

FINDING THE CIVIL TRIAL’S DEMOCRATIC FUTURE AFTER ITS DEMISE

David Marcus*

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* Professor of Law, University of Arizona James E. Rogers College of Law. Many thanks to Jason Kreag, Toni Massaro, Nina Rabin, Chris Robertson, my colleagues at the University of Arizona, and participants at the festschrift held in honor of Steve Subrin at Northeastern University for comments on earlier drafts. Prof. Subrin’s scholarship and collegiality have been models for many of us in the civil procedure community to emulate. I am very grateful to Thom Main for inviting me to help celebrate his life and work.

INTRODUCTION

Steve Subrin is the chronicler *par excellence* of the American procedural past. His histories of the Field Code and the origins of the Federal Rules of Civil Procedure know no equal.¹ The extent to which Prof. Subrin's work occupies the field would be frustrating to an aspiring historian of American civil procedure, were he not such a uniquely kind and generous colleague. I will not, however, dwell on Prof. Subrin's unmatched achievements as a legal historian in my contribution to this festschrift celebrating his career.² Rather, I mention this scholarship to support a claim. If those who know history best understand the present, then Prof. Subrin is a particularly good interpreter of American civil procedure's current era.

I wish it were otherwise because Prof. Subrin has surveyed our procedural present and does not like what he sees.³ Since the 1970s, changes to the American procedural system have "eviscerated the core values of the Federal Rules, namely simplicity, uniformity, access to courts, decisions on the merits, and attorney latitude."⁴ According to Prof. Subrin's critique, today's procedural doctrine fails to vindicate claims accurately and reliably, denies litigants opportunities to participate, and undermines core duties and commitments of our three branches of government.⁵

To Prof. Subrin, one of the current era's worst developments is the disappearance of the civil trial, a phenomenon he has lamented with passion for decades.⁶ The civil trial's demise should cause alarm for many reasons, Prof. Subrin believes, but chiefly for the harm it inflicts on American democracy.⁷ When juries decide cases, elites lose their stranglehold on legal power and citi-

¹ Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115 (Peninah R. Y. Petruck ed., 1991); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

² My own historical work reflects his influence. See, e.g., David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 387–90 (2010) (citing Subrin's work).

³ See generally Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

⁴ *Id.* at 1856.

⁵ *Id.* at 1887–90.

⁶ *Id.* at 1875–77; Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 95 (1997) [hereinafter Subrin, *Uniformity*].

⁷ Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011) (arguing that "[i]f one believes in the underlying values of American democracy" that the disappearance of the civil jury trial is "deeply troubling").

zens gain entry to a unique forum for civic education.⁸ These benefits disappear with the trial's decline, leaving behind an impoverished procedural system.

Prof. Subrin believes that “[c]ivil litigation and democracy should be, and they can be, mutually reinforcing.”⁹ If this is so, then procedural designers should identify ways to resurrect the civil trial. Prof. Subrin has done his part, suggesting a set of reforms devised to boost the rate at which small-scale private law cases go to trial. I describe and briefly critique his proposal in part I. I question whether the sort of interventions Prof. Subrin has proposed will send enough civil cases to trial to achieve the sort of goals he rightfully champions.

Still, Prof. Subrin has made a compelling case that procedural doctrine should shoulder a democratic agenda, and that the civil trial can further this agenda well. I thus extend Prof. Subrin's search for the civil trial's future and, with it, the democratic contributions that civil procedure can make to other corners of litigation. At the opposite end of the procedural spectrum from Prof. Subrin's small-scale private law affairs are large structural reform lawsuits. I argue in part III that these cases may be the best place to look for trial and its benefits going forward. Structural reform trials can facilitate pro-democratic judicial review, create uniquely important moments of accountability for government officials, and spur political engagement outside the courtroom. These cases will always remain a small part of the American civil docket, but their subject matter has such public significance that trials in them can particularly affect the workings of representative government. Moreover, while the overall civil trial rate may be hard to budge, a modest change to judicial practice may produce more trial-type proceedings in structural reform cases. I draw inspiration for these claims from a case study I provide in part II, where the heart of this article lies. *Graves v. Arpaio*, a class action challenging conditions in jails run by Arizona's notorious Sheriff Joe Arpaio, went to trial in August 2008. Its labyrinthine history illuminates the democratic rewards that trials in structural reform cases can produce.

Prof. Subrin celebrates the anti-elitist and civic engagement benefits of jury trials, goods that bench trials in structural reform cases cannot generate. In fact, these cases often highlight some of the phenomena, including enhanced judicial power, that Prof. Subrin faults as anti-democratic when they surface in smaller cases. It may be time, though, to remember the civil trial in modest cases as a procedural relic of a bygone era. If so, structural reform litigation may prove the most fertile ground for this distinctive process, and, going forward, structural reform trials may make different but nonetheless important contributions to American democracy.

⁸ Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 36 (1994) [hereinafter Subrin, *Fudge Points*].

⁹ Burbank & Subrin, *supra* note 7, at 402.

I. THE DISAPPEARING CIVIL TRIAL AND PROF. SUBRIN'S RESPONSE

Prof. Subrin believes that our procedural system, if properly designed, can improve American government by “adding legitimacy and stability to government and society,” “permitting citizens to partake in governance,” “restraining or enhancing power,” and “enhancing human dignity.”¹⁰ Of all the system’s constituent processes, the civil trial can serve these goals with distinctive success. Its efficacy results chiefly from juror participation. Jury trials temper elite control of legal processes and offer intense moments for civic education. In Prof. Subrin’s words, these trials “add legitimacy to our process by engaging a wider spectrum of the population”; they “counter-balance” the power judges wield “by providing community input and permitting dialogue between many citizens”; they educate citizen-jurors “in the values of democracy, law, and governance”; they introduce citizens to others in their community with whom they might otherwise lack contact;¹¹ and they give “the citizenry at large” the power to “decide[] what the community deems acceptable” as “legitimate behavioral norms.”¹²

If the civil trial can deliver all of these benefits, then its near-disappearance should cause worry.¹³ This demise has attracted much comment and only needs a brief summary here. In 1962, trial verdicts accounted for 11.5 percent of all civil case dispositions.¹⁴ By 1982, this figure had fallen to 6.1 percent.¹⁵ As of the turn of the century, only about 2 percent of civil cases ended with a trial verdict,¹⁶ and the American civil litigator averages under one trial per year.¹⁷

Prof. Subrin believes that this demise partly results from litigation inefficiencies fueled by the Federal Rules’ needless procedural burdens and complexity. The Federal Rules do not stop a lawyer from using scorched-earth liti-

¹⁰ Stephen N. Subrin, *On Thinking About a Description of a Country’s Civil Procedure*, 7 TUL. J. INT’L & COMP. L. 139, 140 (1999). The complete list includes the following:

(1) resolving and ending disputes peacefully; (2) efficiency; (3) fulfilling societal norms through law-application; (4) accurate ascertainment of facts; (5) predictability; (6) enhancing human dignity; (7) adding legitimacy and stability to government and society; (8) permitting citizens to partake in governance; (9) aiding the growth and improvement of law; (10) restraining or enhancing power.

Id.

¹¹ STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 256–57 (2006); *see also* Burbank & Subrin, *supra* note 7, at 402. For similar sentiments, *see* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 113–33 (2009); Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America’s Social Capital*, 2006 J. DISP. RESOL. 165 (2006); Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT’L L. 79 (2003).

¹² Burbank & Subrin, *supra* note 7, at 402.

¹³ SUBRIN & WOO, *supra* note 11, at 240–41.

¹⁴ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 (2004).

¹⁵ *Id.*

¹⁶ *Id.* at 463.

¹⁷ ABA SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 19 (Dec. 11, 2009).

gation tactics to bludgeon adversaries into settlements.¹⁸ Indeed, the Federal Rules force even parsimonious lawyers into activity, such as mandatory disclosure, that generates costs but often does little to improve the accuracy of case outcomes.¹⁹ As a result, as Prof. Subrin lamented decades ago, the Federal Rules have turned “[p]artners, associates, paralegals, secretaries, office managers, experts, photocopying machines, magnetic tapes and computers” into “platoons poised to attack, defend and counterattack.”²⁰ Parties feel compelled to settle, and judges exert more control in an effort to contain excessive litigation. This case management, enabled by the “unbridled discretionary power” the Federal Rules afford judges,²¹ can “exacerbate the disease” by increasing litigation activity, and thus costs, even further.²² Judges push the parties to settle,²³ and they contort dismissal and summary judgment doctrine to expand their power to dispose of cases before trial.²⁴

For as long as Prof. Subrin has complained of trial-killing tendencies in the Federal Rules, he has dreamt of a solution.²⁵ Rather than have a single set of rules apply regardless of case size, a tailored set of procedures should govern “simple track” cases, a category of mostly common law disputes involving less than \$500,000 in controversy.²⁶ A recent iteration of Prof. Subrin’s proposal describes the following procedures:

A simple track would set a trial date shortly after commencement that is perhaps no more than six or nine months from the date the answer is filed. A discovery cut-off date would be set at the same time. There would be only one required conference, to set the discovery-cut-off date and the firm trial date, and perhaps even this could be dispensed with if presumptive time standards were established. There would be limits on discovery for all cases on the simple track. Whether that would be two or three depositions, each one lasting no more than three or four hours, and ten or fifteen interrogatories, would be up to the drafters [of the simple track rules]. The length of time before trials and discovery cut-off dates should also be left to the drafters, but it is important that once the dates and limitations are decided upon, they be kept firm, except for very good cause

¹⁸ Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 387 (2010) [hereinafter Subrin, *Limitations of Transsubstantive Procedure*].

¹⁹ *Id.* at 389.

²⁰ Stephen N. Subrin, *The Law and the Rules*, N.Y. TIMES, Nov. 10, 1979, at 23.

²¹ Subrin, *Fudge Points*, *supra* note 8, at 36.

²² Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 389.

²³ Subrin, *Uniformity*, *supra* note 6, at 94.

²⁴ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 390.

²⁵ “Dreamt” is an apt word. Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 173, 182 (2007) [hereinafter Subrin, *Reflections*] (describing “simplified procedure” as a “dream”).

²⁶ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 398–400; Burbank & Subrin, *supra* note 7, at 409–11. Subrin would exempt cases involving “the private enforcement of public law,” or those brought to vindicate statutory rights of action, from his proposal. *Id.* at 411. Hence, the impact would be confined to common law disputes.

shown. . . . The drafters of the simple track should consider requiring more specificity for document requests than is currently the norm²⁷

In addition, a notice pleading standard would govern complaints for cases on the simple track, and the “simple track” rules would exempt parties from initial disclosures requirements.²⁸

As intended, these “simple track” procedures would reduce litigation inefficiencies by restricting discovery and decreasing the work associated with mandatory pretrial conferences. Focused on the merits by the early trial date, litigators would eschew tangentially important discovery and marginally useful motion practice.²⁹ The “simple track” procedures would protect against the buildup of settlement pressure that litigation inefficiencies produce. Judges would have less to manage, both because the “simple track” procedures would require less stewardship, and because the discovery restrictions would minimize conflicts requiring a referee. Freed from having to deal with discovery disputes and other tedious housekeeping matters, judges would be less tempted by “trial-aborting procedural devices,” such as summary judgment and Rule 12(b)(6) dismissals.³⁰ Trial would become “an economically realistic option in substantially more cases.”³¹ Trials would again enable civil litigation to reinforce democracy.³²

Several recurring themes emerge from Prof. Subrin’s evaluation of the jury trial’s benefits, his diagnosis of what has caused its decline, and his prescription of simple track procedures as a remedy. Juror empowerment expands civil procedure’s democratic potential. Inefficiency generated by wasteful, unhelpful litigation has decreased the trial rate and denudes the contributions procedure can make to representative government. Judicial power, manifested as extensive case management and the enlarged exercise of decisional authority, results from this inefficiency and exemplifies the anti-democratic turn in the American procedural system. Significant, but not transformative, rule changes can boost the rate at which small-scale cases go to trial and thereby help civil procedure reclaim some of its lost capacity to contribute to American democracy.

If this summary of Prof. Subrin’s work is accurate, then my suggestion that one look for democratic benefits in structural reform trials might seem to misfire. These cases rarely empower jurors as decisionmakers³³ and instead vest

²⁷ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 399.

²⁸ Burbank & Subrin, *supra* note 7, at 409–11.

²⁹ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 399. *Cf.* Subrin, *Uniformity*, *supra* note 6, at 96 (discussing the utility of an early trial date in producing litigation efficiencies).

³⁰ Burbank & Subrin, *supra* note 7, at 413; *see also* Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 404.

³¹ Burbank & Subrin, *supra* note 7, at 414.

³² *Id.*

³³ For an example of a judge empaneling an advisory jury in a significant injunctive relief case, see *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 396–97 (E.D.N.Y. 2002). For a

judicial elites with a sizeable endowment of both decisional authority and managerial discretion. Moreover, structural reform cases are “statistical rarities.”³⁴ Even if all went to trial, the overall civil trial rate would hardly budge.

Nonetheless, for a couple of reasons, a search in big cases for the future of trial as a pro-democratic process makes sense. First, Prof. Subrin’s proposal, if implemented, might not work. As Steven Gensler and Judge Lee Rosenthal observe, “[t]he vast majority of cases are going to settle for reasons that are not tied to how the judge conducts the pretrial process.”³⁵ Empirical data on attorney behavior are consistent with this observation. Most of the time lawyers keep litigation costs in check, even without rules requiring them to do so, and judges tend to be excessively absent from civil litigation, not overbearingly managerial.³⁶ Lowering costs and minimizing judicial involvement through rule changes, in other words, may not change the civil trial’s status quo. In his most recent article, a magisterial study and critique of our current procedural era, Prof. Subrin identifies a range of political and cultural causes of the trial’s demise.³⁷ These forces are more likely culprits for the development Prof. Subrin regrets, and they probably exceed the capacity of procedural rule changes to counter. Second, even if Prof. Subrin’s simple track proposal could boost the civil trial rate, the result would be citizen jurors engaged exclusively with small-scale, private law matters. Few would ask jurors to decide issues of high political or policy salience.

Large-scale structural reform cases against government defendants are small in number compared to the common law disputes Prof. Subrin targets with his simple track proposal. But a trial in even one of them might promise a good deal of democratic bang for the litigation buck, albeit of a different sort than what small jury trials can generate. I argue that this is so in part III.

discussion of the right to a jury trial in injunctive relief cases, see *New York v. Beretta U.S.A. Corp.*, 317 F. Supp. 2d 193, 195 (E.D.N.Y. 2004).

³⁴ Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511 (1986).

³⁵ Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 867 (2013).

³⁶ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY 35, 42, 75 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); see also Steve Subrin, Ashcroft v. Iqbal: *Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 579 (2012) (“There is no evidence that discovery is an unreasonable burden in the vast majority of cases. In fact, the evidence is to the contrary: discovery works well (or is not used at all) in most cases, and where used is commensurate to the stakes involved.”). Prof. Subrin acknowledges these data. Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 392 (commenting on data that suggest that “lawyers . . . are effectively sorting cases on a case-size basis, despite the transsubstantive nature of the Rules”); Subrin, *Reflections*, *supra* note 25, at 183 (“[I]t looks like lawyers are by themselves [and/or at the prodding of clients] making intelligent decisions about how much discovery is appropriate.”).

³⁷ Subrin & Main, *supra* note 3, at 1856–70. Cf. BURNS, *supra* note 11, at 88–108 (discussing suggested explanations).

II. THE CIVIL TRIAL AND STRUCTURAL REFORM: THE MARICOPA COUNTY JAILS EXAMPLE

My case study of *Graves v. Arpaio*, provided in this part, lays a foundation for my claims about American democracy and the structural reform trial. The case involves a constitutional challenge to the conditions of jails in Maricopa County, Arizona, institutions run by the infamous Sheriff Joe Arpaio. The plaintiffs, a class of pretrial detainees, established the defendants' liability after what amounted to a bench trial in Autumn 2008, but not before nearly a decade of courtroom fights with an adversary famous for his stubborn refusal to compromise or cooperate. The story unfolds at some length, in part because I believe it is a good one, in part because the case itself has gone on for so long, and in part because it has a lot of relevant lessons to teach. The case's history divides into three phases. The first lasted from 1977 to 1981. The second, a period of gridlock, began in 1998 and continued for ten frustrating years. The third lasted for only a few months in 2008 before ending in trial. This final phase demonstrates the efficacy that aggressive case management and trial can have in the face of recalcitrant political power.

A. *The Maricopa County Jails and America's Toughest Sheriff*

1. *The Early History of Maricopa Jails Litigation*

Graves v. Arpaio began as *Hart v. Hill* in 1977, when lawyers for the Maricopa County Legal Aid Society filed the initial complaint in the federal District of Arizona.³⁸ Commenced during the heyday of prison reform litigation,³⁹ the case challenged a range of conditions. Among other allegations, the plaintiffs complained that officials running the Maricopa County jails had interfered with inmate mail, denied them use of telephones, forced them to listen to lengthy religious broadcasts over the public address system, failed to provide them access to legal materials, placed them in overcrowded and dirty cells, fed them inadequate food, and provided them inadequate medical care.⁴⁰

The case was assigned to Earl Carroll, who certified it as a class action.⁴¹ After a couple of years of litigation, the parties agreed to enter into a consent decree toward the end of 1980.⁴² Judge Carroll held a fairness hearing in February 1981 and issued a judgment incorporating the parties' agreement a month

³⁸ Complaint, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 16, 1977).

³⁹ MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 39 (2000).

⁴⁰ Complaint, *supra* note 38.

⁴¹ Memorandum and Order at 5, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Aug. 1, 1978).

⁴² Stipulation and Agreement, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Dec. 8, 1980).

later.⁴³ The consent decree required a litany of changes to improve the lot of Maricopa County inmates, ranging from limits on inmate populations⁴⁴ to improvements in food quality⁴⁵ to better healthcare services.⁴⁶ Read thirty years hence, some of the consent decree's provisions stand out, given how flagrantly the county would renege upon them in the future. These include, for example, the county's agreement "to provide detainees with heating and cooling systems . . . necessary to provide healthful and comfortable living conditions,"⁴⁷ and its agreement "to provide a receiving screening of detainees prior to placement in the general population" to identify those needing medical care.⁴⁸

Judge Carroll retained jurisdiction to monitor compliance with the decree.⁴⁹ The rest of the 1980s witnessed some skirmishing over the county's compliance and the plaintiffs' fees.⁵⁰ By the end of the decade, filings amounted mostly to routine requests to override provisions of the consent decree for short periods of time or reports from the court-ordered monitor.⁵¹ In January 1995, Judge Carroll signed an amended judgment, replacing the 1981 consent decree. This amended judgment indicated that Judge Carroll would put an end to his monitoring of jail conditions, although he retained jurisdiction to enforce compliance with the judgment's specific terms.⁵²

2. Sheriff Joe and the Prison Litigation Reform Act

The Maricopa County jails litigation took a fateful turn when Joe Arpaio, "America's toughest sheriff," arrived on the scene.⁵³ He first won election to serve as Maricopa County's sheriff in 1992, and voters have returned him to office five times since then.⁵⁴ Arpaio has aggressively exploited nativist, anti-big government resentment to achieve international notoriety.⁵⁵ He received his first wave of national attention in 1993 when he erected a "tent city jail" in

⁴³ Judgment, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Mar. 16, 1981).

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 18.

⁴⁶ *Id.* at 12–14.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 2.

⁵⁰ Civil Docket at entries 215–374, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz.).

⁵¹ *Id.* at entries 453–92.

⁵² Amended Judgment at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Jan. 9, 1995).

⁵³ JOE ARPAIO & LEN SHERMAN, *JOE'S LAW: AMERICA'S TOUGHEST SHERIFF TAKES ON ILLEGAL IMMIGRATION, DRUGS, AND EVERYTHING ELSE THAT THREATENS AMERICA* (2008).

⁵⁴ Joe Hagan, *The Long, Lawless Ride of Sheriff Joe Arpaio*, ROLLING STONE (Aug. 2, 2012); Joseph Serna, *Sheriff Joe Arpaio, Illegal Immigration Hardliner, Reelected*, L.A. TIMES, Nov. 6, 2012.

⁵⁵ From early in his tenure, Arpaio made no secret of his dogged pursuit of publicity. See, e.g., Louis Sahagun, *A Maverick Lays Down the Law*, L.A. TIMES, Aug. 9, 1994, at A1 (quoting Arpaio as criticizing his critics as "jealous" because "I'm getting all the publicity"); see also Hagan, *supra* note 54 (describing Arpaio's love of publicity).

Phoenix, ostensibly to ease prison crowding,⁵⁶ but also to cause inmates discomfort.⁵⁷ Temperatures in these tents during the long Phoenix summers have exceeded 140 degrees.⁵⁸

Other publicity-grabbing measures soon followed. Arpaio banned erotic magazines, cigarettes, and coffee;⁵⁹ he refused to screen anything but G-rated movies for inmates;⁶⁰ and, perhaps most notoriously, he required inmates to wear pink underwear.⁶¹ The tone Arpaio set hardly helped improve the conditions covered by the 1981 consent decree.⁶² A 1996 U.S. Department of Justice (“DOJ”) investigation discovered “routine abuse” of prisoners,⁶³ and, after the death of an inmate, an Amnesty International report documented at least a dozen instances of the ill-treatment or use of excessive force on inmates.⁶⁴ In 1997, a year when an Iceland judge refused to extradite a couple to Maricopa County on account of the jails’ “barbaric conditions,”⁶⁵ a federal investigation ended when Arpaio agreed to end the use of excessive force on inmates.⁶⁶ In 1999, he settled a lawsuit brought by the DOJ Civil Rights Division over allegations of constitutionally inadequate medical care for inmates.⁶⁷

During the first few years of Arpaio’s tenure, the Maricopa County jails remained subject to the 1995 amended judgment. On April 8, 1998, however,

⁵⁶ Paul Leavitt, *Weather Went to Extremes in July*, USA TODAY, Aug. 4, 1993, at 3A. Groups of five or more adults can schedule a tour of the “internationally famous Tents Jail.” Prospective tourists are advised that they must wear “business casual” attire. See MARICOPA COUNTY SHERIFF’S OFF., *Jail Information: Tent City Jail*, <http://www.mcso.org/jailinformation/tentcity.aspx> (last visited Apr. 28, 2015).

⁵⁷ Touting his plan, Arpaio complained that “jails are too much like country clubs.” Leavitt, *supra* note 56.

⁵⁸ Eugene Scott, *Temperatures Rise to 145 Inside Tent City*, ARIZ. REPUBLIC, July 3, 2011, at B4. Asked to comment, Arpaio said, “[w]hat am I going to do, take them out of jail because it’s too hot?” *Id.*

⁵⁹ *No-Frills Jail Gets Tougher: No More Coffee*, N.Y. TIMES, Dec. 4, 1994, at 28.

⁶⁰ Judi Villa, *Sheriff Bans R-Rated Movies for Jail Inmates*, ARIZ. REPUBLIC (Dec. 9, 1993, 3:18 PM), <http://www.azcentral.com/news/articles/1993/12/09/19931209joe-arpaio-bans-movies.html>.

⁶¹ *State Plan to Stop Jail Underwear Theft Has Phoenix Sheriff Tickled Pink*, SAN ANTONIO EXPRESS-NEWS (Sept. 21, 1995).

⁶² One little but telling issue: notwithstanding the decree’s requirement that the county feed inmates adequately, Arpaio fed them green bologna. Sue Anne Pressley, *Sheriff’s Specialty: Making Jail Miserable*, WASH. POST, Aug. 25, 1997, at A01.

⁶³ *Is This Man Amusing Anymore?*, N.Y. TIMES, July 28, 1996, <http://www.nytimes.com/1996/07/28/magazine/sunday-july-28-1996-law-enforcement-is-this-man-amusing-anymore.html>.

⁶⁴ AMNESTY INT’L, UNITED STATES OF AMERICA: ILL-TREATMENT OF INMATES IN MARICOPA COUNTY JAILS, ARIZONA 2 (1997), available at <http://www.refworld.org/docid/3ae6a98520.html>.

⁶⁵ Pressley, *supra* note 62.

⁶⁶ Dennis Wagner & Jerry Kammer, *Arpaio Is Happy Jail Probe Is Over*, ARIZ. REPUBLIC (Nov. 1, 1997, 12:10 PM), <http://www.azcentral.com/news/articles/1997/11/01/19971101joe-arpaio-jail-probe.html>.

⁶⁷ Plaintiffs’ Motion to Compel Production of Documents at Exhibit A, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Oct. 10, 2006).

Arpaio moved under the recently enacted Prison Litigation Reform Act (“PLRA”) to terminate the consent decree.⁶⁸ The Maricopa County jails litigation had never really ended, since Judge Carroll’s supervision remained ongoing. Hence the District of Arizona clerk’s office sent Arpaio’s 2001 motion to Judge Carroll and Magistrate Judge Morton Sitver, who had worked with Judge Carroll during the litigation’s first phase in the 1970s.

Enacted in 1995, the PLRA authorizes a defendant to move to terminate any “prospective relief” governing prison conditions, including relief obtained in litigation concluded before the statute’s enactment.⁶⁹ Lawyers for the inmates challenged this provision of the PLRA as unconstitutional, and Judge Carroll agreed.⁷⁰ But the Ninth Circuit reversed, and on September 25, 2001, Arpaio renewed his motion to terminate.⁷¹

This date had enormous significance for the governance of Maricopa County jails. Although Judge Carroll initially denied the motion without prejudice pending an evidentiary hearing on jail conditions, the September 25, 2001 filing triggered the PLRA’s automatic stay provision. The statute provides that a motion to terminate “shall operate as a stay” of a prison conditions remedy, beginning thirty days after filing and ending upon the entry of a final order deciding the motion.⁷² In other words, although Judge Carroll had yet to decide whether the Maricopa County jails had improved sufficiently to justify an end to judicial supervision, the motion’s mere filing freed Arpaio’s jails from decades of federal control. So long as the motion to terminate remained pending, the plaintiffs could not enforce the amended judgment, regardless of how bad conditions got.

B. *Gridlock*

1. *The Judiciary*

For the next six years, *Graves v. Arpaio* stalled, and the Maricopa County jails remained outside judicial supervision. The litigation sputtered along for a couple of years after 2001, with a smattering of motion practice but no real discovery.⁷³ Judge Carroll heard one day of testimony on November 25, 2003, and

⁶⁸ *Graves v. Arpaio*, No. CV-77-0479-PHX-NVW, 2008 WL 4699770, at *1 (D. Ariz. Oct. 22, 2008).

⁶⁹ 18 U.S.C. § 3626(b)(2) (2012); *see also* *Gilmore v. California*, 220 F.3d 987 (9th Cir. 2000) (extensively discussing the termination provision).

⁷⁰ *Graves*, 2008 WL 4699770, at *1.

⁷¹ *Id.*

⁷² 18 U.S.C. § 3626(e)(2) (2012); *see also* *Miller v. French*, 530 U.S. 327, 349 (2000) (upholding as constitutional the automatic stay provision).

⁷³ None of the docket entries between September 25, 2001, and November 25, 2003, reflects any discovery. *Graves v. Arpaio*, No. CV-77-0479-PHX-NVW, 2008 WL 4699770, at *1–2 (D. Ariz. Oct. 22, 2008).

another on January 22, 2004.⁷⁴ The case then ground to a complete halt.⁷⁵ In fact, the plaintiffs would complain in 2008 that “virtually nothing . . . [has] occurred” since the January 2004 hearing day.⁷⁶ (By point of comparison, Judge Carroll stewarded the first phase of litigation from filing to consent decree in less than four years.)

Both the judges assigned to the case and the defense counsel bear responsibility for this gridlock. Neither Judge Carroll nor Judge Sitver pushed the case along with any energy, a lassitude that the defense counsel exploited. By early 2008, seven fully briefed motions awaited decision, including ones on matters as routine as a request for a status conference. Several of these motions had been pending for well over a year.⁷⁷ In a couple of instances, the judges expressed some impatience with the plaintiffs. At one point, Judge Carroll pointedly questioned the plaintiffs’ lawyers over the fees that they would seek if successful.⁷⁸ Another episode went more to the case’s merits. On January 24, 2005, an inmate with diabetes named Deborah Ann Braillard died after going seventy hours without insulin.⁷⁹ Braillard had a lengthy arrest record, and she had received insulin during previous jail stints.⁸⁰ This time, however, shoddy record-keeping practices kept jail staff in the dark about her diabetes during her intake.⁸¹ Braillard pleaded for help as her health deteriorated, and friends tried to notify the jail of her condition.⁸² But officers mistook her distress for symp-

⁷⁴ *Graves*, 2008 WL 4699770, at *2. The hearing testimony came from Arpaio’s witnesses. See *Graves v. Arpaio*, No. 2:77-cv-00479-NVW, at *9–12 (D. Ariz. Sept. 30, 2005).

⁷⁵ On July 29, 2005, for example, plaintiffs listed the following undecided motions, among others: a motion for court-appointed experts (fully-briefed for eighteen months); a motion to compel defendants to allow expert inspections (fourteen months); a motion to quash deposition subpoenas (twelve months); a motion to compel the production of documents (twelve months); and a motion for leave to file declarations of class members (seven months). Pending Motions Notification Pursuant to D. Ariz. L. R. Civ. 7.2(I), *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. July 29, 2005).

⁷⁶ Plaintiffs’ Motion for Expedited Consideration of Motion for Appointment of Class Counsel and Motion for Expedited Consideration of All Pending Motions, at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Mar. 19, 2008).

⁷⁷ Plaintiffs’ Fifth Pending Motions Notification, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Feb. 25, 2008).

⁷⁸ Carroll was concerned about the hourly rate at which plaintiffs’ counsel would attempt to bill Maricopa County. As plaintiffs’ counsel pointed out several times, the court would have to approve any fees awarded prevailing counsel, and the PLRA caps the hourly rate afforded prevailing lawyers. Reporter’s Transcript of Proceedings, In-Court Hearing, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW, at *12–13, 19, 26 (D. Ariz. Jan. 24, 2008).

⁷⁹ Dave Biscobing & Mark LaMet, *Key Evidence in Maricopa County Jail Death Suit of Deborah Braillard ‘Destroyed’*, ABC 15 (Oct. 17, 2012, 8:01 AM), <http://www.abc15.com/news/local-news/investigations/key-evidence-in-maricopa-county-jail-death-suit-of-deborah-braillard-destroyed>.

⁸⁰ JJ Hensley & Michelle Ye Hee Lee, *County Agrees to Settle Suit Tied to Inmate Death*, ARIZ. REPUBLIC, Oct. 5, 2012, at B4.

⁸¹ *Id.*

⁸² Biscobing & LaMet, *supra* note 79.

toms of withdrawal.⁸³ At one point, they moved her to a television room so that she would not disturb sleeping inmates, then later dumped her unconscious body on her bunk.⁸⁴

For obvious reasons, class counsel wanted to talk to Braillard's cellmates, who had witnessed the events leading to her death. Arpaio refused to allow the interviews, so the plaintiffs asked Judge Sitver to intervene. Although he ultimately granted the motion to compel access, he did so with apparent reluctance. "The Court is well aware that continued attempts to seek the Court's intervention with respect to events occurring at the Maricopa County Jail . . . would not necessarily serve the interests of either the pretrial detainees or Defendants," Judge Sitver wrote in February 2005. "Not every serious incident necessarily suggests a violation of constitutional rights"⁸⁵

2. *The Defense Counsel*

The defense counsel stood to gain from delay, particularly because the PLRA required the consent decree's suspension during the lawsuit's pendency. From start to finish, Michele Iafrate, an erstwhile Maricopa County prosecutor with experience defending Arpaio's office and other government units in abuse of power cases,⁸⁶ represented the sheriff.⁸⁷ Dennis Wilenchik joined Iafrate in October 2005, formally as counsel for the Maricopa County Board of Supervisors (BOS), but effectively as another representative for Arpaio. The story of how he entered the case ultimately relates to some of the democratic benefits that trial in structural reform cases can create.

The Maricopa County Attorney represents the BOS and determines whom to hire as outside counsel.⁸⁸ In January 2005, Andrew Thomas, an Arpaio con-

⁸³ Hensley & Ye Hee Lee, *supra* note 80.

⁸⁴ *Id.* In November 2012, Maricopa County agreed to pay \$3.25 million to settle the *Braillard* case, after seven years of litigation. Biscobing & LaMet, *supra* note 79. Arpaio's office destroyed a number of pieces of key evidence that would otherwise have tended to demonstrate gross indifference to her health. *Id.*

⁸⁵ Order, at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Feb. 23, 2005).

⁸⁶ See IAFRATE & ASSOCS., *Michele M. Iafrate*, <http://www.iafratelaw.com/staff/attorneys/michele-m-iafrate> (last visited Apr. 23, 2015); IAFRATE & ASSOCS., *Representative Clients*, <http://iafratelaw.com/representative-clients/> (last visited Apr. 23, 2015) (listing seven government units as "representative clients"). For representative cases, see *Stoddard v. Donahoe*, 228 P.3d 144, 145 (Ariz. Ct. App. 2010); *Trombi v. Donahoe*, 222 P.3d 284, 286 (Ariz. Ct. App. 2009); *Greenwood v. State*, 175 P.3d 687, 689 (Ariz. Ct. App. 2008).

⁸⁷ See *Michele M. Iafrate*, *supra* note 86.

⁸⁸ *Bd. of Supervisors of Maricopa Cnty. v. Woodall*, 586 P.2d 628, 632 (Ariz. 1978) (en banc). This power is actually contested and has been the subject of significant dispute. *Opinion and Order Imposing Sanctions, In re Members of the State Bar of Ariz., Andrew Thomas et al.*, PDJ-2011-9002, at 32-38 (Ariz. Apr. 10, 2012) [hereinafter "Thomas Disciplinary Opinion"], available at http://www.azcourts.gov/Portals/9/Press%20Releases/2012/041012ThomasAubuchonAlexander_opinion.pdf.

fidante,⁸⁹ began his tenure as county attorney.⁹⁰ Thomas had worked the previous nine months as an associate at Wilenchik's firm,⁹¹ a stint of employment the Ninth Circuit would later describe as "a disguised campaign contribution to Thomas."⁹² Upon assuming office, Thomas frequently replaced government lawyers with outside counsel on civil cases.⁹³ By October 2007, he had steered \$1.8 million worth of this work to Wilenchik, his former employer.⁹⁴ These matters included, for example, Thomas's criminal investigation of Terry Goddard, who had beaten Thomas in 2002 to win election as Arizona's Attorney General.⁹⁵ Wilenchik won Arpaio's favor, and at one point Arpaio's deputy requested that Wilenchik represent the sheriff in all civil matters.⁹⁶

⁸⁹ Paul Rubin, *Dangerous Mind*, PHOENIX NEW TIMES, Aug. 26, 2004, <http://www.phoenixnewtimes.com/2004-08-26/news/dangerous-mind/> (quoting Andrew Thomas as saying that "I have a good relationship with Joe"); Michael Kiefer & JJ Hensley, *Criticism Mounting vs. Sheriff Joe Arpaio, Andrew Thomas*, ARIZ. REPUBLIC (Dec. 22, 2009, 12:00 AM), <http://www.azcentral.com/news/articles/2009/12/22/20091222joe-arpaio-criticism-mounting.html>. Ultimately Andrew Thomas was disbarred as a result of some of his actions taken on Arpaio's behalf. Thomas Disciplinary Opinion, *supra* note 88, at 232. The ethics opinion requiring this sanction said the following about Thomas's relationship with Arpaio:

[I]t was [Thomas and a colleague] who encouraged any untoward actions with a resolute refusal to act independently of the Sheriff. With either a wink and a nod or a collaborative voice they supported actions that became increasingly questionable, rather than independently following their seemingly never-assumed role as arbiters of justice. If the mighty forces of the offices of the Sheriff and the County Attorney in Maricopa County were adrift, they were intentionally loosed from their principled moorings by the guided hand of a Respondent with an intellect fueled with ferocity, an irrational ego and a concomitant endless ability to feed their actions with rumors and speculations.

Id. at 21.

⁹⁰ John Dougherty, *Doubting Thomas*, PHOENIX NEW TIMES, June 13, 2006, <http://www.phoenixnewtimes.com/2006-06-08/news/doubting-thomas/>.

⁹¹ *Id.*

⁹² *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 909 (9th Cir. 2012) (en banc).

⁹³ *Head to Head: County Attorney's Race*, ARIZ. REPUBLIC (Sept. 11, 2008, 10:39 AM), <http://www.azcentral.com/news/election/azelections/articles/2008/09/11/20080911elex-ctyattyheadtohead.html>.

⁹⁴ *Sending Friend to Combat Foes: Thomas Funnels High-Profile Cases to Former Employer*, E. VALLEY TRIB., Oct. 23, 2007; see Dennis Welch, *Thomas Uses Private Lawyers on Opponents*, E. VALLEY TRIB. (Oct. 21, 2011, 7:52 PM), http://www.eastvalleytribune.com/news/article_4154bd07-accf-570b-ade3-0dc550aac1ee.html; see also *Lacey*, 693 F.3d at 941 (Kozinski, C.J., dissenting in part).

⁹⁵ Welch, *supra* note 94.

⁹⁶ Paul Rubin, *Below the Belt*, PHOENIX NEW TIMES (Sept. 20, 2007), <http://www.phoenixnewtimes.com/2007-09-20/news/below-the-belt/> (reporting the contents of a letter from Arpaio's top deputy to Thomas, in which the deputy requests that Thomas hire Wilenchik to represent the sheriff's office in all civil matters); see also John Dougherty, *Bully Pulpit*, PHOENIX NEW TIMES (June 29, 2006), <http://www.phoenixnewtimes.com/2006-06-29/news/bully-pulpit/> (discussing the same letter).

Wilenchik has won attention for aggressive litigation tactics deployed in a couple of instances.⁹⁷ An example involves a proceeding against the *Phoenix New Times*, an alternative weekly and long-time Arpaio adversary. (The events eventually generated a civil suit filed by the newspaper's editors, and the following story is based on allegations in the complaint and not facts proven at trial.⁹⁸) The newspaper published Arpaio's home address on its website in 2004, in connection with a story about alleged corruption in the sheriff's office.⁹⁹ Arpaio pressured Thomas to prosecute the newspaper, invoking an obscure Arizona statute that prohibits the electronic dissemination of a law officer's personal information.¹⁰⁰ Eventually Thomas hired Wilenchik, along with a couple of other attorneys, to handle the matter as a special prosecutor.¹⁰¹ In October 2007, Wilenchik served several grand jury subpoenas on the *New Times*, requesting, among other information, the names of all confidential sources used for stories about Arpaio and information about visitors to any story published on the newspaper's website since 2004.¹⁰² The newspaper promptly published the subpoenas in an article entitled *Breathtaking Abuse of the Constitution*.¹⁰³ Wilenchik responded with a motion for criminal contempt, then had several of Arpaio's men arrest the newspapers' co-editors before the presiding judge could rule. The judge would soon quash the procedurally invalid subpoenas.¹⁰⁴ The editors sued, and, six years later, they settled their lawsuit against Arpaio, Wilenchik, and others for \$3.75 million.¹⁰⁵

Public outcry forced Wilenchik off the *Phoenix New Times* matter, but otherwise he continued to handle work on behalf of Maricopa County.¹⁰⁶ Thomas has since met with a less desirable fate. He turned a disagreement with a couple of Maricopa County supervisors¹⁰⁷ over outside counsel referral authority into a

⁹⁷ Another illustration, in addition to what I discuss in this paragraph, is Wilenchik's representation of Arpaio in a defamation suit brought against Arpaio by one of his political opponents. See Dougherty, *supra* note 96.

⁹⁸ Lacey, 693 F.3d at 907.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 907–09.

¹⁰¹ Thomas recused his office from the investigation on conflict of interest grounds. He was also a frequent target of *Phoenix New Times* muckraking. *Id.* at 909.

¹⁰² *Id.*

¹⁰³ Michael Lacey & Jim Larkin, *Breathtaking Abuse of the Constitution*, PHOENIX NEW TIMES (Oct. 18, 2007), <http://www.phoenixnewtimes.com/2007-10-18/news/breathtaking-abuse-of-the-constitution/full/>.

¹⁰⁴ Lacey, 693 F.3d at 910.

¹⁰⁵ Michelle Ye Hee Lee & Michael Kiefer, *Maricopa County Supervisors Settle Lawsuits Filed by 'New Times' Founders*, STAPLEY, ARIZ. REPUBLIC (Dec. 20, 2013, 4:08 PM), <http://www.azcentral.com/news/politics/articles/20131218maricopa-county-supervisors-settle-lawsuit-new-times-founders.html>.

¹⁰⁶ Robert Anglen, *Thomas Fires Prosecutor*, ARIZ. REPUBLIC (Oct. 20, 2007, 1:15 PM), <http://www.azcentral.com/news/articles/2007/10/20/20071020joe-arpaio-new-times-case-dropped.html>.

¹⁰⁷ The story leading to Andrew Thomas's disbarment is a complicated one. As far as I can tell, the conflict between him and the Board of Supervisors began when he and one of the

bizarre vendetta against his political opponents.¹⁰⁸ Among other misdeeds, Thomas indicted a supervisor on spurious bribery charges;¹⁰⁹ filed a frivolous civil suit under the federal RICO statute, with himself and Joe Arpaio as plaintiffs, against a number of government officials, including four Arizona Superior Court judges;¹¹⁰ and then indicted a judge on fabricated bribery charges after the judge ruled against him and Arpaio several times.¹¹¹ This misguided crusade ended with Thomas's disbarment and, as of December 2013, more than \$17 million paid to settle civil cases brought by those wrongfully targeted.¹¹²

3. *A Strategy of Delay in Graves v. Arpaio*

Although not as newsworthy, the strategy of delay that Arpaio's lawyers appear to have employed in *Graves v. Arpaio* was similarly aggressive. They repeatedly refused to engage in discovery,¹¹³ even ignoring the rare order issued by Judge Carroll to cooperate.¹¹⁴ Filings proliferated, including those on picayune matters. After receiving a several-month extension to respond to a

supervisors had a disagreement about referral authority. Thomas Disciplinary Opinion, *supra* note 88, at 33–34.

¹⁰⁸ For much of the story, see Terry Carter, *The Prosecutor on Trial: Ex-Maricopa County Attorney Faces Disbarment for Political Acts*, A.B.A. J. (Apr. 1, 2012, 11:00 AM), http://www.abajournal.com/magazine/article/the_prosecutor_on_trial_ex-maricopa_co_atty_faces_disbarment_for_political/.

¹⁰⁹ Thomas Disciplinary Opinion, *supra* note 88, at 67–68.

¹¹⁰ *Id.* at 106.

¹¹¹ *Id.* at 142. Of the more than 1,000 licensed process servers in Maricopa County, Thomas chose a man who had been convicted years before of threatening the judge with bodily harm to serve him. Sarah Fenske, *Joe Arpaio, Andrew Thomas and the Hunt for Gary Donahoe*, PHOENIX NEW TIMES (June 3, 2010), <http://www.phoenixnewtimes.com/2010-06-03/news/the-hunt-for-gary-donahoe/>.

¹¹² Ye Hee Lee & Kiefer, *supra* note 105.

¹¹³ See, e.g., Plaintiffs' Motion to Compel Production of Documents at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Oct. 10, 2006) (describing defendants' "blanket" refusal to provide documents in response to a discovery request); Defendants' Maricopa County Board of Supervisor's [sic] Objections to 9/30/05 Report and Recommendation and Motion for Protective Order and Request to Set Hearing/Oral Argument on Motion to Terminate at 2–3, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Oct. 17, 2005) (objecting to order requiring defendants to produce various documents relating to inmate healthcare); Defendants' Motion for Emergency Hearing and Motion to Stay the September 30, 2005 Order and Response to Plaintiffs' Motion to Enforce Magistrate Judge's September 30, 2005 Order, No. 77-479, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Oct. 26, 2005) (same); Plaintiffs' Omnibus Motion at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. May 30, 2006) (moving to compel the defendants to participate in certain discovery and describing some of their discovery intransigence). To be fair to Arpaio, Judge Sitver left things in a confused state when he denied some of the plaintiffs' discovery motions without prejudice and asked them to refile their motions together. *Id.* at 11–14.

¹¹⁴ Plaintiffs' Motion for Sanctions for Defendants' Failure to Comply With Discovery Order at 1, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Nov. 21, 2006).

discovery motion,¹¹⁵ for example, Arpaio's lawyers opposed the plaintiffs' request for several extra days to file a reply.¹¹⁶ More significantly, Arpaio's lawyers doggedly resisted when the appointed class counsel invited Margaret Winter of the ACLU, one of the country's premier prison conditions lawyers, and Osborn Maledon, a highly respected Arizona law firm, to join him on the plaintiffs' side.¹¹⁷ Defense counsel's objection generated ten filings,¹¹⁸ and for nearly two years the plaintiffs' legal representation remained uncertain.¹¹⁹

Judge Carroll abetted this gridlock-inducing strategy by simply not deciding motions.¹²⁰ The plaintiffs' frustration was evident. "Defendants continue to do everything in their power to conceal evidence of current conditions at the Maricopa County Jail," the plaintiffs bemoaned in December 2006.¹²¹

Evidence of problems for inmates accumulated as the jails continued to operate without federal judicial supervision due to the PLRA's automatic stay provision. A corrections consultant hired by Maricopa County concluded in a 2003 audit of the jails that prison healthcare failed to meet constitutional minima, and that the jails violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹²² From 2003 to 2007, Arpaio refused to file proof that his

¹¹⁵ Defendants' Motion for Clarification and/or for an Extension of Time in Which to Respond to Plaintiffs' Omnibus Motion, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 1, 2006).

¹¹⁶ Defendants' Response to Plaintiffs' Motion for Extension of Time to File Their Reply in Support of Their Omnibus Motion, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Sept. 15, 2006).

¹¹⁷ Basically, Arpaio argued that the court had to appoint class counsel under Rule 23, and that the ACLU and the law firm could not sua sponte begin representing the class. Defendants' Objection to the Representation of the Plaintiff Class by the Osborn Maledon Law Firm at 3, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 1, 2006); Defendants' Objection to the Representation of the Plaintiff Class by Margaret Winter, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Sept. 20, 2007). He did not argue that either set of lawyers was not competent to handle duties as class counsel. After Judge Carroll formally appointed the new lawyers (and thereby corrected the alleged error), Arpaio continued to object, but on grounds that the appointment was not necessary given the complexity of the lawsuit. Defendants' Motion to Reconsider Order Appointing Debra Hill and Margaret Winter as Class Counsel, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Apr. 08, 2008).

¹¹⁸ *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz.) (Civil Docket at entries 1146, 1152, 1156, 1197, 1200, 1201, 1202, 1203, 1212, 1231).

¹¹⁹ Judge Wake finally put an end to the opposition on April 17, 2008. *Graves v. Arpaio*, No. 2:77-cv-00479-NVW, at 1-2 (D. Ariz. Apr. 17, 2008). Arpaio had filed his first objection on June 1, 2006. Defendants' Objection to the Representation of the Plaintiff Class by the Osborn Maledon Law Firm, *supra* note 117.

¹²⁰ *See, e.g.*, Plaintiffs' Third Pending Motions Notification at 1-2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. July 30, 2007) (documenting seven fully-briefed motions that had been pending for more than 180 days).

¹²¹ Plaintiffs' Reply in Support of: (1) Motion for Sanctions for Failure to Comply With Discovery Order and (2) Motion to Compel Supplemental Responses to First Request for Production of Documents, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Dec. 19, 2006).

¹²² *See* John Dickerson, *Inhumanity Has a Price*, PHOENIX NEW TIMES (Dec. 20, 2007), <http://www.phoenixnewtimes.com/2007-12-20/news/inhumanity-has-a-price/>.

jails met national standards for adequate conditions with the Arizona Department of Health Services, disobeying a state law that required otherwise.¹²³ Guards killed an inmate with mental disabilities in 2003; an incident that Arpaio tried to cover up by destroying evidence.¹²⁴ In 2005, a pregnant prisoner received no medical care for days after another inmate attacked her. She lost her baby and nearly bled to death.¹²⁵ That year, a Maricopa County superior court commissioner described the conditions faced by mentally ill inmates, up to 20 percent of the pretrial inmate population,¹²⁶ in the following way: “Severe overcrowding, unsanitary conditions . . . and bullying by professional criminals, including assaults, extortion and stealing medications, are typical of the conditions under which the mentally ill live.”¹²⁷ After trying for four years to make changes, a nationally recognized expert in prison healthcare hired by the county resigned in 2008, experiencing a “crisis of conscience” and worrying that he would lose his medical license over jail conditions.¹²⁸

The plaintiffs grew desperate. In January 2007, they requested that Judge Carroll designate another magistrate judge to handle discovery matters.¹²⁹ Arpaio’s lawyers objected, arguing with some chutzpah that the “appoint[ment of] a new Judge to rule on certain matters may have the effect of delaying this case.”¹³⁰ The plaintiffs’ Hail Mary came a year later. Noting that Arpaio had produced almost no discovery since January 2004, and listing the many pending motions, the plaintiffs moved to have the case transferred to Susan Bolton, a district judge who had just been assigned to an individual action challenging jail conditions.¹³¹ The request had no chance of succeeding. Judge Bolton’s

¹²³ John Dickerson, *Sheriff Joe Arpaio’s Jails Lose National Accreditation*, PHOENIX NEW TIMES (Oct. 9, 2008), <http://www.phoenixnewtimes.com/2008-10-09/news/sheriff-joe-arpaio-s-jails-lose-national-accreditation/>.

¹²⁴ Melissa Gonzalo, *Local Attorney Speaking Out Against Sheriff Arpaio*, AZCENTRAL (Apr. 14, 2008, 6:30 PM) <http://www.azcentral.com/12news/news/articles/2008/04/14/20080414mcsaallegations04142008-CR.html>.

¹²⁵ John Dickerson, *Arpaio’s Jail Staff Cost Ambrett Spencer Her Baby, and She’s Not the Only One*, PHOENIX NEW TIMES (Oct. 30, 2008), <http://www.phoenixnewtimes.com/2008-10-30/news/arpaio-s-jail-staff-cost-ambrett-spencer-her-baby-and-she-s-not-the-only-one/full/>.

¹²⁶ *Graves v. Arpaio*, No. CV-77-0479-PHX-NVW, 2008 WL 4699770, at *25 (D. Ariz. Oct. 22, 2008).

¹²⁷ Christina Leonard, *Detaining Mentally Ill in Jail a Problem*, ARIZ. REPUBLIC (Mar. 17, 2005, 12:00 AM), <http://archive.azcentral.com/health/news/articles/0317mentallyill.html>.

¹²⁸ Dave Biscobing & Mark LaMet, *MCSO Jail Deaths, Lawsuits Considered ‘Cost of Doing Business’*, ABC 15 ARIZONA (Sept. 12, 2012, 8:54 PM), <http://www.abc15.com/news/local-news/investigations/mcso-jail-deaths-lawsuits-considered-cost-of-doing-business>.

¹²⁹ Plaintiffs’ Motion to Refer Discovery Matters to Magistrate Judge, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Jan. 22, 2007).

¹³⁰ Defendants’ Response to Plaintiffs’ Motion to Refer Matters to Magistrate Judge, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Feb. 7, 2007).

¹³¹ Plaintiffs’ Motion to Consolidate Cases and Motion to Reassign Case, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Mar. 19, 2008).

lawsuit involved a *pro se* inmate plaintiff with an improperly filed complaint—a case, in other words, wholly dwarfed by *Graves v. Arpaio*. She denied the motion in short order.¹³²

C. Trial Through Case Management

Everything changed on April 3, 2008. Without warning or explanation, Judge Carroll issued a one-sentence order “recus[ing] himself from further participation in” *Graves v. Arpaio*. A week later, the District of Arizona’s clerk’s office reassigned the case to Neil Wake.¹³³ Judge Wake speedily untangled the farrago of filings. In six months, he presided over a tightly compressed discovery period, held a bench trial, and issued an eighty-page order deciding the decade-old motion.

A week after receiving the case, Judge Wake put a quick end to the long-festering dispute over the ACLU’s and Osborn Maledon’s role as plaintiffs’ counsel.¹³⁴ On April 24, he issued an extraordinary order, deciding all of the many pending motions in the case (except Arpaio’s motion to terminate) in one fell swoop.¹³⁵ The order also clarified exactly what conditions Arpaio’s motion to terminate put at issue, a question of obvious importance but one that had gone unanswered for seven years. The PLRA provides that “[p]rospective relief shall not terminate if . . . prospective relief remains necessary to correct a current and ongoing violation of the Federal right”¹³⁶ The Ninth Circuit interpreted this language in 2000 to make “evidence on the current circumstances at the prison” essential to the disposition of a motion to terminate.¹³⁷ Nonetheless, Arpaio’s lawyers had refused to respond to discovery requests, reasoning that their motion to terminate put only jail conditions on September 25, 2001, the moment of the motion’s renewal, at issue. All of the plaintiffs’ efforts to gather information about jail conditions since 2001, they insisted, were “meaningless and irrelevant.”¹³⁸ Judge Wake rejected this implausible argument and kick-started the long-dormant discovery on current jail conditions.¹³⁹

Most important, however, was the schedule Judge Wake set in his April 24 order. Nothing but fruitless motion practice had proceeded since January

¹³² *Hart v. Maricopa Cnty. Sheriff’s Office*, No. 77-479; *Popoca v. Arpaio*, No. 07-2250 (D. Ariz. Apr. 9, 2008).

¹³³ Minute Order, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Apr. 10, 2008).

¹³⁴ Order Granting Motion to Withdraw as Attorney, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Apr. 17, 2008).

¹³⁵ *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. entered Apr. 25, 2008).

¹³⁶ 18 U.S.C. § 3626(b)(3) (2012).

¹³⁷ *Gilmore v. California*, 220 F.3d 987, 1010 (9th Cir. 2000).

¹³⁸ Defendants’ Response to Plaintiffs’ Motion to Compel Production of Documents at 5, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Oct. 27, 2006).

¹³⁹ Order at 7, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. entered Apr. 25, 2008).

2004.¹⁴⁰ Trying to get the case going, the plaintiffs asked that Judge Wake set a six-month discovery period, followed by a final evidentiary hearing on the motion to terminate. Not fast enough, Judge Wake decided. “The PLRA plainly conveys congressional intent that termination of prospective relief regarding prison conditions be decided swiftly,” he noted. Hence the evidentiary hearing—for all intents and purposes, the trial—would begin in less than four months, on August 12, 2008.¹⁴¹ Wilenchik immediately moved for a continuance,¹⁴² but Judge Wake refused. “The grave urgency of this proceeding requires that all counsel take all efforts to meet the August 12, 2008 final hearing date,” he insisted, “as the dictates of Congress and the needs of justice in this case will not allow any delay.”¹⁴³

Judge Wake repeatedly reiterated his determination that the trial begin as planned. In an order setting a two-month discovery schedule that the early trial date necessitated, he declared that “[t]he deadlines established by this Order are real. ‘Best efforts’ alone will not constitute compliance.”¹⁴⁴ Wilenchik resisted the trial plan. “I don’t mean to be disrespectful in any way,” he said at a May 19, 2008, status conference, “but when you say we can’t wait, I guess my reaction to that would be, we have waited [thirty] years.”¹⁴⁵ “I’m not waiting [thirty] years,” Judge Wake responded. “I’m not waiting four years. I’m not waiting four months.”¹⁴⁶ Arpaio’s lawyers would have to tell their client that “this is the most important lawsuit” he has, the judge insisted, and that Arpaio’s people must do everything in their power to comply with authorized discovery.¹⁴⁷ “Whatever has happened in the past,” Judge Wake declared,

I want diligent, prompt, and good faith production of this information. I don’t want—and I’m not making any comment or assertion or accusation by anybody. But I don’t want foot dragging. I don’t want combativeness. I want diligence and good faith exactly what Rule 1 and Rule 26 of the Rules of Civil Procedure require to get this information readily available and produced¹⁴⁸

¹⁴⁰ Plaintiffs’ Motion to Consolidate and Motion to Transfer Consolidated Cases at 2–3, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Mar. 19, 2008).

¹⁴¹ Order at 9, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. entered Apr. 25, 2008).

¹⁴² Defendant’s Motion to Continue, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Apr. 30, 2008).

¹⁴³ Order at 1–2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. May 1, 2008).

¹⁴⁴ Order at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. May 29, 2008); *see also* Case Management Order at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 6, 2008) (stating “These Deadlines are Real,” and “The parties are warned that failure to meet any of the deadlines in this order or in the Federal Rules of Civil Procedure without substantial justification may result in sanctions, including dismissal of the action or entry of default.”).

¹⁴⁵ Transcript, Scheduling Conference at 22, at 2, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz., May 19, 2008); *see also id.* at 5 (“I know sometimes the Court, with all due respect, gets involved in this quickly. It’s sitting there for 30 years, et cetera.”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 39.

¹⁴⁸ *Id.* at 70.

After all, the judge continued, “the sheriff and the county have very large budgets for legal fees.”¹⁴⁹

The delaying tactics that Arpaio’s lawyers had previously employed stopped working, as an example illustrates. The plaintiffs wanted their psychiatric expert to interview a number of inmates during a tour of a jail. Arpaio’s lawyers objected, the parties took the matter to Judge Wake, and he granted the interview request.¹⁵⁰ The interviews were scheduled for a Monday. The preceding Thursday afternoon—more than three weeks after the judge issued his order but only a single weekday before the interviews were supposed to begin—Iafrate informed the plaintiffs that Arpaio would not permit the interviews. By her recollection, she insisted, Judge Wake had actually denied the plaintiffs’ request.¹⁵¹ The plaintiffs moved to compel on Friday, taking the sort of action they had attempted to no effect previously.¹⁵² But Judge Wake ruled within hours, ordering before the weekend began that the interviews would proceed as planned on Monday.¹⁵³

A second episode also shows how Judge Wake’s case management practices thwarted attempts to slow-walk the litigation. In June 2008, the parties clashed over the plaintiffs’ request to have two groups tour a jail simultaneously. The tours were supposed to begin on a Monday. At a hearing the preceding Thursday, Arpaio’s lawyer insisted that his client lacked sufficient lead-time to find personnel to act as tour guides.¹⁵⁴ Judge Wake responded with a keen understanding of how delay served Arpaio’s interests:

[F]irst of all, we have to remember the context of this motion and this case. This was your client’s motion filed 10 years ago, and it is, I believe, the oldest lawsuit, other than a few water cases, in the District of Arizona. This motion, which is 10 years old, is probably the oldest pending motion in this court.

The matter is one of great importance to both sides. It is of great importance to the County and the sheriff to have it determine whether this injunction that they agreed to continues in effect. It’s of great importance to the plaintiff class to have the speedy determination of their motion, which, by statute, was supposed to have been decided 10 years ago.

The result of the failure to decide this motion has been that the plaintiff class has been deprived of its stipulated injunction by virtue of the automatic stay in the PLRA. In effect, the defendants have gotten their relief without their motion having been found to be meritorious, and the plaintiffs have lost the benefit of the injunction which they accepted in lieu of further adjudication.

¹⁴⁹ *Id.* at 91.

¹⁵⁰ *Id.* at 116, 120.

¹⁵¹ The argument on the issue at the status conference consumes fifteen transcript pages. *Id.* at 105–20. Moreover, Judge Wake actually ruled twice for the plaintiffs, once after Iafrate argued against the request and again after Wilenchik did the same. *Id.* at 105, 120.

¹⁵² Plaintiffs’ Statement Regarding Discovery Dispute, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 6, 2008).

¹⁵³ Order, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 6, 2008).

¹⁵⁴ Telephonic Discovery Dispute, Transcript at 4–5, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. June 19, 2008).

Now, I just give this brief summary, not to suggest how this case should go. I have no idea who will or ought to win this motion. But this is litigation of the utmost importance to all the parties and to the public. . . . And no matter how you analyze it, it appears to me that in light of all the resources available to the County and to the sheriff, and of all the emergencies that they have to deal with as a routine part of doing business, I can't see any difficulty or any justification for not directing the sheriff and the County to provide whatever security or guides they think appropriate according to their standards and doing it even on four days notice

So for these reasons, I find it not at all difficult to conclude that the County and the sheriff should be ordered, and I will order them, to provide the security they otherwise think appropriate for whether you call it two or three separate groups.

And in so concluding, it appears to me, in fact, I have no difficulty concluding that any inconvenience to the County would be utterly trivial compared to the disruption to the case preparation, the discovery preparation, the needs of the litigants, and the needs of the Court to bring this long-delayed proceeding to a conclusion.¹⁵⁵

"My order is unqualified," Judge Wake declared as he ended the hearing.¹⁵⁶

Judge Wake kept the parties to his schedule, and they completed extensive discovery in a very short period of time.¹⁵⁷ The trial began on August 12, 2008, as planned, and proceeded for thirteen days.¹⁵⁸ Shortly after it ended, the National Commission on Correctional Health Care ("NCCHC"), a non-profit entity that reviews healthcare services for inmates, terminated its accreditation of the Maricopa County jails based on evidence introduced at trial.¹⁵⁹ This development dealt a blow to Arpaio, whose lawyers had stressed the NCCHC's accreditation to support the motion to terminate.¹⁶⁰

On October 22, 2008—ten-and-a-half years after Arpaio first filed his motion to terminate, but only six months and twelve days after Judge Wake got the case—the judge issued his findings of fact and conclusions of law. He concluded that some aspects of the amended judgment deserved termination, but also that the Maricopa County jails remained constitutionally deficient in a signifi-

¹⁵⁵ *Id.* at 6–9.

¹⁵⁶ *Id.* at 12.

¹⁵⁷ Between June 26, 2008, and July 30, 2008, for example, the parties noticed 54 depositions. Civil Docket at entries 1321–437, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz.).

¹⁵⁸ *Graves v. Arpaio*, No. CV-77-0479-PHX-NVW, 2008 WL 4699770, at *1 (D. Ariz. Oct. 22, 2008).

¹⁵⁹ Board Defendants' Notice of Filing and Serving Affidavit of Betty J. Davis, Director, Correctional Health Services, Maricopa County, Arizona at Exhibit A, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Sept. 30, 2008) (attaching letter from NCCHC advising Arpaio that it was terminating its accreditation based in part on "trial testimony").

¹⁶⁰ Arpaio's post-trial brief mentions the NCCHC's accreditation in the first paragraph of a section entitled "Evidence of Care." Board Defendants' Post-Hearing Brief at 17, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Sept. 10, 2008); see also Dickerson, *supra* note 123 (describing the stress placed on the accreditation and trial and the reasons for its withdrawal).

cant number of respects. He identified the following problems, among many others:

- At one jail, pretrial inmates in segregated housing were locked into 10.5 by 4.3 foot cells, three inmates per cell, for twenty-two to twenty-three hours each day.¹⁶¹
- Inmates spent up to eight hours in court-holding cells that lacked sufficient “soap and toilet paper to maintain basic elements of hygiene and sanitation.”¹⁶²
- Intake cells, in which violent repeat offenders were indiscriminately mixed with DUI or criminal speeding arrestees, were “at times” so crowded that inmates could not sit down, even on the floor.¹⁶³ Twenty-four percent of inmates spent more than twenty-four hours in these cells upon arrest.¹⁶⁴
- Officers often failed to clean cells or provide inmates with adequate opportunities to do so themselves.¹⁶⁵
- Pretrial inmates were insufficiently screened for chronic health problems or mental illness, did not receive medications in a timely fashion, and were “frequently . . . denied” access to healthcare.¹⁶⁶
- The Maricopa County jails’ dietician’s opinion that inmates received adequate nutrition was “unworthy of belief.”¹⁶⁷ Some of the food inmates received was inedible,¹⁶⁸ and inmates lacked sufficient daily caloric intake.
- Corrections officers failed to monitor inmates sufficiently and did not maintain adequate security.¹⁶⁹

In 2010, the Ninth Circuit affirmed all aspects of Judge Wake’s decision.¹⁷⁰

As is invariably so with structural reform litigation,¹⁷¹ the story of *Graves v. Arpaio* did not end with the close of trial. The remedy phase, which began with the parties negotiating over proposed steps for reform,¹⁷² remains ongoing. After receiving several reports from monitors assessing his judgment’s implementation, Judge Wake expressed frustration in April 2010 with Arpaio’s failure to comply fully and especially that “improvements appearing to be most critically needed . . . appear to have been disregarded or postponed to avoid expense.”¹⁷³ In some respects, however, the jails have clearly improved. By May

¹⁶¹ *Graves*, 2008 WL 4699770, at *15.

¹⁶² *Id.* at *21.

¹⁶³ *Id.* at *17.

¹⁶⁴ *Id.* at *37.

¹⁶⁵ *Id.* at *22.

¹⁶⁶ *Id.* at *27–29.

¹⁶⁷ *Id.* at *45.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *48.

¹⁷⁰ *Graves v. Arpaio*, 623 F.3d 1043, 1051 (9th Cir. 2010).

¹⁷¹ Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27 (1979).

¹⁷² See e.g., Joint Status Report With Respect to Medical and Mental Health Issues, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Dec. 2, 2008).

¹⁷³ Order at 3, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. Apr. 7, 2010).

2012, lawyers for the plaintiffs agreed that Arpaio had remedied all of the non-medical problems that Judge Wake had identified.¹⁷⁴ Although some signs point in the right direction,¹⁷⁵ the provision of adequate healthcare remains an ongoing concern.¹⁷⁶

III. THE ROLE OF TRIAL IN STRUCTURAL REFORM LITIGATION

Graves v. Arpaio required intensive case management by a federal judge at the apogee of his powers. Judge Wake had sole responsibility for decisionmaking, no layperson participated in the establishment of minimal standards for prison governance, and the trial did not provide civic education to citizen-jurors. *Graves v. Arpaio* is also an extraordinary case, hardly the sort of matter that could generate a large number of trials going forward. In other words, the case is the opposite of what Prof. Subrin targets with his simple-track proposal.

But trials in big cases like *Graves* make important contributions to American democracy. An appreciation of these benefits requires that one rethink some of Prof. Subrin's premises—that juror participation is key to procedure's democratic potential and that judicial power denudes the contributions procedure can make to representative government. Litigation inefficiencies might force settlement in small-scale cases, but in structural reform lawsuits they can preclude resolution on the merits. Coupled with aggressive case management, trial can respond and thereby act as a procedural facilitator for a type of litigation that addresses shortcomings in representative government. Trial also provides a unique moment of public accountability for various government officials and, because of some cases' high political salience, a vehicle for political mobilization. Finally, these benefits might be realizable more readily than the sort that trial in small-scale cases might provide. A change to judicial practice can readily generate more trial-type proceedings in structural reform cases.

What follows are a series of hypotheses, inspired by *Graves v. Arpaio*, about the function and value of trial in structural reform lawsuits. Although scholars have subjected this litigation to relentless scrutiny, little is known about the actual procedural dynamics of public law litigation or the incentives

¹⁷⁴ Plaintiffs' Response to Defendant Arpaio's Motion to Terminate, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. May 16, 2012).

¹⁷⁵ In 2011, the NCCHC conditionally restored the jails' accreditation. Michelle Ye Hee Lee, *Maricopa County Jails Receive Conditional Accreditation*, ARIZ. REPUBLIC (Dec. 14, 2011, 9:44 PM), <http://www.azcentral.com/news/articles/2011/12/14/20111214maricopa-county-jails-receive-conditional-accreditation.html>. In March 2012, Maricopa County agreed to implement an electronic medical records system. Michelle Ye Hee Lee, *Medical Records in Maricopa County Jails to Go Electronic*, REPUBLIC (Mar. 14, 2012, 9:35 PM), <http://archive.azcentral.com/12news/news/articles/20120314medical-records-maricopa-county-jails-go-electronic.html>. Poor record-keeping had been a major cause of a number of problems, including Deborah Braillard's death.

¹⁷⁶ *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1325–27 (D. Ariz. 2014).

motivating the participants in it.¹⁷⁷ Part II's case study of *Graves v. Arpaio* is fundamentally limited as a data source, but perhaps it suggests lessons that can inform an empirical research agenda going forward.

A. *Trial's Relationship to Case Management in Structural Reform Litigation*

The democratic benefits that structural reform trials can produce flow in part from the functional utility of the process. Prof. Subrin faults aggressive case management in ordinary civil cases as a trial-killing phenomenon. If *Graves v. Arpaio* is representative, judicial power and trial enjoy a more symbiotic relationship in structural reform litigation. Trial, abetted by aggressive case management, responds elegantly to problems arising from the incentives that government officials and their lawyers may have to delay and obstruct.

1. *Delay and Obstruction as an Optimal Strategy*

Two types of inefficiencies in structural reform cases retard the resolution of cases on the merits, rather than force settlement. These inefficiencies produce delay and obstruction as the defendant's preferred litigation strategy. The first has to do with informational difficulties. The parties may want to settle, but they cannot predict possible trial outcomes and thus cannot agree to settlement terms. Recurring conditions in structural reform cases particularly thwart such prognostication, described by legal economists as essential to settlement.¹⁷⁸ As Judge Wake did in *Graves*, judges often bifurcate structural reform litigation into liability and remedy phases. The latter often last for a long time¹⁷⁹—seven years and counting for *Graves*. Remedial phases often proceed as an exercise in dialogue and negotiation, not adversarial adjudication, as *Graves* has.¹⁸⁰ The remedy depends not on some actuarial calculation of an injury's monetary worth, but upon the exercise of ample judicial discretion.¹⁸¹

¹⁷⁷ Notable exceptions include Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006), and Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

¹⁷⁸ On the relationship between trial predictions and settlement, see, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 564 (2012); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417–18 (1973); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12 (1984).

¹⁷⁹ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873–74 (1999) (“[S]tructural reform litigation takes place in a kind of slow motion, as rights and remedies are redefined in an iterated process that often stretches out over a number of years in an effort to achieve concrete changes in public institutions.”).

¹⁸⁰ Sabel & Simon, *supra* note 177, at 1055; see also PETER H. SCHUCK, *SUING GOVERNMENT* 151 (1983); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365 (1991).

¹⁸¹ John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1128–34 (1996).

A principal-agent problem creates the second inefficiency. The government official calling the shots for the defendant agency might have an incentive to prolong litigation, even if settlement better serves the interests of the agency and the taxpayers paying for its defense. More litigation means more fees to distribute to outside counsel and thus to potential campaign donors. When Andrew Thomas ran for reelection, for example, he received three-fourths of all contributions law firms handling Maricopa County work made to candidates for the county attorney position.¹⁸² Private litigants have an incentive to monitor wasteful litigation, since they will internalize the costs of excess by paying more in fees. When attorneys' fees come from the public treasury, however, the costs are too diffuse to prompt such monitoring. An opponent might try to make political hay of these wasteful fees, but, if Maricopa County is any example, they may have little resonance in elections marred by low voter turnout. Thomas tripled outside counsel fees during his first term as county attorney, for example,¹⁸³ yet he easily won reelection.

Also, a government official who settles a high-profile case may pay a political price if the small number of motivated, ideological constituents who vote in minor elections interpret the deal as a sop to politically-disadvantaged groups.¹⁸⁴ In fact, officials may believe they can curry political favor from such constituencies by refusing to compromise. Arpaio's resistance to settlement overtures in a racial profiling case the DOJ brought against him suggests this sort of motive.¹⁸⁵ "I am the constitutionally and legitimately elected sheriff and I absolutely refuse to surrender my responsibility to the federal government," Arpaio fulminated. "[T]o the Obama administration, who is attempting to strong arm me into submission only for its political gain[.]" Arpaio continued, "I say, 'This will not happen, not on my watch!'"¹⁸⁶

¹⁸² Yvonne Wingett & Grayson Steinberg, *Cash Pours In, Raising Stakes for County Attorney Race*, ARIZ. REPUBLIC (Aug. 14, 2008, 12:00 AM), <http://archive.azcentral.com/arizonarepublic/news/articles/2008/08/14/20080814bigmoney0814.html>. Control over the funds used to pay these fees was important enough in Maricopa County to start the series of missteps that led to Thomas's disbarment. Other government officials might balk at wasted litigation costs and try to impose some discipline. See e.g., Sabel & Simon, *supra* note 177, at 1092. But recourse short of legal action against the profligate official might be limited. Only after Thomas's fall from political grace did other officials within Maricopa County begin to discipline expenditures on private lawyers. *Private Counsel Fees Are Capped*, ARIZ. REPUBLIC, May 14, 2010.

¹⁸³ *Private Counsel Fees Are Capped*, ARIZ. REPUBLIC, May 14, 2010.

¹⁸⁴ For a more nuanced description of the incentives and pressures a government official feels, see Colin S. Diver, *The Judge as a Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 72-73 (1979).

¹⁸⁵ Sari Horwitz, *Arizona Sheriff Rejects Court Monitor; Justice Department Threatens to Sue*, WASH. POST. (Apr. 3, 2012), http://www.washingtonpost.com/politics/arizona-sheriff-rejects-court-monitor-justice-department-threatens-to-sue/2012/04/03/gIQA8P8ztS_story.html.

¹⁸⁶ Jason Ryan, *DOJ Breaks Off Negotiations With Defiant Sheriff Joe Arpaio*, ABC NEWS (Apr. 3, 2012), <http://abcnews.go.com/blogs/politics/2012/04/doj-breaks-off-negotiations-with-defiant-sheriff-joe-arpaio/>.

Plenty of structural reform cases proceed amicably to negotiated resolutions, without infection by these sorts of pathologies. But *Graves v. Arpaio* suggests that these inefficiencies can develop and produce a litigation dysfunction. Unable to predict outcomes, the government official does not want the agency to settle, but presumably he does not want it to lose at trial either. With plenty of fees to distribute, the official might opt for delay and obstruction as his preferred litigation strategy. The seven years of purposeless litigation in *Graves v. Arpaio* before Judge Wake assumed control testify to this strategy's brutal effectiveness.

2. Trial as a Response

An early, firm trial date can defeat this dysfunctional strategy. Obstruction fails, because the trial forces a merits resolution in short order. The early, firm trial date can also solve the principal-agent problem created by the government official's incentives to prolong litigation for two reasons. First, to the extent that the official fears a political backlash from a settlement, trial provides political cover by taking the power to resolve the case out of his hands. Second, a firm trial date disciplines the official, who might otherwise pay wasteful fees as political patronage, and his counsel, who might otherwise pocket them happily.¹⁸⁷ The reason is simple: "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."¹⁸⁸ To have a chance of winning, the government's lawyers will have to allocate their scarce resources—their time and energy—efficiently and productively.¹⁸⁹ They cannot pursue obstreperous litigation conducted for purposes of delay, lest they begin trial unprepared.

Prof. Subrin has commented upon the effectiveness of an early trial date,¹⁹⁰ and *Graves v. Arpaio* illustrates its efficacy. Before the summer of 2008, almost no discovery proceeded, and when plaintiffs attempted to engage in discovery, the defendants objected.¹⁹¹ Judge Wake set the trial date on April 24, 2008. The plaintiffs then propounded a sizeable number of discovery requests, including dozens of deposition notices, and after Judge Wake rebuffed a couple

¹⁸⁷ Cf. Stephen N. Subrin, *Thoughts on Misjudging Misjudging*, 7 NEV. L.J. 513, 520 (2007) ("Without the realistic threat of trial, with the concomitant threat of imposed sanctions, not many defendants, if not most, would ever bargain at all.")

¹⁸⁸ See *Mortality Quotes*, THE SAMUEL JOHNSON SOUND BITE PAGE, <http://www.samueljohnson.com/mortalit.html> (last visited Apr. 27, 2015).

¹⁸⁹ For a discussion of how early trial dates can contribute to the efficient prosecution of complex civil litigation, see Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 148–52, 172–73 (2012).

¹⁹⁰ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 399; Subrin, *Uniformity*, *supra* note 6, at 96.

¹⁹¹ E.g., Civil Docket at entries 958, 979, 1165, 1181, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz.).

of attempts to delay discovery, the defendants cooperated with little resistance.¹⁹²

The trial date's firmness can require intensive case management by the court.¹⁹³ Here is where the adversarial relationship between trial and case management that Prof. Subrin posits flips. If the defendants do not cooperate with the plaintiffs' discovery requests, made on an expedited basis, the early trial date only harms the plaintiffs' cause by leaving them with an impoverished evidentiary record. Judge Wake, for example, had to shepherd *Graves v. Arpaio* aggressively during the pretrial period. He issued a detailed scheduling order that prescribed dates for inspections, interrogatory responses, depositions, and the exchange of expert reports.¹⁹⁴ He held a hearing every third weekday on discovery matters during the first month of the discovery period, and in the two-month period he decided nine discovery disputes overall.¹⁹⁵ Prof. Subrin concedes the necessity of intense case management in complex litigation,¹⁹⁶ but he treats this judicial role as something of a necessary evil. The judge *qua* case manager becomes an "efficiency expert[]," not an adjudicator, Prof. Subrin insists, and thus "not what it meant to be a wise judge for the past three millennium."¹⁹⁷ In structural reform litigation like *Graves v. Arpaio*, however, the judge *qua* case manager makes the judge *qua* adjudicator possible.

B. *The Democratic Benefits of Structural Reform Trials*

Connected to trial's functional value in structural reform litigation is one of the contributions to democracy that such trials can make. By countering litigation inefficiencies, trials facilitate representation-reinforcing judicial review and thereby improve representative government. Structural reform trials do not derive their democratic force entirely from judicial power, however. They also provide a singular setting for government accountability, and their often high political salience can spur mobilization beyond the courtroom.

1. *Representation Reinforcement Benefits*

Lawyers often bring structural reform cases on behalf of politically marginalized groups, such as prisoners or children in foster care. These groups' lack of effective representation in electoral politics may explain why the government treats them badly and why they need to sue. When a court remedies the group's injuries with an injunction, it reinforces their representation, corrects for a flaw in majoritarian institutions, and, so the argument goes, thereby

¹⁹² *Id.* at entries 1449, 1454.

¹⁹³ See Gensler & Rosenthal, *supra* note 35, at 856.

¹⁹⁴ Order, *Graves v. Arpaio*, No. 2:77-cv-00479-NVW (D. Ariz. May 29, 2008).

¹⁹⁵ *Id.* (Civil Docket entries).

¹⁹⁶ Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 18, at 398; Subrin, *Reflections*, *supra* note 25, at 183.

¹⁹⁷ Subrin, *Uniformity*, *supra* note 6, at 100–01.

improves democratic government.¹⁹⁸ Judicial review arguably vests judges with their most robust decisional power, but this power serves, rather than frustrates, democratic ends.

Representation-reinforcing judicial review can only succeed if plaintiffs can put on a good case. Plaintiffs who attack the facial lawfulness of some stated policy may be able to do so without difficulty. Those who challenge the day-to-day administration of a program, in contrast, may have a tougher row to hoe. These sorts of claims need extensive investigations into the daily operation of police stations, jails, public schools, and child welfare agencies before plaintiffs can meet their burden to establish systemic deficiencies in program administration. Government officials can degrade the quality of the plaintiffs' case by obstructing discovery, and they can delay the moment of adjudication, when representation reinforcement happens, with a strategy of delay. The very political discreteness of the group seeking injunctive relief may make this strategy all the more attractive to an official currying support from constituents.

As discussed, an early, firm trial date, made credible by extensive case management, can respond to this strategy. The substantive law that judges can employ to ensure the humane administration of government programs through judicial review loses value unless a procedural pathway to high-quality merits adjudication exists. Trial can open this pathway and, as such, functions as a procedural enabler of representation reinforcement.

Of course, not everyone agrees with this pro-democratic understanding of structural reform litigation.¹⁹⁹ Even a representation-reinforcement skeptic, however, should prefer trial as the best possible way to resolve these cases. A trial forces the judge into view, where public scrutiny can hold him accountable. As Judith Resnik has argued, quoting Jeremy Bentham, "[p]ublicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial."²⁰⁰ Also, a trial will likely produce a published set of findings,²⁰¹ whereas negotiat-

¹⁹⁸ See, e.g., Fiss, *supra* note 171, at 6–8. For a defense of representation reinforcement through judicial review as pro-democratic, see Ilya Somin, *Democracy and Judicial Review Revisited*, 7 GREEN BAG 2D 287, 291–93 (2004); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88 (1980) (asserting that “a representation-reinforcing approach to judicial review . . . is not inconsistent with, but on the contrary . . . entirely supportive of, the underlying premises of the American system of representative democracy”).

¹⁹⁹ See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 8 (2003).

²⁰⁰ Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 530 (2006) (quoting JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 355 (Edinburgh, William Tait 1843)); see also Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 24–26 (2011).

²⁰¹ Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 165 (2006) (“Judgment as a matter of law, bench trials, and the like are the grist of the opinion mill.”).

ed consent decrees often remain inaccessible except to the unusually intrepid researcher.²⁰² Structural reform after trial happens in the open, in other words, lessening whatever democratic affront judicial review might pose.

2. *Accountability Benefits*

Trials in structural reform cases provide unique moments of accountability and, in this way, engage the public without juror empowerment. They can force those responsible for the allegedly deficient program to explain their choices for its administration in public, as part of a conversation disciplined by evidentiary rules and procedural practices that require honesty and completeness. In non-legal settings, the official cannot be compelled to explain himself and can avoid questions that displease him. At trial, the official's arguments, justifications, and evasions do not disappear into an obscure deposition transcript, and the official cannot use the luxury of an affidavit, written in advance, to equivocate.²⁰³ He has to answer hard questions.

Arpaio's testimony in a racial profiling case brought against his office illustrates how the disciplined nature of conversation at trial can produce this sort of accountability. He had made a number of incendiary statements in other settings, including claims in his co-authored book that Mexican immigrants "are separate from the American mainstream,"²⁰⁴ and that "[a]ll other immigrants, exclusive of those from Mexico, hold to certain hopes and truths" about the American dream.²⁰⁵ During a television interview with Glenn Beck, when asked how he can enforce immigration law, Arpaio said, "what they look like, if they just look like they came from another country, we can take care of that situation."²⁰⁶ When class counsel grilled Arpaio on these statements at trial, he dissembled and unconvincingly disavowed them.²⁰⁷ At the end of the examination, the lawyer got Arpaio to declare that he had misrepresented his beliefs to the public on television and in print.²⁰⁸

²⁰² See generally Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515 (2010).

²⁰³ The refusal of witnesses to testify in favor of Prop 8, California's constitutional amendment prohibiting same-sex marriage, is illuminating in this respect. After rendering opinions in depositions and expert reports, most of these witnesses refused to testify at trial. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 954–55 (N.D. Cal. 2010).

²⁰⁴ Reporter's Transcript of Proceedings Before the Honorable G. Murray Snow (Bench Trial Day 2, at 278–537) at 352, *Melendres v. Arpaio*, No. 2:07-cv-02513-GMS (D. Ariz. July 24, 2012).

²⁰⁵ *Id.* at 348.

²⁰⁶ *Id.* at 364.

²⁰⁷ Arpaio blamed the incendiary statements in his autobiography, for example, on his co-author. *Id.* at 349.

²⁰⁸ The lawyer and Arpaio had the following colloquy:

Q: Which is the truth, Sheriff: what you're saying here in court or what you said in your book?

A: The truth is what I say in court, to the best of my recollection.

A trial can also produce and organize information about the administration of government programs and create accountability in this manner. Based in part on evidence the *Graves v. Arpaio* plaintiffs presented at trial, the NCCHC withdrew Maricopa County's accreditation. Presumably the information necessary to make this judgment existed in deposition testimony and in documents exchanged in discovery. In this form, however, the information was scattered and not at the public's disposal. At trial, the plaintiffs' lawyers not only had to publicize this information, they also had to organize it in a manner to help the finder of fact measure the jails' compliance with minimum standards of adequacy. Interested observers, like the NCCHC, could more readily learn from the information packaged thusly. Other actors, such as investigative journalists, can unearth and organize the sort of information that the plaintiffs' lawyers assembled for the *Graves v. Arpaio* trial. But litigators have tools, such as the discovery rules and subpoena power, that others lack, and trial, with testimony under oath and cross-examination, may vest this information with a particular endowment of credibility.

3. Civic Engagement Benefits

Trials in structural reform cases can galvanize civic engagement, even if citizen-jurors do not actually make legal decisions. During any trial, "a citizen," whether a party or a witness, "can effectively tell his own story publicly in a forum of power."²⁰⁹ This storytelling is all the more significant in structural reform litigation, since it often involves issues of high political and policy salience. What's more, this storytelling happens under speech conditions that guarantee equality of treatment. An inmate or a child in foster care shares the stage equally with government officials. While plenty of governmental processes may place all participants on formally equal footing, the trial does a better job than most at actually valuing all voices equally.²¹⁰

Trials in structural reform cases can also catalyze political participation, again, due to the significant salience of the issues ventilated in them. A wide range of community groups organized "pack the court" campaigns during trial in the New York City stop-and-frisk litigation to engage communities affected

Q: Which is the truth, Sheriff, what you say here in court today or what you tell interviewers like . . . Glenn Beck on national television?

A: Sometimes when you're talking to national television it's much different than testifying, where you're going back and forth very quickly, and sometimes . . . the media edits or twists things around.

Q: . . . Is what you're saying here in court true or is what you told . . . Glenn Beck true?

A: To the best of my recollection, I'm testifying to what I remember here in court.

Id. at 477–78.

²⁰⁹ BURNS, *supra* note 11, at 113.

²¹⁰ *Id.* at 133 (describing procedural justice literature).

by police practices in efforts to reform them.²¹¹ After each day during the trial's first week, organizations led marches and rallies, often departing from the courthouse steps.²¹² Advocates likewise used the trial in the Arpaio racial profiling case as a springboard for community organizing and political action.²¹³ During and for several months after the trial, for example, Latino groups registered thousands of new voters in Maricopa County.²¹⁴ It is hard to imagine advocates using other moments in litigation, such as document review or depositions, to prompt such public action. Perhaps trial succeeds as a galvanizing mechanism because non-lawyers have an intuitive understanding of the process's significance, and because its openness enables access to political actors.

C. *Expanding Opportunities for Trial-Type Proceedings*

An elaborate normative metric is required to measure the democratic value of structural reform trials against the benefits that can flow from juror engagement in small-scale cases. But this comparison may be academic if the civil trial rate in ordinary litigation will remain depressed, reform proposals like Prof. Subrin's notwithstanding. In contrast, trials and trial-type proceedings in structural reform litigation remain distinct procedural possibilities. My impressionistic sense is that this litigation produces trials at a rate higher than that which commentators commonly assert about complex litigation.²¹⁵ In July 2013, trial ended in the New York stop-and-frisk case.²¹⁶ Trial in the racial profiling case against Arpaio's office concluded in August 2012.²¹⁷ A plaintiff class of about 8,500 children, challenging the constitutional adequacy of Massachusetts' fos-

²¹¹ *E.g.*, *First Week of Floyd Stop-and-Frisk Trial Concludes*, COMMUNITIES UNITED FOR POLICE REFORM (Mar. 22, 2013), <http://www.changethenypd.org/news/first-week-floyd-stop-and-frisk-trial-concludes>.

²¹² *Id.*

²¹³ Ted Robbins, *Ariz. Activists Rally for Votes Against Sheriff Arpaio*, NPR (Aug. 2, 2012), <http://www.npr.org/2012/08/02/157761433/ariz-activists-rally-for-votes-against-sheriff-arpaio>; *see also* Tim Gaynor, *Hundreds in Phoenix March Against Arizona Immigration Law*, REUTERS NEWS (July 28, 2012), <http://www.reuters.com/article/2012/07/28/us-usa-arizona-immigration-protest-idUSBRE86R0SJ20120728>.

²¹⁴ *See Best of the Press: 11,054*, ADIOS ARPAIO (Aug. 1, 2012), <http://www.adiosarpaio.com/2012/08/best-of-the-press-11054/>.

²¹⁵ *E.g.*, Craig Green, *Black-and-White Judging in a World of Grays*, 46 TULSA L. REV. 391, 403 (2011) ("Even more than other lawsuits (which is saying something), class actions almost never reach trial . . ."). *But see* Gene Mesh, *Handling a Mass Disaster as a Class Action*, 27 AM. JUR. TRIALS 485, § 105 ("[F]ew class actions for damages, as distinguished from civil rights class suits for injunctive relief, ever reach the trial stage . . .").

²¹⁶ *E.g.*, Joseph Goldstein, *Judge Criticizes 'High Error Rate' of New York Police Stops*, N.Y. TIMES, May 21, 2013, at A20. On the likely size of the plaintiff class, *see* *Floyd v. New York*, 283 F.R.D. 153, 172 (S.D.N.Y. 2012).

²¹⁷ *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013); William Hermann, *Arizona Sheriff Arpaio's Racial Profiling Trial Ends*, BLOOMBERG BUS. (Aug. 3, 2012 9:01 PM), <http://www.bloomberg.com/news/articles/2012-08-02/arizona-sheriff-s-civil-rights-trial-draws-to-close>.

ter care system, rested in May 2013 after presenting its case-in-chief at trial.²¹⁸ Another trial, involving a 900,000-member class, began in March 2013, to determine whether New York City had planned sufficiently to protect people with disabilities in the event of a disaster.²¹⁹ The challenge to overcrowded conditions in California's prisons went to trial,²²⁰ as did an enormous disability rights case in Milwaukee.²²¹ In March 2014, trial ended in a case challenging the legality of Michigan's same-sex marriage ban.²²²

The fact remains that structural reform trials are and always will be rare. But these cases provide "vivid" litigation episodes, with more public significance than their numbers alone might suggest.²²³ Trial in even one of them might yield democratic benefits commensurate with those that a score of small-scale jury trials can produce. The Arpaio racial profiling trial may not have involved jurors in decision-making, but it helped catalyze efforts to register thousands of new Latino voters.

Finally, a modest change to judicial practice can generate the functional equivalent of trial in a lot of structural reform cases. This is so because, increasingly, merits adjudication occurs at the class certification stage when plaintiffs seek injunctive relief for systemic harm.

Many, if not most, structural reform cases proceed as class actions.²²⁴ Before the U.S. Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes* in June 2011, class certification motions in these cases succeeded as a matter of course

²¹⁸ E.g., Milton J. Valencia, *Judge Hears Case over Mass. Foster Care System*, BOS. GLOBE (Jan. 23, 2013), <http://www.bostonglobe.com/metro/2013/01/23/former-foster-child-tells-federal-court-she-was-neglected-and-over-prescribed-drugs-state-system/MK5iTKfhw46b9pYQRWI4FN/story.html>. On the size of the plaintiff class, see *Vigurs ex rel. Connor B. v. Patrick*, 272 F.R.D. 288, 292 (D. Mass. 2011).

²¹⁹ E.g., Cindy Rodriguez, *City's Treatment of Disabled During Disasters to be Scrutinized During Trial in Class Action Lawsuit*, WNYC NEWS (Mar. 11, 2013), <http://www.wnyc.org/story/274693-citys-treatment-disabled-during-disasters-be-scrutinized-during-trial-class-action-lawsuit/>.

²²⁰ *Brown v. Plata*, 131 S. Ct. 1910, 1910, 1928 (2011). For examples of prison conditions cases going to trial in the years 2012 and 2013, see *Ball v. LeBlanc*, 988 F. Supp. 2d 639 (M.D. La. 2013); *Prison Legal News v. Colum. Cnty.*, 942 F. Supp. 2d 1068 (D. Or. 2013); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-cv-01317, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012); *Native Am. Council of Tribes v. Weber*, 897 F. Supp. 2d 828 (D.S.D. 2012).

²²¹ *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 481, 488 (7th Cir. 2012). For examples of other disability rights cases going to trial during the last three years, see *Chester Upland Sch. Dist. v. Pennsylvania*, 284 F.R.D. 305 (E.D. Pa. 2012); *CG v. Pa. Dep't of Educ.*, 888 F. Supp. 2d 534 (M.D. Pa. 2012); *C.K. ex rel. R.P.-K. v. Dep't of Educ.*, No. 10-00436, 2012 WL 1082250 (D. Haw. Mar. 30, 2012); see also *DL v. District of Columbia*, 845 F. Supp. 2d 1 (D.D.C. 2011).

²²² Erik Eckholm, *In Gay Marriage Suit, a Battle over Research*, N.Y. TIMES (Mar. 7, 2014), <http://www.nytimes.com/2014/03/08/us/in-gay-marriage-suit-a-battle-over-research.html>.

²²³ Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511 (1986).

²²⁴ David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. (forthcoming 2015) (SSRN draft at 6–8).

and required little more than a perfunctory opinion from the judge.²²⁵ Courts imposed minimal evidentiary obligations on plaintiffs to prove that their claims met the requirements for certification in Rule 23 of the Federal Rules.²²⁶ *Wal-Mart*, however, announced a more stringent standard for Rule 23(a)(2)'s commonality requirement. Class certification now requires a "common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke."²²⁷ Also, plaintiffs after *Wal-Mart* bear the evidentiary burden to show that this "common contention" exists with "significant proof."²²⁸

When plaintiffs attack the administration of a government program, service, or institution, as opposed to the facial legality of some stated policy, the plaintiffs' common question often asks whether there exists a systemic practice or custom of illegal behavior that has caused harm to class members. Defendants often deny that this question is relevant to class members' claims, insisting that any injuries suffered by class members resulted from idiosyncratic, individualized causes.²²⁹ Put differently, defendants deny that a custom or practice responsible for class members' harm exists. To resolve the dispute and determine whether the proposed class meets the commonality requirement, the court must resolve the central merits question for the plaintiffs' case: does the defendant indeed have an unlawful custom or practice that causes harm to all

²²⁵ The *Wal-Mart* court tightened up the standards for Rule 23(a)(2)'s commonality provision and Rule 23(b)(2). Before *Wal-Mart*, courts routinely declared that each requirement is all-but-automatically satisfied in structural reform cases seeking injunctive relief. *See, e.g.*, *Kanter ex rel. Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) ((b)(2)); *S.S. ex rel. D.S. v. N.Y.C. Dep't of Educ.*, 255 F.R.D. 59, 73 (E.D.N.Y. 2008) ((b)(2)); *Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 474 (E.D. Pa. 2008); *Bzdawka v. Milwaukee Cnty.*, 238 F.R.D. 469, 476 (E.D. Wis. 2006) ((b)(2)); *Does I-III v. District of Columbia*, 232 F.R.D. 18, 26–29 (D.D.C. 2005) (commonality); *Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001) (commonality); *Forbes ex rel. Marisol A. v. Giuliani*, 929 F. Supp. 662, 692 (S.D.N.Y. 1996) ((b)(2)); *Carter ex rel. Caroline C. v. Johnson*, 174 F.R.D. 452, 467 (D. Neb. 1996) ((b)(2)).

²²⁶ *E.g.*, *Willits v. Los Angeles*, No. CV 10-05782, 2011 WL 7767305, at *2 (C.D. Cal. Jan. 3, 2011); *Shakhnes ex rel. Shakhnes v. Eggleston*, 740 F. Supp. 2d 602, 628 (S.D.N.Y. 2010); *Staley v. Wilson Cnty.*, No. 3:04-1127, 2006 WL 2401083, at *5 (M.D. Tenn. Aug. 18, 2006); *LV v. N.Y.C. Bd. of Educ.*, No. 03 Civ. 9917, 2005 WL 2298173, at *2 (S.D.N.Y. Sept. 20, 2005); *Raymond v. Rowland*, 220 F.R.D. 173, 179 (D. Conn. 2004).

²²⁷ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

²²⁸ *Id.* at 2553; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (providing a "preponderance of the evidence" standard). *Cf.* George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871, 882–83 (2012) (commenting on the proper evidentiary standard).

²²⁹ *E.g.*, *Mothersell v. Syracuse*, 289 F.R.D. 389, 395–96 (N.D.N.Y. 2013); *Parsons v. Ryan*, 289 F.R.D. 513, 520 (D. Ariz. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587, 597–98 (D. Or. 2012); *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 510 (N.D. Cal. 2011); *Buchanan ex rel. N.B. v. Hamos*, No. 11 C 6866, 2012 WL 1953146, at *9 (N.D. Ill. May 30, 2012).

class members?²³⁰ Moreover, it must do so based on evidence, not the pleadings, because of the “significant proof” obligation *Wal-Mart* set.

Courts now have a reason—perhaps an obligation—to conduct the equivalent of a bench trial at the class certification stage in structural reform litigation. A Texas district judge did so in a sizeable foster care reform case after the Fifth Circuit vacated her class certification order for failing to make commonality findings “with requisite proof.”²³¹ On remand, the judge held a three-day evidentiary hearing, during which she heard testimony from seventeen witnesses²³² and received sixty-two exhibits into evidence.²³³ She then re-certified the class. As for commonality, the judge was “persuaded” that the Texas system suffered from systemic deficiencies that put children at the risk of harm, a conclusion supported by six pages of evidentiary findings.²³⁴ Another district judge relied on trial findings when he re-certified a class of children with disabilities after the D.C. Circuit vacated an earlier order.²³⁵

Most structural reform cases will not proceed to trial. But many will include a class certification stage. Some judges, even after *Wal-Mart*, decide class certification motions on the papers, or at most after a couple of hours of oral argument.²³⁶ If a district judge wants a class certification to withstand appellate scrutiny, she should hold the equivalent of a bench trial to gather the necessary evidence. Findings based on live witness testimony will more likely

²³⁰ *E.g.*, *Mothersell*, 289 F.R.D. at 396; *Parsons*, 289 F.R.D. at 521; *Ligon v. City of New York*, 288 F.R.D. 72, 82 (S.D.N.Y. 2013); *Strickland ex rel. D.G. v. Yarbrough*, 278 F.R.D. 635, 639 (N.D. Okla. 2011); *Aguilar v. Immigration & Customs Enforcement*, No. 07 Civ. 8224, 2012 WL 1344417, at *5 (S.D.N.Y. Apr. 16, 2012).

²³¹ *Stukenberg ex rel. M.D. v. Perry*, 675 F.3d 832, 843 (5th Cir. 2012).

²³² Minute Entry for Jan. 22, 2013, Proceedings at 1–2 *Stukenberg*, 675 F.3d 832 (No. 2:11-cv-00084); Minute Entry for Jan. 23, 2013, Proceedings at 1–3 *Stukenberg*, 675 F.3d 832 (No. 2:11-cv-00084); Minute Entry for Jan. 24, 2013, Proceedings at 1–2 *Stukenberg*, 675 F.3d 832 (No. 2:11-cv-00084).

²³³ Decl. of Christina Wilson in Support of Plaintiffs’ Post-Hearing Brief in Support of Motion for Class Certification at 1, Exs. 1–31 *Stukenberg*, 675 F.3d 832 (No. 2:11-cv-00084); Decl. of Adriana T. Luciano in Support of Plaintiffs’ Post-Hearing Brief in Support of Motion for Class Certification at 1, Exs. 1–31 *Stukenberg*, 675 F.3d 832 (No. 2:11-cv-00084).

²³⁴ *M.D. v. Perry*, 294 F.R.D. 7, 38–44 (S.D. Tex. 2013).

²³⁵ *D.L. v. District of Columbia*, 845 F. Supp. 2d 1, 5–6 (D.D.C. 2013); *see also* Plaintiffs’ Motion for Class Certification and Reinstatement of Findings of Liability and Order Granting Relief at Ex. 1 D.L., 845 F. Supp. 2d 1 (No. 1:05-cv-01437) (indicating evidence the plaintiffs relied upon in support of their class certification motion).

²³⁶ *Parsons v. Ryan*, another prison conditions case assigned to Judge Wake, is illustrative. Judge Wake certified an inmate class in March 2013. He reviewed an extensive paper record of evidence to determine if a common question sufficient for Rule 23(b)(2) purposes existed. Agreeing that the plaintiffs met the standard, he concluded that “probative evidence . . . tips the balance in favor of concluding that the problems identified in the provision of health care are not merely isolated instances but, rather, examples of systemic deficiencies . . .” *Parsons v. Ryan*, 289 F.R.D. 513, 521 (D. Ariz. 2013). Although the finding does not preclude a different conclusion after trial, Judge Wake effectively decided the key issue of the defendant’s liability, sufficient to support the issuance of injunctive relief. But he did so after an afternoon of oral argument, not after anything that approximated the thirteen days of trial he held in *Graves v. Arpaio*.

receive deference from an appellate court than findings based on filings alone.²³⁷ Beyond their strategic value, trial-type proceedings at the class certification stage can generate a lot of the democratic benefits I have identified, in a large number of structural reform cases. This boost requires nothing more than a change in judicial practice, not even a modest rule reform, to happen.

CONCLUSION

My turn to structural reform litigation differs from Prof. Subrin's emphasis on the small-scale private law case as the repository for civil procedure's democratizing potential in the wake of the civil trial's demise. While we go in different directions, I am convinced by his insistence on a particular point of departure. For decades, Prof. Subrin has insisted that civil procedure do more than facilitate dispute resolution efficiently, that the proper procedural regulation of civil litigation can create important benefits for American democracy. This must be so.

²³⁷ *E.g.*, *Bertucci Contracting Corp. v. M/V Antwerpen*, 465 F.3d 254, 258 (5th Cir. 2006).