The Cost of a Constitutional Right: An Examination of Medical Copayments in Prison and the Eighth Amendment

*Jamie Shaw**

Introduction

Segdrik Farley was a few months away from completing twenty-one years in Wisconsin prison when he was overcome by a toothache.[1] Farley put in "request after request to receive medical attention," all of which were denied.[2] Finally, he laid on the ground and pretended he could not move so that a correctional officer would take him to the doctor.[3] Farley then faced a problem encountered by many incarcerated individuals: he did not have seven dollars and fifty cents to cover the copayment required for a prison medical visit.[4] Even after being seen by a doctor, his pain persisted and he was now indebted to the prison for his medical care.[5] Prison jobs in Wisconsin often bring in as little as nineteen to thirty-three cents an hour.[6] Without financial help from family and friends outside of prison, inmates often have to choose between buying necessities like soap or seeing a doctor.[7] Over the course of his incarceration, Farley worked as a baker, cook, dishwasher, and janitor.[8] Sixty percent of his paycheck was taken out for court costs, limiting his earnings to eight dollars and ninety-four cents every two weeks (with the occasional extra dollar if he was able

* George Mason University, Antonin Scalia Law School, J.D. expected, 2024.

1 Jonah Beleckis, *Perpetuating Poverty: Formerly Incarcerated People Warn of 'Agonizing' Choices Around Wisconsin's Prison Copays*, Wis. Pub. Radio (June 8, 2022), https://www.wpr.org/perpetuating-poverty-formerly-incarcerated-people-warn-agonizing-choices-around-wisconsins-prison.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Beleckis, *supra* note 1.

8 *Id.*

to fit in extra work hours).[9] Farley comes from poverty.[10] Two years after his release, he was still working to pay back court costs and restitution, as well as about two hundred dollars in medical debt from his incarceration.[11]

The United States has the largest number of incarcerated individuals in the world.[12] More than two million people are incarcerated across the country.[13] As a result of the continuous increase in incarceration, effective correctional medical care is becoming an even greater necessity.[14] Given the lack of autonomy while incarcerated, imprisoned individuals rely heavily on the prison medical system.[15] Incarcerated individuals cannot self-treat minor ailments such as headaches or colds and often have to seek medical attention to obtain items as simple as aspirin, antacids, and Band-Aids.[16] Incarcerated individuals are also more likely to have chronic health conditions including diabetes, high blood pressure, HIV, substance abuse, and mental health disorders.[17] These conditions make effective correctional medical care even more imperative. Mass incarceration has shortened the overall life expectancy in the United States by nearly two years.[18] A study conducted by Professor Evelyn Patterson of Vanderbilt University found that for each year incarcerated, a person's life expectancy decreases by two years.[19] Despite the pertinent need for a satisfactory correctional health care

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] John Gramlich, *American's Incarceration Rate Falls to Lowest Level Since 1955*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/.

[13] *Id.*

[14] *Correction Healthcare*, NAT'L INST. OF CORR., https://nicic.gov/projects/correctional-healthcare (last visited Feb. 24, 2024).

[15] *See* William J. Rold, *Thirty Years After* Estelle v. Gamble*: A Legal Retrospective*, 14 J. CORR. HEALTH CARE 11, 15 (2008).

[16] *Id.*

[17] *Health*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/health.html (last visited Feb. 24, 2024).

[18] Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies*, 54 CRIMINOLOGY 360, 374 (2016).

[19] Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523, 523, 527 (2013).

system, American correctional facilities' current health care services are of poor quality and challenging to access.[20]

Medical copayments in prison are one aspect of the prison health care system that negatively impacts incarcerated individuals by creating a barrier to receiving medical care.[21] Medical copayments in prison should be acknowledged as unconstitutional because the limited financial opportunities of incarcerated individuals deprive them of medical treatment guaranteed under *Estelle v. Gamble*.[22] This Comment will examine prison copayments in relation to the Eighth Amendment. Parts I and II will offer a historical context of the United States prison system and the health care system within prisons. Part III will examine the case law surrounding prisoners' rights and the requirements to claim an Eighth Amendment violation in prison. Part IV will explore medical copayments in prison, and Part V will examine the constitutionality of medical copayments. Finally, Part VI will propose alternatives to the current medical copayment policies in prisons and suggest steps to improve the prison health care system.

BACKGROUND

I. MASS INCARCERATION IN THE AMERICAN PRISON SYSTEM

The United States incarcerates more people than any other country in the world.[23] As a result of President Nixon's "war on drugs" campaign, the prison population increased in the 1970s.[24] The coining of this phrase coincided with the "tough on crime" attitude of the time.[25] In 1970, President Nixon signed the Controlled Substances Act (CSA) into law, regulating and classifying certain drugs into five schedules, based on the substance's medical use, potential for abuse,

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[20] *Health*, *supra* note 17.

[21] *See* Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays/.

[22] Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

[23] James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

[24] *Id.*

[25] *Id.*

and safety or dependence liability.[26] President Nixon also increased the size and presence of federal drug control agencies and created the Drug Enforcement Administration (DEA) in 1973.[27] President Reagan continued to promote the "war on drugs," leading the rates of incarceration to skyrocket.[28] The 1984 Sentencing Reform Act established the United States Sentencing Commission, which set sentencing guidelines and created mandatory minimum sentences.[29] The number of individuals incarcerated for nonviolent drug offenses "increased from 50,000 in 1980 to over 400,000 by 1997."[30] Incarceration continued to increase in the mid-1990s as a result of the 1994 Crime Bill, promoted by both political parties.[31] The 1994 Crime Bill "created tough new criminal sentences and incentivized states to build more prisons and pass truth-in-sentencing laws."[32] The "tough on crime" platform was again seen through the implementation of harsh sentencing laws, an increase in federal funding for prisons, an increased use in the death penalty, and the encouragement to charge juveniles as adults.[33] Although the prison population has declined by about ten percent in the last decade, mass incarceration continues to be a pervasive problem in the United States.[34]

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[26] *Drug War History*, DRUG POL'Y ALL., https://drugpolicy.org/drug-war-history/ (last visited March 21, 2024); *Overview of Controlled Substances and Precursor Chemicals*, USC ENV. HEALTH & SAFETY, https://ehs.usc.edu/research/cspc/chemicals/ (last visited March 21, 2024).

[27] *Drug War History*, DRUG POL'Y ALL., https://drugpolicy.org/drug-war-history/ (last visited March 21, 2024).

[28] *Id.*

[29] *Executive Summary*, U.S. SENTENCING COMMISSION, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/executive_summary_and_preface.pdf.

[30] *Drug War History*, DRUG POL'Y ALL., https://drugpolicy.org/drug-war-history/ (last visited March 21, 2024).

[31] Cullen, *supra* note 23; Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis.

[32] *Id.* Truth-in-sentencing laws require incarcerated individuals to serve a substantial portion of their prison sentence imposed by the court before being eligible for release. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUST., TRUTH IN SENTENCING IN STATE PRISONS 3 (1999). Most truth-in-sentencing laws require an individual to serve eighty-five percent of their prison sentence. *Id.*

[33] Ofer, *supra* note 31.

[34] Cullen, *supra* note 23.

II. PRISON HEALTH CARE SYSTEM IN THE UNITED STATES

A. *Background of Prison Health Care*

The prison health care system is far from exemplary.[35] In 2004, more than 800,000 inmates reported having one or more chronic medical condition and inadequate access to medical care.[36] In a 2009 study, among inmates with a chronic medical condition, roughly sixty-eight percent of inmates in local jails, twenty percent of inmates in state prison, and fourteen percent of inmates in federal prison did not receive a medical exam since they were incarceration.[37] Inmates do not get regular access to doctors and nurses, and often lack privacy when they do receive medical treatment.[38] In some correctional facilities, an inmate who wants to see a doctor must be seen by a correctional officer first.[39] If the correctional officer determines there is a medical necessity, the inmate will see a nurse, who then decides if the inmate will see a physician.[40] Medical units are often understaffed and prisons routinely hire underqualified medical staff.[41] In addition, inmates frequently go without vital medications due to shortages.[42] An investigation by CNN reported that Wellpath, a company that provides healthcare to correctional facilities, has

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[35] *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976); *See* Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009).

[36] *Id.* at 668–69.

[37] *Id.* at 669.

[38] *See* Hoag Levins, *Reviewing the Flaws of U.S. Prisons and Jails' Health Care System*, UNIV. OF PENN. LEONARD DAVIS INST. OF HEALTH ECON. (Mar. 6, 2023), https://ldi.upenn.edu/our-work/research-updates/the-flaws-of-u-s-prisons-and-jails-health-care-system/.

[39] *Id.*

[40] *Id.*

[41] *See* Blake Ellis & Melanie Hicken, *Behind Bars, They Beg for Medical Attention from a Giant Government Contractor. For Some, Help Doesn't Come – Or It Comes Too Late. A CNN Investigation Exposes Preventable Deaths and Dangerous Care That Government Agencies Have Failed to Stop*, CNN, https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/ (last visited March 21, 2024); *See* Dean A. Dabney & Michael S. Vaughn, *Incompetent Jail and Prison Doctors*, 80 PRISON J. 151, 154 (2000) ("Although the exact number is unknown, investigative reporters have estimated that somewhere between 15% to 78% of correctional physicians practice medicine with restrictions on their medical license.").

[42] Blake Ellis & Melanie Hicken, *Behind Bars, They Beg for Medical Attention from a Giant Government Contractor. For Some, Help Doesn't Come – Or It Comes Too Late. A CNN Investigation Exposes Preventable Deaths and Dangerous Care That Government Agencies Have Failed to Stop*, CNN, https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/ (last visited March 21, 2024).

been sued for contributing to more than seventy deaths over a four year period.[43]

Additionally, prisons have inadequate health care policies for the LGBTQ+ community and women.[44] Despite treatment for gender dysphoria being medically necessary and effective, many prisons often refuse or deny such treatment.[45] Prisons claim the treatment is merely cosmetic and creates a greater risk of violence for transgender inmates.[46] Similarly, women face many unique challenges while incarcerated.[47] To begin, access to menstrual hygiene products is often inconsistent or deficient.[48] In addition, cervical and breast cancers occur at higher rates in women's prisons in part due to the lack of preventative health services during incarceration.[49] Moreover, although "[a]n estimated 58,000 people every year are pregnant when they enter local jails or prisons,"[50] only half of pregnant women in prison received any kind of prenatal care apart from an obstetric exam.[51] This failure to provide routine and necessary medical treatments creates an association between incarceration and increased birth complication.[52] Pregnant inmates have even reported being shackled while giving birth.[53]

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[43] *Id.*

[44] *See* National Center for Transgender Equality, LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 15 (2018) ("Prisons and jails have almost universally inadequate policies for evaluating and treating gender dysphoria, a serious medical condition that many transgender people have."); Karissa Rajagopal et al., *Reproductive Health Care for Incarcerated People: Advancing Health Equity in Unequitable Settings*, 66 CLINICAL OBSTETRICS & GYNECOLOGY 73, 76 (2023) ("The availability of reproductive health care for incarcerated people is variable and often limited.").

[45] National Center for Transgender Equality, *supra* note 44, at 15.

[46] *Id.*

[47] Morgan Craven, *The Effect of Co-Payments on Incarcerated Women*, THE MED. CARE BLOG (Jan. 11, 2018), https://www.themedicalcareblog.com/the-effect-of-co-payments-on-incarcerated-women/.

[48] Karissa Rajagopal, *supra* note 44, at 76.

[49] *Id.*

[50] Wendy Sawyer & Wanda Bertram, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2022*, PRISON POL'Y INITIATIVE (May 4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day/.

[51] Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (March 1, 2023), https://www.prisonpolicy.org/reports/pie2023women.html.

[52] Nicolette Wolfrey, *Incarceration Harms Moms and Babies*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (June 2021), https://nationalpartnership.org/wp-content/uploads/2023/02/incarceration-hurts-moms.pdf.

[53] *Id.*

B. *The Effect of the COVID-19 Pandemic on Prisons*

The COVID-19 pandemic exacerbated the poor health care in prisons and jails throughout the United States.[54] Prisons have become hotspots for the COVID-19 virus.[55] In March 2020, one of the first cases of COVID-19 in prison was diagnosed at Riker's Island in New York City.[56] Within two weeks, more than two hundred cases were diagnosed at Riker's Island.[57] As of July 3, 2023, there have been nearly 650,000 COVID-19 cases among individuals incarcerated in prison, and nearly 250,000 COVID-19 cases among prison staff.[58] Additionally, there have been over 3,000 deaths of incarcerated individuals and prison staff due to COVID-19.[59] The death rate of COVID-19 is twenty percent higher for incarcerated individuals than the average American.[60] Health care systems in prisons lack the ability to properly treat and prevent illnesses and diseases due to overcrowding and the large population of clinically vulnerable individuals.[61]

In addition to the large number of inmates that contracted COVID-19, the pandemic also negatively impacted medical care in prisons and jails for inmates who did not contract COVID-19.[62] Basic requests for medical treatment were often ignored as facilities stopped allowing appointments outside of prison, including specialists' appointments.[63] In a Vox investigation, twenty-four people incarcerated in more than fifteen facilities throughout ten states described the effect of COVID-19.[64] Responding individuals

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[54] *See COVID-19 in Prisons and Jails*, PRISON POL'Y INITIATIVE (April 2023), https://www.prisonpolicy.org/virus/.

[55] Michelle Pitcher, *Should Prisoners Have to Pay for Medical Care During a Pandemic?*, THE MARSHALL PROJECT (Nov. 2, 2020), https://www.themarshallproject.org/2020/11/02/should-prisoners-have-to-pay-for-medical-care-during-a-pandemic.

[56] Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, 180 JAMA INTERN. MED. 1041, 1041 (2020).

[57] *Id.*

[58] THE COVID PRISON PROJECT, https://covidprisonproject.com/ (last visited Feb. 24, 2024).

[59] *Id.*

[60] *How Many People in Prisons Died of COVID-19?*, USA FACTS (Sept. 20, 2022), https://usafacts.org/articles/how-many-people-in-prisons-died-of-covid-19/.

[61] Hawks et al., *supra* note 56, at 1041.

[62] Victoria Law, *HealthCare in Jails and Prisons Is Terrible. The Pandemic Made It Even Worse.*, VOX (June 28, 2022, 7:00 AM), https://www.vox.com/23175978/health-care-prison-jail-covid-pandemic.

[63] *Id.*

[64] *Id.*

reported frequent cancellations of appointments, denial of specialty treatment, lack of post-surgery follow-ups, and months without daily medications during the pandemic.[65] The pandemic caused a significant delay in essential doctor appointments in California prisons.[66] As of mid-2022, more than 10,000 specialty appointments, approximately 6,000 primary care appointments, and nearly 1,000 ultrasound exams for end-stage and advanced liver disease were overdue.[67] In New York City's Rikers Island, detainees missed almost 40,000 appointments in four months alone.[68]

Clayton McCray, a 25-year-old, was in jail during the COVID-19 pandemic.[69] A prior shooting injury left McCray's spine damaged, and he developed a condition known as drop foot that required regular treatment and daily wound cleanings.[70] The jail staff did not allow a specialist to examine McCray's infected foot in person due to COVID-19.[71] Ultimately, by September 2020, the infection was so severe McCray's right leg had to be amputated below the knee.[72]

III. THE U.S. SUPREME COURT'S REVIEW OF PRISONER CLAIMS

A. *Rise of the Prisoners' Rights Movement*

In the twentieth century, prison conditions were far from humane.[73] Medical services were performed by prisoners, and doctors often saw patients for a minute at a time.[74] The prison health care system was worse than the health care systems found in developing countries.[75] Despite the lack of health care available, courts continuously maintained a "hands-off" policy and deferred the handling of prisoner claims to correctional facilities until the 1960s.[76] The prisoners' rights

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65 *Id.*

66 *Id.*

67 *Id.*

68 Law, *supra* note 62.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *See* Douglas C. McDonald, *Medical Care in Prisons*, 26 CRIME & JUST. 427, 431 (1999).

74 *Id.* at 433, 441.

75 *Id.* at 434.

76 Lorena O'Neil, *The Prisoners' Rights Movement of the 1960s*, OZY (Apr. 11, 2014), https://perma.cc/GF H8-JRFT.

movement began in 1963 with the case of *Jones v. Cunningham*.[77] The Supreme Court held that state inmates have the right to file a writ of habeas corpus challenging both the legality of their sentencing and the conditions of their imprisonment.[78] Additionally, in the 1964 case, *Cooper v. Pate*, an inmate successfully challenged the denial of his right to practice his religion through a writ of habeas corpus.[79] As a result of *Cooper*, numerous lawsuits arose on behalf of incarcerated individuals regarding the conditions of their confinement.[80]

B. *Prisoner Rights Established in Estelle v. Gamble*

In 1976, after continuous presentation of cases involving unhygienic conditions and inadequate health care services, the Supreme Court granted certiorari to hear the landmark case, *Estelle v. Gamble*.[81] *Estelle* examined the constitutional principles governing medical care to incarcerated individuals.[82] Gamble, an inmate of the Texas Department of Corrections, was injured while performing a prison work assignment.[83] Gamble brought suit against Estelle, Director of the Department of Corrections; Husbands, warden of the prison; and Dr. Ralph Gray, medical director of the Department and chief medical officer of the prison hospital.[84] Gamble filed his complaint under 42 U.S.C. § 1983[85] and alleged he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of the injury he sustained during prison work.[86]

In its opinion, the Supreme Court relied on case law such as *Gregg v. Georgia* that clarified the scope of the Eighth Amendment, finding that the Eighth Amendment's prohibition against cruel and unusual punishment is

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[77] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[78] *Id.*

[79] Cooper v. Pate, 378 U.S. 546, 546 (1964).

[80] O'Neil, *supra* note 76.

[81] McDonald, *supra* note 73, at 435; *Estelle*, 429 U.S. at 97.

[82] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[83] *Id.* at 98.

[84] *Id.*

[85] *Id.* 42 U.S.C. § 1983 states that any person who, under color of law, subjects an individual to the deprivation of any right, privilege, or immunity secured by the Constitution and laws shall be held liable to the party injured.

[86] *Estelle*, 429 U.S. at 98, 101. The Eighth Amendment protects against excessive bail, excessive fines, and cruel and unusual punishment. U.S. CONST. amend. VIII.

not confined to barbarous methods.[87] Instead, the Amendment has been interpreted in a flexible manner.[88] The Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain" and punishments "grossly out of proportion to the severity of the crime."[89]

In *Estelle*, the Supreme Court held that the government has an obligation to provide medical care for incarcerated individuals.[90] The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[91] Deliberate indifference, as a legal concept, is defined as a "conscious choice to disregard the consequences of one's acts or omissions."[92] An inadvertent failure to provide adequate medical care does not constitute an "unnecessary and wanton infliction of pain" necessary to establish an Eighth Amendment violation.[93] Instead, an inmate must allege acts or omissions "sufficiently harmful to evidence deliberate indifference to serious medical needs."[94] Deliberate indifference can be created by a doctor in response to a prisoner's needs, a prison guard intentionally denying or delaying access to medical care, or a prison guard's intentional interference with prescribed treatment.[95] Additional examples of deliberate indifference include failing to provide treatment for diagnosed conditions, making medical decisions based on irrelevant factors, and interfering with the access to treatment.[96] To prove an Eighth Amendment violation under *Estelle*, incarcerated individuals must satisfy both an objective and subjective requirement.[97]

1. Objective Prong for an Eighth Amendment Violation

To bring a successful claim regarding an Eighth Amendment violation, an incarcerated individual must show their medical need

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87 Gregg v. Georgia, 428 U.S. 153, 171 (1976).

88 *Id.*

89 *Id.* at 173 (citing Furman v. Georgia, 408 U.S. 238, 392–93 (Burger, J., dissenting)).

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

91 *Id.* at 104 (internal citation omitted).

92 Model Jury Instruction 9.8 for the Ninth Circuit.

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

94 *Id.* at 106.

95 *Id.* at 104–05.

96 A JAILHOUSE LAWYER'S MANUAL 789 (Peyton Lepp et al. eds., 12th ed. 2020).

97 Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 5 (2008).

is sufficiently serious.[98] In *Rhodes v. Chapman*, the Supreme Court held that Eighth Amendment evaluations of prison conditions must be conducted using objective standards to the maximum extent possible.[99] The Court further stated that only deprivations denying "the minimal civilized measure of life's necessities" could be serious enough to support an Eight Amendment cause of action.[100] Under Supreme Court case law, stating that a condition is restrictive or harsh does not amount to a claim regarding cruel and unusual punishment.[101] Despite this, a condition need not be life-threatening to be deemed serious and support an Eighth Amendment violation claim.[102] Courts often examine whether an individual has been diagnosed by a physician, or if the medical issue is so obvious a layperson would recognize the need for medical attention.[103] Courts also consider whether the condition "causes pain, discomfort, or threat to good health."[104]

2. Subjective Prong for an Eighth Amendment Violation

In addition to satisfying the objective prong, an incarcerated individual must also satisfy a subjective prong to establish an Eighth Amendment violation.[105] The subjective prong requires an inquiry into the prison official's state of mind when the alleged violation took place.[106] In *Farmer v. Brennan*, the Supreme Court held that a prison official could not be found liable under the Eighth Amendment "unless the official knew of and disregarded an excessive risk to inmate health or

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[98] *Id.*

[99] Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Rummel v. Estelle, 445 U.S. 263, 274–75 (1980)).

[100] *Id.* at 347.

[101] *Id.*

[102] Rold, *supra* note 15, at 16.

[103] A JAILHOUSE LAWYER'S MANUAL, *supra* note 96, at 789; *see also* Richmond v. Huq, 885 F.3d 928, 936–37, 948 (6th Cir. 2018) (holding that a prisoner raised an issue of material fact as to whether she had a serious medical need necessary to establish an Eighth Amendment violation committed by certain prison staff when prison staff failed to provide ordered care from the hospital and jail doctors, including psychiatric medication and daily treatment of the prisoner's burns); Prince v. Sheriff of Carter Cnty., 28 F.4th 1033, 1044 (10th Cir. 2022) (holding that a prisoner's claim of psychosis, fecal incontinence, and catatonia could all reasonably rise to the level of seriousness sufficient to satisfy deliberate indifference because the prisoner's symptoms were all serious enough for a layperson to recognize the need for medical attention easily).

[104] Rold, *supra* note 15, at 16 (quoting Dean v. Coughlin, 623 F.Supp. 392, 404 (S.D.N.Y. 1985)).

[105] Farmer v. Brennan, 511 U.S. 825, 838 (1994).

[106] *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 299 (1991)).

safety."[107] The Court stated that "the official must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference."[108] The *Farmer* ruling begs the question of what evidence is needed to prove awareness. To prove this subjective prong, the individual bringing the claim must prove the prison official believed the inmate's health was in danger and "purposely allowed [the inmate] to go without necessary medical help."[109] Prison official's knowledge or awareness of an inmate's health can, however, "be inferred from the surrounding facts where the failure to respond to a clear risk is reckless."[110]

C. *Prisoner Rights after Estelle*

As Rold points out, three fundamental rights have emerged in cases following *Estelle*.[111] Incarcerated individuals have the right to access care, the right to ordered care, and the right to a professional medical judgment.[112] The failure of correctional officers to honor incarcerated individuals' medical rights results in an Eighth Amendment violation.[113]

Access to medical care is essential—when incarcerated individuals are denied access to necessary medical care, their constitutional rights are violated.[114] All correctional facilities must have the capability to provide for sick inmates, either within the correctional facility or outside the prison by means of specialists and inpatient hospital treatments.[115] Once an incarcerated individual is ordered treatment from a health care professional, the Eighth Amendment also protects that inmates' right to receive such medical treatment without any delay from the ordered timeline.[116] Lastly, inmates have the right to receive

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107 *Id.* at 837.

108 *Id.*

109 A JAILHOUSE LAWYER'S MANUAL, *supra* note 96, at 788.

110 Rold, *supra* note 15, at 16; *accord* Prince v. Sheriff of Carter Cnty., 28 F.4th 1033, 1046 (10th Cir. 2022) (holding that an inmate could have reasonably satisfied the subjective component of deliberate indifference given that the inmate only spoke to Defendant nurse in incoherent phrases, was moved to an isolated cell due to his illness, had submitted multiple medical requests, and had been taken to the emergency room three times within a month).

111 Rold, *supra* note 15, at 14.

112 *Id.*

113 *See id.*

114 *See id.*

115 *Id.*

116 *Id.*

medical judgment by "medical personnel, using equipment designed for medical use, in locations conducive to medical functions, and for reasons that are purely medical."[117] This right to adequate medical care protects not only the discretion surrounding medical diagnostic and treatment decisions, but also the environment where inmates receive care.[118]

D. *Effect of Estelle on Privatization of Prison Health Care*

Privatization of medical care in prisons and jails has become a common trend throughout the United States as governments attempt to cut costs.[119] When prisons privatize, they hire private companies to provide medical staff and handle all medical care within the prison.[120] Although the Supreme Court decided *Estelle* before prisons began to contract out their medical services, the Supreme Court examined the application of the Eighth Amendment to privatized prison health care in *West v. Atkins*.[121]

Quincy West tore his Achilles tendon while playing volleyball at a state prison where he was incarcerated.[122] West was treated by Dr. Atkins, an orthopedic surgeon under contract with the North Carolina Department of Corrections.[123] Over a period of several months, Dr. Atkins "treated West's injury by placing his leg in a series of casts."[124] Dr. Atkins allegedly refused to schedule West for surgery, despite acknowledging that surgery would be necessary.[125] West was ultimately discharged from the medical facility with his leg still swollen and painful and his motion impeded.[126]

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117 *Id.* at 15 (quoting Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 956–57 (1977)).

118 *Id.*

119 *See* Jason Szep et al., *U.S. Jails Are Outsourcing Medical Care – and the Death Toll Is Rising*, REUTERS (Oct. 26, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-privatization/.

120 *See, e.g.*, Beth Schwartzapfel & Jimmy Jenkins, *Arizona Privatized Prison Health Care to Save Money. But at What Cost?*, THE MARSHALL PROJECT (Oct. 31, 2021, 10:00 AM), https://www.themarshallproject.org/2021/10/31/arizona-privatized-prison-health-care-to-save-money-but-at-what-cost.

121 Rold, *supra* note 15, at 17.

122 West v. Atkins, 487 U.S. 42, 43 (1988).

123 *Id.* at 44.

124 *Id.*

125 *Id.*

126 *Id.*

Unfortunately, as per state law, since West was a prisoner in "close custody," he was barred from employing or electing to see a different physician of his choosing.[127] Following his treatment, West brough a suit against Atkins for violation of his Eighth Amendment right to be free from cruel and unusual punishment.[128] West claimed Atkins' care was so deficient as to constitute deliberate indifference.[129] West's claim was dismissed by the lower courts on the grounds that Atkins was an independent contractor, not a state employee.[130] The Supreme Court disagreed and held that Atkins acted under color of state law in providing medical treatment to West.[131] The Court read *Estelle* to conclude that "medical treatment of prison inmates by prison physicians is state action."[132] Under the Eighth Amendment, the state's employment of an independent doctor pursuant to a contractual arrangement does not alter the analysis.[133] If correctional facilities could avoid *Estelle* liability by contracting out medical care, *Estelle* and the resulting precedents would be at risk.[134] *West* was a monumental case regarding inmates' rights.[135] *West* determined that "private contractors to state and local governments who provide services to prisoners are 'state actors' for purposes of the Eighth Amendment."[136] It also determined that "the governments who hire [private contractors] remain liable for failing to provide constitutionally adequate care."[137]

E. *Successful Eighth Amendment Violation Claims after Estelle*

Although *Estelle* and the preceding case law have made it difficult to establish an Eighth Amendment violation in prison, there have been numerous instances of incarcerated individuals bringing a successful claim

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127 *Id.* "North Carolina law bars all but minimum-security prisoners from exercising an option to go outside the prison and obtain medical care of their choice at their own expense or funded by family resources or private health insurance." West v. Atkins, 487 U.S. 42, 44 n.2 (1988).

128 *West*, 487 U.S. at 45.

129 *Id.*

130 *Id.* at 45–46.

131 *Id.* at 50–51.

132 *Id.* at 53–54.

133 *Id.* at 55.

134 Rold, *supra* note 15, at 17.

135 *See id.*

136 *Id.*

137 *Id.*

against prison officials.[138] In *Jensen v. Shinn*, incarcerated individuals in an Arizona correctional facility brought a successful Eighth Amendment violation claim against the Director of Arizona's prisons and the Assistant Director of the Arizona Department of Corrections, Rehabilitation, and Reentry's Medical Services Contract Monitoring Bureau.[139] The incarcerated individuals alleged that the prison officials provided "minimally sufficient health care and minimally humane conditions in maximum custody units."[140] In regards to the minimally sufficient health care claim,

> The Court identified six medical care practices that allegedly exposed [the prisoners] to a substantial risk of serious harm in violation of the Eighth Amendment: (i) Insufficient health care staffing; (ii) Failure to provide timely access to health care; (iii) Failure to provide timely emergency treatment; (iv) Failure to provide necessary medication and medical devices; (v) Failure to provide for chronic diseases and protection from infectious disease; and (vi) Failure to provide timely access to medically necessary specialty care.[141]

The Court concluded the prison officials were deliberately indifferent to the incarcerated individuals' medical needs.[142] The prison officials were both aware of the conditions that presented a risk of harm to the inmates and did not take any effective actions to remedy the inmates' conditions.[143]

In *Phillips v. Roane County*, the Sixth Circuit held that a reasonable trier of fact could find that correctional officers violated detainee Sonya Denise Phillips's Eighth Amendment right when she died from untreated diabetes while awaiting trial.[144] During Phillips's time in jail, she repeatedly complained she did not feel well.[145] Correctional officers even found Phillips unconscious in her cell and did not send her to the emergency room.[146] The Court held that the symptoms experienced by Phillips portrayed the existence of a serious medical condition.[147] The condition was so obvious even a layperson would recognize the need for medical

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[138] *See, e.g.*, Jensen v. Shinn, 609 F.Supp. 3d 789, 796 (D. Ariz. 2022); Phillips v. Roane Cnty., 534 F.3d 531, 545 (6th Cir. 2008).

[139] *Jensen*, 609 F.Supp. 3d at 796–97.

[140] *Id.* at 796.

[141] *Id.* at 864.

[142] *Id.* at 866.

[143] *Id.*

[144] Phillips v. Roane Cnty., 534 F.3d 531, 536–37, 542 (6th Cir. 2008).

[145] *Id.* at 536–37.

[146] *Id.*

[147] *Id.* at 540.

attention, satisfying the objective prong of deliberate indifference.[148] The Court also held that the subjective prong was satisfied when correctional officers witnessed Phillips's "life-threatening symptoms over a two-week period" and failed to transport Phillips to the hospital.[149] The Court concluded "that there [was] sufficient evidence from which a trier of fact could infer that each individual correctional officer had an objective awareness as to the seriousness of Phillips's ailment, and that their failure to do anything about her ailments amounted to deliberate indifference."

IV. MEDICAL COPAYMENTS IN PRISON

In most states, incarcerated individuals must pay medical copayments for physician visits, medications, and other medical services.[150] Medical copayments typically get taken out of an inmate's commissary account or trust fund—funded by money provided by the individual's family and money earned from prison jobs.[151] In 2000, President Clinton signed the Federal Prisoner Health Care Copayment Act of 2000 into law.[152] The Act allowed the Bureau of Prisons to charge a copayment fee in federal prisons for health care services provided during a health care visit requested by an inmate.[153]

Facing a growing number of incarcerated individuals, jurisdictions throughout the United States began charging inmates fees to collect money to offset high correctional costs.[154] According to the Bureau of Prisons, in 2022, the average cost of incarceration for a federal inmate in a federal facility was $42,672 per year.[155] Medical copayments have been implemented as a means to reimburse the states and counties for the

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148 *Id.* (quoting Blackmore v. Kalamazoo Cnty., 390 F.3d 890, 899 (6th Cir. 2004)).

149 *Id.* at 541.

150 Sawyer, *supra* note 21.

151 Andrews, *Even in Prison, Health Care Often Comes With a Copay*, NPR (Sept. 30, 2015), https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-health-care-often-comes-with-a-copay.

152 *See* Federal Prisoner Health Care Copayment Act of 2000, Pub. L. No. 106–294, 114 Stat. 1038 (Oct. 12, 2000).

153 18 U.S.C. § 4048(b)(1).

154 *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate.

155 Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65405, 65406 (Sept. 22, 2023).

cost of providing medical care to incarcerated individuals.[156] Politicians and elected officials also attempt to gain support by promoting inmate fees to offset the footing of inmates' bills by taxpayers.[157]

Medical copayments were also introduced as a means to deter inmates from unnecessary doctor's visits.[158] Requiring copayments addresses a frequently cited concern by prison officials that inmates fake illnesses or injuries.[159] This phenomenon, known as malingering, refers to "the intentional production of false or over-exaggerated medical or mental health symptoms."[160] Incarcerated individuals may engage in malingering for various reasons.[161] Inmates may seek to avoid criminal responsibility, reduce or alter their sentences, transfer to better locations, receive lighter or easier work, or obtain perks such as better shoes or a lower bunk.[162] Although implementing medical copayments can ensure only inmates with an actual, severe illness or injury will seek medical attention, the implementation may pose the threat of deterring inmates from seeking necessary care.[163]

ANALYSIS

I. UNCONSTITUTIONALITY OF MEDICAL COPAYMENTS IN PRISON

A. *Consequences and Impracticability of Medical Copayments*

1. The Barriers and Deterrent Effects of Medical Copayments

Overly expensive and burdensome medical copayments in prisons and jails have counterproductive and dangerous repercussions.[164] Most importantly, access to health care is impeded.[165] Medical copayments

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156 Sawyer, *supra* note 21.

157 Eisen, *supra* note 154.

158 Sawyer, *supra* note 21.

159 *See* Lorry Schoenly, *He's Faking It: How to Spot Inmates' Invented Illnesses*, CORRECTIONS1 (Sept. 30, 2017, 9:23 AM), https://www.corrections1.com/correctional-healthcare/articles/hes-faking-it-how-to-spot-inmates-invented-illnesses-dx3GtdjSL9acMbxn/.

160 *Id.*

161 *Id.*

162 *Id.*

163 Andrews, *supra* note 151.

164 Sawyer, *supra* note 21.

165 *Charging Inmates a Fee for Health Care Services (2017)*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/charging-inmates-a-fee-for-health-care-services-2017-2/ (last visited Feb. 26, 2024).

create a barrier to absolute access to care and disregard the importance of preventative care.[166] Copayments also deter care necessary to keep chronic conditions under control, and deter treatment of communicable diseases that could easily spread throughout prisons.[167] Additionally, copayments that order a substantial portion of an inmate's income "prevent the timely identification, isolation, treatment, and referral of cases."[168]

Diseases are also more likely to spread when individuals avoid seeking medical attention.[169] As seen during the COVID-19 pandemic, the close confinement and lack of isolation in prisons cause illnesses and diseases to spread at an even higher rate compared to the general public.[170] Additionally, diseases contracted in prison can spread rapidly into the community when inmates are released before receiving treatment, harming the general population as well.[171]

Lastly, the longer an incarcerated individual waits to seek medical attention, the more likely the illness or disease will become worse.[172] Postponing medical care both poses a dangerous risk to the sick individual and leads to more aggressive and expensive treatment that prisons could have otherwise avoided.[173] Medical copayments in prison were implemented to cut costs for governments and taxpayers, but in practice, inmates' copayments are doing the opposite, increasing the number and cost of treatments.[174]

2. The Minimal Benefits of Medical Copayments

Copayments serve very minimal benefits to the prison industry.[175] Despite the attempt to offset correctional costs and lower taxpayer spending, the money received from medical copayments is minimal in

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166 *Id.*

167 Andrews, *supra* note 151.

168 Andre G. Montoya-Barthelemy et al., *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, 58 AM. J. PREVENTATIVE MED. 888, 888–89 (2020).

169 Sawyer, *supra* note 21.

170 *See supra* Part II, Section B.

171 Sawyer, *supra* note 21.

172 *Id.*

173 *Id.*

174 *See id.*

175 Michael Ollove, *No Escaping Medical Copayments, Even in Prison*, STATELINE (July 22, 2015, 12:00 AM), https://stateline.org/2015/07/22/no-escaping-medical-copayments-even-in-prison/.

proportion to the amount of money spent on prison health care.[176] In 2014, Pennsylvania collected about $373,000 from inmates out of $248 million spent on inmate health care.[177] Virginia collects about $500,000 a year from inmates while spending $160 million on prisoner health care.[178] California also collects about $500,000 a year in medical fees from inmates, while spending $2.2 billion on prisoner health care.[179] In addition to the nominal revenue received from copayments, these payments create massive barriers for incarcerated individuals, making prison copayments both unnecessary and harmful.[180] The detrimental barriers and harms that result from inmates' copayments outweigh the marginal benefit, further showing the impracticability of such fees.

3. The Dangers Medical Copayments Pose on Impoverished Inmates

An estimated eighty percent of incarcerated individuals self-identify as low income.[181] An extra burden is placed on incarcerated individuals families who might lack the recourses to financially support their incarcerated family member.[182] For example, Kyle Walker worked as a legal assistant to support her two children and boyfriend.[183] Walker's boyfriend was incarcerated in Texas.[184] In Texas, a now-repealed 2011 law raised the copayment for medical care in prisons from three dollars for each visit to a one-hundred-dollar annual flat fee.[185] If an incarcerated individual was considered indigent (in other words, they do not have any money in their commissary

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176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *See id.*; *see* Andrews, *supra* note 151.

181 *Ending the Poverty to Prison Pipeline*, FPWA (Apr. 2019), https://www.fpwa.org/wp-content/uploads/2023/05/FPWAs-Ending-the-Poverty-to-Prison-Pipeline-Report-2019-FINAL.pdf.

182 *See Who Pays? The True Cost of Incarceration on Families*, FINES & FEES JUSTICE CENTER (Sept. 13, 2015), https://finesandfeesjusticecenter.org/articles/who-pays-true-cost-incarceration-families/.

183 Max Rivlin-Nadler, *How Medical Copays Haunt Prisoners and Their Loved Ones*, VICE (Jan. 18, 2017, 12:00 AM), https://www.vice.com/en/article/kbba8n/how-medical-copays-haunt-prisoners-and-their-loved-ones.

184 *Id.*

185 *Id.* In 2019, Texas legislature repealed the one-hundred-dollar flat fee and replaced it with a charge of thirteen dollars and fifty-five cents per visit. Sawyer, *supra* note 21.

account), then they were exempt from the copayment fee.[186] But, once any money was deposited into the account, the prison would take half of the deposited amount to put towards the outstanding copayment until the inmate settles the balance.[187] Walker could only afford to send her boyfriend thirty to forty dollars every couple of weeks, half of which got taken out to pay the outstanding copayment balance.[188] Subsequently, Walker's imprisoned boyfriend was often left with around seven dollars every week to purchase other necessities.[189] As a result of medical copayments, impoverished inmates may choose to forgo necessities to seek medical treatment or forgo medical treatment altogether.[190] In a study conducted within two state prisons, around sixty-six percent of inmates indicated that they had declined to seek medical attention at least once in the previous three months due to a five dollar copayment fee.[191]

Although a two dollar to thirteen dollar medical copayment may seem reasonable for the average American, that rate is not appropriate for incarcerated individuals when their wage is taken into account.[192] Incarcerated individuals typically earn anywhere from fourteen to sixty-three cents per hour, and some prisons do not even pay their inmates to work.[193] In states like West Virginia—where copayments are six dollars—it would take an incarcerated individual 125 hours—to afford the copayment amount—an entire month's pay.[194] To put this figure into perspective, if West Virginia medical providers outside the prison system charged a proportional amount, copayments for residents making minimum wage would equal $1,093 per appointment.[195] Fourteen states charge a medical copayment tantamount to charging minimum wage workers outside of prison more than two hundred dollars per copayment.[196]

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186 Rivlin-Nadler, *supra* note 183.

187 *Id.*

188 *Id.*

189 *See id.*

190 *Id.*

191 *See* Brian R. Wyant et al., *Gender Differences and the Effect of Copayment on the Utilization of Health Care in Prison*, 27 J. CORRECT. HEALTH CARE 30, 32 (2001).

192 Sawyer, *supra* note 21; Pitcher, *supra* note 55.

193 Sawyer, *supra* note 21.

194 *Id.*

195 *Id.*

196 *Id.*

4. The Dangers Medical Copayments Pose on Incarcerated Women and Minorities

A study conducted within two public state prisons on the East Coast concluded that medical copayments imposed a greater barrier to treatment for women and minority groups.[197] Medical copayments negatively impact incarcerated women's physical and social well-being and a greater number of women reported that the copayment fee was a financial stressor.[198] Women are more likely than men to seek medical attention and prescriptions, meaning copayments have a more pronounced effect on incarcerated women.[199] In addition, due to the inconsistent access of feminine products, women often have to purchase everyday necessities such as menstrual hygiene products using their commissary accounts, creating a financial burden.[200] Fifty eight percent of women in prisons and eighty percent of women in jails are mothers, and more than half of them are the primary caretakers of their children.[201] Many of these women purchase calling cards (prepaid cards that allow inmates to use the phone) using their commissary accounts to talk to their families.[202] These additional costs often prevent women from seeking medical attention to avoid the added financial strain of copayments.[203]

B. *Current Protections for Incarcerated Individuals are Insufficient*

1. Exemption of Medical Copayments in Prisons

Although indigent inmates in certain states and federal prisons are exempt from medical copayments, the requirements are extremely stringent.[204] In states that allow for an exemption, if an individual is

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197 Wyant et al., *supra* note 191, at 31, 34.

198 *See id.* at 33–34.

199 Craven, *supra* note 47.

200 *Id.*

201 Sawyer & Bertram, *supra* note 50.

202 Craven, *supra* note 47.

203 *Id.*

204 *See State and Federal Prison Co-Pay Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), https://www.prisonpolicy.org/reports/copay_policies.html.

labeled indigent, they do not pay a copayment.[205] At the federal level, an incarcerated individual is indigent if they have not had an account balance of six dollars in their trust fund or commissary account for thirty days.[206] Thirteen states require inmates to have less than five dollars in their account to qualify as indigent.[207] Additionally, most states require incarcerated individuals to keep low balances for at least a month before qualifying as indigent.[208] States such as Alabama, Connecticut, Massachusetts, and Utah require inmates to hold a low balance even longer, from forty-five to ninety days.[209] On the other hand, states such as South Carolina and North Carolina charge incarcerated individuals medical copayments regardless of their indigency status.[210]

Determining indigency based on the presence of five to six dollars is both impractical and unrealistic. An inmate may have five dollars in their commissary account and still be considered impoverished and unable to afford a copayment fee. Moreover, requiring a certain amount of time for a commissary account to hold a specific amount of money to qualify as indigent is harmful. The time requirement may prevent inmates from seeking money to purchase necessities like soap or shampoo to remain classified as indigent.[211] Additionally, an inmate can lose their indigency status simply because they received a small deposit from a family member or from working a prison job.[212]

In federal prisons and twenty-four state prisons, if an inmate is not considered indigent but does not have sufficient funds to pay the copayment, a debt is created.[213] In such prisons, any funds deposited into the inmate's account are applied to the debt until the inmate settles the balance.[214] In many states when money is deposited into an inmate's commissary or trust fund account, half or all of the deposited amount is automatically used to pay the negative balance until the debt is

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205 *Id.*

206 *Id.*

207 *See* Tiana Herring, *For the Poorest People in Prison, It's a Struggle to Access Even Basic Necessities*, PRISON POL'Y INITIATIVE (Nov. 18, 2021), https://www.prisonpolicy.org/blog/2021/11/18/indigence/.

208 *Id.*

209 *Id.*

210 *State and Federal Prison Co-Pay Policies and Sourcing Information*, *supra* note 204.

211 *See* Herring, *supra* note 207.

212 *Id.*

213 *See State and Federal Prison Co-Pay Policies and Sourcing Information*, *supra* note 204.

214 *Id.* The repayment systems vary by state. *Id.*

paid off.[215] Some states even prevent other charges from being incurred until the inmate pays off the debt, creating financial hardship for low-income inmates.[216] Furthermore, some states, including Louisiana require the debt to be paid off even after the inmate is released from prison.[217] The current policies require incarcerated individuals to go into debt for access to basic necessities and to exercise guaranteed rights.[218] Although it is possible to receive an exemption from medical copayments in prison,[219] the standard is far too narrow and restrictive to be effective.

2. The Prison Industry's Response to COVID-19

As a result of the COVID-19 pandemic, many prisons altered their medical copayment policies to "avoid disincentivizing people in prison from seeking necessary medical care."[220] Twenty-eight states changed their copayment policy in the early months of the pandemic.[221] Ultimately, every state except for Nevada temporarily changed their respective policies at some point during the pandemic.[222] Out of the states that charge medical copayments, only ten states completely suspended the fee during the pandemic.[223] The Federal Bureau of Prisons did not alter its copayment policy for COVID-19-related illnesses until March 10, 2021.[224] The federal policy change expired only four months later on June 20, 2021.[225] Five states—Texas, Alabama, Arkansas, Idaho, and Minnesota—have also reversed any COVID-19-related changes to medical copayments.[226]

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215 *See id.*

216 *Id.* (observing, for example, New Hampshire's requirement that "the negative balance will be paid off before any other charges can be incurred").

217 *Id.*

218 *See* Herring, *supra* note 207.

219 *See State and Federal Prison Co-Pay Policies and Sourcing Information*, *supra* note 204.

220 Tiana Herring, *COVID Looks Like It May Stay. That Means Prison Medical Copays Must Go.*, PRISON POL'Y INITIATIVE (Feb. 1, 2022), https://www.prisonpolicy.org/blog/2022/02/01/pandemic_copays/.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 Tiana Herring, *COVID Looks Like It May Stay. That Means Prison Medical Copays Must Go.*, PRISON POL'Y INITIATIVE (Feb. 1, 2022), https://www.prisonpolicy.org/blog/2022/02/01/pandemic_copays/. Pitcher, *supra* note 55.

Although many states altered their medical copayment policy in response to the pandemic, some states required physical symptoms directly related to COVID-19 to be present to have the fee waived.[227] This policy update created an obstacle for asymptomatic individuals.[228] The Centers for Disease Control and Prevention (CDC) estimated that forty percent of individuals that test positive for the COVID-19 virus are asymptomatic.[229] The CDC estimated the percentage could be even higher in prisons where social distancing and isolation are more challenging.[230] At one prison in Ohio, officials reported ninety-five percent of inmates who tested positive for COVID-19 were asymptomatic.[231]

In addition to the barriers created by requiring inmates to be symptomatic in order to have the copayment waived, the federal government and many states reversed such policies shortly after their implementation, portraying the minimal benefit of such reforms.

C. *Eighth Amendment Violation*

Medical copayments in prison violate the Eighth Amendment's protection against cruel and unusual punishment. Although copayments are not the brutal, physical punishment often pictured when considering the Eighth Amendment's cruel and unusual standard, "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment.[232] An "unnecessary and wanton infliction of pain" includes actions that have no penological justification.[233] Wantonness is a malicious and intentional disregard of a person's rights and safety.[234] Wantonness also includes a complete disregard of and indifference to the consequences of ones actions.[235] To claim that medical copayments involve the

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227 Pitcher, *supra* note 55.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citing Furman v. Georgia, 408 U.S. 238, 392–93 (Burger, J., dissenting)).

233 Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citing *Gregg*, 428 U.S. at 183; Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

234 *Wanton*, BLACK'S LAW DICTIONARY (11th ed. 2019).

235 *Id.*

"unnecessary and wanton infliction of pain," an incarcerated individual must show a deliberate indifference to their health or safety.[236]

In *Estelle*, the Court found that deliberate indifference occurs when prison officials intentionally interfere with incarcerated individuals' treatment or intentionally deny or delay access to medical care.[237] When prison officials implement copayments, they intentionally interfere with inmates' treatment and place undue burdens on incarcerated individuals. Inmates frequently defer medical treatment to avoid paying the copayment, which interferes with their treatment.[238] Additionally, although copayments were implemented to deter unnecessary doctors' visits and to lower to demand for services, postposing medical care until the illness becomes more serious constitutes an intentional delay of care.[239]

1. Objective Prong for an Eighth Amendment Violation

Medical copayments in prison satisfy the objective prong for an Eighth Amendment violation because the resulting deprivation is sufficiently serious.[240] Medical copayments interfere with inmates' access to care, which can result in a greater number of sick inmates and more serious illnesses and diseases.[241] Postposing medical attention until an illness or disease becomes more urgent is dangerous to both the sick inmate and the other inmates within the prison.[242]

To satisfy deliberate indifference, an inmate must show they had an objectively serious medical need.[243] Such medical need is deemed serious if a layperson would recognize the need for medical attention or if a physician has diagnosed the condition.[244] Therefore, medical copayments that affect a medical need diagnosed by a physician or a medical need that is so obvious as to require medical attention constitute the required serious medical need necessary to satisfy an Eight Amendment violation.

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236 *Estelle,* 429 U.S. at 104.

237 *Id.* at 104–05.

238 *See* Andrews, *supra* note 151.

239 *See id.*; Sawyer, *supra* note 21.

240 *See* Sawyer, *supra* note 21.

241 *Id.*

242 *See* Hawks et al., *supra* note 56, at 1041.

243 A JAILHOUSE LAWYER'S MANUAL, *supra* note 96, at 785.

244 *Id.* at 785–86.

2. Subjective Prong for an Eighth Amendment Violation

If an inmate shows that a prison official knew about a serious medical need and consciously disregarded it, the subjective prong for an Eighth Amendment violation is satisfied.[245] The official committing the alleged constitutional violation must have acted with a subjective or culpable state of mind.[246] In regard to medical copayments, the subjective prong for an Eighth Amendment violation is satisfied when three criteria are met.[247] First, an inmate must show the prison official was aware the inmate needed medical attention for a serious need.[248] Second, the official must know a copayment prevented the inmate from receiving such attention.[249] Third, and finally, the official must have done nothing to remedy the situation.[250] While it can be difficult for a prison official to know if a copayment definitively prevented an inmate from seeking medical attention, most prison officials are likely aware that the majority of incarcerated individuals are impoverished.[251] Implementing a fee known to create a barrier to treatment satisfies the subjective prong required to show deliberate indifference.[252] Prison officials should be aware of the substantial risk the fee can pose on inmates but still chose to implement and enforce such policy, creating deliberate indifference.[253]

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245 Farmer v. Brennan, 511 U.S. 825, 837 (1994).

246 *Id.* at 845.

247 *Id.*

248 *Id.*

249 *See id.*

250 *Id.*

251 *See* Inmate Commissary Account Deposit Procedures, 69 Fed Reg. 40315 (July 2, 2004) (Describing how the Bureau of Prisons handles all commissary account deposits and are, therefore, aware of how much money is being deposited into inmates' accounts). *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/. (Stating that prisons also pay inmates' wages and are therefore aware of the low hourly rate inmates make). *See* Ann Carson, et al., *Employment of Persons Released from Federal Prison in 2010*, U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf. (Surveying 51,000 individuals released from federal prison, the Bureau of Justice Statistics collected their income prior to incarceration. This report revealed the low incomes of incarcerated inmates, further proving the prison industry's subjective knowledge of incarcerated individuals indigency).

252 *C.f. Farmer*, 511 U.S. at 837.

253 *See supra* note 251.

3. Medical Copayments Interference on Prisoners' Rights

Estelle and subsequent case law established guaranteed rights for incarcerated individuals which include the right to access care, the right to ordered care, and the right to have a professional medical judgment.[254] Medical copayments in prison interfere with such rights. Copayments prevent inmates from seeking medical attention, interfering with their access to care and their right to a professional medical judgment.[255] Copayments also interfere with inmate's right to ordered care because the fees take away money the inmate could have used to purchase necessary medications or treatment ordered by their doctor.[256]

II. NEXT STEPS

Estelle established that incarcerated individuals have a right to adequate health care while incarcerated.[257] Federal, state, and local governments acknowledge *Estelle* by providing medical care to inmates, but at a cost.[258] Prisons began charging inmates medical copayments to offset the cost of medical care and deter unnecessary medical visits.[259] The result of such fees negatively impacted inmates by impeding on their access to care, creating a greater likelihood of illness, and ultimately leading to more aggressive and expensive treatments.[260] Medical copayments violate the Eighth Amendment by creating a deliberate indifference to serious medical needs.[261] The deliberate indifference created by such copayments constitutes an unnecessary and wanton infliction of pain which establishes cruel and unusual punishment.[262] For those reasons, United States prisons and jails should ultimately abolish medical copayments. Many prisons waived medical copayments during the COVID-19 pandemic, proving the capability of the federal government and states to do without these harmful fees.[263]

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254 Rold, *supra* note 15, at 14.

255 *See* Andrews, *supra* note 151.

256 *See* Rivlin-Nadler, *supra* note 183; *see supra* Part V, Section A(3).

257 Estelle v. Gamble, 429 U.S. 97, 103 (1976).

258 Sawyer, *supra* note 21.

259 *Id.*

260 *Charging Inmates a Fee for Health Care Services (2017)*, *supra* note 165.

261 *C.f.* Farmer v. Brennan, 511 U.S. 825, 837 (1994).

262 *See Estelle*, 429 U.S. at 104.

263 *See supra* Part V, Section B(2).

Another alternative to the current implementation of medical copayments in prison would be to significantly reduce such fees. Reducing the copayment will make it more manageable for the average inmate, thereby eliminating any unnecessary or undue burden.[264] Altering medical copayments to the amount an inmate makes in an hour or two of work would be more reasonable and more in line with the current copayment system outside of prison.[265] Having inmates pay a nominal, feasible fee would still deter frivolous medical visits without preventing inmates from seeking necessary medical attention.

Additionally, the indigency determination to exempt an inmate from medical copayments should be analyzed using the same structure courts use to determine the appointment of representation. At federal law, courts appoint counsel if an individual seeking representation is "financially unable to obtain counsel."[266] Federal courts take a holistic approach when determining indigency and the financial eligibility for the appointment of counsel.[267] Courts consider the individual's income and assets as well as their obligations, expenses, and debts.[268] In Virginia, determination of indigency is based on two measures.[269] First, courts examine whether the individual is a current recipient of state or federally funded public assistance programs.[270] Second, courts look at the individual's net income, assets, and other exceptional expenses that would prevent the individual from securing private counsel.[271] To promote consistency and uniformity within the criminal justice system, the indigency determination to exempt an inmate from medical copayments should be the same as the indigency determination for appointment of counsel.

Federal and state governments can still decrease the cost of medical care and deter unnecessary doctor visits without charging inmates a copayment. Prisons can implement greater preventative care measures to reduce the number of sick inmates, lowering the overall

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264 *See* Sawyer, *supra* note 21.

265 *See id.*

266 18 U.S.C. § 3006A(b).

267 *See Financial Affidavit*, U.S. CTS., (March 39, 2021), https://www.uscourts.gov/forms/cja-forms/financial-affidavit.

268 *Id.*

269 *See* Va. Code Ann. § 19.2–159(B) (West 2021).

270 *Id.*

271 *Id.*

cost of treatment.[272] Governments can also set clear guidelines and conduct investigations to ensure inmates receive adequate medical care. Providing adequate medical care can prevent more excessive and expensive treatments among inmates.[273] Prisons can also implement medical or geriatric parole policies to release sick or frail inmates that no longer pose a public safety risk, lowering the amount of money spent on medical care. Lastly, reducing incarceration rates, especially for minor crimes, can alleviate resources and cut the costs of medical care within prisons. Overall, there are other ways for governments to accomplish the purported goals of medical copayments without the current harm medical fees have posed on incarcerated individuals.

CONCLUSION

Incarcerated individuals, such as Segdrik Farley, should not have to defer seeking medical attention for a serious medical need out of fear of paying a fee. Inmates should not be subjected to poor medical conditions or cruel and unusual treatment simply because they are incarcerated. The Constitution guarantees a right to be free from cruel and unusual punishment, a right that belongs to incarcerated individuals just as much as the general population.[274]

Medical copayments in prison were implemented to cut costs, raise revenue, and deter inmates from unnecessary doctor visits.[275] In practice, medical copayments do more harm than good.[276] Medical copayments prevent incarcerated individuals from seeking medical attention, with the adverse effect of spreading illnesses and diseases within the prison and to the public.[277] Additionally, copayments lead to more aggressive and expensive treatment of such illnesses and diseases.[278] Medical copayments in prison constitute a deliberate indifference, satisfying the requirement of an Eight Amendment violation.[279] Given the copayments indifference to inmates health and

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[272] Niyi Awofeso, *Making Prison Health Care More Efficient*, 331 BRITISH MED. J., 248, 249 (2005).

[273] Sawyer, *supra* note 21.

[274] U.S. CONST. amend. VIII.

[275] Eisen, *supra* note 154.

[276] Sawyer, *supra* note 21.

[277] *Id.*

[278] *Id.*

[279] *C.f.* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

the lack of benefits the copayments possess, the federal government should hold prisons accountable for such violations and eliminate, or at minimum, limit medical copayments in prison.