

**CRUEL AND UNUSUAL PRISON HEALTHCARE:  
A LOOK AT THE ARIZONA CLASS ACTION  
LITIGATION OF *PARSONS V. RYAN* AND  
SYSTEMIC DEFICIENCIES OF PRIVATE  
HEALTH SERVICES IN PRISON**

Molly Rothschild\*

*In 1976, the United States Supreme Court established an incarcerated person's constitutional right to healthcare in Estelle v. Gamble. In 2012, in an Arizona District Court, 14 incarcerated persons formed a class alleging the Arizona Department of Corrections was violating this constitutional right. Six years after that initial filing, the Arizona Department of Corrections was held in contempt for violating a settlement agreement it had reached with the plaintiff class. Multiple hearings revealed the deeply systemic—and sometimes fatal—flaws in the monitoring and administration of healthcare in prisons across Arizona. The plaintiff class has continued to struggle to bring the Arizona Department of Corrections into compliance with the settlement, and this has led the court to question the integrity of all monitoring systems and resort to the appointment of an outside expert. This is further complicated by Arizona's statutory mandate of contracting with private healthcare providers, and the available litigation solutions are increasingly more finite and drastic. This Note explores the Parsons v. Ryan litigation, including possible next steps the court could consider in compelling compliance from the Arizona Department of Corrections; and ultimately suggests the most sustainable solution is systemic change.*

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\* J.D. Candidate, University of Arizona James E. Rogers College of Law, Class of 2020. This Note is dedicated to the resilient individuals, families, and communities impacted by mass incarceration. Thank you to the countless tenacious people in civil and human rights advocacy who have inspired and guided me; Professor Jason Kream for his helpful advisement; the *Arizona Law Review* team for their detail-oriented attention; my supportive family and friends who keep me optimistic; and to my incredible partner Justin who supports me in every endeavor. Thank you for your love and support. All errors are my own.

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## INTRODUCTION

### *A. Giving a Voice to the Voiceless*

For two years of his five-year prison sentence, Ferdinand Dix filed complaint after complaint with the Arizona Department of Corrections (“ADC”) reporting symptoms of lung cancer: persistent cough, loss of breath, and a positive test for tuberculosis.<sup>1</sup> Mr. Dix was sentenced to five years imprisonment for

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1. Third Amended Class Action Complaint For Injunctive and Declaratory Relief at 39, *Gamez v. Ryan*, No. 10-02070 (D. Ariz. Mar. 6, 2012), ECF No. 31; Victoria Bekiempis, *Don’t Get Cancer if You’re in Prison*, NEWSWEEK (July 22, 2015, 9:54 AM),

forgery and drug charges; but those five years cost him his life.<sup>2</sup> Mr. Dix had metastasized cancer and his liver “was infested with tumors and grossly enlarged to four times normal size.”<sup>3</sup> Eventually, his stomach reached the size of a full-term pregnancy.<sup>4</sup> What was the ADC medical staff’s response to Mr. Dix’s complaints and clearly visible illness? Drink energy shakes.<sup>5</sup> It was not until Mr. Dix became fully unresponsive that the prison took him to a hospital.<sup>6</sup> By then, it was too late.<sup>7</sup> Mr. Dix died of untreated lung cancer a few days later—he was only 47 years old.<sup>8</sup>

Mr. Dix is one of many people who lost their lives in Arizona prisons due to the prison’s indifference to his needs.<sup>9</sup> In 2012, in the class action of *Parsons v. Ryan*, 14 people incarcerated in the Arizona prison system joined together to sue the ADC for its deliberate indifference to incarcerated persons’ constitutionally mandated healthcare.<sup>10</sup> In doing so, the plaintiff class also gave a voice to those who already lost their lives as a result of the prison’s carelessness or inaction.<sup>11</sup>

One of the plaintiffs in *Parsons* was Stephen Swartz, who was housed in an Arizona prison in Buckeye.<sup>12</sup> While incarcerated, Mr. Swartz was assaulted and sustained facial fractures.<sup>13</sup> Despite referrals from doctors, Mr. Swartz did not receive appropriate medical care until almost an entire year after the incident.<sup>14</sup>

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<https://www.newsweek.com/2015/07/31/dont-get-cancer-if-youre-prison-356010.html>; Bob Ortega, *Arizona Prisons Can Be Deadly for Sick*, ARIZ. REPUBLIC (June 4, 2012, 11:20 PM), <http://archive.azcentral.com/arizonarepublic/news/articles/2012/06/02/20120602arizona-prisons-can-deadly-sick.html>.

2. Ortega, *supra* note 1.

3. Third Amended Class Action Complaint For Injunctive and Declaratory Relief, *supra* note 1, at 39.

4. *Id.*; see also *The Face of Healthcare for the Seriously Ill in Arizona’s Prisons - Ferdinand’s Story*, YOUTUBE (Feb. 26, 2012), <https://www.youtube.com/watch?v=gcXo9mqwGDU&feature=youtu.be>.

5. Third Amended Class Action Complaint For Injunctive and Declaratory Relief, *supra* note 1, at 39.

6. *Id.*

7. *See id.*

8. *Id.*; Ortega, *supra* note 1.

9. See Joe Watson, *Arizona Prison System Plagued by Politics, Privatizations, and Prisoner Deaths*, PRISON LEGAL NEWS (July 15, 2013), <https://www.prisonlegalnews.org/news/2013/jul/15/arizona-prison-system-plagued-by-politics-privatization-and-prisoner-deaths/>.

10. See generally Class Action Complaint For Injunctive and Declaratory Relief at 3–14, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Mar. 22, 2012), ECF No. 1.

11. See, e.g., *id.* at 24 (“[C]orrectional officers at the Tucson prison stood by and watched a severely mentally ill prisoner named Tony Lester bleed to death after his second suicide attempt.”).

12. See *id.* at 5; Jimmy Jenkins, *On the Inside: The Chaos of Arizona Prison Health Care*, KJZZ (Dec. 18, 2017), <http://kjzz.org/content/572976/inside-chaos-arizona-prison-health-care#start> (reporting that Mr. Swartz was released from custody).

13. Class Action Complaint For Injunctive and Declaratory Relief, *supra* note 10, at 5.

14. *Id.*

Instead, ADC sent him to an oral surgeon.<sup>15</sup> Mr. Swartz developed partial paralysis in his face (and ultimately had to be revived) because he was over-sedated by the oral surgeon.<sup>16</sup> In addition, Mr. Swartz did not receive adequate mental health care or dental care while he was in prison.<sup>17</sup> In his own words, Mr. Swartz joined the class action because, despite his own treatment, he still believes in the system's potential for justice.<sup>18</sup> Speaking to the long-term effects improper healthcare in prisons can have on society, Mr. Swartz said, “[i]f we inflict pain and suffering upon these people—what’s going to happen when they come back out into society? They’re going to be damaged. They’re going to be hurt. And they’re going to—more than likely—reoffend.”<sup>19</sup>

### ***B. Contents and Aims of this Note***

This Note will explore the *Parsons* litigation.<sup>20</sup> Specifically, this Note will focus on two of the many issues raised by the *Parsons* litigation: (1) the issue of class action monitors<sup>21</sup> and (2) the issue of ultimate resolution.<sup>22</sup> The exploration of these two issues serves the dual purpose of addressing a litigation specific issue: class action monitors, as well as a broader policy issue: prison and prison healthcare reforms.

Part I of this Note will briefly discuss the history of prison litigation in the United States and the judicially and legislatively crafted barriers that have drastically reduced incarcerated persons’ ability to seek redress in the courts. Part II will provide a factual and procedural history of the *Parsons* litigation. Part III will address the issue of class action monitors and propose additional options for monitoring ongoing contempt in *Parsons*.<sup>23</sup> Part IV will address non-litigation-based solutions to remedy the past and address the future of healthcare in prisons. Part IV will also argue that the healthcare received in prisons is one of the most important factors to successful reintegration and lowering recidivism rates. Broadly, this Note strives to contribute to the canon of legal scholarship surrounding prison class actions through the lens of *Parsons*.

This Note focuses on the *Parsons* litigation, as opposed to one of the many other prison class action suits around the country,<sup>24</sup> for three main reasons.

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15. *Id.*

16. *Id.* at 38.

17. *Id.* at 5–6.

18. Jenkins, *supra* note 12.

19. *Id.*

20. The *Parsons* case is ongoing and active. Therefore, information in this Note is subject to change.

21. *See infra* Section III.C.

22. *See infra* Section III.D; *see also infra* Section IV.B.

23. *See generally* Order and Judgment of Civil Contempt, *Parsons v. Ryan*, No. 12-0601 (D. Ariz. June 22, 2018), ECF No. 2898; *see also* Jimmy Jenkins, *Scabies Outbreak Confirmed at 2 Arizona Prisons in 4 Months*, KJZZ (Oct. 26, 2018, 4:47 PM), <http://kjzz.org/content/717961/scabies-outbreaks-confirmed-2-arizona-prisons-4-months> (last updated Oct. 29, 2018, 8:55 AM) (reporting a scabies outbreak at an Arizona prison that was not timely reported or treated).

24. *See generally infra* note 70.

First, the case is monumental because in June 2018, the District Court sua sponte held the ADC in contempt of a settlement reached in 2014 and fined the ADC \$1.4 million.<sup>25</sup> Contempt orders in similar cases are rare for three reasons: (1) the civil contempt standard is a challenging one;<sup>26</sup> (2) it often takes years of litigation and other attempts to resolve the issues prior to contempt because contempt is the “strongest sanction available to a court;”<sup>27</sup> and (3) prisons are often quick to settle claims.<sup>28</sup> Magistrate Court Judge David Duncan’s decision to hold the ADC in contempt sua sponte is fairly unique,<sup>29</sup> although not unprecedented.<sup>30</sup> It is also permitted by law.<sup>31</sup> However, it is indicative of the “pervasive and intractable failures” of the ADC.<sup>32</sup> Second, there is a gap in legal scholarship regarding the *Parsons* litigation, and this Note aims to begin to fill that void. Third, while it is estimated that more than half of all state prisons receive their healthcare through private providers,<sup>33</sup> since 2010, Arizona statutorily *requires* the privatization of

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25. Order and Judgment of Civil Contempt, *supra* note 23, at 23.

26. *See id.* at 2 (To find civil contempt “a court must determine by *clear and convincing* evidence that: (1) a valid court order exists that is ‘specific and definite;’ (2) the party had knowledge of the order, and notice of and an opportunity to be heard about the alleged noncompliance; and (3) the party failed to take ‘*all* reasonable steps to comply with the order.’” (emphasis added and internal citations omitted).

27. Corene Kendrick, *Arizona Prison Officials Found in Contempt for Massive Prison Health Care Scandal*, ACLU (June 25, 2018, 11:45 AM), <https://www.aclu.org/blog/prisoners-rights/medical-and-mental-health-care/arizona-prison-officials-found-contempt-massive>; *see* *Coleman v. Brown*, 952 F. Supp. 2d 901, 936 (E.D. Cal. 2013); *see also* *Coleman v. Wilson*, 912 F. Supp. 1282, 1323 (E.D. Cal. 1995) (holding the plaintiffs’ Eighth Amendment rights were violated and plaintiffs repeatedly asked the court for contempt orders during a litigation period of over 18 years); *see also* Order and Judgment of Civil Contempt, *supra* note 23, at 1 (contempt order issued two years after plaintiff’s first motion to enforce the settlement).

28. *See, e.g.*, Keramet Reiter & Natalie Pifer, *Brown v. Plata*, OXFORD HANDBOOKS ONLINE IN CRIMINOLOGY AND CRIM. JUST., June 2015, at 7, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-113?print=pdf>.

29. *See* *Cintron v. Vaughn*, No. 69-CV-13578-EBB, 2007 WL 4240856, at \*9 (D. Conn. Nov. 29, 2007) (explaining that in another case the Second Circuit Court of Appeals had “admitted that [the] *sua sponte* finding of civil contempt was unique.”).

30. *See, e.g.*, *S.E.C. v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 441 (2d Cir. 1987) (holding sua sponte contempt was appropriate given the injunction that was violated “was designed to protect persons who . . . were too numerous and too ill-informed to protect their own interests.”).

31. Paul A. Grote, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1269 (2011) (“[A]n opposing party may make a motion for contempt, but the judge may also take action sua sponte.”).

32. Order at 1, *Parsons v. Ryan*, No. 12-0601 (D. Ariz. Oct. 10, 2017), ECF No. 2373.

33. Alex Casendino, *Convicts Without Care: How the Privatization of Healthcare in the U.S. Prison System Fails to Protect Inmates Health*, BERKLEY POL. REV. (Jan. 28, 2017), <https://bpr.berkeley.edu/2017/01/28/convicts-without-care-how-the-privatization-of-healthcare-in-the-u-s-prison-system-fails-to-protect-inmates-health/>.

healthcare in its prisons<sup>34</sup>—which creates additional barriers to resolving the prison healthcare crisis in Arizona.

## I. PRISON LAWSUITS – FROM “SLAVES OF THE STATE”<sup>35</sup> TO SUFFERERS OF THE STATE

### A. A Brief Look Back

Prior to the 1960s, incarcerated people had no real mechanism to exercise constitutional rights.<sup>36</sup> Instead, laws from 1871 controlled those incarcerated, and incarcerated people were considered “slave[s] of the state.”<sup>37</sup> In 1964, the Supreme Court held, for the first time in *Cooper v. Pate* that people in state prisons could challenge the legality of prison conditions in federal court.<sup>38</sup> *Cooper* was a per curiam decision in which the Supreme Court held that the rights of incarcerated people are protected under § 1983 of the Civil Rights Act of 1871.<sup>39</sup> To bring a successful § 1983 claim, the plaintiff must show the defendant was acting under the color of law and the violation was of a right guaranteed by the Constitution.<sup>40</sup>

The *Cooper* ruling flooded courthouses because people finally had a mechanism to combat the unconstitutional conditions they were living in.<sup>41</sup> Lawsuits escalated from “218 in 1966 to almost 18,477 in 1984.”<sup>42</sup> One of these suits, *Estelle v. Gamble*, was brought in 1976.<sup>43</sup> *Estelle* established for the first time that states are constitutionally required to provide medical care for people who are incarcerated.<sup>44</sup> *Estelle* additionally established the “deliberate

34. Criminal Justice Enhancement Fund, H.B. 2010, 49th Leg., 3d Spec. Sess., 41-2401 § 26 (c) (Ariz. 2009).

35. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871).

36. See Jason Yanofski, *Prisoners v. Prisons: A History of Correctional Mental Health Rights*, 7 PSYCHIATRY (EDGMONT) 41, 42 (Oct. 2010).

37. *Ruffin*, 62 Va. at 796.

38. 378 U.S. 546, 546 (1964) (holding a cause of action was permitted because the denial of purchasing certain religious material was a denial of a privilege held by other incarcerated people); see also Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States through the Lens of the Prisoners’ Rights Movement*, 102 J. AM. HIST. 73, 77 (2015).

39. *Cooper*, 378 U.S. at 546.

40. See 42 U.S.C. § 1983 (2012).

41. See Chase, *supra* note 38, at 77 (“From 1965 to 1995, federal courts found that eight of the eleven states of the U.S. South had unconstitutional prison systems.”).

42. *Id.*

43. 429 U.S. 97 (1976).

44. *Id.* at 103 (holding the government has an “obligation to provide medical care for those whom it is punishing by incarceration.”). The standard of healthcare today is at “a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards’ . . . . [P]risoners are entitled to access to care for diagnosis and treatment, a professional medical opinion, and administration of the prescribed treatment.” *Prison Healthcare: Costs and Quality*, PEW CHARITABLE TR., at 4 (Oct. 2017), [https://www.pewtrusts.org/~media/assets/2017/10/sfh\\_prison\\_health\\_care\\_costs\\_and\\_quality\\_final.pdf](https://www.pewtrusts.org/~media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf).

indifference” standard under the Eighth Amendment.<sup>45</sup> However, this standard was not clearly defined until *Farmer v. Brennan*, which was decided 18 years after the *Estelle* decision.<sup>46</sup> In *Farmer*, the Court rejected a purely objective test for defendants’ deliberate indifference and held:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>47</sup>

The Ninth Circuit categorized the deliberate indifference standard into two parts: an objective test and a subjective test.<sup>48</sup> First, the objective test requires the plaintiff to show a “serious medical need” by showing that if left untreated, the need could result in additional injury or “unnecessary and wanton infliction of pain.”<sup>49</sup> Second, the subjective test requires the plaintiff to show the defendant’s subjective deliberate indifference.<sup>50</sup> The plaintiff can demonstrate this by making a showing of “(1) a purposeful act or failure to respond to a prisoner’s medical need and (2) harm caused by the indifference.”<sup>51</sup>

This challenging “deliberate indifference” standard was likely a reaction to the influx of lawsuits,<sup>52</sup> but regardless of intent, the standard created a barrier for various potential litigants.<sup>53</sup> In the following years, additional judicially created barriers limited incarcerated persons’ access to the courts and the Supreme Court continued pre-*Estelle* attempts to remove courts from the discourse about prisoner

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45. 429 U.S. at 104; see Jeffrey M. Lipman, *Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Amendment Outlook*, 31 CREIGHTON L. REV. 435, 442 (1998).

46. *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994); Martin A. Schwartz, *Supreme Court ‘Defines Deliberate Indifference,’* 1994 SUP. CT. PREVIEW 159, 159, 161 (1994–95), <https://heinonline.org/HOL/P?h=hein.journals/suemrtpr3&i=195> (additionally, “prison officials may avoid liability by showing (1) that they did not know about the facts creating the danger, or, (2) that while they knew of the facts, they mistakenly believed that there was no substantial risk of harm, or, (3) that they knew about the risk and responded reasonably to it.”).

47. *Farmer*, 511 U.S. at 837.

48. See *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

49. *Id.*

50. See *id.* (citing *Estelle*, 429 U.S. at 105) (“inadvertent [or negligent] failure to provide adequate medical care’ alone does not state a claim under § 1983.”).

51. *Parsons v. Ryan*, 289 F.R.D. 513, 520 (2013) (citing *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (stating that the required state of mind for deliberate indifference is “subjective recklessness”).

52. See Yanofski, *supra* note 36, at 42–43.

53. See, e.g., Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 489–90 (2004).

rights.<sup>54</sup> *Turner v. Safley*, decided in 1987, promulgated a four-part standard of review to determine what rights people retain while incarcerated.<sup>55</sup> As applied, it denies people the ability to exercise rights they should retain regardless of incarceration.<sup>56</sup> The Court in *Washington v. Harper* applied this standard of review in 1990, but it further “diluted” the protections.<sup>57</sup> These decisions were, in effect, judicially created attempts to curtail prison litigation before Congress responded.<sup>58</sup> That response came in the form of the Prison Litigation Reform Act (“PLRA”) of 1996.<sup>59</sup>

### B. *The Prison Litigation Reform Act (“PLRA”)*

The PLRA was passed by Congress in 1996 and created significant barriers for incarcerated people filing lawsuits.<sup>60</sup> The goal of the PLRA was to reduce “frivolous lawsuits while preserving meritorious suits.”<sup>61</sup> In reality, the litigation increase Congress responded to reflected an overall rise in the prison population<sup>62</sup>—Congress’ interpretation of the “explosion in litigation” as

54. See *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (“[C]ourts are ill equipped to deal with the increasingly urgent problems of prison”), *overruled* by *Thornburgh v. Abbott*, 490 U.S. 401, 401–02 (1989).

55. 482 U.S. 78, 89–92 (1987).

56. *Id.*; see Cheryl Dunn Giles, *Turner v. Safley and Its Progeny: A Gradual Retreat to the Hands-Off Doctrine?*, 35 ARIZ. L. REV. 219, 223–24, 230 (1993) (The four-part standard of review is: (1) There must be a “valid, rational connection” between the regulation and governmental interest; (2) If an alternative way to exercise the right exists, courts should give the “judicial deference owed to corrections officials;” (3) “When accommodation . . . will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials;” and (4) “Absence of ready alternatives is evidence of the reasonableness of a prison regulation.”).

57. See generally *Washington v. Harper*, 494 U.S. 210 (1990); Giles, *supra* note 56, at 231–33 (arguing the *Harper* ruling further narrowed the ability of those incarcerated to sue by “no longer requiring evidence that accommodation of an asserted right will result in a ‘significant’ impact or ‘ripple effect’ . . . [which] is unduly deferential to prison officials’ judgment” and by “[misapplying] the fourth prong of the *Turner* test which encourages lower courts to unduly defer to prison official’s judgment”). See also Yanofski, *supra* note 36, at 42–43.

58. See Yanofski, *supra* note 36, at 43.

59. 42 U.S.C. § 1997e (2013).

60. See *Know Your Rights: The Prison Litigation Reform Act*, ACLU 1 (Aug. 2011), [https://www.aclu.org/files/assets/kyr\\_plra\\_aug2011\\_1.pdf](https://www.aclu.org/files/assets/kyr_plra_aug2011_1.pdf).

61. Eleanor M. Levine, *Compensatory Damages are Not for Everyone: Section 1997E(E) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2203 (2017).

62. Lynn S. Branham, *Limiting the Burdens of Pro Se Inmate Litigation: A Technical-Assistance Manual for Courts, Correctional Officials, and Attorney Generals*, ABA CRIM. JUST. SEC. 1, 21 (May 1977) (“[W]hile the number of civil rights suits filed by state prisoners increased, as mentioned earlier, by 227% between 1980 and 1995, the number of state prisoners increased even more—by 237%. As a result, the *per-capita* rate with which state prisoners filed civil-rights suits in federal court between 1980 and 1995



“frivolous” was therefore flawed.<sup>63</sup> Regardless of this misinformed understanding of why there was a rise in litigation, the PLRA had a drastic effect; it reduced litigation in federal courts by 60% between 1995 and 2006.<sup>64</sup>

Some of the most challenging barriers promulgated by the PLRA include: (1) exhaustion (the concept that the petitioner must attempt to resolve all claims through the “prison’s grievance procedure,” including all levels of appeal, prior to filing in court);<sup>65</sup> (2) payment by petitioner of filing fees in full;<sup>66</sup> (3) a three strikes rule (every suit dismissed for being “frivolous, malicious, or [failing to] state a proper claim” is a strike and after the third, petitioners “cannot file unless [they] pay the entire court filing fee up-front”);<sup>67</sup> and, in cases seeking compensatory damages, (4) a rule that the petitioner must first show *physical* injury or injury based on a sexual act<sup>68</sup>—mental or emotional injury alone does not suffice.<sup>69</sup>

Despite these massive barriers and the narrowing of incarcerated persons’ ability to petition courts, the conditions leading to constitutional violations persist,

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actually declined slightly—from 40.7 suits per every 1000 state prisoners in 1980 to 39.4 suits per every 1000 state prisoners in 1995.”)

63. See Levine, *supra* note 61.

64. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141–42 (2008).

65. 42 U.S.C. § 1997e(a) (2012); *Know Your Rights: The Prison Litigation Reform Act*, *supra* note 60, at 1; see also David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1455–56 (2010).

66. *Know Your Rights: The Prison Litigation Reform Act*, *supra* note 60, at 3. Note that in Arizona, those who are not functionally literate work for only \$0.10/hour and those who are functionally literate start at \$0.15/hour, with the max pay being \$0.80/hour. *Department Order 903 – Inmate Work Activities*, ARIZ. DEP’T OF CORRECTIONS (Feb. 24, 2018), Attachment A–B [https://corrections.az.gov/sites/default/files/policies/900/0903\\_032519.pdf](https://corrections.az.gov/sites/default/files/policies/900/0903_032519.pdf). The average person incarcerated in the United States makes a maximum of \$1.41 per hour; some states, such as North Carolina and South Dakota, pay a max of \$0.38. 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/>.

67. *Know Your Rights: The Prison Litigation Reform Act*, *supra* note 60, at 4. An indigent party may be entitled to file *in forma pauperis* (“IFP”) and have the costs of litigation waived, but IFP is significantly diminished under the PLRA. See COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL 339 (11th ed. 2017). If a petitioner has IFP status, under the PLRA they have to pay the filing fee, but can do so in installments. *Id.* After three strikes, the petitioner cannot proceed IFP and loses the option of installments. *Id.*

68. § 1997e(e). Most courts have held this provision is only prohibitive in suits seeking compensatory damages and does not apply to nominal, punitive, or equitable damages. JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS’ SELF-HELP LITIGATION MANUAL 1, 620 (Oxford Univ. Press ed., 4th ed. 2010). In *Parsons*, the plaintiffs are seeking injunctive relief and therefore relief is still available for standalone emotional and mental harms. *Id.*

69. A Michigan federal court declared this provision unconstitutional in 2006. *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006); *Know Your Rights: The Prison Litigation Reform Act*, *supra* note 60, at 4; see also Fathi, *supra* note 65, at 1455–56.

and many prisoner claims are still severe enough to break through, often in the form of class actions.<sup>70</sup> Prisons across the United States continue to struggle, especially with providing the constitutionally mandated level of healthcare required by *Estelle*.<sup>71</sup>

## II. “A HALF-HEARTED COMMITMENT”<sup>72</sup>—BRIEF HISTORY OF *PARSONS V. RYAN*

### A. *From Public to Private: Trouble Ahead*

In 2009, the 49th Arizona Legislature passed House Bill 2010 which required, by statute, that Arizona privatize healthcare in prisons.<sup>73</sup> An initial requirement of privatization was that the private contractor had to provide healthcare for all people in prison for less than what the publicly provided healthcare cost Arizona in the fiscal year of 2007–2008.<sup>74</sup> This language was reformed in 2011, as the ADC received little to no bids for the contract given the limited budget.<sup>75</sup> In July 2012, the contract was awarded to Wexford Health

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70. This is evidenced by at least three major class actions filed and approved as classes in Illinois, Alabama, and Louisiana over the past three years. Illinois: See generally, *Lippert v. Baldwin*, No. 10 C 4603, 2017 WL 1545672, at \*1 (N.D. Ill. Apr. 28, 2017). See also Dylan Walsh, *Does Bad Health Care Constitute Cruel and Unusual Punishment?*, ATLANTIC (June 17, 2017), <https://www.theatlantic.com/politics/archive/2017/06/illinois-prisons-health-care/530400/> (reporting on *Lippert v. Baldwin* which started with Don Lippert, a diabetic incarcerated person, and expanded into a class of incarcerated persons alleging the Illinois prison system “systematically puts inmates ‘at risk of pain, injury, and death’”); Alabama: See generally *Braggs v. Dunn*, 317 F.R.D. 634, 639 (M.D. Ala. 2016). See also Debbie Elliott, *Alabama Prisons Ruled ‘Horrendously Inadequate,’ Must Improve*, NPR (June 27, 2017, 5:14 PM), <https://www.npr.org/2017/06/27/534601344/alabama-prisons-ruled-horrendously-inadequate-must-improve> (reporting on *Braggs v. Dunn* in which the presiding judge found “serious systemic deficiencies” in the delivery of mental health service to those incarcerated in Alabama which leads to “serious harm and increased suicide risk”); Louisiana: See generally *Lewis v. Cain*, 324 F.R.D. 159, 162 (M.D. La. 2018). See also Amanda Aronczyk & Katie Quandt, *Angola Prison Lawsuit Poses Question: What Kind of Medical Care Do Inmates Deserve?*, NPR (Mar. 10, 2018, 7:46 AM), <https://www.npr.org/sections/health-shots/2018/03/10/591624904/angola-prison-lawsuit-poses-question-what-kind-of-medical-care-do-inmates-deserve> (reporting on *Lewis v. Cain* which began with plaintiff Francis Brauner, who after an accident was bed-bound for a month and developed an infection so serious he was paralyzed—the class action alleges the prison causes “needless pain and suffering”); see also *Major Cases*, PRISON L. OFF., <http://prisonlaw.com/major-cases/> (last visited Sept. 12, 2019) [hereinafter *Examples of Other Class Actions*] (listing major litigation involving the Prison Law Office, with medical and mental health care being the most numerous).

71. See *Examples of Other Class Actions*, *supra* note 70.

72. Order and Judgment of Civil Contempt, *supra* note 23, at 20.

73. Criminal Justice Enhancement Fund, H.B. 2010, 49th Leg., 3d Spec. Sess., 41-2401 § 26(c) (Ariz. 2009).

74. *Id.*; Caroline Isaacs, *Death Yards: Continuing Problems with Arizona’s Correctional Health Care*, AM. FRIENDS SERV. COMM. ARIZ. 1, 7 (Oct. 2013), <https://www.afsc.org/sites/default/files/documents/DeathYardsFINAL.pdf>.

75. Isaacs, *supra* note 74, at 8.

Sources, despite its well-documented history of incurring fines and failing to provide proper healthcare to prisons in other jurisdictions.<sup>76</sup>

The contract with Wexford did not go well.<sup>77</sup> On August 27, 2012, 103 incarcerated people in an Arizona prison were exposed to hepatitis C, which is a virus that can cause liver disease.<sup>78</sup> This occurred when a nurse gave a dose of insulin to an incarcerated person who was hepatitis C positive; the nurse mixed up his vial with those of other patients and tainted the insulin supply.<sup>79</sup> In January 2013, the contract with Wexford was severed and the ADC signed a contract with Corizon Health.<sup>80</sup> Wexford publicly stated it found *Parsons* to be “accurate,” explaining that the ADC healthcare system “is broken and does not provide a constitutional level of care.”<sup>81</sup>

## **B. Factual and Procedural Background of Parsons**

### *1. The Complaint*

On March 22, 2012 in an Arizona District Court in Phoenix, Arizona, 14 plaintiffs filed a class action complaint on behalf of themselves and similarly situated incarcerated people in Arizona.<sup>82</sup> The plaintiffs named Charles L. Ryan,<sup>83</sup>

76. *Id.* at 8–9 (citing historical episodes which should have raised flags about whether Wexford would be an appropriate fit for the contract: (1) 2010 audit in Washington in which Wexford “systematically failed to comply;” (2) 2007 audit in Mississippi in which the Department of Corrections “failed to collect \$931,310 . . . after [Wexford] charged the state for more staff members than it actually provided;” and (3) Wexford facing fines in at least four other jurisdictions totaling over \$500,000); *see also* *What Can Arizona Expect from Wexford Health Services? Failure to Deliver*, ACLU FAIR CARE FOR ALL, [http://acluaz.org/sites/default/files/documents/Wexford%20One-Pager\\_1.pdf](http://acluaz.org/sites/default/files/documents/Wexford%20One-Pager_1.pdf) (last visited Apr. 19, 2019).

77. *See generally* Isaacs, *supra* note 74, at 9. *See also* Wexford Health Source Incorporated, *Meeting with the Arizona Governor’s Office* (Nov. 8, 2012), <https://assets.documentcloud.org/documents/844537/wexford-20power-20point.pdf>.

78. Isaacs, *supra* note 74, at 9; *Hepatitis C*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/hepatitis-c/symptoms-causes/syc-20354278> (last visited Apr. 19, 2019).

79. Isaacs, *supra* note 74, at 9; Craig Harris, *Prison Nurse Tied to Hepatitis C Exposure*, ARIZ. REPUBLIC (Sept. 4, 2012, 11:12 PM), <http://archive.azcentral.com/arizonarepublic/news/articles/2012/09/04/20120904arizona-inmates-exposed-hepatitis-c-dirty-needle.html>.

80. Isaacs, *supra* note 74, at 10; Craig Harris, *Arizona Prisons’ Health-care Contractor Replaced*, ARIZ. REPUBLIC (Jan. 30, 2013, 6:40 PM), <http://archive.azcentral.com/news/articles/20130130arizona-prison-health-care-contractor-contract-terminated.html>; *see also* Matt Stroud, *Arizona Replaces ‘Grossly Inadequate’ For-Profit Prison Firm with Another For-Profit*, FORBES (Feb. 1, 2013, 5:57 PM), <https://www.forbes.com/sites/mattstroud/2013/02/01/arizona-replaces-grossly-inadequate-for-profit-prison-contractor-with-another-private-firm/#78ff1a261f02>.

81. Isaacs, *supra* note 74, at 10; Wexford Health Source Incorporated, *supra* note 77, at 3.

82. Class Action Complaint For Injunctive and Declaratory Relief, *supra* note 10, at 1.

Director of the Arizona Department of Corrections, et al. as defendants.<sup>84</sup> The plaintiffs claimed the defendants put all those incarcerated in Arizona at “substantial risk” of “unnecessary pain and suffering, preventable injury, amputation, disfigurement, and death”<sup>85</sup> due to the defendants’ “grossly inadequate” physical, mental, and dental healthcare.<sup>86</sup> The plaintiffs merely sought what they should have already received without a lawsuit: constitutional healthcare and confinement.<sup>87</sup>

## 2. Motion to Dismiss

The lengthy opposition from the ADC, which continues today,<sup>88</sup> began on July 19, 2012.<sup>89</sup> The ADC filed a motion to dismiss the lawsuit<sup>90</sup> for failure to state a claim, failure to exhaust, and mootness.<sup>91</sup> In October 2012, the District Court denied that motion.<sup>92</sup>

In response to the defendants’ argument that plaintiffs failed to state a claim, the court reasoned that the complaint was already screened under 28 U.S.C. § 1915A(b), which requires the court determine cognizable claims for review or dismissal.<sup>93</sup> Therefore, filing a 12(b)(6) motion to dismiss, the standard for which

83. Charles Ryan retired on September 13, 2019. Maria Polletta, *Embattled Arizona Department of Corrections Director Chuck Ryan to Step Down*, AZCENTRAL (Aug. 9, 2019, 5:51 PM), <https://www.azcentral.com/story/news/politics/arizona/2019/08/09/charles-ryan-director-arizona-department-corrections-retire/1971458001/>. David Shinn was appointed by Governor Doug Ducey to replace Ryan as the Director. Maria Polletta, *Arizona Governor Picks Federal Bureau of Prisons Official David Shinn to Lead State Corrections Agency*, AZCENTRAL (Oct. 7, 2019, 5:58 PM), <https://www.azcentral.com/story/news/politics/arizona/2019/10/07/david-shinn-appointed-director-arizona-department-corrections/3900413002/>.

84. *Id.*

85. *Id.* In the first eight months of 2013 there were 50 deaths in the ADC, including eight suicides. In 2011 and 2012 combined, there were 37 deaths. Isaacs, *supra* note 74, at 4. In 2018, there were 133 deaths. *Inmate Death Notifications*, ARIZ. DEP’T OF CORRECTIONS, 18–40, <https://corrections.az.gov/inmate-death-notifications?page=15> (last visited Nov. 4, 2019).

86. Class Action Complaint For Injunctive and Declaratory Relief, *supra* note 10, at 2.

87. *Id.* at 3; *see also* *Parsons v. Ryan*, 289 F.R.D. 513, 515 (D. Ariz. 2013).

88. *Parsons*, while settled in 2014, continues today with the ADC having been found in contempt of the settlement. *See* Jimmy Jenkins, *Judge Denies State’s Motions for Relief from More Oversight in Arizona Prison Health Care Case*, KJZZ (Nov. 15, 2018, 3:41 PM), <http://kjzz.org/content/726153/judge-denies-states-motions-relief-more-oversight-arizona-prison-health-care-case> (last updated Nov. 19, 2018, 1:28 PM).

89. Defendants’ Motion to Dismiss, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. July 19, 2012), ECF No. 50.

90. *Id.* at 2 (defendants filed this dismissal under the Fed. R. Civ. P. 12(b)(6)).

91. *Id.*

92. Order at 1, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Oct. 10, 2012), ECF No. 175.

93. *Id.* at 3; 28 U.S.C. § 1915A(b) (1996). This screening process is required and is specific to prisoner claims. 28 U.S.C. § 1915A(a) (“The court shall review . . . a

is “identical” to the dismissal review standard under 28 U.S.C. § 1915A(b), was duplicative.<sup>94</sup> The court determined the 12(b)(6) motion could only be granted if the court believed reconsideration appropriate, which is “rare,” and was not asserted by the defendants here.<sup>95</sup>

In response to the arguments that the plaintiffs failed to exhaust their remedies under the PLRA, the court held “none are meritorious.”<sup>96</sup> The main reason was that the parties entered into a “tolling agreement” which explicitly stated “Charles Ryan and the ADOC agree to irrevocably waive and not assert in any civil lawsuit brought by plaintiffs’ counsel . . . any defense based on allegations that plaintiffs failed to exhaust administrative remedies.”<sup>97</sup> The defendants’ final argument was that the claims were moot.<sup>98</sup> Defendants argued that because Wexford was now providing the healthcare, the ADC was not responsible and could not (because of privatization) be held responsible for failures.<sup>99</sup> The court also rejected this argument and cited Arizona Revised Statutes § 31-201.01(d) which states, “the director shall provide medical and health services for the prisoners.”<sup>100</sup> While these services can be privately contracted for, it does not abdicate the duty to ensure constitutionally administered healthcare.<sup>101</sup>

### 3. Class Certification

On November 13, 2012, having survived the motion to dismiss, the *Parsons* plaintiffs filed to certify their claim as a class.<sup>102</sup> The plaintiffs sought to certify the class to include all current and future incarcerated people subjected to “the medical, mental health, and dental care policies and practices” of the ADC.<sup>103</sup>

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complaint in a civil action in which a prisoner seeks redress from a governmental entity . . .”).

94. Order, *supra* note 92, at 3.

95. *Id.* at 3–4 (citing Sch. Dist. No. 1J, *Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)) (reconsideration requires a showing of: (1) newly discovered evidence; (2) clear error or manifest injustice; or (3) change in the law—“Defendants make no argument that reconsideration of the Court’s March 28, 2012 Order is appropriate.”).

96. *Id.* at 7.

97. *Id.*

98. *Id.* at 9.

99. *Id.*

100. ARIZ. REV. STAT. § 31-201.01(D) (1968); *see also* Order, *supra* note 92, at 10.

101. Section 31-201.01(D); *see also* Order, *supra* note 92, at 10.

102. Prisoner Plaintiff’s Motion & Memorandum of Points and Authorities in Support of Class Certification at 1, 5, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Nov. 13, 2012), ECF No. 245.

103. *Parsons v. Ryan*, 289 F.R.D. 513, 515 (D. Ariz. 2013). The plaintiffs also sought to have a subclass certified to include all current and future incarcerated persons subjected to isolation by the ADC, but this subclass is not the focus of this Note. *Id.* However, it is important to remember that there is a subclass of plaintiffs who too are severely affected by the ADC and who are seeking to vindicate their rights through this litigation.

To succeed in certifying as a class, the Plaintiffs must first satisfy the prerequisites of Federal Rule of Civil Procedure 23(a).<sup>104</sup> The Rule requires the class only be certified if there is: (1) numerosity;<sup>105</sup> (2) commonality;<sup>106</sup> (3) typicality;<sup>107</sup> and (4) fair and adequate representation.<sup>108</sup> The type of class actions that may be maintained are regulated by Rule 23(b).<sup>109</sup> The class can be maintained only if: (1) prosecuting the claims separately would create a risk of “inconsistent or varying adjudications” or adjudications which would be “dispositive of the interests of the other class members;”<sup>110</sup> (2) the defendants “acted or refused to act” in a way that applies to the whole class so that relief is appropriate for the whole class;<sup>111</sup> or (3) the questions of law or fact regarding the class members “predominate” over those affecting individual members.<sup>112</sup> The class must meet all of these requirements from Rule 23, which were interpreted by the Supreme Court in 2011 in *Wal-Mart Stores v. Dukes*.<sup>113</sup>

*Wal-Mart* was decided a year before *Parsons* was filed.<sup>114</sup> In *Wal-Mart*, a class of 1.5 million women who were present and former Wal-Mart employees alleged systemic gender discrimination in violation of Title VII.<sup>115</sup> In a controversial 5-4 opinion, the Court decertified the class, which was previously affirmed by the Ninth Circuit.<sup>116</sup> Justice Scalia reasoned that Rule 23(a) is subject to a “rigorous analysis” in which plaintiffs must be ready to prove *in fact* each prerequisite of Rule 23(a).<sup>117</sup> Specifically, the Court strengthened the “commonality” analysis under Rule 23(a)(2).<sup>118</sup> This interpretation of Rule 23 “raise[d] the bar” and created a “more restrictive era” for class certification.<sup>119</sup>

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104. FED. R. CIV. P. 23(a).

105. *Id.* at 23(a)(1) (“the class is so numerous that joinder of all members is impracticable”).

106. *Id.* at 23(a)(2) (“questions of law or fact common to the class”).

107. *Id.* at 23(a)(3) (“claims or defenses of the representative parties are typical of the claims or defenses of the class”).

108. *Id.* at 23(a)(4) (“representative parties will fairly and adequately protect the interests of the class”).

109. *Id.* at 23(b).

110. *Id.* at 23(b)(1).

111. *Id.* at 23(b)(2).

112. *Id.* at 23(b)(3) (considered in the court’s finding of this prong are: (1) the members of the class’ interests in individual control of the actions; (2) the “extent and nature” of ongoing litigation regarding the instant issues; (3) the “desirability or undesirability” of a concentration of the litigation in the forum; and (4) the management difficulties of class actions).

113. *See* 564 U.S. 338 (2011).

114. *Id.*

115. *Id.* at 343.

116. *Id.* at 367.

117. *Id.* at 350–51.

118. Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1099 (2013).

119. David Marcus, *The Public Interest Class Action*, 101 GEO. L.J. 777, 792–93 (2016); *see also* Bone, *supra* note 118, at 1098 (arguing that *Wal-Mart* “limit[s] the

Despite these barriers and the additional requirements of PLRA, the class certification in *Parsons* was granted on March 6, 2013.<sup>120</sup> The court found the plaintiffs met each of the four prerequisites under Rule 23(a), and under Rule 23(b)(2), established that the defendants “acted or refused to act” in a way that applied to the whole class; therefore, relief to the class as a whole was appropriate.<sup>121</sup>

Unsurprisingly, after *Wal-Mart*, the most contested prong was commonality.<sup>122</sup> In *Parsons*, the court determined that the commonality prong was satisfied by the “common question[s]” of the defendants’ systemically deficient healthcare practices and the “substantial risk of serious harm” from placing incarcerated persons in solitary confinement.<sup>123</sup> Defendants argued that: (1) Plaintiffs’ allegations were a “conglomeration” of specific instances not aligned with the ADC’s policies;<sup>124</sup> (2) the fact-specific allegations required individual inquiry and therefore precluded commonality;<sup>125</sup> and (3) many plaintiffs did not allege harm and therefore the claims were “facially insufficient” for the purposes of deliberate indifference.<sup>126</sup> The court disagreed and diametrically contrasted the *Parsons* commonality issue with the *Wal-Mart* commonality issue.<sup>127</sup> Most persuasive to the court was a “cure notification” sent on September 21, 2012 by the ADC to Wexford that identified 20 areas of noncompliance regarding healthcare and responsiveness.<sup>128</sup> The court determined this was probative evidence that the allegations were not isolated but systemic—established by ten failed practices of the ADC.<sup>129</sup> The court found that these “systemic deficiencies”

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availability of the class action in federal court,” but is just one of many cases that has limited access to class actions).

120. *Parsons v. Ryan*, 289 F.R.D. 513, 515 (D. Ariz. 2013).

121. *Id.* at 516, 524; FED. R. CIV. P. 23(b)(2).

122. *See generally* Marcus, *supra* note 119, at 793–95.

123. *Parsons*, 289 F.R.D. at 517.

124. *Id.* at 520.

125. *Id.*

126. *Id.*

127. *Id.* at 521.

128. *Id.* The areas of noncompliance included, but were not limited to: “[i]nadequate staffing levels” that created “inappropriate scheduling gaps in on-site medical coverage” and forced staff to work “excessive hours, creating fatigue risks.” *Id.* at 517. The following “[q]uantitative decrease[s]” in routine care: “backlog of prescription medication expiration review, backlog of chart reviews, backlog of provider line appointments, untimely handling of Health Needs Requests, and backlog/cancellation of outside specialty consultations.” *Id.* at 517–18. In regard to medication: “[i]ncorrect or incomplete pharmacy prescriptions;” inconsistent medication approval process, refill, or return procedures; and inappropriate change or termination of medication. *Id.* at 517. Further, the ADC was “unresponsive” to grievances and exhibited a “lack of responsiveness and/or lack of awareness of incident urgency.” *Id.* at 517–18.

129. The class was certified in regard to ten systemic practices:

- i. Failure to provide timely access to health care;
- ii. Failure to provide timely emergency treatment;
- iii. Failure to provide necessary medication and medical devices;
- iv. Insufficient health care staffing;

in healthcare practices exhibited deliberate indifference, which established commonality.<sup>130</sup>

The defendants appealed the order granting class certification.<sup>131</sup> On June 5, 2014, the Ninth Circuit Court of Appeals affirmed the lower court's decision.<sup>132</sup> The defendants once again disputed commonality and argued that the lower court erred in finding that the plaintiffs met the requisite standard for commonality.<sup>133</sup> They essentially argued that the systemic violation was a collection of individual violations and therefore, "after *Wal-Mart*, Eighth Amendment claims can *never* be brought in the form of a class action."<sup>134</sup> The Ninth Circuit firmly disagreed with this assertion and wrote that the defendants have a "fundamental misunderstanding" of "*Wal-Mart*, Eighth Amendment doctrine, and the plaintiffs' constitutional claims."<sup>135</sup> The crux of the Ninth Circuit's reasoning regarding commonality mirrored that of the district court—by setting out the ten systemic failing practices of the ADC, the class clearly established and "far exceeded" the *Wal-Mart* commonality inquiry.<sup>136</sup>

#### 4. Settlement

Trial was set for October 20, 2014.<sup>137</sup> Five days before trial, the parties settled.<sup>138</sup> The settlement, formally called "the Stipulation," agreed to a variety of measures and changes.<sup>139</sup> One of the key areas of the Stipulation was that the ADC

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- v. Failure to provide care for chronic diseases and protection from infectious disease;
  - vi. Failure to provide timely access to medically necessary specialty care;
  - vii. Failure to provide timely access to basic dental treatment;
  - viii. Practice of extracting teeth that could be saved by less intrusive means;
  - ix. Failure to provide mentally ill prisoners medically necessary mental health treatment (i.e. psychotropic medication, therapy, and inpatient treatment); and
  - x. Failure to provide suicidal and self-harming prisoners basic mental health care.

*Id.* at 525.

130. *Id.* at 522.

131. *Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014).

132. *Id.*

133. *Id.* at 672–73.

134. *Id.* at 675–76.

135. *Id.* at 676.

136. *Id.* at 679, 683.

137. Order Granting Plaintiffs' Motion to Modify the Scheduling Order to Extend Time For the Completion of Fact and Expert Discovery at 2, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Mar. 13, 2013), ECF No. 388.

138. Minute Entry at 1, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Oct. 15, 2014), ECF No. 1193 (reflecting that a settlement was reached); *see also* Stipulation at 16, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Oct. 14, 2014), ECF No. 1185 (reflecting that the ADC signed and dated the Stipulation on October 9, 2014).

139. *See* Stipulation at 2–11, *supra* note 138.



agreed to comply with 103 specified healthcare measures.<sup>140</sup> The Stipulation set benchmarks that could internally measure the ADC compliance and were particularized to each facility.<sup>141</sup> The compliance was measured by a “monthly report card” known as a “CGAR”(standing for compliance: green, amber, red).<sup>142</sup>

At the end of the first year after the Stipulation, the ADC agreed to be at or over 75% compliance with the promulgated performance health measures.<sup>143</sup> At the two-year mark, it agreed to be at or exceeding 80% compliance; and after the two-year mark, it agreed to be at or exceeding 85% compliance.<sup>144</sup> The Stipulation required 100% compliance, but if the ADC did not meet the required measures on the agreed timeline, that could trigger court intervention.<sup>145</sup> The ADC also agreed to request that the Arizona Legislature provide funds to increase staffing.<sup>146</sup>

In terms of monitoring, the Stipulation allowed for plaintiffs’ oversight, however, defendants measured their own compliance through the CGAR.<sup>147</sup> The Stipulation granted plaintiffs reasonable access to various health records, records of those who died in custody,<sup>148</sup> tours of ADC facilities, confidential interviews with class members, interviews with employees, and more.<sup>149</sup>

Regarding enforcement, if the ADC had “substantial” compliance failures, the plaintiffs would provide a “Notice of Substantial Non-Compliance,” which would first attempt to be resolved informally, and if not resolved, would be filed for enforcement in court.<sup>150</sup> Additionally, the defendants agreed to withdraw their petition for rehearing at the Ninth Circuit and waived a petition of certiorari with the Supreme Court.<sup>151</sup> When the Stipulation was approved, the defendants

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140. Exhibit B of Stipulation at 8–15, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Oct. 14, 2014), ECF No. 1185-1.

141. Stipulation, *supra* note 138, at 2–3.

142. Order and Judgment of Civil Contempt, *supra* note 23, at 2.

143. Stipulation, *supra* note 138, at 3.

144. *Id.* This was the same timeline outlined for compliance in regard to the subclass.

145. Order and Judgment of Civil Contempt, *supra* note 23, at 18.

146. Stipulation, *supra* note 138, at 2.

147. See *Parsons v. Ryan: Settled – Post Judgment Monitoring*, ACLU ARIZ., <https://www.acluaz.org/en/cases/parsons-v-ryan> (last visited Nov. 17, 2018); Beth Schwartzapfel, *Federal Judge Considers \$1M in Fines for Prison Medical Provider’s ‘Intractable Failures’*, ABA J. (Feb. 27, 2018, 1:55 PM), [http://www.abajournal.com/news/article/federal\\_judge\\_considers\\_1m\\_in\\_fines\\_for\\_prison\\_medical\\_providers\\_intractabl](http://www.abajournal.com/news/article/federal_judge_considers_1m_in_fines_for_prison_medical_providers_intractabl).

148. Eighteen reviews of death, “mortality reviews,” were submitted into evidence during a hearing. “ADC checked ‘yes’ 6 times to the question: ‘Could the patient’s death have been prevented or delayed by more timely intervention.’ ADC checked ‘yes’ 8 times to the question: ‘Is it likely that the patient’s death was caused by or affected in a negative manner by health care personnel.’” Order and Judgment of Civil Contempt, *supra* note 23, at 7–8.

149. Stipulation, *supra* note 138, at 11–13.

150. *Id.* at 12.

151. *Id.* at 13.

were ordered to pay \$4.9 million in attorney's fees and "up to \$250,000 per year in monitoring fees and expenses."<sup>152</sup>

5. *Post-Settlement: "Missing the Mark After Four Years"*<sup>153</sup>

In April 2016, the plaintiffs filed a motion to enforce the Stipulation in district court.<sup>154</sup> As provided by the Stipulation, they also filed their notice of substantial noncompliance that was provided to the defendants on October 15, 2015.<sup>155</sup> After a year and a half of remediation plans,<sup>156</sup> discovery disputes,<sup>157</sup> further notices of substantial noncompliance,<sup>158</sup> "retaliation and intimidation" during a site visit,<sup>159</sup> issues with defendants' monitoring methodologies,<sup>160</sup> testimony by defendants of failure to comply,<sup>161</sup> and additional motions to enforce the Stipulation,<sup>162</sup> the district court ordered on October 10, 2017 that by January 9, 2018, the defendants must show cause as to why they should not be held in contempt and fined \$1,000 for every court mandated performance measure they did not comply with.<sup>163</sup>

On June 22, 2018, the defendants were held in contempt sua sponte.<sup>164</sup> Among the issues raised in the contempt order were the issues of the ADC's internal monitoring<sup>165</sup> and issues with privatized healthcare.<sup>166</sup> The court noted that the healthcare was not being monitored by the ADC for all the necessary

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152. Order Granting Motion to Approve Stipulation at 4, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Feb. 24, 2015), ECF No. 1458.

153. Order and Judgment of Civil Contempt, *supra* note 23, at 20.

154. Motion to Enforce the Stipulation, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. Apr. 26, 2016), ECF No. 1555; Order and Judgment of Civil Contempt, *supra* note 23, at 1.

155. See Notice of Measures That Were in Compliance as of Plaintiffs' October 15 Notice of Non-Compliance at 1, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Apr. 26, 2016), ECF No. 1580.

156. See Docket: Nos. 1580–2372, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. May 18, 2016–Oct. 10, 2017); see also Minute Entry, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. June 24, 2016), ECF No. 1619.

157. See Minute Entry, *Parsons v. Ryan*, 2:12-CV-00601 (D. Ariz. Aug. 19, 2016), ECF No. 1666.

158. See, e.g., Minute Entry, *Parsons v. Ryan*, 2:12-CV-00601 (D. Ariz. Oct. 26, 2016), ECF No. 1725.

159. See Minute Entry, *Parsons v. Ryan*, 2:12-CV-00601 (D. Ariz. Nov. 2, 2016), ECF No. 1734.

160. See Plaintiffs' Reply in Support of Plaintiffs' Regarding Unresolved Issues Related to Defendants' Proposed Monitoring Guide and Methodology to Measure Compliance with the Stipulation [Doc. 1755], *Parsons v. Ryan*, 2:12-CV-00601 (D. Ariz. Dec. 12, 2016), ECF No. 1816.

161. Order and Judgment of Civil Contempt, *supra* note 23, at 2.

162. See, e.g., Motion to Enforce the Stipulation, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. July 12, 2016), ECF No. 1625.

163. Order, *supra* note 32, at 4.

164. Order and Judgment of Civil Contempt, *supra* note 23, at 19.

165. See *id.* at 15–16.

166. See *id.* at 10–13, 20.

performance measures in real time, and that in December 2017, plaintiffs alleged defendants missed “420 instances of non-compliance.”<sup>167</sup> The court was also concerned with what the ADC called “a good business decision” by which it frequently financially incentivized its privatized contractor, Corizon, to comply with court orders, although it was already contractually mandated to comply.<sup>168</sup> The court found that four years after the settlement, the defendants “repeated failed attempts, and too-late efforts . . . demonstrate[d] a half-hearted commitment”<sup>169</sup> that left them under the 85% compliance threshold regarding the following ten performance measures (“PMs”) at five ADC facilities:

- (1) PM 35: “All inmate medications will be transferred with and provided to the inmate or otherwise provided at the receiving prison without interruption” (parentheses omitted);
- (2) PM 39: “Routine provider referrals will be addressed by a Medical Provider and referrals requiring a scheduled provider appointments [sic] will be seen within fourteen calendar days of the referral;”
- (3) PM 44: “Inmates returning from an inpatient hospital stay or ER transport with discharge recommendations from the hospital shall have the hospital’s treatment recommendations reviewed and acted upon by a medical provider within 24 hours;”
- (4) PM 46: “A Medical Provider will review the diagnostic report, including pathology reports, and act upon reports with abnormal values within five calendar days of receiving the report at the prison;”
- (5) PM 47: “A Medical Provider will communicate the results of the diagnostic study to the inmate upon request and within seven calendar days of the date of the request;”
- (6) PM 50: “Urgent specialty consultations and urgent specialty diagnostic services will be scheduled and completed within 30 calendar days of the consultation being requested by the provider;”
- (7) PM 51: “Routine specialty consultations will be scheduled and completed within 60 calendar days of the consultation being requested by the provider;”
- (8) PM 52: “Specialty consultation reports will be reviewed and acted on by a Provider within seven calendar days of receiving the report;”
- (9) PM 54: “Chronic disease inmates will be seen by the provider as specified in the inmate’s treatment plan, no less than every 180 days unless the provider documents a reason why a longer time frame can be in place;” and

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167. *Id.* at 15–16.

168. *Id.* at 17 (internal quotations omitted).

169. *Id.* at 20.

(10) PM 66: “In an IPC (in-patient component), a Medical Provider encounters [sic] will occur at a minimum every 72 hours.”<sup>170</sup> (Illustrated by graphs in the Appendix).

As a result of the defendants’ failure to comply, the court ordered the defendants to pay over \$1.4 million in contempt fees which would be used to support reaching compliance.<sup>171</sup> Further, the defendants were required to continue filing reports reflecting noncompliance.<sup>172</sup> The defendants appealed the contempt order, asking the Ninth Circuit to vacate the order and arguing the district court judge did not have the authority to issue the contempt sanctions.<sup>173</sup> The Ninth Circuit heard oral arguments for the appeal on September 24, 2019.<sup>174</sup>

On the same day of the contempt order, the court issued an order in response to the defendants’ request to terminate monitoring of a majority of the performance measures.<sup>175</sup> The request was granted in part and denied in part.<sup>176</sup> However, due to the court’s lack of confidence in the integrity of the defendants’ monitoring processes and “because the stakes could not be higher,”<sup>177</sup> the court also ordered an expert, at the defendants’ expense, to assess and review the ADC’s monitoring of the performance measures.<sup>178</sup>

### III. WHO IS WATCHING THE PRISONS?

#### A. *The United States Averts its Eyes*

Monitoring is just one essential piece of successful oversight for prison systems.<sup>179</sup> Many countries have an agency to monitor and enforce “minimal standard[s] of health, safety, and humane treatment” in prisons.<sup>180</sup> In Europe, monitoring exists in perpetuity in correctional systems to prevent any sort of abuse of incarcerated people before it happens.<sup>181</sup> The United States “is one of the only Western nations without a formal and comprehensive system in place providing for regular, external review of all prisons and jails.”<sup>182</sup> Yet the United States is

170. *Id.* at 21–23; Exhibit B of Stipulation, *supra* note 140, at 10–12 (internal parenthetical omitted).

171. Order and Judgment of Civil Contempt, *supra* note 23, at 23.

172. *Id.* at 24.

173. Jimmy Jenkins & Steve Goldstein, *Arizona Argues at 9th Circuit to Overturn Prison Health Care Fine*, KJZZ (Sept. 25, 2019, 4:45 PM), <https://kjzz.org/content/1189356/arizona-argues-9th-circuit-overturn-prison-health-care-fine>.

174. *Id.*

175. Order at 14, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. June 22, 2018), ECF No. 2900.

176. *Id.* at 12.

177. *Id.*

178. *Id.*

179. Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1439 (2010).

180. Fathi, *supra* note 65, at 1453.

181. Michael B. Mushlin & Michele Deitch, *Opening up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1385 (2010).

182. *Id.*

where monitors are most needed because U.S. prisons, due to their “closed environments, largely hidden from public view,”<sup>183</sup> create a space where abuse is prone to happen and is likely to go unnoticed and unaccounted for.<sup>184</sup> This has left any possible oversight largely to federal courts.<sup>185</sup>

***B. The Court Watches: Uses of Experts & Special Masters in Federal Court***

Federal courts have the authority to appoint judicial adjuncts, including experts, monitors, special masters, receivers, etc., to help resolve and manage complex disputes, particularly those that require institutional compliance and change.<sup>186</sup> Rule 706 of the Federal Rules of Evidence and Rule 53 of the Federal Rules of Civil Procedure provide explicit authority for these appointments.<sup>187</sup> These roles have been used in a variety of cases, including but not limited to: school desegregation;<sup>188</sup> corporate scandals;<sup>189</sup> complex environmental litigation;<sup>190</sup> and commonly—prison class action litigation.<sup>191</sup>

Rule 706 governs experts.<sup>192</sup> Rule 706 not only allows the request of experts by the parties, but also by the judge.<sup>193</sup> Experts can be deposed and

183. Fathi, *supra* note 65, at 1453.

184. Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT’G REP. 236, 236 (2012).

185. Fathi, *supra* note 65, at 1454.

186. See generally *Monitors Standards*, AM. BAR ASS’N, [https://www.americanbar.org/groups/criminal\\_justice/standards/MonitorsStandards/](https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/) (last visited Jan. 18, 2019); see also Thomas E. Willging et al., *Special Masters’ Incidence and Activity*, FED. JUD. CTR. 1, at 6, 9, 27 (2000), <https://www.uscourts.gov/sites/default/files/specmast.pdf>.

187. See FED. R. EVID. 706; FED. R. CIV. P. 53; Sofia Adrogué & Alan Ratliff, *The Independent Expert Evolution: From the “Path of Least Resistance” to the “Road Less Traveled?”*, 34 TEX. TECH. L. REV. 843, 883 (2003). Some courts have even appointed a mix of the two under Rule 53 as a “court-appointed expert master.” *Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21*, 383 F. Supp. 699, 764 (E.D.N.Y. 1974), *aff’d sub nom. Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975).

188. See, e.g., David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 363–66 (1981).

189. See, e.g., Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1714 (2007).

190. See, e.g., Timothy G. Little, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission*, 8 HARV. ENVTL. L. REV. 435, 435 (1984).

191. See, e.g., Laurie Udesky, *Court Takes Over California’s Prison Health System*, 366 LANCET 796, 796 (Sept. 3, 2005); Kevin Gosztola, *Federal Court will Appoint Monitor to Ensure Illinois Prisoners Have Basic Health Care*, SHADOWPROOF (Jan. 7, 2019), <https://shadowproof.com/2019/01/07/federal-court-will-appoint-monitor-to-ensure-illinois-prisoners-have-basic-health-care/>; Scott Bauer, *Monitor: Problems Persist at Wisconsin’s Youth Prisons*, STAR TRIB. (Jan. 14, 2019, 2:00 PM), <http://www.startribune.com/groups-report-shows-continued-problems-at-juvenile-prison/504323902/>.

192. FED. R. EVID. 706.

193. *Id.* at 706(a).

examined by the parties.<sup>194</sup> Rule 53 provides for the appointment of special masters who, like experts, have special knowledge in the field but are empowered to gather evidence, control proceedings, and make findings.<sup>195</sup> Once a special master submits an order or recommendation, the parties have the opportunity to be heard and can appeal the finding.<sup>196</sup> The ultimate authority still lies with the court which can “affirm, adopt, modify or reverse the order or recommendation, or order that the matter be resubmitted to the master.”<sup>197</sup> The special master can also have a more limited role and be appointed for specific tasks including but not limited to: managing and resolving discovery issues; facilitating settlement; or serving as monitors.<sup>198</sup>

### C. ADC Monitoring Under Parsons

Per the Stipulation in *Parsons*, the ADC was essentially in charge of monitoring its own progress with some oversight from the plaintiffs’ attorneys.<sup>199</sup> This was done using the CGAR tool discussed previously in Section II.B.4. However, the court found that the internal monitoring done by the ADC had “profound and systemic concerns . . . at every stage of the process,”<sup>200</sup> one of the largest concerns being that there was no real-time monitoring.<sup>201</sup>

The plaintiffs identified numerous major flaws with the defendants’ CGAR system that make it unreliable.<sup>202</sup> For example, the ADC does not randomize source documents,<sup>203</sup> and the source documents themselves are incomplete, error-ridden, and cannot be traced from start to finish.<sup>204</sup> This draws

194. *Id.* at 706(b)(2)–(4).

195. FED. R. CIV. P. 53(c); Adrogué & Ratliff, *supra* note 187, at 886.

196. FED. R. CIV. P. 53(f)(1)–(2); Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW 360 1, 3 (Aug. 15, 2017, 11:36 AM), <https://www.jamsadr.com/files/uploads/documents/articles/scheindlin-law360-the-use-of-special-masters-in-complex-cases-2017-08-15.pdf>.

197. Scheindlin, *supra* note 196.

198. The default role provided for by the rule allows the master to: “(A) regulate all proceedings; (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and (C) if conducting an evidentiary hearing, exercise the appointing court’s power to compel, take, and record evidence.” FED. R. CIV. P. 53(c)(1)(A)–(C); Scheindlin, *supra* note 196.

199. ACLU ARIZ., *supra* note 147.

200. Order, *supra* note 175, at 6; *see* Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring at 3, *Parsons v. Ryan*, No. 2:12-CV-00601 (D. Ariz. May 8, 2017), ECF No. 2046 (defendants testified that they “didn’t know what [they] were doing because [they] had never done it before.”).

201. Order and Judgment of Civil Contempt, *supra* note 23, at 15.

202. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 3.

203. ADC was put on notice of this deficiency by one of their internal monitors who has experience in Excel that documents were not being randomized properly, but ADC disregarded the monitor’s warnings. *Id.* at 7. The lack of randomization leads to “intentional or inadvertent bias.” *Id.* at 5.

204. *Id.* at 11–15. The concern with not being able to trace the process from start to finish goes to the court’s interest in the credibility of evidence—comparable to the “chain

into question the integrity of the whole process.<sup>205</sup> Take, for example, PM 85: “[Prisoners with mental health needs] shall be seen by a mental health provider within 30 days of discontinuing medications.”<sup>206</sup> This performance measure should *exclude* patients for which the 30 days have not yet elapsed because the Department of Corrections will always be found compliant with these patients whether they have seen a provider yet or not.<sup>207</sup> However, the defendants kept including these patients in its reporting, which “misleadingly inflate[d]” the compliance scores.<sup>208</sup> The way the ADC implemented it, the CGAR methodology created unreliable and improper results, which could be changed prior to the production of the final report—with no record of the changes being made.<sup>209</sup> As a result, the defendants did not identify causes of the issues,<sup>210</sup> did not follow court orders,<sup>211</sup> and did not hold Corizon, the privatized healthcare provider for the ADC, responsible.<sup>212</sup>

An evidentiary hearing on the integrity of the CGAR system showed that the defendants not only continued to use the CGAR system in its noncompliant form after the court rejected it,<sup>213</sup> but they also stopped monitoring many of the performance measures without notice to the court or plaintiffs.<sup>214</sup> This was contrary to a prior order of the court, which required the defendants to make a showing of compliance prior to termination of monitors.<sup>215</sup> Even more concerning, the evidence presented at the evidentiary hearing convinced the court that Corizon instructed medical providers on how to “beat the monitor.”<sup>216</sup> Dr. Jan Watson, a doctor with 30 years of experience who served for six months at an ADC prison

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of custody” doctrine in criminal cases. The Supreme Court has said in criminal cases that in order for physical evidence to be admissible, the prosecution has to establish chain of custody to prove “the identity and integrity” of the evidence “by tracing its continuous whereabouts.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 335–36 (2009) (internal quotations removed).

205. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 10–11.

206. Exhibit B of Stipulation, *supra* note 140, at 14.

207. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 27–28. Note that PM 85 did not appear as one of the ten measures the defendants were found to be under 85% compliance with. However, the data is skewed by including patients who defendants could not possibly be in noncompliance with; so there is no verifiable way to know if they actually are in compliance. *See id.* at 27–28.

208. *Id.* at 27–28.

209. *Id.* at 29–30, 33. “[W]itnesses testified to a rebuttal process between Corizon and [ADC] headquarters staff, whereby Corizon can challenge the monitors’ findings after they have been entered into the CGAR system. This happens before Defendants provide the CGAR reports to Plaintiffs and the Court.” *Id.* at 29.

210. *Id.* at 33.

211. *Id.* at 35–39.

212. *Id.* at 2, 39.

213. Order, *supra* note 175, at 3.

214. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 1.

215. *Id.* at 1–2.

216. Order, *supra* note 175, at 11.

was asked on the stand by the judge if Corizon staff was “giving . . . tips and tricks to evade the monitor[.]”<sup>217</sup> Her response? “Yes.”<sup>218</sup>

Dr. Watson’s testimony continued to be even more shocking, and in turn, more damning for the defendants. She testified that “she believed Corizon staff were altering her treatment plans and notes under her name in the computer system without her knowledge or consent.”<sup>219</sup> Dr. Watson’s testimony also included stories of her having to send employees to the pharmacy because the prison ran out of medication; watching a diabetic person in prison be denied insulin by a nurse who said “[the incarcerated patients] need to learn to be responsible;” and after changing an incarcerated person’s healthcare plan, being told she should just “let [the person] die.”<sup>220</sup>

Not only did the evidentiary hearing and years of failure to comply with the Stipulation lead the court to issue the severe sanction of contempt against the defendants,<sup>221</sup> but the continual noncompliance after the contempt order led the plaintiffs to ask the court for either an independent auditing entity or a receiver.<sup>222</sup> In December 2018, the court chose an expert, Dr. Marc Stern, pursuant to Rule 706 to examine the defendants’ practices at the defendants’ expense.<sup>223</sup> Before retiring in June 2016, Judge Duncan ordered the appointment of an expert, and in December 2018, presiding Judge Roslyn Silver appointed Dr. Marc Stern.<sup>224</sup> The defendants promptly appealed the appointment and tried to “limit the scope” of what the expert could do.<sup>225</sup> Judge Silver stated that it is “ill-advised” for the ADC to continue “defending its noncompliance.”<sup>226</sup>

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217. Jimmy Jenkins, *Whistleblower Takes the Stand: Former Arizona Prison Doctor Makes Stunning Allegations in Federal Court*, KJZZ (Feb. 27, 2018, 10:21 AM), <https://kjzz.org/content/614094/whistleblower-takes-stand-former-arizona-prison-doctor-makes-stunning-allegations>.

218. *Id.*

219. *Id.*

220. *Id.*; see also Kevin Reagan, *Doctor Testifies on ‘Dangerous’ Health Care Practices at Florence Prison*, FLORENCE REMINDER & BLADE-TRIB. (Feb. 27, 2018), [https://www.pinalcentral.com/florence\\_reminder\\_blade\\_tribune/news/doctor-testifies-on-dangerous-health-care-practices-at-florence-prison/article\\_f26003eb-0778-5cbb-83d8-3846d850d920.html](https://www.pinalcentral.com/florence_reminder_blade_tribune/news/doctor-testifies-on-dangerous-health-care-practices-at-florence-prison/article_f26003eb-0778-5cbb-83d8-3846d850d920.html).

221. See *supra* Section II.B.5.

222. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 2.

223. Jacques Billeaud, *Expert Picked in Lawsuit Over Inmates’ Health Care in Arizona*, AZ CENTRAL (Dec. 6, 2018, 4:39 PM), <https://www.azcentral.com/story/news/local/phoenix/2018/12/06/judge-hold-hearing-suit-over-arizona-inmate-health-care/2226223002/>; Order, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Dec. 11, 2018), ECF No. 3089.

224. *Parsons v. Ryan Case Update*, PRISON LAW OFF. at 4, <https://prisonlaw.com/wp-content/uploads/2019/10/AZ-Case-Update-rev.-October-2019-FINAL.pdf> (last visited Oct. 14, 2019).

225. *Expert’s Appointment Appealed in Suit Over Care for Inmates*, U.S. NEWS (Jan. 11, 2019), <https://www.usnews.com/news/best-states/arizona/articles/2019-01-11/experts-appointment-appealed-in-suit-over-care-for-inmates>; Jimmy Jenkins, *Federal*



#### D. The Possible Future of Parsons

In addition to the option to appoint an expert, the court also had the choice to appoint a special master, who can serve the enforcement functions that the expert is unable to.<sup>227</sup> One hypothesis as to why the court chose not to appoint a special master at this stage is because the rule only permits the master's appointment provided the parties consent to the assigned duties;<sup>228</sup> this consent is not needed in the appointment of an expert.<sup>229</sup> Given the ADC's obstinacy since the Stipulation,<sup>230</sup> it would likely be difficult, if not impossible, to get consent that would give the special master the latitude to make a significant impact.

Another option, which is not unprecedented, would be to bring the ADCs' healthcare into receivership.<sup>231</sup> Receivership in *Parsons* would essentially shift all of the power related to institutional prison healthcare to the federal court.<sup>232</sup> While receivership has been described as an extraordinary<sup>233</sup> and highly intrusive remedy,<sup>234</sup> it is an effective solution when an agency cannot reform itself after other attempts at relief.<sup>235</sup> In fact, receiverships are not as extraordinary as sometimes characterized.<sup>236</sup> Receivers have not only been used in prison and jail litigation,<sup>237</sup> but also notably in litigation regarding public housing<sup>238</sup> and school

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*Judge Slaps Down State's Request to Limit Scope of Prison Health Care Investigation*, KJZZ (Jan. 31, 2019, 3:40 PM), <https://kjzz.org/content/755870/federal-judge-slaps-down-states-request-limit-scope-prison-health-care-investigation> (last updated Feb. 4, 2019, 3:37 PM).

226. Billeaud, *supra* note 223.

227. *See supra* Section III.B.

228. FED. R. CIV. P. 53(a)(1)(A). *But see* Willging et al., *supra* note 186, at 4–5.

229. *See* FED. R. EVID. 706.

230. *See supra* Section II.B.5; *see also* Billeaud, *supra* note 223 (“[T]he state’s insistence on defending its noncompliance [is] ill-advised”); *see also* Jenkins, *supra* note 225 (reporting that the ADC filed a motion to limit the scope of the independent expert).

231. Sabrina Wilson, *Prison, Jail Receiverships Have Happened Before in the U.S.*, WVUE NEW ORLEANS (Apr. 26, 2016, 10:26 PM), <http://www.fox8live.com/story/31823772/prison-jail-receiverships-have-happened-before-in-the-us/>.

232. Jenifer Warren, *U.S. to Seize State Prison Health Care*, L.A. TIMES (July 1, 2005, 12:00 AM), <http://articles.latimes.com/2005/jul/01/local/me-prisons1>.

233. *See Court-Created Receivership Emerging as Remedy for Persistent Noncompliance with Environmental Laws*, 10 ENVTL. L. REP. 10059, 10062 (1980).

234. Warren, *supra* note 232.

235. Lynn E. Cunningham & Dennis Foley, *Receivership as a Remedy for Poor Agency Performance*, 29 CLEARINGHOUSE REV. 1034, 1034 (Mar. 1996).

236. Catherine Megan Bradley, *Old Remedies Are New Again: Deliberate Indifference and the Receivership in Plata v. Schwarzenegger*, 62 N.Y.U. ANN. SURV. OF AM. L. 703, 704 (June 29, 2007) (“Popular wisdom now holds that receiverships are relics of the past, and scholarly interest in them has dropped off dramatically. Yet recent research indicates that courts have not stopped using receiverships.”).

237. *See generally* Plata v. Schwarzenegger, 603 F.3d 1088, 1090 (9th Cir. 2010). *See also* Serge F. Kovalski, *Jail Medical Services Are Returned to D.C. Control: Judge Cites Progress and Ends Receivership*, WASH. POST (Sept. 19, 2000), <http://www.washingtonpost.com/wp-srv/WPcap/2000-09/19/034r-091900-idx.html>.

desegregation.<sup>239</sup> Although the PLRA narrowed relief in prison litigation,<sup>240</sup> in 2010 the Ninth Circuit made clear in *Plata v. Schwarzenegger* that the PLRA did not bar the use of receivership.<sup>241</sup>

Critics of receiverships point to separation of powers<sup>242</sup> and argue deference should be given to administrative actors;<sup>243</sup> however, these arguments tend to be ineffective when constitutional rights are at stake.<sup>244</sup> Arguably, through the passage of § 1983, “Congress explicitly authorized courts to correct legislative bodies.”<sup>245</sup>

In 2017, Plaintiffs argued for the appointment of a receiver solely for the purpose of monitoring compliance,<sup>246</sup> but receivers have historically overtaken the entire system.<sup>247</sup> On September 6, 2019, plaintiffs asked the district court to do just that.<sup>248</sup> Counsel for the plaintiffs have stated that receivership is warranted because “there is a grave and immediate threat of harm to the plaintiffs and . . . the use of

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238. See generally Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in Tinsley v. Kemp Public Housing Litigation*, 65 MO. L. REV. 654 (2000).

239. Famously a receiver was used in *Brown v. Board of Education. Court-Created Receivership Emerging as Remedy for Persistent Noncompliance with Environmental Laws*, *supra* note 233, at 10060; see also *Local Taxes, Federal Courts, and School Desegregation in the Proposition 13 Era*, 78 MICH. L. REV. 587, 589 n.15 (Feb. 1980).

240. Bradley, *supra* note 236, at 709 (citing the PLRA, 18 U.S.C. § 3626(a)(1)(A)) (“The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

241. *Plata*, 603 F.3d at 1093.

242. Bradley, *supra* note 236, at 722–25 (arguing the separation of powers argument is vulnerable to various criticisms: (1) The legislature has not fixed the problem and “there is little political will to fix an expensive problem like prison healthcare;” (2) The courts are the only path to relief; and (3) “[The] population with the most direct access to information about prison conditions is either entirely or partially barred from voting based on this information.”).

243. This argument fails when the administrative actors are the ones who are unable to comply with the Stipulation. See *id.* at 722.

244. *Id.* at 725.

245. *Id.*

246. Plaintiffs’ Statement Regarding Evidentiary Hearings on Monitoring, *supra* note 200, at 2.

247. Kirsten Lundberg & Eric Weinberger, *Community Savings, or Community Threat? California Policy for Ill and Elderly Inmates*, CASE CONSORTIUM AT COLUMBIA U. 1, 3–6 (May 2012), [http://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/90/casestudy/files/global/90/California%20Policy%20for%20Ill%20and%20Elderly%20Inmates\\_wm.pdf](http://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/90/casestudy/files/global/90/California%20Policy%20for%20Ill%20and%20Elderly%20Inmates_wm.pdf); see also *Plata v. Schwarzenegger*, 603 F.3d 1088, 1088 (9th Cir. 2010).

248. Jimmy Jenkins, *Inmates Call for Federal Takeover of Arizona Prison Health Care System*, KJZZ (Sept. 6, 2019, 2:27 PM), <https://kjzz.org/content/1157671/inmates-call-federal-takeover-arizona-prison-health-care-system> (last updated Sept. 9, 2019, 11:07 AM).

less extreme measures by the court to try to remediate the problem have been proven futile.”<sup>249</sup>

The plaintiffs’ motion was filed before Dr. Stern filed his anticipated report on October 4, 2019.<sup>250</sup> One of the many recommendations in the 138-page report was that the legislature repeal the statute privatizing prison healthcare.<sup>251</sup> The report stated that privatization is the second largest barrier to the Arizona Department of Corrections complying with the Stipulation in *Parsons*.<sup>252</sup> The first barrier Dr. Stern cites is insufficient funding, but the two go hand-in-hand.<sup>253</sup> The report explained that “at least \$10 million” of the state’s dollars are going to profit and not “to improving healthcare and compliance.”<sup>254</sup> Dr. Stern also cited dangerous transitions of vendors, lack of flexibility, challenges with hiring, and the “poor track record” of the private vendors as additional challenges posed by privatization.<sup>255</sup> Ultimately, the privatization of Arizona prison healthcare provides no benefit for ADC or those incarcerated.<sup>256</sup>

With the expert’s report and motions on receivership before her, Judge Silver issued an order on October 11, 2019 laying out three options for the parties moving forward. They could: (1) enforce the current Stipulation, in which the court would be very involved in making sure the defendants comply;<sup>257</sup> (2) negotiate a new settlement; or (3) go to trial.<sup>258</sup> The court ended its order by stating that while the defendants have the choice of how to spend their money, they should not continue to spend public money to defend their “*undisputed* breaches.”<sup>259</sup>

#### IV. ADDITIONAL SOLUTIONS? LITIGATION IS NOT THE WAY.

As demonstrated by *Parsons* and other class actions around the country,<sup>260</sup> litigation is frequently the only avenue,<sup>261</sup> albeit a diminished one,<sup>262</sup> to

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249. *Id.*

250. Marc F. Stern, *Report to the Court in the Matter of Parsons v. Ryan*, et al., *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Oct. 2, 2019), ECF No. 3379.

251. *Id.* at 108.

252. *Id.* at 104–05.

253. *Id.*

254. *Id.* at 104.

255. *Id.* at 105–07.

256. *See id.* at 106–08.

257. The court noted in its order the present issue of enforcement, considering the defendants’ current appeal of the contempt order. Order, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Oct. 2, 2019), ECF No. 3385.

258. *Id.* at 3–5.

259. *Id.* at 6.

260. *See Examples of Other Class Actions*, *supra* note 70.

261. *See* Margo Schlanger, *The Political Economy of Prison and Jail Litigation*, PRISON LEGAL NEWS (June 15, 2007), <https://www.prisonlegalnews.org/news/2007/jun/15/the-political-economy-of-prison-and-jail-litigation/> (“At the end of the day, then, both jail and prison systems do indeed respond to the salient threat of serious damages liability. If prison administrators are to be believed, litigation’s deterrence of unconstitutional conduct by prison agencies is effective mostly around the edges.”).

attempt to bring recalcitrant prisons into compliance with their constitutional duties.<sup>263</sup> Even then, enforcement is complex and poses challenges.<sup>264</sup> However, there are systemic ways legislatures and voters can, and should, deal with the current dismal state of prison healthcare.<sup>265</sup> While systemic change often takes time, and strategic litigation is a crucial advocacy avenue to ensure people who are incarcerated get the healthcare they deserve<sup>266</sup>—in the long run, systemic change is the most sustainable way to ensure that obstinate prisons comply with constitutional duties.<sup>267</sup> Further, systemic change has the overall greater benefit of better outcomes of success for reentry,<sup>268</sup> and it is worth investing in because litigation is costly.<sup>269</sup>

#### A. *Why the Health of Incarcerated People Matters*

Compared to people who are not incarcerated, people with a history of incarceration have worsened physical and mental health.<sup>270</sup> Many people enter

262. See *supra* Section I.B; see also Lisa Drapkin, *Struggles of Using Legal Recourse as a Path Toward Better Prison Conditions*, NAT'L LAW. GUILD (Jan. 15, 2018), <https://www.nlg.org/struggles-of-using-legal-recourse-as-a-path-toward-better-prison-conditions/>.

263. See Schlanger, *supra* note 261 (“There are sharp limits to the ability of prison and jail litigation to improve conditions of confinement . . . The PLRA has undermined this effect to some extent, but litigation remains a useful regulatory tool.”).

264. See *supra* Part III.

265. See Part IV.

266. See generally *Major Cases*, PRISON LAW OFF., <http://prisonlaw.com/major-cases/> (last visited Apr. 21, 2019).

267. This systemic change takes many forms as explored in Section IV.B. Changes such as architecture can also have impacts. Paul Nagashima, *Jails and Prisons: Safety and Security in a Shifting Paradigm*, HDR INC. (Apr. 28, 2016), <https://www.hdrinc.com/jails-and-prisons-safety-and-security-shifting-paradigm>.

268. See, e.g., Ted Gest, *Why America's Prisons Need 'Systemic Change,'* CTR. ON MEDIA CRIME AND JUST. AT JOHN JAY C. (May 16, 2018), <https://thecrimereport.org/2018/05/16/why-americas-prisons-need-systemic-change/>; see also Rex Salisbury, *Criminal Justice is Broken—Here Are Three Groups Fixing the System*, MEDIUM (June 12, 2017), <https://medium.com/@rex.salisbury/criminal-justice-is-broken-here-are-three-groups-fixing-the-system-5d45c84c66f7> (highlighting three organizations working to make systemic changes in prison systems across the country).

269. In FY 2018, the ADC was approved for an overall budget of \$1,177,027,000, with \$153,661,500 allocated for healthcare related services (\$2,829,400 for “healthcare personal services;” \$2,020,400 for “health care operating” costs; and \$148,811,700 for private contracted health care services). *Fiscal Year 2018 Appropriations Report*, STATE DEP'T CORRECTIONS 99, 99–100 (2018), [https://corrections.az.gov/sites/default/files/adc-appropriationsreport\\_fy2018.pdf](https://corrections.az.gov/sites/default/files/adc-appropriationsreport_fy2018.pdf). This budget does not account for the additional costs of litigation. See *id.* As of August 31, 2019, the ADC has spent \$19.2 million on legal costs in the *Parsons v. Ryan* suit. Jimmy Jenkins, *Arizona Asking 9<sup>th</sup> Circuit to Invalidate Prison Health Care Fines*, KJZZ (Sept. 23, 2019, 4:58 PM), <https://kjzz.org/content/1185421/arizona-asking-9th-circuit-invalidate-prison-health-care-fines>.

270. *Incarceration*, OFF. DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration> (last visited Apr. 21, 2019).

prison with pre-existing health conditions.<sup>271</sup> An individual may enter prison with a pre-existing health condition and then be subjected to poor nutrition, inadequate hygiene, and restrictions of access to fresh air.<sup>272</sup> Additionally, they may be subjected to poor or nonexistent healthcare.<sup>273</sup> In a nationwide survey conducted in 2009,<sup>274</sup> “20.1% of state inmates . . . had received no medical examination since incarceration.”<sup>275</sup> While incarcerated in the United States, 28.9% of people stopped taking prescription medications that they were taking prior to incarceration, and following serious injury, 12% of those incarcerated were “not seen by medical personnel.”<sup>276</sup>

Society should care about the health of those incarcerated because at least 95% of people currently in state prisons will be released at some point.<sup>277</sup> In October 2018, 1,531 people were released from Arizona prisons.<sup>278</sup> Those incarcerated, although often out of sight, are not isolated from society, and by extension, from public health.<sup>279</sup> People coming home from incarceration bring their health with them—sometimes including unmanaged and untreated conditions such as hepatitis-C, tuberculosis, and HIV.<sup>280</sup> Additionally, previously incarcerated people will not have their best shot at reentry and avoiding recidivism if they are preoccupied with unaddressed health needs.<sup>281</sup>

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271. *Why Promote Prison Reform?*, UNITED NATIONS OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html> (last visited Apr. 21, 2019); *see also* Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 670 (Apr. 2009) (“[w]e estimate that nearly 500,000 inmates have a previously diagnosed mental condition.”).

272. *Why Promote Prison Reform?*, *supra* note 271.

273. *Id.*

274. While this study is from ten years ago, the information is still relevant because it is likely some of the participants are still incarcerated or were recently released.

275. *See also* Wilper et al., *supra* note 271, at 669.

276. *Id.*

277. NRRC Facts & Trends, NAT’L REENTRY RESOURCE CTR., <https://csgjusticecenter.org/nrrc/facts-and-trends/> (last visited Apr. 21, 2019).

278. *Institutional Population Movement Report*, ARIZ. DEP’T CORRECTIONS (Oct. 2018), [https://corrections.az.gov/sites/default/files/REPORTS/Stats/Oct2018/adc-inmate\\_stats\\_pop-movement\\_oct18.pdf](https://corrections.az.gov/sites/default/files/REPORTS/Stats/Oct2018/adc-inmate_stats_pop-movement_oct18.pdf).

279. *Why Promote Prison Reform?*, *supra* note 271.

280. Josiah D. Rich et al., *How Health Care Reform Can Transform the Health of Criminal Justice-Involved Individuals*, 33 NAT’L INST. OF HEALTH AUTHOR MANUSCRIPT 462, 464 (Mar. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4034754/pdf/nihms580088.pdf>; Steven Ross Johnson, *Prison Healthcare Systems Need Better Integration into the Community*, MODERN HEALTHCARE (Oct. 11, 2018, 1:00 AM), <https://www.modernhealthcare.com/article/20181011/NEWS/181019963>; Kamala Mallik-Kane & Christy A. Visser, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration* 1, 21, URB. INST. JUST. POL’Y CTR. (Feb. 2008), <https://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.PDF>.

281. *See* Section IV.A.1; *see also* Section IV.A.2.

### 1. Reducing Recidivism

Recidivism is the “tendency of a convicted criminal to reoffend.”<sup>282</sup> For many state and local governments, reducing recidivism is a goal on which they spend millions, and for good reason.<sup>283</sup> If each state reduced recidivism by 10%, the savings would amount to “hundreds of millions” of dollars annually.<sup>284</sup> When there is a successful reduction in recidivism, crime rates are lower and less money and resources are spent on incarceration and enforcement.<sup>285</sup> Therefore, reducing recidivism should be an ultimate goal of all governmental and public agencies.

Improperly treated underlying health issues contribute to recidivism.<sup>286</sup> One study found that formerly incarcerated people “with physical health conditions were more likely to be reincarcerated for parole violations” than their healthy counterparts.<sup>287</sup> According to the Office of Disease Prevention and Health Promotion (“ODPHP”), formerly incarcerated people have an “increased risk” of health issues.<sup>288</sup> Two factors that often contribute to recidivism are substance abuse and mental health concerns<sup>289</sup>—both of which can potentially be managed by proper healthcare.<sup>290</sup> Appropriate treatment and continuity of care through reentry can be preventative.<sup>291</sup> The ODPHP recommends “comprehensive health care services during incarceration,” as one significant way to improve the health of those incarcerated and to reduce future incarceration rates.<sup>292</sup>

### 2. Reentry for those with Health Concerns

Reentry into communities after time in prison is challenging.<sup>293</sup> Previously incarcerated individuals often need a job<sup>294</sup> and housing,<sup>295</sup> but have

282. *Recidivism*, OXFORD ENGLISH DICTIONARY (3d ed. 2009).

283. *Three Core Elements of Programs that Reduce Recidivism: Who, What, and How Well*, CSG JUST. CTR. (June 4, 2018), <https://csgjusticecenter.org/jr/posts/three-core-elements-of-programs-that-reduce-recidivism-who-what-and-how-well/>.

284. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 5.

285. *See id.*

286. *Id.*

287. Mallik-Kane & Visher, *supra* note 280, at 31.

288. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 5; *Incarceration*, *supra* note 270.

289. *See generally* William D. Bales et al., *Recidivism and Inmate Mental Illness*, 6 INT’L J. CRIMINOLOGY & SOC. 40 (2017), <https://www.lifescienceglobal.com/pms/index.php/ijcs/article/viewFile/4524/2557>.

290. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 5.

291. *Id.*

292. *Incarceration*, *supra* note 271.

293. *See* MIT, *Innovative Strategies to Reduce Recidivism and Help Prison Inmates Transition Back to Society*, PHYS. ORG. (May 11, 2017), <https://phys.org/news/2017-05-strategies-recidivism-prison-inmates-transition.html>.

294. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> (“[F]ormerly incarcerated people are unemployed at a rate of over 27%—higher than the total U.S. unemployment rate during any historical period, including the Great Depression.”).

limited resources and a criminal record.<sup>296</sup> Furthermore, many people still struggle with addiction or various forms of trauma.<sup>297</sup>

Barriers to reentry also exist because many formerly incarcerated individuals often lack health insurance and connections to community healthcare services.<sup>298</sup> Those with health issues struggle more with reentry than those without.<sup>299</sup> In a study performed in 2008, researchers compared the reentry experiences of previously incarcerated people who had health problems to those who did not.<sup>300</sup> They found that “those with physical health conditions were more likely to have trouble keeping housing and . . . mov[ed] around more often than other returning prisoners.”<sup>301</sup> This also affected employment—those reentering with physical health conditions had “less employment success” and “significantly lower” employment rates than those who reentered healthy.<sup>302</sup> This emphasizes why proper healthcare for those incarcerated is so imperative to giving people the best chance at successful reentry.

### **B. Non-Litigation Solutions**

#### *1. Bye-Bye Privatization, Hello Partnerships*

Privatization of prison healthcare contributes to the “recurring problem” of inadequate healthcare in prisons.<sup>303</sup> Not only are states using private companies to cut costs, and in turn cut corners to appropriate healthcare,<sup>304</sup> but with privatization, there is always a financial incentive.<sup>305</sup> ADC healthcare is a “capitation system.”<sup>306</sup> In a capitation healthcare system, a fixed amount is paid

295. Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> (“formerly incarcerated people are almost 10 times more likely to be homeless than the general public.”).

296. Mallik-Kane & Visher, *supra* note 280, at 14–16.

297. *See* MIT, *supra* note 293.

298. Mallik-Kane & Visher, *supra* note 280, at 23 (“Medicaid benefits are suspended during incarceration and the restoration of eligibility can take several months.”).

299. *See id.* at 1.

300. *See generally id.*

301. *Id.* at 25.

302. *Id.*

303. Issacs, *supra* note 74, at 4; Ira P. Robbins, *Managed Health Care in Prisons as Cruel and Unusual Punishment*, 90 J. CRIM. L. & CRIMINOLOGY 195, 196 (1999).

304. *See The Current State of Public and Private Prison Healthcare*, WHARTON: U. PENN (Feb. 24, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison>.

305. *See generally* Will Tucker, *Profits v. Prisoners: How the Largest US Prison Health Care Provider Puts Lives in Danger*, SPLC (Oct. 27, 2016), <https://www.splcenter.org/20161027/profits-vs-prisoners-how-largest-us-prison-health-care-provider-puts-lives-danger>. Corizon is now owned by a private equity firm that had \$22 billion in assets in 2018. *See* Elizabeth Weill-Greenberg, *Corizon, The Prison Healthcare Giant, Stumbles Again*, APPEAL (Feb. 8, 2019), <https://theappeal.org/corizon-the-prison-healthcare-giant-stumbles-again/>.

306. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 98.

per patient regardless of the patient's needs.<sup>307</sup> As a result, the level of care may be reduced in exchange for financial gain<sup>308</sup> or providers may be incentivized to see the "healthier" and "less time consuming" patients.<sup>309</sup> Capitation systems move all the risk to the healthcare contractor, consequently, in a for-profit model, it creates "an almost irresistible incentive to deny care."<sup>310</sup> Spending is less transparent in capitation systems.<sup>311</sup> In 2016, Corizon earned about \$1.4 billion in revenue. It had also been named as the defendant in "at least [660] malpractice lawsuits" from 2010–2015.<sup>312</sup>

The problem of privatization of prison healthcare is clear to many involved in *Parsons*.<sup>313</sup> In the contempt order, Judge Duncan explicitly drew attention to privatization and its risks:

The evidence suggests that the States' recalcitrance flows from its fear of losing its contracted healthcare . . . If a private contractor is pushed to the door because it cannot meet the State's obligations, then so be it. Such a result would flow directly from the state's decision to privatize health care to save money. That goal of privatization cannot be achieved at the expense of the health and safety of the sick and acutely ill inmates. Indeed, Arizona for most of its history, and many states, do not privatize their healthcare services. The Court must place a clear and focused light on what is happening here: the State turned to a private contractor which has been unable to meet the prisoner's health care needs. Rather than push its contractor to meet those needs, the State has instead paid

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307. Andrew Ruskin, *Capitation: The Legal Implication of Using Capitation to Affect Physician Decision-Making Processes*, 13 J. CONTEMP. HEALTH L. & POL'Y 391, 391 (1997).

308. See John D. Goodson et al., *The Future of Capitation: The Physician Role in Managing Change in Practice*, 16 J. GEN. INTERN MED. 250, 250–51 (2001) ("[a]mple evidence suggests that physicians respond to economic incentives in their practices. In fee-for-service (FFS) practices, physicians tend to order more tests, consultations, elective procedures, and hospitalizations . . . . In capitated practices, patients have fewer overall hospitalizations, see specialists less often, and may underuse quality monitoring for chronic illness while more intensively monitoring areas of potential overuse, such as cesarean delivery rates.").

309. Joanne Kenen, *Pros and Cons of Health Payment Reform: Capitation*, ASSOC. OF HEALTH CARE JOURNALISTS (July 14, 2016), <https://healthjournalism.org/blog/2016/07/pros-and-cons-of-health-payment-reform-capitation/>.

310. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 12–13; Weill-Greenberg, *supra* note 305 (quoting David Fathi, Director of the ACLU National Prison Project).

311. *Prison Healthcare: Costs and Quality*, *supra* note 44, at 13.

312. Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market>.

313. See Order and Judgment of Civil Contempt, *supra* note 23, at 20; Stern, *supra* note 250.



them more and rewarded them with financial incentives while limiting the financial penalties for non-compliance.<sup>314</sup>

The irony of privatization is that while it is justified as a cost-saving mechanism, in reality, healthcare spending for states has increased.<sup>315</sup>

However, some states have been seeking alternative options.<sup>316</sup> Four states have tried university partnerships with some success.<sup>317</sup> In Texas, the state prisons are in direct partnership with the universities.<sup>318</sup> This has revolutionized the health care system in Texas through telemedicine (doctors over video monitors) which is delivered by Texas Tech University and University of Texas Medical.<sup>319</sup> The New Mexico Department of Health has done this on a smaller scale with Project ECHO, a telemedicine program tailored to helping those diagnosed with hepatitis C, which is administered by the University of New Mexico.<sup>320</sup> However, the main concern with telemedicine is that the services are overused to replace, rather than supplement, in-person care.<sup>321</sup>

New York did not partner with its universities, but abandoned Corizon for the agency that now runs its public hospitals.<sup>322</sup> This was advantageous because it created continuity of care: many of those incarcerated, once released, could use the same provider they had in prison, making the transition easier.<sup>323</sup> This too is part of

314. *Id.*

315. *The Current State of Public and Private Prison Healthcare*, *supra* note 304; Isaacs, *supra* note 74, at 7, 9 (the first privatized healthcare contract in Arizona was awarded for more than was spent on healthcare in the prior year—although initially the legislature mandated that the contract be for less).

316. One very promising suggestion is that of the United States Public Health Service Commissioned Corps, which is a “uniformed medical civil service” that also responds in cases of epidemics and emergencies. Steve Coll, *The Jail Health-Care Crisis*, *NEW YORKER* (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis>.

317. *See id.* (This model has advantages but has not always been successful. In Connecticut, the correctional system took the health care administration back from the University of Connecticut for poor administration); *see also* Roxanne Squires, *Connecticut DOC Set to Take Over Inmate Healthcare from UConn*, *CORRECTIONAL NEWS* (Aug. 2, 2018), <http://correctionalnews.com/2018/08/02/connecticut-doc-set-take-inmate-healthcare-uconn/>.

318. Brian Heaton, *Texas Expanding Telemedicine Use for Inmates*, *GOV. TECH. MAG.* (Jan. 26, 2015), <http://www.govtech.com/health/Texas-Expanding-Telemedicine-Use-for-Inmates.html>.

319. *Id.*

320. *See generally* Sanjeev Arora et al., *Project ECHO: Linking University Specialists with Rural and Prison-Based Clinicians to Improve Care for People with Chronic Hepatitis C in New Mexico*, 122 *PUB. HEALTH REP.* 74 (2007).

321. Michael Ollove, *State Prisons Turn to Telemedicine to Improve Health and Save Money*, *GOV. TECH. MAG.* (Jan. 21, 2016), <http://www.govtech.com/health/State-Prisons-Turn-to-Telemedicine-to-Improve-Health-and-Save-Money.html>.

322. Maura Ewing, *Why New York Dropped Corizon*, *MARSHALL PROJECT* (June 11, 2015), <https://www.themarshallproject.org/2015/06/11/why-new-york-dropped-corizon>.

323. *Id.*

the solution—integrating prison health systems into the community through partnerships to ensure continuity of care post-release.<sup>324</sup>

### 2. *Non-Rural Prisons & Community Care*

The larger solution must go further than improving the quality of prison healthcare—it must also include improving access to “high-quality, community-based care,” which can “improve individual and community health while simultaneously reducing recidivism.”<sup>325</sup> Rural prisons pose challenges not only for in-prison healthcare,<sup>326</sup> but for out of prison services as well.<sup>327</sup>

One large reason so many partnerships are resorting to telemedicine is because the rural locations of many prisons impose burdens on physicians, especially specialists, who must travel to provide care.<sup>328</sup> Further, rural communities also pose a challenge for continuity of care.<sup>329</sup> Individuals returning to rural populations often do not have access to the same levels of government programs and healthcare services as those in urban areas.<sup>330</sup> They usually have to travel to city centers to receive this assistance, or they do not receive help at all.<sup>331</sup> This is not to say services in urban areas are sufficient to serve vulnerable populations;<sup>332</sup> rather, it illustrates the magnitude of the issue.

### 3. *Sentencing Schemes & The Role of Compassionate Release/Medical Parole*

An even larger issue is sentencing, and a sentence will dictate how long someone incarcerated may have to rely on prison healthcare. Mandatory minimums,<sup>333</sup> three-strike laws,<sup>334</sup> and other sentencing structures have expanded the prison population rapidly, and with very few opportunities to shorten a final

324. Johnson, *supra* note 280.

325. Rich et al., *supra* note 280, at 467.

326. See Noah Berger, *State Prisons and the Delivery of Hospital Care*, PEW (July 19, 2018), <https://www.pewtrusts.org/en/research-and-analysis/reports/2018/07/19/state-prisons-and-the-delivery-of-hospital-care>.

327. See generally Eric J. Wodahl, *The Challenges of Prisoner Reentry from a Rural Perspective*, 7 WESTERN CRIMINOLOGY REV. 32 (2006).

328. Michelle Andrews, *Telemedicine Opening Doors to Specialty Care for Inmates*, KAISER HEALTH NEWS (May 1, 2018), <https://khn.org/news/telemedicine-opening-doors-to-specialty-care-for-inmates/>.

329. Wodahl, *supra* note 327, at 35.

330. *Id.* at 34.

331. *Id.*

332. See *Access in Brief: Rural and Urban Health Care*, MEDICAID AND CHIP PAYMENT AND ACCESS COMM. 1 (Oct. 2018), <https://www.macpac.gov/wp-content/uploads/2018/10/Rural-Access-In-Brief.pdf>.

333. See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/blog/sentencing-laws-and-how-they-contribute-mass-incarceration-0>.

334. See *10 Reasons to Oppose “3 Strikes, You’re Out,”* ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> (last visited Apr. 19, 2019).

sentence.<sup>335</sup> The more people in prison, the more healthcare services the prison has to provide—yet the quality of care has to remain constitutional for each and every person.

“Accelerated aging” is the proposition that people, especially those over the age of 50, age faster in prison.<sup>336</sup> Studies have found that the health of people incarcerated over 50 deteriorates quickly—with one study finding that 51 people incarcerated had health conditions comparable to those outside of prison at an age 15 years older than them.<sup>337</sup> Further, “estimates are that older prisoners cost between three to nine times more per prisoner to incarcerate than younger ones.”<sup>338</sup>

Different states have different sentencing reprieves, such as “medical parole” and “compassionate release,” which are designed to address the aging prison population.<sup>339</sup> In theory, these mechanisms allow low-risk people in prison who have severe health needs to finish their sentences early.<sup>340</sup> However, the sentencing reprieves are rarely used.<sup>341</sup> Arizona, which has statutory compassionate leave,<sup>342</sup> had six people apply for compassionate release in 2015; one was recommended to the governor for release, and that one person was released.<sup>343</sup>

What Arizona does not have, which other states have adopted, is a statutory age limit for those in prison.<sup>344</sup> In some states, people incarcerated are eligible for parole once they reach a certain age, or reach a certain age and have served a particular amount of time.<sup>345</sup> Many of these laws seem to acknowledge

335. See *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Apr. 19, 2019).

336. Maurice Chammah, *Do You Age Faster in Prison?: Science Tries to Catch Up With The Problem of ‘Accelerated Aging.’*, MARSHALL PROJECT (Aug. 24, 2015), <https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison>.

337. *Id.*

338. Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM) 1, 9 (June 2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf>.

339. See Andreas Mitchell & Brie Williams, *Compassionate Release Policy Reform: Physicians as Advocates for Human Dignity*, 19 *AMA J. ETHICS* 854, 855 (Sept. 2017).

340. Chammah, *supra* note 336.

341. Tina Maschi, *The State of Aging: Prisoners and Compassionate Release Programs*, HUFF. POST (Oct. 23, 2012), [https://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners\\_b\\_1825811.html](https://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners_b_1825811.html).

342. ARIZ. REV. STAT. § 31-233, ARIZ. REV. STAT. § 41-1604.11, ARIZ. DEPT. CORRECTIONS, <https://corrections.az.gov/release-types> (last visited Apr. 19, 2019).

343. Two applications had not been decided by the end of the year and before the publication of the data. Gina Barton, *Release Programs for Sick and Elderly Prisoners Could Save Millions. But States Rarely Use Them*, J. SENTINEL (Apr. 18, 2018), <https://projects.jsonline.com/news/2018/4/18/release-programs-for-sick-elderly-prisoners-could-save-millions.html>.

344. Price, *supra* note 338, at 28.

345. *Id.*

the concept of accelerated aging, as some laws set the age at 45 or 55.<sup>346</sup> These laws make rational sense from a public safety perspective because research shows that there is a relationship between age and crime and that criminality decreases as people age.<sup>347</sup>

The use of compassionate release or adoption of an age limit could significantly assist the ADC in complying with their constitutional duty of care under *Estelle* because if substantial use was made of these mechanisms, the number of people that the ADC would be responsible for (and likely who require substantial care) would decrease.

### CONCLUSION

Providing healthcare to incarcerated persons is not a choice—it is a constitutional mandate. Yet the choices policymakers and institutions make have severe impacts on those coming home from incarceration. Litigation that forces states, legislators, and institutions to take a hard look at themselves can expedite necessary systemic change.<sup>348</sup> The plaintiff class in *Parsons* is doing just that. They are reminding those who prioritize cutting costs over providing care that the Constitution extends to even those on the margins, and they give voice to the voiceless.

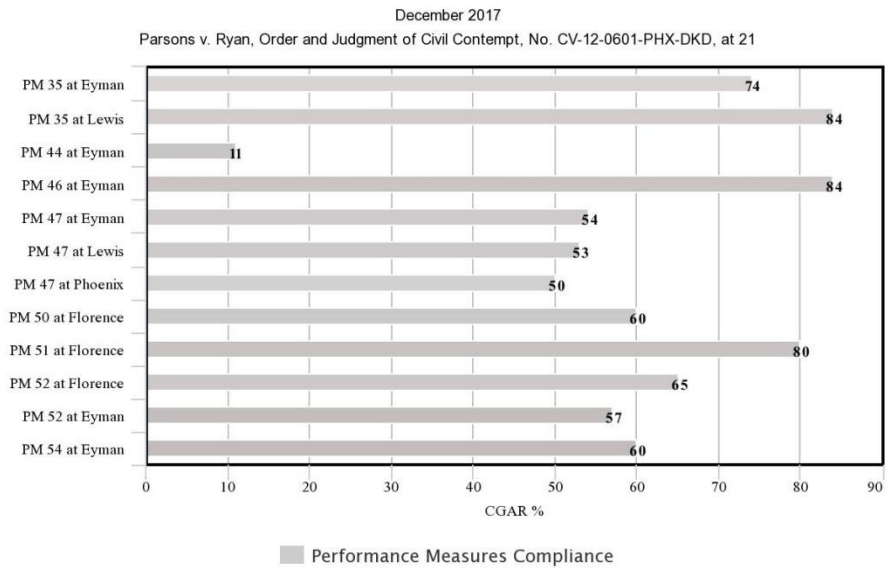
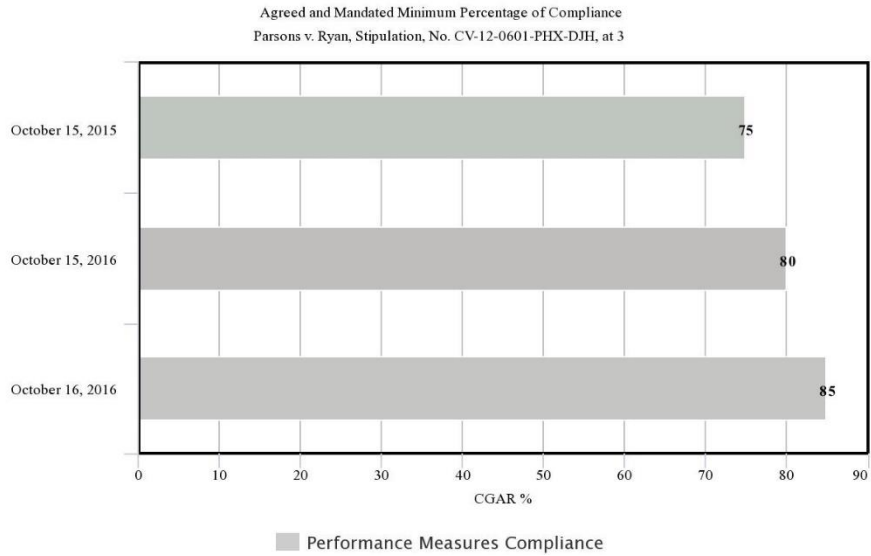
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346. *Id.* at 28, 30.

347. See Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 337 (Kevin M. Beaver et al, eds., SAGE 2014); see also Caitlin V. M. Cornelius et al., Christopher J. Lynch, & Ross Gore, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling* 1, 2 (2017), [http://scs.org/wp-content/uploads/2017/06/6\\_Final\\_Manuscript.pdf](http://scs.org/wp-content/uploads/2017/06/6_Final_Manuscript.pdf).

348. In January of 2019, the ADC announced that a new private provider, Centurion Managed Care, would be taking over the prison healthcare system in July of 2019. See Lauren Castle, *A Month Before Dying, Inmate Accused Arizona Prison of Poor Medical Treatment*, AZ CENTRAL (Feb. 19, 2019, 11:19 AM), <https://www.azcentral.com/story/news/local/arizona/2019/02/19/arizona-inmate-accuses-prison-poor-healthcare-month-before-dying-department-of-corrections/2851932002/>.

APPENDIX<sup>349</sup>



349. Order and Judgment of Civil Contempt, *supra* note 23, at 21–23.