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### ARTICLE

#### FOR-PROFIT PRISONS: DEADLY DEFICIENCIES IN MEDICAL CARE

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As of 2014, roughly 131,000 prisoners in the United States were incarcerated in a privately-controlled institution.<sup>1</sup> This number has been steadily on the rise since the first implementation of privately-owned prisons at the turn of the century.<sup>2</sup> The movement toward privatization was driven by a push to lessen costs and alleviate burdens upon the public sector.<sup>3</sup> While proponents of private prisons argue that relegating prisons to the private market increases quality, in many cases the opposite is

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TUMCA Law & Policy Review is a platform for current undergraduate moot court participants and TUMCA (Texas Undergraduate Moot Court Association) Alumni to engage in legal scholarship. Each issue centers on a topic that article submissions must discuss in some form. The topic of this issue concerned any legal issues that arise due to prison conditions.

<sup>1</sup> Megan Mumford, Diane Whitmore Schanzenbach, & Ryan Nunn, *The Economics Of Private Prisons*, The Hamilton Project, at 2.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 1.

true.<sup>4</sup> Due to the nature of most private prison contracts, privately owned-prisons are plagued by a misalignment of priorities. Instead of encouraging efficient prison procedures, the structure of the agreement formed between states and firms encourages private contractors to pursue maximum profits, cutting corners along the way.<sup>5</sup> Because of the economic incentives motivating the behavior of for-profit prisons, a pattern of unacceptable systemic neglect of inmate health has arisen across the nation.

This article will look specifically at one of the most common areas of insufficiency within the private prison system: the profit-motivated neglect of inmate medical needs. This trend of neglect is systemic, from the denial of insulin for diabetic inmates in Tennessee to accounts of deadly instances of under-qualified staffing in Texas. To understand the reason for the widespread occurrence of these failures, it is important to understand the forces motivating the firms responsible for the care of tens of thousands of the nation's prisoners.

All private prisons in the U.S. are controlled by six firms, with 96% of private prison beds under the management of three contractors.<sup>6</sup> This level of market control within the corrections industry invalidates the central claim of many supporters of privatization: the benefit of competition. The private market, some argue, incentivizes firms to "become more efficient than their public counterparts" in order to compete with other contractors in the market.<sup>7</sup> This argument is rooted in "public choice theory" which argues that "market-driven competition in policy development" will lead to efficient provision of services.<sup>8</sup> However, the high level of market concentration attained by CoreCivic (formerly Corrections Corporation of America), GEO Group, and Management And Training Corporation nullifies what benefits might be reaped from competition.<sup>9</sup> In a market in which just three firms control nearly the entire industry, competition is suffocated under the weight of three massive oligopolists. This is especially the case in states such as California, Tennessee, and Texas, where a single

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<sup>4</sup> See generally Terry L. Stewart, *Private Prisons Advantages And Misconceptions From An Arizona Director's Perspective*, Dunn Stewart Group, (2002).

<sup>5</sup> Megan Mumford, Diane Whitmore Schanzenbach, & Ryan Nunn, *The Economics Of Private Prisons*, The Hamilton Project, at 1.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective Than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, SAGE Social Science Collections, (1999), at 359.

<sup>8</sup> *Id.* at 360.

<sup>9</sup> Megan Mumford, Diane Whitmore Schanzenbach, & Ryan Nunn, *The Economics Of Private Prisons*, The Hamilton Project, at 3.

contractor controls all the private prisons found in all three states.<sup>10</sup> Without the impetus of competition, contractors have no motivation to pursue efficiency, ingenuity, or quality of care in prison management.

Supporters of privatization also argue that limited bureaucracy within privately-controlled prisons allows for prisons to deliver care more effectively, unburdened by bureaucratic restrictions and procedure.<sup>11</sup> While analysis of whether private prisons are generally more efficient is inconclusive, the absence of bureaucracy has a measurable secondary effect. Without the oversight of bureaucracy, deficiencies in prison procedure are neither detected nor corrected. This lack of oversight has been condemned in the past by the Department of Justice, most notably in a 2016 report authored by the Department of Justice's inspector general. The report highlights the necessity of the implementation of further oversight in private prisons "to ensure that federal inmates' rights and needs are not placed at risk when they are housed in contract prisons."<sup>12</sup> Where what limited contractual guidelines do exist, many say that "the contracts lack clear and specific requirements in many areas of operation" and that those guidelines have "no teeth" when it comes to enforcement.<sup>13</sup>

Private prisons lack both competition and bureaucracy to keep contractors on the straight-and-narrow. Instead of pursuing the legitimate goals of incarceration within the United States, contractors are free to pursue the goal of any other private firm: maximize profit. The result has been a corrections industry that, acting in accountability only to its shareholders, has consistently failed to provide adequate medical care to their prisoners.

A 2016 report authored by *The Nation's* Seth Freed Wessler details numerous inmate deaths at prisons contracted to private firms by the Bureau of Prisons. In a review of over 9,000 pages of medical records belonging to inmates held in private facilities, two independent doctors found that 49% of reviewed cases "contained indications of inadequate medical care."<sup>14</sup> In approximately a third of the cases reviewed, the doctors concluded that "the inadequacies likely contributed to the

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<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Office Of The Inspector General, Evaluations and Inspection Division 16-06, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, ii, (August 2016).

<sup>13</sup> Seth Freed Wessler, 'This Man Will Almost Certainly Die', *The Nation*, Jan. 20, 2016.

<sup>14</sup> *Id.*

premature deaths of the prisoners.”<sup>15</sup> These inadequacies ranged from denial of adequate medication, to lengthy wait-times before an inmate could be seen by a doctor, to the imposition of cost-motivated quotas dictating how many inmates could be admitted to an emergency room. One of the most troubling deficiencies in the report, however, is the employment of Licensed Vocational Nurses as primary caregivers for prison populations.<sup>16</sup>

Licensed Vocational Nurses (LVNs) are trained to “change dressings, check blood pressure, help patients bathe, and gather basic information.” With only a year of training, LVNs lack the qualifications and abilities of Registered Nurses, and are generally only intended to be hired as support staff in a medical environment. Despite the limitations of their training, however, LVNs are a common fixture in private prisons, as they are less costly than more capable alternatives.<sup>17</sup> While federally-operated prisons rarely hire LVNs because of their extreme limitations, the primary medical care of many for-profit prisoners depends upon an underqualified, cost-effective LVN. These LVNs are forced into roles where they are “pressed to operate on the borders of their legal scope of practice,” as, in many instances, they are the only form of care available to an inmate for days or weeks at a time.<sup>18</sup> The employment of such underqualified staffers has resulted in “prison medical units repeatedly failing to diagnose patients correctly despite obvious and painful symptoms”.<sup>19</sup> The failure to employ competent and qualified medical staff in private prisons is systemic, resulting in needless pain, extended suffering, and death.

The death of Nestor Garay is one such instance. In the early hours of the morning on June 26, 2014 in a private prison operated by GEO Group in Big Spring, Texas, Garay’s cellmates were awoken by the sounds of distressed moaning.<sup>20</sup> They discovered him to be dripping in sweat, nearly falling from his bunk.<sup>21</sup> Garay had suffered a massive stroke. According to John Foster, a neurologist at the hospital where Garay was eventually treated, medical professionals have “a three-hour window to give

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

a clot buster” after a stroke to prevent irrevocable damage.<sup>22</sup> Instead of receiving the necessary immediate care, Garay would not receive treatment until nearly six hours after his cellmates were first awakened.

The events of those six hours are unclear. What is known is a result of the reports of Garay’s cellmates and the notes of Gary Austin. Austin, an LVN, was the only medical staffer on site at the time of Garay’s stroke.<sup>23</sup> Nestor Garay did not receive adequate care because his only caregiver was not qualified to care for him. Austin, acting under the over-the-phone guidance of an off-site nurse practitioner, attempted to administer an anti-seizure medication because of a misdiagnosis of symptoms.<sup>24</sup> When Garay was unable to swallow the pills, Austin was instructed to return Garay to a cell. Garay was alone on a cell floor for three hours. By morning, a new nurse arrived and, observing Garay’s state, phoned the prison’s physician who ordered that he immediately be taken to the hospital.<sup>25</sup> It was too late. Garay was declared brain-dead shortly after his arrival.<sup>26</sup>

Understaffed medical units with under-qualified medical staffers like the one from Garay’s tale are not unique to prisons run by GEO Group. In Hartsville, Tennessee, a lawsuit was filed against CoreCivic, the operator of the newly-opened Trousdale Turner Correctional Center. The lawsuit alleges that gross understaffing “has led to insufficient care for some 60 inmates who have Type 1 or Type 2 diabetes.”<sup>27</sup> Because of CoreCivic’s “policy and practice of understaffing,” inmates with diabetes were unable to access basic diabetes care.<sup>28</sup> According to one inmate, Tazarius Leach, some days he did not receive his medication on time, and some days he did not receive it at all. According to Douglas Dobson, another inmate, in February 2016, all of the inmates went without insulin for multiple days. The ineffective care at Trousdale was a direct result of CoreCivic’s profit-motivated hiring practices. The under-trained, understaffed medical unit consisting of four nurses and four nurse practitioners resulted in the flagrant risk of their inmates’ lives.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Steven Hale, *Lawsuit: Understaffing Leads to Insufficient Care for Diabetic Inmates at Private Prison*, Nashville Scene, Feb. 9, 2017.

<sup>28</sup> *Id.*

These accounts, accompanied by many others, coalesced into a nation-wide opposition to the privatization of prisons.<sup>29</sup> As reports of inadequacy piled and private contracts continued to be renewed, even the Department of Justice took notice. On August 18, 2016, the then-Deputy Attorney General, Sally Q. Yates, released a memo announcing that the DOJ would begin “phasing out” private prisons.<sup>30</sup> The memo announced that “as each private prison contract reaches the end of its term, the [Bureau of Prisons] should either decline to renew that contract or substantially reduce its scope.”<sup>31</sup> This announcement was made as part of a goal “to reduce [federal] reliance on private prisons” following a movement to reduce overall federal prison populations in the United States.<sup>32</sup> After nearly two decades, the steady growth of the private prison industry came to a halt.

The memo was short-lived. On February 21, 2017, Attorney General Jeff Sessions released a memo reversing the 2016 announcement, commanding the Department of Justice to “return to its previous approach.”<sup>33</sup> While data is not available reflecting the extent of private prison growth since the release of the February 2017 memo, one can be certain that growth exists. Sessions’s reversal is not just a reversal of an Obama-era policy; it is an endorsement of an industry which, left unchecked, will continue to seek new and innovative ways to minimize cost and maximize profit. The result of the continued use of private prison contractors will be more stories like that of Nestor Garay. Allowing industry giants such as CoreCivic, GEO Group, and Management and Training Corporation to continue to prosper is a failure of the American prison system. The result is the failure of private prisons to care for those whom they are meant to protect.

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<sup>29</sup> See generally *WAREHOUSED AND FORGOTTEN Immigrants Trapped in Our Shadow Private Prison System*, ACLU of Texas & American Civil Liberties Union, Jun. 5, 2014.

<sup>30</sup> Memorandum, Office of the Deputy Attorney General, Reducing our Use of Private Prisons, (Aug. 18, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Memorandum, Office of the Attorney General, Rescission of Memorandum on Use of Private Prisons, (Feb. 21, 2017).