to provide medical care to prisoners).

29. Carrabba, *supra* note 27, at 348-49.

30. *Id.* at 348.

31. Carrabba, *supra* note 27, at 349 (citing Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

Eight Amendment is nothing less than the dignity of man."[32] The Court further contributed to the evolving cruel and unusual punishment standard in *Gregg v. Georgia*, where it established a two-part test prohibiting punishments "grossly out of proportion to the severity of the crime" or involving "the unnecessary and wanton infliction of pain."[33]

The government's obligation to provide medical treatment for prisoners did not historically arise from the Eighth Amendment; rather, common law directed application of the duty of the custodian with regard to government's supervision of the incarcerated separate from any Eighth Amendment concerns.[34] The common law duty of custodial care essentially developed from *Spicer v. Williamson*, which required care for prisoners who, because of their incarceration, could not properly attend to themselves.[35] *Spicer* recognized that justice required care for prisoners, who cannot support themselves due to deprivation of liberty.[36] Later, many state and federal statutes incorporated this common law "duty" for the public to provide medical care for prisoners.[37]

While common and statutory law developed the concept of the public's "duty" to provide health care, the definition of "cruel and unusual punishment" simultaneously matured so as to provide "rights" for prisoners.[38] In *Estelle v. Gamble*, a 1976 Supreme Court decision, the majority finally combined the two concepts—right and duty.[39] In *Estelle*, the Court joined the notion of "evolving standards of decency" from *Trop*, the prohibition of "unnecessary and wanton infliction of pain" from *Gregg*, and the common law duty to provide medical treatment expressed in *Spicer*.[40] For the first time, the Court applied the Eight Amendment as requiring that the government

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32. *Id.* at 354 (quoting *Trop*, 356 U.S. at 100).

33. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

34. Shields, *supra* note 18, at 278-279 (citing Indian *ex rel.* Tyler v. Gobin, 94 F. 48, 50 (C.C.D. Ind. 1899), in which a prisoner was kidnapped from jail by an angry mob and hanged. The court imposed upon the sheriff a duty to provide care).

35. *Id.* at 279 (citing Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926), in which the Supreme Court of North Carolina required that the public care for prisoners in the interest of justice).

36. *Spicer*, 132 S.E. at 293.

37. *See* Shields, *supra* note 18, at 279 (discussing this development in the law).

38. *Id.* ("The development of the right to medical care for prisoners paralleled the expanding definition of cruel and unusual punishments.").

39. Estelle v. Gamble, 429 U.S. 97, 100-03 (1976); *see also* Shields, *supra* note 18, at 279 (noting the right to medical care for prisoners and the definition of "cruel and unusual punishment were combined in *Estelle*").

40. *Estelle*, 429 U.S. at 102-03.

provide adequate medical care to its prisoners and detainees.[41] Whether the Constitution has been violated "should turn on the character of the punishment rather than the motivation of the individual who inflicted it."[42]

Estelle established the framework for health care analysis within the prison setting.[43] In this case, a Texas prisoner alleged that the prison violated his constitutional rights by failing to provide adequate medical attention. The Court determined that Eight Amendment principles did require the government to provide medical care to those it punishes with incarceration.[44] The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes 'unnecessary and wanton infliction of pain' proscribed by the Eight Amendment."[45] Such conduct included indifference demonstrated by prison doctors in their response to prisoners' needs, or by prison guards "in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[46]

Estelle, however, acknowledged some limitation to the Eighth Amendment in the health care context. First, the Court noted that not every claim of inadequate medical care by a prisoner necessarily constitutes a violation of the Eighth Amendment.[47] For example, simple negligence or malpractice alone fails to show a violation.[48]

Furthermore, *Estelle* provides a two-prong test for the application of the Clause. To establish a violation under the Eighth Amendment, *Estelle* requires (1) that a prisoner demonstrate a "serious medical need," and (2) that prison officials were deliberately

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41. *Id.* at 103.

42. *Id.* at 116.

43. *Id.* at 97; *see also* SUSAN L. KAY, THE CONSTITUTIONAL DIMENSIONS OF AN INMATE'S RIGHT TO HEALTH CARE 3 (1991) (explaining that the state has an affirmative duty to protect individuals in custody from private harm). The *Estelle* case also led to a number of circuit court decisions validating prisoners' claims of deliberate indifference to their safety. *See, e.g.*, Elliot v. Cheshire County, 940 F.2d 7, 10-11 (1st Cir. 1991) (establishing duty on jail to protect detainee from his suicidal tendencies, of which jail personnel were aware or should have been aware); Davis v. Zahradnick, 600 F.2d 458, 459-60 (4th Cir. 1979) (establishing duty on guard to protect prisoner from assault). For additional commentary on the state's affirmative duty to protect individuals in custody from private harm, see Susan H. Kuo, *Bringing in the State: A Constitutional Duty to Protect From Mob Violence*, 79 IND. L.J. 177, 210 (2004).

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

45. *Id.* at 104.

46. *Id.* at 104-105; *see also* Laaman v. Helgemore, 437 F. Supp. 269, 311 (D.N.H. 1977) (finding that deliberate or calloused indifference to serious medical needs may be evinced by the treating physician, prison guards, or the administration).

47. *Estelle*, 429 U.S. at 105.

48. *Id.* at 106.

indifferent to this need.[49] Courts refer to this standard as the medical professional judgment standard.[50] The serious medical need requirement is not so high as to embrace only conditions that are life-threatening; however, a deliberate failure to treat a minor medical need does not constitute a violation.[51] The second prong, requiring deliberate indifference to the medical need, is similarly broad and was left undefined by the *Estelle* Court; however, with developing "contemporary standards of decency," courts have simultaneously developed a more definitive duty of care in the prison system.[52]

C. Farmer v. Brennan*: A New Standard*

With many questions left unanswered, the Supreme Court in 1994, again addressed the criteria for a violation of the Eighth Amendment in *Farmer v. Brennan.* In *Farmer*, a preoperative transsexual incarcerated with other males in the federal prison system, claimed that another inmate beat and raped him after he was transferred to a higher security facility holding many troublesome prisoners.[53] The prisoner alleged that the prison had acted with "deliberate indifference" to his safety in violation of the Eighth Amendment because of the penitentiary's awareness of its violent environment and history of inmate assaults, and in light of prisoners' particular vulnerability to sexual attack.[54] The District Court concluded that prison officials only violate the Eighth Amendment when they are "reckless in a criminal sense."[55] In other words, the prison official would have needed " 'knowledge' of a potential danger," though the official in *Farmer* lacked such knowledge because the prisoner never expressed his safety concerns to them.[56] The Court of Appeals affirmed.[57]

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49. *Id.* at 104-105; *see also* KAY, *supra* note 43, at 4 n. 4 (noting that "less stringent standards may apply under certain state constitutional provisions or (more possibly) upon application of specific state statutes regulating medical care for prisoners").

50. Posner, *supra* note 28, at 353.

51. KAY, *supra* note 43, at 4 (citing Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980); Goff v. Bechtold, 632 F. Supp. 697, 698 (S.D. W. Va. 1986)).

52. *Estelle*, 428 U.S. at 103-104; *see also* KAY, *supra* note 43, at 5 (noting that "deliberate indifference" is not overly precise as a standard—although making clear that not every action or inaction by the government amounts to a violation of the Eighth Amendment).

53. Farmer v. Brennan, 511 U.S. 825, 825 (1994).

54. *Id.*

55. *Id.*

56. *Id.* at 831-832.

57. *Id.* at 825.

The Supreme Court in *Farmer* required both that the prison official know of the facts from which an inference could be drawn that a substantial risk of serious harm exists, and that the prison official draw such an inference.[58] In reaching this conclusion, the Court reiterated the two-prong examination for Eighth Amendment violations.[59] The Court confirmed the first requirement—that the alleged deprivation be "sufficiently serious" and show "substantial harm."[60] The Court also accepted the second requirement—that prison officials act with "deliberate indifference" to inmate health or safety.[61] The disagreement, however, concerned the proper test for deliberate indifference.[62]

The Supreme Court paused in *Farmer* to define at long last the term "deliberate indifference."[63] The Court acknowledged the confusing, inconsistent tests adopted by Courts of Appeal subsequent to *Estelle v. Gamble*.[64] Justice Souter, writing for the Majority, noted that while *Estelle* established that deliberate indifference entails something more than mere negligence, clearly something less than acts or omissions for the very purpose of causing harm or knowledge that harm will result may satisfy the standard.[65]

The *Farmer* court rejected a recklessness standard.[66] The Courts of Appeals had routinely equated deliberate indifference with recklessness, placing deliberate indifference somewhere between the poles of negligence at one end, and purpose or knowledge at the other.[67] Justice Souter addressed this "recklessness" approach, concluding that acting or failing to act with deliberate indifference to a substantial risk of serious harm to an inmate equals reckless

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58. *Id.* at 837.

59. *Id.* at 834.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 832 (*comparing* McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir.1991) ("holding that 'deliberate indifference' requires a 'subjective standard of recklessness' "), *with* Young v. Quinlan, 960 F.2d 351, 360-261 (3d Cir. 1992) ("[A] prison official is deliberately indifferent when be knows or should bave known of a sufficiently serious danger to an inmate."). The Court in *Estelle* distinguished "deliberate indifference to serious medical needs of prisoners," from "negligen[ce] in diagnosing or treating a medical condition." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Following *Estelle*, the Court described deliberate indifference as a state of mind more "blameworthy than negligence." *Farmer*, 511 U.S. at 835. Before *Farmer*, the Court had read *Estelle* as requiring "more than an ordinary lack of due care for the prisoner's interests or safety." *Id.*

65. *Farmer*, 511 U.S. at 835.

66. *Id.* at 836-837.

67. *Id.* at 836.

disregard for that risk.[68] However, recklessness is not itself a self-defining standard and cannot fully answer the pending question about the level of culpability deliberate indifference requires.[69]

In its consideration of the term "deliberate indifference," the Court ultimately favored a subjective standard as opposed to an objective approach.[70] The Court discussed the consequences of an objective test and rejected such a standard, concluding that a prison official cannot be found liable for cruel and unusual punishment unless that official "knows of and disregards an excessive risk" to inmate health or safety.[71] Rather, the official must have awareness of "facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference."[72] In other words, the Constitution does not outlaw cruel and unusual "conditions;" it prohibits cruel and unusual "punishments."[73]

With its subjective Eighth Amendment standard, the Supreme Court refused to impose liability on prison officials solely because of the presence of objectively inhumane prison conditions.[74] Within the second prong of the test, the court declined to include any objective component—that the official should have known his act or omission would result in injury.[75] The Court specifically rejected a reading of the Eighth Amendment that would have imposed liability solely because of objectively inhumane prison conditions.[76] Therefore, *Farmer* additionally requires consciousness of risk in addition to the objective component.[77] The Court ultimately held 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."[78]

The Supreme Court, in finally clarifying the standard for Eighth Amendment violations in this context, also exhibited a more contemporary standard of decency to prisoners than previously

68. *Id.*
69. *Id.*
70. *Id.* at 837-839.
71. *Id.* at 837.
72. *Id.*
73. *Id.*
74. *Id.* at 838 (citing Wilson v. Seiter, 501 U.S. 294, 299-302 (1991)).
75. *Id.* at 838-839.
76. *Id.* at 838.
77. *Id.* at 839.
78. *Id.* at 847.

demonstrated by courts.[79] The Court commented that although the Constitution "does not mandate comfortable prisons . . . [it also does not] permit inhumane ones."[80] Accordingly, the Court explicitly concluded that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[81] The *Farmer* Court remanded the case, emphasizing that the District Court may have placed too much weight on the prisoner's failure to notify the officials of his risk of harm, in finding that the prison failed the subjective requirement.[82]

Under the *Farmer* test, a claim under the Eighth Amendment no longer requires an objective inquiry for deliberate indifference.[83] In other words, a claimant need not show that a prison official acted or failed to act while believing that a harm would actually befall an inmate.[84] Rather, "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[85] For example, if an inmate presented evidence that a substantial risk of inmate injury was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," and the record suggested that the official had received information concerning the risk and thus, " 'must have known' about it," then such evidence may be "sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."[86]

D. Effect of Farmer *on the Eighth Amendment: Up for Interpretation*

Even after *Farmer v. Brennan*, the nature of the government's duty to provide medical treatment to prisoners remains ambiguous. Fundamental in *Farmer* is the principle that under the Eighth Amendment, after the government eliminates from prisoners any means of self-protection, the government and its officials may not allow the state of nature simply to take its course.[87] As a result, the

79. *See, e.g., id.* at 833-844 (citing Trop v. Dulles, 356 US 86, 101 (1958) and "evolving standards of decency").

80. *Id.* at 832; *see also* Heather M. Kinney, Note & Comment, *The "Deliberate Indifference" Test Defined: Mere Lip Service to the Protection of Prisoners' Civil Rights*, 5 TEMP. POL. & CIV. RTS. L. REV. 121, 124 (1995) (discussing the *Farmer* case).

81. *Farmer*, 511 U.S. at 835.

82. *Id.* at 848.

83. *Id.* at 842.

84. *Id.*

85. *Id.*

86. *Id.* at 842-843.

87. *Id.* at 833 (citing DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 199-200 (1989)).

Eighth Amendment requires that such prison officials protect prisoners from harm.[88]

The outcome in *Farmer* reflects significant development in societal and jurisprudential values, and symbolizes a shift in the Court's perspective on prison cases; arguably this development will persist.[89] However, after *Farmer*, one can conclude that the burden lies with prison officials as a result of their newly imposed duty to protect prisoners and provide reasonable safety.[90] This result significantly affects the Court's adoption of the actual knowledge standard, considering that inaction by prison officials, when combined with inferential evidence of actual knowledge, may constitute deliberate indifference.[91]

Justice Blackmun's concurring opinion recognizes the considerable effect *Farmer* has on prison officials, and the critical bearing this reading has upon the Eighth Amendment in general. Blackmun emphasizes that the majority opinion creates "no new obstacles for prison inmates to overcome" and explains that "it 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."[92] The message of *Farmer* appears to be that of an

88. Marjorie Rifkin, Farmer v. Brennan*: Spotlight on an Obvious Risk of Rape in a Hidden World,* 26 COLUM. HUM. RTS. L. REV. 273, 286 (1995); *see also* Newman v. Alabama, 522 F.2d 71 (5th Cir. 1975) (discussing application to state prisons). Although the Constitution does not require the state to operate prisons, "as a practical matter it must." *Id.* at 74. However, the Constitution does demand that if a state imprisons a citizen, "his or her imprisonment must not transgress the interdiction of cruel and unusual punishment under the Eighth Amendment, as applied to the states through the Fourteenth Amendment." *Id.* For a discussion on pre-trial detainees, as opposed to prisoners, see KAY, *supra* note 43, at 5-6. A pre-trial detainee is a person incarcerated in a local jail or detention facility prior to his or her trial on a criminal case. *Id.* at 5. "[O]bviously, state courts may apply their own constitutions, statutes, or regulations and provide greater protection to pre-trial detainees than the federal Constitution. In addition, pre-trial detainees may file a simple negligence or malpractice action in state court complaining of medical treatment that was received." *Id.* at 6 n.5; *see also* Bell v. Wolfish, 441 U.S. 520 (1979) (finding the Eighth Amendment prohibition inapplicable to pre-trial detainees because such individuals have not been convicted, and pre-trail detainees could only raise due process claims).

89. Rifkin, *supra* note 88, at 286-87 (noting that the government's obligation to protect prisoners can most likely be attributed to the perspective of a newly-configured Supreme Court subsequent to its earlier decision in *Estelle*, with Justices Ginsberg, Kennedy, Souter, and Thomas).

90. *Id.* at 287 n.66 (noting the Supreme Court's rejection of reasoning by the Seventh Circuit, which had held that prison officials are "entitled to assume that prisoners will exercise care for their own safety" and, therefore, are not liable for injuries to prisoners assaulted by one another).

91. *Id.* at 287.

92. Farmer v. Brennan, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring).

"affirmative duty" imposed by the Eighth Amendment upon prison officials to remedy a risk of harm.[93]

Additionally, after *Farmer* questions linger as to the relative weight assigned to each of the two prongs required for Eighth Amendment liability.[94] The first prong, objective consideration of the seriousness of the risk of harm or the harm itself, clearly will become more important as health standards modernize.[95] Furthermore, the Supreme Court apparently established an "affirmative duty" with *Farmer*, but left unanswered and undefined the scope of that duty.[96] Do prisoners have an affirmative right to receive adequate health care from prisons? Or, to the contrary, does this right manifest itself as negative in nature, as a duty on the government *not* to show deliberate indifference to inmate health care?[97] Given the reasoning of *Farmer* and its predecessor line of cases, the courts have emphasized the evolving standard of decency.[98]

E. Prison Health Care: A Continuing Problem

Subsequent to the Supreme Court's decision in *Estelle v. Gamble*, privatization of medical services grew rapidly.[99] Managed care—the set of practices by which insurers attempt to manage physician practices to maintain low utilization and costs of medical services—arose in response to skyrocketing health costs.[100] Many correctional departments enter contracts with private medical providers to supply medical services throughout the system, and other prisons contract for medical services with specific institutions.[101] The prison medical unit operates in the physical setting or infirmary established by the department of corrections yet provides medical services independent of the department.[102] The medical unit recruits and trains all medical staff, makes all medical decisions, and delivers

93. *Id.* at 857 (Blackmun, J., concurring) (referring to risk of harm in inmate assault, including prison rape, in the context of the facts of *Farmer*).

94. Rifkin, *supra* note 88, at 292.

95. *Id.*

96. *Farmer*, 511 U.S. at 857 (Blackmun, J., concurring).

97. Conversations with Professor James Blumstein, Vanderbilt University Law School.

98. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (stating that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

99. CHADWICK L. SHOOK & ROBERT T. SIGLER, CONSTITUTIONAL ISSUES IN CORRECTIONAL ADMINISTRATION 118 (2000).

100. Stephen R. Latham, *Regulation of Managed Care Incentive Payments to Physicians*, 22 AM. J.L. & MED. 399, 400-401 (1996).

101. SHOOK & SIGLER, *supra* note 99, at 118.

102. *Id.*

all medical treatment.[103] In some cases, the medical unit delivers these services within the confines of the institution; in other cases, off-site community facilities must provide more critical and intensive medical services.[104]

Individuals incarcerated within the correctional system are the most challenging population in terms of a puhlic health concern, and the number of such inmates is rapidly increasing.[105] In addition to the growing size of the prison population, inmates have raised public health concerns given the "prevalence of mental health problems, infectious diseases, substance abuse, and other morbidities."[106] Prison inmates may actually require more medical attention than the general public since they suffer from above-average incidence of most illnesses and are prone to hypochondria and malingering.[107] Within secure, incarcerated environments, inmates face distinct health risks, including intentional violence, infectious disease outbreaks, depression, and other ailments.[108]

The dramatic rise in health care costs also raises concerns about funding the expensive treatment system within prisons.[109] This fiscal dilemma within the country's prison system results from a combination of the high cost of health care, diminishing governmental budgets, reluctant prison administrations in allocating meager funds to medical services, and increasing taxpayer frustration with the government's willingness to spend tax dollars on criminals.[110] Moreover, the rising cost of prison health care parallels the rapid rise in medical costs for the overall population—and in terms of correctional costs, health care spending increases faster than others.[111]

Given the discouraging state of high costs and the realities of the prison health system, managed care provides many solutions. Concerns regarding the quality, accessibility, and costs of prison health care have prompted development of managed care models in the corrections population.[112] Private companies claim to provide many advantages over government-run correctional health agencies

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103. *Id.*

104. *Id.*

105. Harold Pollack et al., *Health Care Delivery Strategies for Criminal Offenders*, 26 J. HEALTH CARE FIN. 63 (1999).

106. *Id.* at 65

107. Jessica Wright, *Medically Necessary Organ Transplants for Prisoners: Who is Responsible for Payment?*, 39 B.C. L. REV. 1251, 1253-54 (1998).

108. Pollack, *supra* note 105, at 65.

109. Wright, *supra* note 107, at 1253.

110. *Id.*

111. *Id.*

112. Pollack, *supra* note 105, at 65.

by offering, for example, reform of on-site health care operations and reduction in the need for hospital visits.[113] Private contracts allow easier prediction of costs and provide an available pool of doctors, nurses, and other workers who address gaps in staffing more quickly than "government bureaucracies."[114] Ultimately, correctional health care companies save taxpayer money.[115]

Consequently, contractual difficulties in many managed care arrangements arise in prison health care, just as in other public sector settings. As in other settings, "public sector organizations act as customer, regulator, and partner in their arrangements with private contract providers."[116] Therefore, public organizations frequently face credibility problems when setting financial incentives—reimbursement rates and contractual requirements—to protect the long term profitability of such arrangements.[117] Among other issues raised by the privatization of prison health care is whether the pursuit of profit leads to dishonest medical practice.[118]

Many institutional factors can contribute to market failures within a prison health care system, which requires a greater focus on health care adequacy. Long-term relationships between prison authorities and private contractors can undermine competitive markets, a phenomenon observed in other contexts wherein a state institution bargains with private organizations for essential services.[119] The diminishing competitive pressures result in greater latitude for contractors to earn monopoly profits, as well as lesser incentives to address patient concerns.[120] Another potential problem arises with "low-bidder" legislative mandates in many states, which require that prison contracts accept only the lowest bidders.[121] These regulations arguably provide few incentives for quality, and may

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113. William Allen & Kim Bell, *Death, Neglect and the Bottom Line: Push to Cut Costs Poses Risks*, ST. LOUIS POST-DISPATCH, Sept. 27, 1998, at G1.

114. *Id.*

115. *Id.* (citing Dr. Stuart Shapiro, President of Prison Health Services of New Castle, Del, testifying before Congress, who stated, "[they] save hundreds of millions of taxpayer dollars at state and local levels."). This, of course, may be disputed. *See, e.g.*, Todd Mason, *It's a Bust: Many For-Profit Jails Hold No Profits—Nor Even Any Inmates; Still Promoters Keep Pushing Privately Run Prisons to Job-Hungry Towns; Texas Rent-A-Cell Breakout*, THE WALL STREET JOURNAL, June 18, 1991.

116. Pollack, *supra* note 105, at 65.

117. *Id.*

118. Allen & Bell, *supra* note 113, at G1 (finding, for example, that "government agencies have found that some companies exaggerate the amount of medical care they provide or leave positions unfilled").

119. Pollack, *supra* note 105, at 4.

120. *Id.*

121. *Id.*

produce frequent turnover given the poor profitability of contractors.[122]

Along with institutional factors, other elements of the prison system still hinder efforts to create market discipline on contracting providers.[123] First, given the unique nature of the patient population, the recruitment and retention of skilled medical personnel becomes problematic. Consequently, prison health providers experience a higher rate of turnover and lower quality of resulting care.[124] Second, social and political factors may contribute to less patient advocacy and regulatory strategies that might assure quality care.[125] The managed care arrangement, industry and government officials say, saves the public money and may improve health care for prisoners.[126]

Despite the benefits of managed care within the prison context, the managed care system presents many shortcomings that could potentially lead to a constitutional problem. In an exposé uncovering the dangers behind Correctional Medical Services, Inc. of St. Louis, one of the nation's largest correctional healthcare firms, the *St. Louis Post-Dispatch* claimed there is reason to question the quality and motives behind today's correctional health care.[127] The investigation painted a picture of an industry that, "at best, is still trying to find its way through the complex problems posed by health care in a prison environment."[128] At worst emerged an industry that "takes advantage of the public's ill will toward inmates to give poor care while making profit."[129]

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Allen & Bell, *supra* note 113, at G1.

127. *Id.* The investigative team, which included a Chicago-based specialist in correction health care, spent more than five months visiting prisons and jails; gathered hundreds of police, court and medical records, and other documents; and interviewed doctors, nurses, inmates, lawyers, scholars, prison and health experts, and families of inmates who died behind bars. *Id.* The team found "more than 20 cases in which inmates allegedly died as a result of negligence, indifference, understaffing, inadequate training or overzealous cost-cutting." *Id.* One nurse implicated in the death of an inmate at a Florida jail, for example, quipped, "[w]e save money because we skip the ambulance and bring them right to the morgue. . . ." *Id.*

128. *Id.*

129. *Id.* (finding a series of troubling effects of managed health care in prisons, including intervention of distant administrators in the practice of medicine by doctors, "often second-guessing their decisions on economic grounds," which can lead to delayed treatment or approval; a "culture of skepticism" that permeates correctional health care; the fact that the National Commission on Correctional Health Care, which sets standards and accredits prison and jail health care operations, "does not serve as the watchdog that private companies claim. . ."). Moreover, Michael Vaughn, professor of criminology at Georgia State University claims that

III. IMPLICATIONS OF MANAGED HEALTH CARE IN PRISONS & HOW THE EIGHTH AMENDMENT AFFECTS PHYSICIANS AND PUBLIC POLICY

A. Bowman *v. CCA: A Current Case Study*

An examination of *Bowman v. CCA*, in which an alleged violation of the Eighth Amendment occurred in the context of a prison health care system, illustrates the potential managed health care problem. The plaintiff, Patricia Bowman, filed a Section 1983 action as the next friend of her deceased son, inmate Anthony Bowman, against CCA, the warden of its correctional facility, and Dr. Robert Coble, a physician under contract with CCA.[130] The Sixth Circuit Court of Appeals recently ruled on the district court's finding of potential Eighth Amendment violations—but reversing only on jurisdictional grounds.[131] The Court failed to address the constitutionality of managed care organizations—leaving the potential for future litigation.

Ms. Bowman contended that the contract between CCA and Coble, and in particular, Coble's incentive provisions within the contract, motivated Coble's decision to postpone Bowman's transfer.[132] Further, Ms. Bowman alleged that CCA and Dr. Coble violated Bowman's Eighth Amendment right to adequate medical care for his sickle cell anemia for failing to transfer Bowman in a timely fashion to a hospital setting for treatment by a physician who specialized in his particular condition.[133] Finally, Ms. Bowman asserted that the failure to transfer and provide adequate care resulted in her son's death.[134]

The contract between CCA and Dr. Coble exhibited many unique features and resembled a managed care organization. CCA entered into a contract in 1991 with the State of Tennessee to house state prisoners at CCA facilities, including the particular facility at issue here, South Central Correctional Facility ("SCCF").[135] During its negotiation and contract formation process, CCA estimated its non-

"[f]or every death there are hundreds of cases of inmates in these correctional facilities who are receiving substandard care. . . ."

130. Bowman v. Correctional Corp. of Am., 188 F. Supp. 2d 870, 873-74 (M.D. Tenn. 2000).

131. *See* Bowman v. Correctional Corp. of Am., 350 F.3d 537, 551 (6th Cir. 2003) (reversing the district court's holding with respect to the unconstitutionality of CCA's medical policy, along with the injunction awarded on that basis, since this issue was moot for Bowman and she had no standing upon which to bring such a claim for prospective relief).

132. *Bowman,* 188 F. Supp. 2d at 874.

133. *Id.*

134. *Id.*

135. *Id.* at 879.

personnel medical expenses for the treatment of prisoners; the expense category included "hospitalizations, referrals to medical specialists, prescription drugs and laboratory tests."[136] Although CCA's initial expense projection was $500,000 per year, during 1992, 1993, and 1994, its actual expenses for these services and products exceeded $1,000,000.[137]

In response to the unexpected, increased costs, CCA in 1994 negotiated with Dr. Coble to exclusively provide health services at SCCF.[138] Effectively, the contract formed a managed health care system at SCCF.[139] Dr. Coble's duties consisted of, among other responsibilities, "determining the existence of medical emergencies."[140] Additionally, the contract configured Dr. Coble's compensation so he would receive a base salary, but included financial incentives that could increase his compensation by $95,000 per year.[141] At the time of the contract's execution, CCA's medical cost rate per inmate was $3.07 per day.[142] However, evidence showed that medical expenses under Dr. Coble decreased to $1.46 per inmate.[143]

The plaintiff asserted two theories to establish the "deliberate indifference" necessary to trigger municipal liability. Her first theory argued that the contract between CCA and Coble, with its extreme financial incentives to reduce necessary medical services for inmates, represented an unconstitutional policy that violated CCA's constitutional obligation to provide adequate medical care under the Eighth Amendment.[144] The plaintiff's second theory further argued that the effect of the financial incentive provisions of the contract between CCA and Coble motivated the physician to delay a transfer of Bowman to an outside hospital and that the untimely transfer proximately caused his death.[145] The district court reserved the first, constitutional issue to decide for itself, while the jury decided the second issue of causation and damages.[146]

The district court relied heavily upon the language of *Estelle v. Gamble*, without reference to the subsequent decision of *Farmer v.*

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 880.
143. *Id.*
144. *Id.* at 882.
145. *Id.*
146. *Id.*

Brennan.[147] The district court noted that "[r]egardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action. . ."[148] The court also quoted *Estelle*, suggesting that ordinary medical treatment questioned by prisoners is not necessarily enough for a constitutional violation and that the action must be characterized as "repugnant to the conscience of mankind."[149] Similarly, the court referred to the Court of Appeals for the Sixth Circuit, which stated that where prisoners have received some medical attention and the dispute centers on the adequacy of the treatment, federal courts are reluctant to second-guess medical judgments and to "constitutionalize claims which sound in state tort law."[150]

However, despite the court's acknowledgement of the heightened bar for constitutional actions of prison health care, it noted that, "medical attention rendered may be so woefully inadequate as to amount to no treatment at all."[151] When the government incarcerates an individual and holds the prisoner against his will, the Constitution imposes a corresponding duty to assume responsibility for his safety and well being.[152] When the State exercises its power to restrain a person's liberty, but fails to provide for basic human needs, it transgresses the substantive limits on state action set by the Eighth Amendment.[153]

This decision reinforced the notion that CCA cannot contract away its legal obligations to provide adequate medical care to inmates in its custody.[154] Federal courts prohibit prison and jail officials from outsourcing or contracting away their constitutional duty to provide and monitor the medical treatment provided to prisoners.[155] For example, in a situation involving a sheriff, whose policy constitutes deliberate indifference to the needs of inmates, the county is liable as a result—given the official capacity of the sheriff.[156] Similarly, CCA

147. *Id.* at 883. This is interesting because the Supreme Court addressed the Eighth Amendment standard for health care in *Farmer v. Brennan*, 511 U.S. 825 (1994). Courts still regard *Estelle* as the true standard. *See id.* at 835 (discussing "deliberate indifference" and the *Estelle* case); Helling v. McKinney, 509 U.S. 25, 31-33 (1993) (same).

148. *Bowman*, 188 F. Supp. 2d at 883.

149. *Id.*

150. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976).

151. *Id.*

152. *Id.* at 884.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (citing Willis v. Barksdale, 625 F. Supp. 411 (W.D. Tenn. 1985), in discussing vicarious liability).

must provide medical care for state inmates by virtue of its contract with the Tennessee Department of Corrections; CCA's agreement with Dr. Coble cannot contract away this responsibility.[157]

The court addressed the plaintiff's claim according to the dual (objective and subjective) components of an Eighth Amendment claim.[158] Courts focus on the likelihood of exposure to harm, not manifest symptoms of disease, in determining the objective requirement for Eighth Amendment claims of this nature.[159] In *Helling*, the Supreme Court observed "that the Eighth Amendment protects against future harm to inmates is not a novel proposition."[160] Under *Helling*, the prisoner must show current harm or that the medical policy "is sure or very likely to cause serious illness and needless suffering."[161] Despite the objective element of an Eighth Amendment claim, which requires a "serious medical" condition, the *Bowman* district court emphasized that actual physical injury due to indifference is unnecessary.[162]

The district court first found that CCA's contract violated the objective requirement. The contract between CCA and Dr. Coble governed not only the referrals of inmates to medical specialists, but the decisions to issue prescription drugs and to conduct medical laboratory tests.[163] The district court stated that, by definition, the medical services provided by CCA involved a perceived or actual serious medical condition requiring medical treatment or analysis by a medical specialist.[164] Therefore, the court concluded that the decedent's claim as to the constitutionality of CCA's health management contract on non-personnel medical services satisfied the objective component of the Eighth Amendment claim.[165]

The *Bowman* district court then emphasized the broadness of the subjective requirement for Eighth Amendment violations. The court noted that establishment of deliberate indifference requires no proof of intent to harm or a detailed inquiry into a party's state of mind as to the indifference.[166] Furthermore, the standard requires no conscious indifference, rather just "knowledge of the asserted serious

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 885 (citing Helling v. McKinney, 509 U.S. 25, 33 (1993)).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 886 (citing Weeks v. Chaboudy, 984 F.2d 185, 187 (6th Cir. 1993)).

needs or of circumstances clearly indicating the existence of such needs. . ."[167] The court also acknowledged that delays in providing access to medical care or recommended surgery for inmates can demonstrate deliberate indifference to a serious medical problem.[168]

The *Bowman* court also analyzed constitutional policies on medical care, as opposed to decisions involving individual treatment cases.[169] In *Ancata*, the Eleventh Circuit considered a county's policy requiring inmates to obtain a court order before referring them to a nonstaff medical specialist, unless the prisoners paid the bill themselves.[170] The Eleventh Circuit determined that the county's policy could constitute deliberate indifference.[171] Perhaps most applicable to the context of managed health care, *Ancata* concluded that "if necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out," including where defendants place "financial interests. . .ahead of the serious needs [of a prisoner]."[172]

The *Bowman* district court found itself bound to the jury's determination of the cause and effect of CCA's policy upon the deceased inmate Bowman given both the complexity of the issues surrounding his medical condition, his personal medical history, and the necessity of allowing the exercise of medical judgment.[173] The jury, however, found no causal connection between Dr. Coble's treatment, the CCA policy, and Bowman's death.[174] Nonetheless, the Court noted its separate obligation for injunctive relief to determine if the medical policy would likely expose inmates to harm, and therefore violate "contemporary standards of decency."[175] So despite the jury finding a lack of causation—the court noted the possibility of a constitutional violation.

In assessing whether CCA's policy violated contemporary standards, the district court expressed concerns regarding the

167. *Id.* (quoting Horn v. Madison County Fiscal Court, 22 F.3d 103, 110 (6th Cir. 1994)).

168. *Id.* (citing Byrd v. Wilson, 701 F.2d 592, 595 (6th Cir. 1983) (describing a nine hour delay of medical treatment after clear notice of medical need); Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972) (also noting a nine hour delay after clear notice of medical need); Bunton v. Englemyre, 557 F. Supp. 1, 4 (E.D. Tenn. 1981) (holding a four day delay in treating medical needs satisfied denial of summary judgment).

169. *Id.* (citing Ancata v. Prison Health Services Inc., 769 F.2d 700, 702 (1985)).

170. *Id.*

171. *Id.* at 886-87.

172. *Id.* at 887.

173. *Id.*

174. *Id.*

175. *Id.*

financial motivations of CCA policymakers.[176] CCA's medical director primarily concerned himself with financial costs and exercised little meaningful supervision over Dr. Coble's substantive medical decisions.[177] The court again noted that Dr. Coble had substantial financial incentives to limit medical care.[178] "As employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of a corporation for whom they labor, thereby insuring their own job security."[179] The court elucidated that, with respect to cutting corners on constitutional guarantees, "entrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent."[180]

When determining whether the health management policy violates contemporary standards, courts must rely upon objective external factors in making its conclusions.[181] The Council on Ethics and Judicial Affairs of the American Medical Association ("AMA") published a report that established ethical standards and considerations on financial incentive provisions in physician contracts in a managed health care program.[182] This report suggested limits on the magnitude of financial incentives, proposing incentives calculated according to practices of a sizable group of physicians rather than on an individual basis, and based on quality of care instead of cost of care.[183]

Applying the professional medical standards deemed appropriate by the AMA, the court recognized that financial incentives within Dr. Coble's plan exceeded the acceptable risk threshold of 25 percent.[184] CCA's contract with Dr. Coble effectively permitted him to double his income under the contract.[185] Also contrary to AMA standards, these financial incentives were based on the performance of one physician rather than a group or groups of physicians.[186] Furthermore, the court noted that the monthly payments to Dr. Coble heightened the impact of financial incentives upon the physician's compensation, as the AMA report predicted.[187]

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176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* (quoting McKnight v. Rees, 88 F.3d 417, 424 (6th Cir. 1996)).
180. *Id.*
181. *Id.* (citing Rhodes v. Chapman, 452 U.S. 337, 346-47 (1981)).
182. *Id.*
183. *Id.* at 887-888.
184. *Id.* at 889.
185. *Id.*
186. *Id.*
187. *Id.*

Given the collective medical, legal, and correctional standards applicable, the district court concluded that CCA's medical policy, as represented by its contract with Dr. Coble, violated contemporary standards of decency.[188] The managed care plan violated the standard of decency by giving a physician who provides exclusive health treatment to prison inmates financial incentives to substantially increase his income through reductions in medical services necessary to inmates.[189] CCA's contract with Dr. Coble reduced medical costs from $2.43 per inmate to $1.48 per inmate.[190] Similarly, CCA's prescription drug costs diminished from $108,751 in 1994 to $74,660 in 1997, despite an increase of 170 inmates and soaring market prices of prescription drugs.[191]

After years of litigation, the case resulted in a jury verdict in favor of the defendants CCA and Coble—except as to the claim that CCA's medical policy violated the Eighth Amendment.[192] The district court concluded that, as a matter of law, CCA's policy violated its Eighth Amendment duty to provide adequate medical care to its inmates.[193] The court held that "CCA's medical policy with its exclusive contract for Dr. Coble's services and its extreme financial incentives for Coble poses a significant risk for the denial of necessary medical treatment for inmates . . . in violation of the Eighth Amendment."[194]

The district court in *Bowman* primarily concerned itself with the fact that Dr. Coble, with his incentives, exclusively administered referrals to medical specialists or determined the need for prescriptions and laboratory tests.[195] The court was also concerned that inmates had no other choice of health care provider, asserting that the "Eighth Amendment forbids unnecessary suffering in the short term for inmates who are wholly dependant upon the state to provide such basic medical care."[196] After an economic analysis, the Court noted that for each year of his contract, Dr. Coble reached the maximum of his financial incentives.[197] Essentially, the contract

188. *Id.* at 890.
189. *Id.*
190. *Id.* at 889.
191. *Id.* at 889-890.
192. *Id.* at 874.
193. *Id.* at 891.
194. *Id.* at 874.
195. *Id.* at 890.
196. *Id.*
197. *Id.*

created "serious potential conflicts" between the health needs of the prisoners and the personal financial interests of a physician.[198]

The district court cautioned that its conclusion should not be construed as categorically barring from prison settings managed health care systems with physician incentives.[199] The court made no attempt to set compensation rates for medical services, suggesting that how institutional policy impacts particular inmates depends upon "individual determination."[200] Ultimately the court found that this contract simply went "too far," as reflected by the record.[201] Despite the arguably unique set of facts in *Bowman*, the court suggested that a managed health care system within a prison setting can violate the Cruel and Unusual Punishment Clause.[202]

B. Nature of the Government's Eighth Amendment Duty: Affirmative or Negative?

Even after the Supreme Court's decision in *Farmer v. Brennan*, the nature of the government's duty under the Eighth Amendment prohibition of cruel and unusual punishment remains unclear. The Supreme Court has addressed the notion of governmental duty provided by the Constitution, and has not generally conferred an affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests.[203] But where the government has deprived an individual of liberty, as in the prison setting, the Constitution imposes upon the states affirmative duties of care and protection.[204] Analysis of a line of cases documenting interpretation of the government's constitutional duty regarding prison libraries presents a reasonable parallel to health care for inmates. The Supreme Court in 1977, with *Bounds v. Smith*, held

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 196 (1989). "

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . .The rationale for this is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 199-200.

204. *Id.* at 198 (noting the Eighth Amendment as one example of an "affirmative [duty]" upon the states to provide adequate medical care to incarcerated prisoners).

that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisons with adequate law libraries or adequate assistance from persons trained in the law."[205] The question arose later, in *Lewis v. Casey*, as to the nature of this duty.[206]

Lewis presents the question of constitutional requirements in the context of access to the courts, and assesses challenges to the district court, which had rejected claims of "systemic injury" and found no *Bounds* violations.[207] In *Lewis*, twenty-two inmates of various prisons filed a class action on behalf of adult prisoners incarcerated by the State of Arizona, alleging deprivation of their rights of access to the courts and counsel protected by the First, Sixth, and Fourteenth Amendments.[208] The Arizona Department of Corrections argued that in order to establish a *Bounds* violation, an inmate must show that the inadequacies of a prison's library facilities or legal assistance program caused him actual injury.[209] Justice Scalia, writing for the Court, found that the district court's failure to identify anything more than isolated instances of actual injury rendered the *Bounds* violation invalid.[210]

Scalia in *Lewis* analyzed standing in the prison context and drew analogy to *Estelle v. Gamble*.[211] If a healthy inmate, who had suffered no deprivation of necessary medical treatment, could claim violation of his constitutional right to medical care simply on the ground of inadequate prison medical facilities, "the essential distinction between judge and executive would have disappeared . . . it would have become the function of the courts to assure adequate medical care in prisons."[212] Justice Scalia acknowledged that *Bounds* established no right to a law library or to legal assistance any more than *Estelle* established a right to a prison hospital.[213] *Bounds*, to Justice Scalia, acknowledged the "already well-established" right of access to the courts.[214] Similarly, Scalia implied that the *Estelle* case was limited to establishing protection from cruel and unusual

205. Bounds v. Smith, 430 U.S. 817, 828 (1977).
206. Lewis v. Casey, 518 U.S. 343 (1996).
207. *Id.* at 348.
208. *Id.* at 346.
209. *Id.* at 348.
210. *Id.* at 349.
211. *Id.* at 350.
212. *Id.*
213. *Id.*
214. *Id.*

punishment.[215] In discussing the right of access to the courts, Scalia suggested that there is no affirmative right to health care, rather a negative duty to protect from cruel and unusual punishment.[216] Comparable to the effect of *Estelle*, *Bounds* emphasized that law library facilities were merely "one constitutionally acceptable method to assure meaningful access to the courts" and that its decision "[did] not foreclose alternative means to achieve that goal."[217]

Justice Scalia's discussion of the implications of *Bounds* relates to what right essentially arises with regards to prison access.[218] Therefore, an inmate cannot establish relevant injury simply by establishing that one's prison law library or legal assistance program is inadequate in some theoretical sense.[219] Scalia refers to this concept as the "precise analog" of the healthy inmate claiming constitutional violation due to inadequacy of a prison infirmary.[220] Thus, as a "precise analog" of the prison library cases, an inmate does not have an affirmative or "free-standing" right to medical care, according to Justice Scalia's dicta.

The line of prison library cases illustrates the nature of constitutional rights granted to prisoners, and the Supreme Court suggested a "precise analog" to such rights under the Eighth Amendment.[221] Ultimately, the Court deemed meaningful access to the courts as the "touchstone" requiring the inmate to "go one step further" and establish that the alleged shortcomings in the prison's library or legal assistance program hindered efforts to pursue a legal claim.[222] Although prisoners have no affirmative right, that is, cruel and unusual punishment remains the "touchstone," (as an "analog" to *Bounds*), inadequate access to medical care might very well violate the Eight Amendment. Thus, prison managed care itself does not violate the Eighth Amendment, but if its implementation results in some injury due to skewed financial incentives, prison managed care might satisfy the constitutional pre-requisite of injury for a valid claim.

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215. *Id.*
216. *Id.*
217. Bounds v. Smith, 430 U.S. 817, 830 (1977).
218. *Lewis*, 518 U.S. at 351.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*

C. The Negative Right: When Does the Government Fulfill Its Duty?

The Court's Eighth Amendment jurisprudence, as noted in *Lewis v. Casey*, provides a negative right, or duty on behalf of the government, rather than an affirmative right to health care by prisoners.[223] The question now arises as to the level of medical care required in order for the government to fulfill this negative duty. It is, of course, well-established that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment, though exactly what "deliberate indifference" means remains unclear. [224] Despite the Supreme Court's discussion of the "deliberate indifference" standard in *Farmer v. Brennan*, the U.S. Courts of Appeals still vary on interpreting the level of conduct that sufficiently states a claim for cruel and unusual punishment.[225]

In general, prison officials violate the Eighth Amendment by satisfying two requirements. First, under the objective prong, the deprivation must be sufficiently serious.[226] Second, the subjective prong determines whether defendants exhibit "deliberate indifference."[227] Again, the Supreme Court in *Farmer v. Brennan* recently expounded on the phrase and adopted "subjective recklessness" as the test for "deliberate indifference," consistent with the Cruel and Unusual Punishment Clause.[228] At the same time, the Court rejected an objective component for the test (that prison officials "should have" known).[229] The Court finally concluded that a prison official under the Eighth Amendment may be held liable "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."[230] So long as the medical need to which the corrections officials were deliberately indifferent is "serious," the claim satisfies the requirement.[231] Still, the general test

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223. *Id.* at 350; Conversations with Professor James Blumstein, Vanderbilt University Law School.

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

225. Stacy Lancaster Cozad, *Cruel But Not So Unusual:* Farmer v. Brennan *and the Devolving Standards of Decency,* 23 PEPP. L. REV. 175, 201-204 (1995) (concluding that *Farmer* leaves ambiguity whereas some courts have taken a standard from *Farmer* that still allows prisoners to establish actual knowledge merely by pointing to the obviousness of the risk, despite *Farmer*'s clear rejection of a subjective component that the officer or prison official should have known of some risk).

226. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

227. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

228. *Id.* at 839-840.

229. *Id.* at 839-840.

230. *Id.* at 847.

231. Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996).

for Eighth Amendment violations remains broad, leaving the potential for a court to find managed care violative.

Mere disagreement with the medical treatment received does not provide standing for an Eighth Amendment claim of deliberate indifference to medical needs.[232] Effectively, the Eighth Amendment is distinct from a medical malpractice cause of action.[233] The Fifth Circuit Court of Appeals held that deliberate indifference only encompasses "unnecessary and wanton infliction of pain repugnant to the conscience of mankind."[234] Again, subjective recklessness as used in criminal law is the appropriate test for deliberate indifference.[235] The Seventh Circuit Court of Appeals similarly concluded that the Constitution is not a "medical code that mandates specific medical treatment."[236]

However, deliberate indifference to "serious medical needs" meets the requirement for Eighth Amendment violations. A serious medical need is one that has been diagnosed by a physician as mandating treatment or one so obvious that even a lay person would easily recognize the necessity for a doctor's attention.[237] Moreover, even elective treatment recommended by a physician but not "necessary" to saving life or health, may be constitutionally mandated upon a prisoner's election of that treatment.[238]

Additionally, a lack of knowledge by the prison official of any harm most likely precludes any Eighth Amendment violation.[239] As a result of *Farmer* having eliminated any objective component in the deliberate indifference analysis, if a doctor has no knowledge of any harm to the prisoner, most courts will find no violation. For example, the Second Circuit Court of Appeals found no violation where prison doctors failed to discover a tumor that resulted in an inmate's blindness. The court rejected the claim, concluding that unless he proves that the doctor both knew about the condition and ignored it, the prisoner cannot satisfy the deliberate indifference standard.[240]

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232. Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997).

233. *See, e.g.*, Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (noting "the courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punisbments clause into a medical malpractice statute for prisoners"); *see also* Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997) (noting medical malpractice does not ordinarily give rise to an Eighth Amendment claim).

234. *Norton*, 122 F.3d at 291.

235. *Id.*

236. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996).

237. Laaman v. Helgemore, 437 F. Supp. 269, 311 (D.N.H. 1977).

238. *Id.*

239. Johnson v. Quinones, 145 F.3d 164, 169-70 (4th Cir. 1998).

240. *Id.*

This standard clearly requires more than mere negligence, although inmates need not establish that a prison official, through inaction or omission, undertook specifically to harm the inmate.[241]

Another fundamental aspect of Eighth Amendment interpretation by the courts is the evolving "contemporary standards of decency" standard. Even after *Farmer v. Brennan*, the Second Circuit, for example, acknowledged this evolving standard in reversing a denial of a prisoner's claim under the Cruel and Unusual Punishment Clause.[242] In *Koehl*, an inmate alleged that his prescription eyeglasses were necessary to prevent him from experiencing double vision and flawed depth perception.[243] The Second Circuit determined that, while these conditions do not cause suffering, they were sufficiently inconsistent with "contemporary standards of decency."[244] Though these consequences of merely denying the inmate a pair of glasses do not inevitably entail pain, the Court found that they adequately met the test of "suffering" from *Estelle v. Gamble*.[245]

Although courts have never found the financial incentives of managed health care to violate the Eighth Amendment, the features of such a system could potentially fail the constitutional responsibilities imposed on the government. As the contemporary standards of decency have evolved, so too have our notions of physical harm and medical deprivation. As a result of *Estelle*'s philosophy, courts will recognize a constitutional claim when prison officials intentionally deny access to medical care or interfere with prescribed treatment.[246] While single instances of health treatment denied or delayed may appear to be the product of mere negligence when viewed in isolation, "repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures."[247]

A series of incidents closely related in time "may disclose a pattern of conduct amounting to deliberate indifference to true

241. *See* SHOOK & SIGLER, *supra* 99, at 119 (stating that an inmate must show that an institutional official was more than merely negligent in response to a medical condition and noting that "[i]nmates do not need to show that the inaction on the part of the officials was undertaken to specifically harm the inmate.").

242. Koehl v. Dalsheim, 83 F.3d 86, 88 (2d Cir. 1996) (citing the "contemporary standards of decency" standard).

243. *Id.* at 87.

244. *Id.* at 88.

245. *Id.* at 88 (finding the denial of eyeglasses satisfied the "suffering" test laid out in *Gamble*).

246. Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977).

247. *Id.*

medical needs of prisoners."[248] In *Todaro v. Ward*, the Second Circuit found that the existing prison procedures had resulted in interminable delays and outright denials of medical care to suffering inmates.[249] The Second Circuit refused to accept the argument that institutional practices must be defective to the maximum degree before a constitutional rights violation can be recognized and corrected.[250] Rather, the court emphasized that to hold as such would encourage lowering prison health standards to the "lowest common denominator."[251] The Second Circuit concluded that inadequate resources no longer can excuse the denial of constitutional rights.[252] Moreover, courts may likely consider delay of emergency medical treatment to be deliberately indifferent in the context of the Eighth Amendment.[253]

Similarly, when "systematic deficiencies" in staffing, facilities, or procedures inevitably result in unnecessary suffering, courts will not hesitate to use injunctive powers.[254] The Constitution "does not stand in the way of a broader attack on the adequacy of an institution's entire health care system which threatens the well-being of many individuals."[255] The measure by which a prison's medical care services and the system of access to them are to be judged is whether or not the facilities, acts, or omissions endanger the health of the prison community in a deliberate or calloused manner.[256]

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

249. *Id.* at 53

250. *Id.*

251. *Id.*

252. *Id.* at 54 n.8 (citation omitted).

253. *See* Archer v. Dutcher, 733 F.2d 14 (2d Cir. 1984) (finding that where prison personnel waited five hours before sending a prisoner suffering from abdominal pain to proper treatment at a nearby hospital, the actions may have constituted deliberate indifference).

254. *Todaro*, 565 F.2d at 52.

255. *Id.*

256. Laaman v. Helgemore, 437 F. Supp. 269, 315 (D.N.H. 1977) (finding that "the medical unit must be looked at as a whole because it is the end result, the total health care made available to and received by the plaintiff class which is subject to constitutional scrutiny . . . .").

IV. APPLICATION: COULD THE EIGHTH AMENDMENT APPLY TO MANAGED HEALTH CARE?

A. What Must a Prisoner Establish to Present a Valid Claim?

In light of the Supreme Court's decisions in *Estelle* and *Farmer*, a prisoner could very well present a valid Section 1983 claim against a prison or prison official under the appropriate circumstances.[257] Given the progeny of *Estelle* and despite the emphasis on subjective intent in *Farmer*, the claim need not establish malicious intent.[258] However, the prisoner must show an abundance of causation to satisfy the first prong and something more than negligence for the second element.[259] *Bowman v. CCA* arguably demonstrates a scenario in which a managed care organization's conduct could satisfy the first prong of this test. Assuming the prisoner in such a situation, one with sickle cell anemia for instance, can show a sufficiently serious deprivation of medical care, the focus turns to the test's subjective prong. Therefore, the probable battleground in many cases regarding the ultimate question of whether a managed health care plan has violated the Eighth Amendment will turn on the "deliberate indifference" question.

Although the Supreme Court decided *Wilson v. Seiter* prior to *Farmer*, *Wilson* mandated an inquiry into the prison official's state of mind when considering a claim of cruel and unusual punishment.[260] The *Wilson* Court specifically rejected a proposal that draws a distinction between "short-term" or "one-time" conditions (in which a state of mind requirement would apply) and "continuing" or "systematic" conditions (in which state of mind would be irrelevant).[261] This relates to the issue of managed care, since a plaintiff could argue that the systematic flaws of managed health care lead to continuous and inevitable injury among the prisoners. The fact that the Court refused to establish such a standard suggests that a prison's health

257. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Servs., 489 US 189, 196, 200-201 (1989) (acknowledging that when a state incarcerates a person, the Constitution imposes a "corresponding duty to assume some responsibility for his safety and well-being"). However, the Court found the *Estelle* analysis simply did not apply to the facts of this case. *Id.*

258. Wilson v. Seiter, 510 U.S 294, 305 (1991).

259. *Id.* at 305-06 (noting mere negligence would not satisfy whether the respondent acted "maliciously" nor would it satisfy the "deliberate indifference" standard); Farmer v. Brennan, 511 U.S. 825, 835 (1994) (distinguishing "'deliberate indifference to serious medical needs of prisoners,' from [] 'negligen[ce] in diagnosing or treating a medical condition,' holding that only the former violates the Clause").

260. *Wilson*, 510 U.S. at 299.

261. *See id.* at 300 (finding "neither a logical nor a practical basis" for drawing such a distinction).

policy, which systematically treated inmates poorly, would not constitute an Eighth Amendment violation without subjective intent.

However, the Court has also rejected the argument that the Eighth Amendment does not protect against prison conditions that merely threaten to cause health problems in the future—that is, the Cruel and Unusual Punishment Clause does protect against future harm.[262] That a prison authority may not be deliberately indifferent to an inmate's current health problems but could ignore a condition of imprisonment that is certain or very likely to cause serious illness and needless suffering "the next week or month or year. . ." ignores the essence of the Eighth Amendment.[263] For example, "a prisoner could successfully complain about demonstrably unsafe drinking without waiting for an attack of dysentery."[264]

In *Helling v. McKinney*, the Court remanded an inmate's claim that prison officials were deliberately indifferent in exposing him to levels of ETS that posed an unreasonable risk of serious damage to his future health.[265] The inmate had been assigned a cell with another inmate who smoked five packs of cigarettes a day.[266] Although there is no constitutional right to a smoke-free prison environment, the Court recognized this as a valid cause of action under the Eighth Amendment by alleging that he had been involuntarily exposed to levels of ETS.[267] The Court noted scientific opinion that exposure to ETS could pose unreasonable risk of harm, and also concluded that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated "current standards of decency."[268] The Court rejected the argument that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.[269] The Court reserved for the district court the issues of whether exposure to ETS is sufficiently

262. Helling v. McKinney, 509 U.S. 25, 32-33 (1993).

263. *Id.* at 33 (citing Hutto v. Finney, 437 U.S. 678, 682 (1978), in which the Court noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease—and this condition required a remedy—even though it was not alleged that the harm would occur immediately and may not affect all of those exposed).

264. *Id.*

265. *Id.* at 35. Exposure to environmental tobacco smoke ("ETS") is often associated with chronic disease in nonsmokers.

266. *Id.* at 28.

267. *Id.* at 29.

268. *Id.*

269. *Id.* at 34.

grave to implicate "serious medical need" and whether such exposure is contrary to current standards of decency.[270]

Furthermore, the Supreme Court emphasizes the concept of "punishment" in construing them from within the Eighth Amendment.[271] The source of the intent requirement is "the Eighth Amendment itself, which bars only cruel and unusual *punishment*—rather than the predilections of the Court."[272] The Court also has indicated that holding convicted criminals in unsafe conditions constitutes cruel and unusual punishment.[273]

Despite the somewhat heightened subjective standard imposed on the prisoner's claim, *Wilson* urged further analysis by the lower court even when the challenged conduct appears to be just negligence.[274] *Wilson* concluded that, out of an abundance of caution, the lower court conceivably could have given further thought to "at best. . .negligence," despite a standard that prison officials acted "maliciously and sadistically for the very purpose of causing harm."[275] Of course mere negligence would not satisfy an Eighth Amendment standard of deliberate indifference, but the Court's remand of this case demonstrates that a plaintiff might show a valid Section 1983 claim challenging inhumane prison conditions.[276]

B. At What Point Does a Policy or Doctor Impute Liability Upon the Prison?

Had the *Bowman* jury concluded that the doctor did in fact act with deliberate indifference to Mr. Bowman, another question would have arisen as to the point at which the policy of a managed care organization would show injury. The Court has never addressed this

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270. *Id.* at 35.

271. Wilson v. Seiter, 510 U.S. 294, 300 (1991) (emphasizing that the Eighth Amendment only bans punishment); *see also* Duckworth v. Franzen, 780 F.2d 645, 652 (7tb Cir. 1985) (noting that a prison guard accidentally injuring a prisoner would not be considered punishment); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) ("The thread common to all [Eighth Amendment prison cases] is tbat 'punishment' has been deliberately administered for a penal or disciplinary purpose. . . .").

272. *Wilson*, 510 U.S. at 300 (emphasis in original); *see also Duckworth*, 780 F.2d at 652:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what tbe word means today; it is what it meant in tbe 18th century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment . . . whether we consult the usage of 1791, 1868 or 1985.

273. Youngberg v. Romeo, 457 U.S. 307, 315-316 (1982).

274. *Wilson*, 510 U.S. at 305.

275. *Id.* at 305-306 (The lower court applied a standard whereby the prison official must have acted "maliciously and sadistically for the very purpose of causing harm.").

276. *See Wilson*, 510 U.S. at 311 (White, J. concurring) (noting, however, that the majority's holding makes it easier for prison officials to defeat a Section 1983 claim brought by a prisoner).

issue in the prison context, but has done so with claims of excessive force, false arrest, and false imprisonment incidents by law enforcement officials.[277] For example, a municipality may not be held liable under Section 1983 solely because it employs a tortfeasor.[278] Rather, the plaintiff must identify a municipal "policy" or "custom" that caused the injury.[279]

The Supreme Court does not authorize the award of damages against a municipal corporation based on the actions of one of its officers when the jury has concluded that the officer inflicted no constitutional harm.[280] If a person has suffered no constitutional injury at the hands of the individual officer or prison official, policies or regulations that may have authorized a particular act or procedure is "quite beside the point."[281]

The Court has also consistently refused to hold municipalities liable under a theory of respondeat superior.[282] A city is not liable under Section 1983 unless a municipal policy causes a constitutional deprivation as determined using a two-factor test. First, there is the issue of whether the policy in question is adequate.[283] Second, if the policy is not adequate, the next question becomes whether such inadequate policy can be said to justifiably represent "city policy."[284] As the Court noted, it may appear "contrary to common sense" to assert that a municipality would actually have such an unreasonable policy—and this holds true for the prison context.

Why would a prison implement a health care policy of inadequate treatment?[285] The Court responded that the policymakers

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277. *See, e.g.*, Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997) (excessive use of force by a police officer).

278. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 692 (1978).

279. *Brown*, 520 U.S. at 403.

280. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

281. *Id.* (finding that Police Department regulations authorizing use of force cannot be found unconstitutional when the police officer's treatment of the plaintiff was itself not unconstitutional).

282. *Brown*, 520 U.S. at 403; *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985) (noting that the Court had previously held that a city could not be held liable under Section 1983 based upon theories akin to respondeat superior); City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989) (Respondeat superior or vicarious liability will not attach under Section 1983).

283. *Harris*, 489 U.S. at 390-91 (discussing a municipal policy for training police officers). The Supreme Court has never decided the issue of imputed liability in the prison context. Nonetheless, this represents a valid parallel in that courts could analyze the liability of prison systems under a test that considers the adequacy and justifiability of their policies.

284. *Id.*

285. *Id.* at 390 Again, the Court analyzes this institutional policy in the context of police officer training—but the parallel can be effectively established here to prison policy. Why would a prison ever institute a policy that is facially deficient?

of the city can "reasonably said to have been deliberately indifferent to [a] need" where both the need for a proper policy is obvious and the inadequacy is likely to result in the violation of constitutional rights.[286] In this event, the failure to provide proper health treatment may be fairly said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes the injury.[287] Additionally, in order for liability to attach in this context, the policy must be closely related to the ultimate injury.[288] While a prison could not be held liable under respondeat superior, liability resulting from a prison's managed health policy could be imputed to the State under a Section 1983 claim.

C. Managed Health Care and its Reputation

Since the Supreme Court has established the avenue potential prisoner claims must take against a managed health care policy under the Eighth Amendment, the question becomes: should courts hold some managed health care systems deliberately indifferent? Certainly managed health care and HMOs have a questionable reputation among much of the public, and the advent of the Patient's Bill of Rights has instigated considerable backlash against managed care.[289] A large and growing number of physicians in today's managed care market receive pay for services according to incentives that offer financial rewards for providing less and less expensive medical treatment.[290] These schemes typically reward doctors for decreasing costs of care, reducing the number and costs of referrals for inpatient or specialty care.[291] In response, many states are currently considering bills to limit or prohibit physician incentive plans, as identified in *Bowman*.[292]

The primary claims a prisoner would raise regarding managed health policies would center on physician incentive plans.[293] Basic physician payment customarily occurs through three modes: fee for service (historically the dominant form of pay—until managed care), salary, or capitation.[294] Plans with fee for service still reward

286. *Id.*
287. *Id.*
288. *Id.* at 391.
289. Conversations with Professor James Blumstein, Vanderbilt Law School.
290. LATHAM, *supra* note 100, at 399.
291. *Id.*
292. *Id.*
293. For an in depth analysis of financial incentives within managed care, see *id.*
294. *Id.* at 402

physicians for providing fewer services, in that they still seek to limit unnecessary care, thereby controlling costs.[295] Plans with salaries also adopt incentive schemes to keep physicians conscious of cost control.[296] Finally, capitation systems—as discussed in *Bowman*, similarly create incentives to control and reduce costs.[297]

Capitation systems spark the most debate regarding financial incentives. First, physicians and other providers claim that capitation has introduced economic considerations into their provision of care and that they occasionally "are aware that they can save money by withholding care or providing less expensive care (for example, substituting a generic drug for a name-brand pharmaceutical), and this creates an inherent conflict of interest."[298] Second, many experts also assert that low payments do not provide enough money to fund the preventive care services that capitation theoretically should encourage; furthermore, many health plans offer bonuses to physicians for efficiency—"either for following 'utilization management' guidelines . . . or through some other mechanism."[299]

However, despite the widespread use of incentive payments in managed health care, there exists little data determining the effects of incentive schemes.[300] Although we know that managed care greatly reduces the costs of treatment, there is relatively little information indicating that these limitations "result in increased morbidity or mortality among managed care patients, as opposed to [fee for service] patients."[301]

Given the arguably worthy aim of policy incentives to reduce costs, the Court has considered arguments by federal prisons that, despite good faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions.[302] Justice White worried that *Wilson* suggested that prison officials will be able to defeat a Section 1983 action challenging inhumane prison

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295. *Id.*

296. *Id.*

297. Bowman v. Corrections Corp. of Am., 188 F. Supp. 2d 870 (M.D. Tenn. 2000); LATHAM, *supra* 100, at 402 ("Payment by capitation is . . . an incentive for physicians to keep costs down.").

298. Mark Hagland, *How Does Your Doctor Get Paid? The Controversy Over Capitation*, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/doctor/care/capitation.html (last visited Mar. 28, 2005).

299. *Id.* "Capitated payment has become a major issue in the federal government's Medicare managed care program as well, which has been plagued with departures by health plans and providers who feel that payment rates are simply too low at this time to make participation successful."

300. LATHAM, *supra* note 100, at 407.

301. *Id.*

302. Wilson v. Seiter, 510 U.S. 294, 301 (1991).

conditions simply by showing that the conditions are caused by insufficient funding from the legislature rather than by deliberate indifference.[303] However, policy considerations cannot dictate punishment (in other words, cost cannot be made the issue).[304]

D. Cruel and Unusual: A Tough, but Viable Claim for the Future

As demonstrated through this note, an inmate could potentially raise a valid claim under the Eighth Amendment that a prison's managed health care incentives violate the Cruel and Unusual Punishment Clause. However, the inmate must satisfy a number of elements before a court would recognize a violation. These requirements should be divided into two critical components, set out in the existing case law.

The first prong of the prisoner's claim would establish that the deprivation or injury as to the inmate or inmates is sufficiently serious.[305] This component requires more than a scientific or statistical inquiry into the seriousness of the potential harm and the likelihood that the conditions of the health plan or managed care system will actually cause such an injury.[306] The court no doubt will review the particular managed care policy adopted by the prison. The prisoner's claim of deliberate indifference under the second, subjective prong would be undermined if the officials formed the policy to demonstrate and require "adequate" health care, as the CCA policy appeared in *Bowman*. Moreover, the *Helling* Court suggested in dicta that the prison could adopt a new policy administered in a way that would facially minimize risks and effectively make it impossible for an inmate to prove that he would be exposed to "unreasonable risk" or that he is now entitled to an injunction.[307]

Nonetheless, courts should assess (as required by the objective prong) whether society considers the prisoner's claimed lack of medical attention to be so grave that it violates contemporary standards of decency. *Helling* provided the example of a health risk so severe that society would not tolerate the prison policy neglecting the risk of exposure to cigarette smoke.[308] The Court's analysis, though

303. *Id.* at 311 (White, J., concurring).

304. *Id.* at 301-02.

305. Rhodes v. Chapman, 452 U.S. 337, 347-49 (1981). Again, this is an objective prong established originally in *Estelle* and reiterated in *Farmer*.

306. Helling v. McKinney, 509 U.S. 25, 36 (1993).

307. *Id.*

308. *See id.* (finding that the exposure to cigarette smoke has become objectively intolerable and the determination was remanded to the District Court).

not specifically related to medical treatment of prisoners, implicates the policies of managed health care, and calls into question its various financial incentives. Unfortunately for the prisoner, however, and unlike the observable and grave consequences of exposure to cigarette smoke, there is relatively little information revealing that financial incentives in health care produce increased mortality or threat to health.[309] In the future, inmates might isolate data that would demonstrate potential negative affects of managed health care incentives.[310]

Despite the significant, yet questionable potential for a prisoner to satisfy the first prong, the second prong imposes an even stricter prerequisite. As previously noted, the subjective element requires that defendants exhibit "deliberate indifference."[311] *Farmer v. Brennan* appeared to employ a heightened standard from what was arguably the lesser standard produced by *Estelle*. The subjective component requires some subjectively intended act of punishment. Again, forming the health policy in such a way as to provide at least "adequate" medical attention significantly undermines the inmate's claim of deliberate indifference. Thus, as the Court indicated in *Helling*, a prison could adopt a policy specifically addressing any future claims by its incarcerated patients.[312]

However, the Court has suggested that if prison officials were aware of a particular condition or cognizant of the potential dangers of a particular condition and ignored it, their act (or failure to act) would violate the subjective standard. The vagueness of this standard prompts two possible situations concerning whether the prison official knew of the potential harm to the inmate: whether 1) *in spite of* this knowledge, officials acted in a way which produced the harm, or 2) *because of* this knowledge they acted in a manner which resulted in the harm. Given the analysis of the *Estelle* line of cases and the nature of the government's obligations, courts are probably closer to an "in spite of" standard.[313] Even after *Farmer*, one can conclude that

309. LATHAM, *supra* note 100, at 407.

310. Arguably, *Bowman v. Corrections Corporation of America*, 188 F. Supp. 2d 870 (M.D. Tenn. 2000), demonstrates such negative repercussions of financial incentives, as the District Court determined. Clearly, Mr. Bowman's incentives were not aligned with those financial aims of the treatment policy. *Id.* at 879. However, statistical data regarding the overall effects of managed health care could satisfy this question.

311. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

312. Helling v. McKinney, 509 U.S. 25, 36 (1993).

313. *See, e.g. Helling*, 509 U.S. at 36 (finding that despite inmate's exposure to ETS, the prison's failure to address its inmate's concerns raised a valid Eighth Amendment claim); Brown v. Bryan County, 219 F.3d 450, 462 (5th Cir. 2000) (finding that Sheriff's failure to train police officer in making arrest without excessive force could constitute "deliberate indifference").

inaction by prison officials, combined with inferential evidence of actual knowledge can constitute deliberate indifference.[314]

E. Judicial Approach to Health Policy Analysis

Although the Supreme Court has upheld financial incentives in managed health care despite quality implications, the judiciary withholds the authority and the obligation to clarify the Eighth Amendment standard.[315] The Eighth Amendment restrains the exercise of legislative power. "It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not."[316]

Despite legislative measures adopted by citizens' chosen representatives, which provide an important means of identifying contemporary values, "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power."[317]

If a prisoner were to claim that managed health care violated Constitutional rights, courts must, in order to remain consistent with the *Estelle* deliberate indifference standard, focus on the incentives of the managed health care policy. Again, if the words of the policy itself portray its mission as striving to provide top quality medical care for prisoners, it may be difficult to find the policy deliberately indifferent since the documented intent is to provide adequate care. However, despite the aim of the policy, its financial incentives could be so perverse that they may lead to such results as in *Bowman* (where the patient died of sickle cell anemia when not transferred to an expert). Therefore, a court considering whether a policy fails the deliberate indifference standard should look for a coverage mechanism which 1) creates no physician disincentive, and 2) creates a physician incentive that is at least "aligned" with the incentives of the policy's patients.

V. CONCLUSION

Courts have never concluded that managed health care, due to its financial incentives, violates the Eighth Amendment. However, as

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314. Rifkin, *supra* note 88, at 287.

315. *See* Pegram v. Herdrich, 530 U.S. 211, 237 (2000) (holding that mixed eligibility decisions by HMO physicians are not fiduciary decisions under ERISA).

316. Furman v. Georgia, 408 U.S. 238, 313-314 (1972).

317. Gregg v. Georgia, 428 U.S. 153, 174 (1976).

contemporary standards of decency have evolved, so too has our notion of physical harm and medical deprivations.

Given the realities of the prison system and the high costs of health care, a complete fee for service system provided for incarcerated citizens presents an unreasonable and impossible solution to Mr. Bowman's problem. Accordingly, it is unlikely that courts will ever conclude that managed health care in prisons *itself* violates the Eighth Amendment, in light of our growing dependence on the managed format. However, cases similar to Mr. Bowman's will no doubt arise in the future, and Eighth Amendment claims could implicate managed health care policies adopted by prisons that employ perverse incentives schemes, such as significant capitation arrangements. To be successful, the inmate's claim must satisfy the two prong test showing serious injury as a result of the policy, and deliberate indifference on behalf of the prison official.

Prisoners, like all other Americans, have no "affirmative" right to medical treatment; rather, the nature of the government's obligation manifests itself in a "negative" right. Nonetheless, the Supreme Court's attention to the Eighth Amendment subsequent to *Estelle v. Gamble*, despite a heightened standard, suggests the potential for a viable claim by a prisoner against a managed care policy. If an inmate can demonstrate that the policy was harmful to prisoners over time and, that in spite of this result officials continued the policy, courts could find a violation of the Cruel and Unusual Punishment Clause. Without a systematic study portraying harm resulting from managed health financial incentives, such an inference will be difficult to establish. Courts should recognize that contemporary standards of decency reject perverse incentive schemes for managed care in prisons—just as courts have done for suffocating second-hand smoke.

*Richard Siever**

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