

**NEW YORK UNIVERSITY
ANNUAL SURVEY
OF AMERICAN LAW**

**VOLUME 65
ISSUE 4**

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City

SUMMARY OF CONTENTS

ARTICLES

RULE 23(B)(2) CERTIFICATION OF EMPLOYMENT CLASS
ACTIONS: A RETURN TO FIRST PRINCIPLES
Mark A. Perry and Rachel S. Brass 681

WHAT WE DON'T KNOW MIGHT HURT US: SUBJECTIVE
KNOWLEDGE AND THE EIGHTH AMENDMENT'S DELIBERATE
INDIFFERENCE STANDARD FOR SEXUAL ABUSE IN PRISONS
Katherine Robb 705

NOTES

FIREARM FEDERALISM
Anthony P. Badaracco 761

UNITED STATES v. INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION: ANALYZING THE CIVIL RICO SUIT AND ITS
IMPLICATIONS FOR THE FUTURE
Elizabeth Dondlinger 795

THE LIMITS OF FEDERAL JURISDICTION AND THE F-CUBED CASE:
ADJUDICATING TRANSNATIONAL SECURITIES DISPUTES IN
FEDERAL COURTS
Danielle Kantor 839

RULE 23(B)(2) CERTIFICATION OF EMPLOYMENT CLASS ACTIONS: A RETURN TO FIRST PRINCIPLES

*MARK A. PERRY AND RACHEL S. BRASS**

INTRODUCTION

Federal Rule of Civil Procedure 23(b)(2) authorizes a class action if “the party opposing the class has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

Unlike Rule 23(b)(3), the principal alternative route to class certification, the text of Rule 23(b)(2) does not require notice to absent class members, nor does it require (or even permit) class members to opt out of the lawsuit. Moreover, Rule 23(b)(3) requires a court to make pre-certification findings that common questions predominate and that a class action is the superior method of resolving the dispute. These findings need not be made under Rule 23(b)(2) as written.

For these reasons, many class plaintiffs find it advantageous to seek class certification under Rule 23(b)(2) rather than meet the more rigorous and protective standards of Rule 23(b)(3). As classes seeking certification of claims for monetary damages under Rule 23(b)(2) have grown more common, so too have certification orders containing judicially grafted solutions to perceived problems with class treatment of such claims.¹

Plaintiffs alleging discrimination in employment in particular have made aggressive use of Rule 23(b)(2). For the two largest putative employment class actions in history, one alleging sex discrimination and one claiming disability discrimination, plaintiffs secured district court certification under Rule 23(b)(2).²

* © 2010 by Mark A. Perry and Rachel S. Brass. Mr. Perry and Ms. Brass are partners at Gibson, Dunn & Crutcher LLP. Mr. Perry is also an adjunct professor at the Georgetown University Law Center. While the authors represent parties or amici in several of the cases discussed in this Article, the views expressed are solely their own.

1. Such “work-arounds” raise a host of interesting issues. *See infra* note 21.

2. *See Hohider v. United Parcel Serv., Inc.*, 243 F.R.D. 147, 153 (W.D. Pa. 2007) (Americans With Disabilities Act); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 143 (N.D. Cal. 2004) (Title VII of the 1964 Civil Rights Act). The *Dukes* certi-

Proponents of an expansive reading of Rule 23(b)(2), particularly in the employment context, frequently point to the Advisory Committee's Note stating that this provision was intended to encompass "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class."³

But these proponents, and virtually all courts, have failed to recognize the relevance of the interpretive methodology set forth by the Supreme Court in *Ortiz v. Fibreboard Corp.*⁴ for determining whether a particular claim may proceed under the "mandatory" provisions of Rule 23—subdivisions (b)(1) and (b)(2)—or, instead, must be certified (if at all) under subdivision (b)(3). The *Ortiz* Court made clear that adherence to the principles articulated in the historical antecedents of the mandatory provisions is a presumptively necessary precondition to class certification under those provisions.⁵

The historical antecedents to Rule 23(b)(2) uniformly involved claims of de jure segregation, and in those cases the courts approved class-wide injunctions precluding the defendant (usually a school district) from continuing to separate the races.⁶ Such cases are worlds apart from a modern suit alleging employment discrimination, an intentional tort, and seeking a wide range of monetary remedies (including back pay, compensatory damages, and punitive damages) under federal statutes such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act.⁷

When the *Ortiz* analysis is applied to Rule 23(b)(2), it strongly suggests that most modern employment discrimination cases cannot be certified under that subdivision. Rather, claims of intentional discrimination in employment brought under federal statutes authorizing legal relief and a statutory or constitutional entitlement to a jury trial must be certified in accordance with Rule

fication order is still undergoing appellate review. See 556 F.3d 919 (9th Cir. 2009) (granting rehearing en banc). The *Hohider* certification order was vacated on appeal. 574 F.3d 169, 171 (3d Cir. 2009).

3. Adv. Comm. Notes to 1966 Amendments, 39 F.R.D. 69, 102 (1966) [hereinafter Notes to 1966 Amendments]. The Advisory Committee also indicated that certain antitrust claims could be certified under subdivision (b)(2). See *infra* text accompanying note 128; see also *Reeb v. Ohio Dep't of Rehab'l Corr.*, 435 F.3d 639, 651–52 (6th Cir. 2006) (Keith, J. dissenting); Brief of Plaintiffs-Appellees at 46–47, *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. April 24, 2008) (No. 07-4588) (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998)).

4. 527 U.S. 815 (1999).

5. *Id.* at 845.

6. See *infra* Part V (discussing historical antecedents to Rule 23(b)(2)).

7. See *infra* Part III (discussing modern employment cases).

23(b)(3), which both imposes more stringent requirements on class certification and affords more protections to defendants and absent class members.

This Article proceeds as follows: Part I addresses the origins of the modern Rule 23 class action generally, and Rule 23(b)(2) in particular. Part II describes recent developments in employment class action litigation. Part III sets forth the framework for analyzing the mandatory certification provisions, in the context of Rule 23(b)(1), in *Ortiz*. Part IV applies that framework to Rule 23(b)(2). Part V addresses the implications of that analysis to the modern employment class action and suggests that such cases, insofar as they seek monetary damages, generally cannot be certified under Rule 23(b)(2).

I. DEVELOPMENT OF RULE 23(B)(2)

Class action practice in federal court is governed by Federal Rule of Civil Procedure 23, adopted by the Supreme Court pursuant to the Rules Enabling Act, a federal statute that authorizes promulgation of procedural rules that may not “abridge, modify, or enlarge” the substantive law.⁸

As the drafters of Rule 23 recognized, class actions are a continually evolving feature of American law.⁹ Representative legal actions first appeared in the Court of Chancery as exceptions to the rule of compulsory joinder where that rule, “relentlessly applied, would preclude decision of cases where it was impracticable or impossible to get all the interested persons before the court.”¹⁰ During the time of the divided bench, American courts adopted and built upon the English exceptions, allowing collective actions to

8. 28 U.S.C. § 2072(a) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals”); *id.* § 2072(b) (“Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”); *see also Hohider*, 574 F.3d at 185.

9. *See* Notes to 1966 Amendments, *supra* note 3, at 97 (“Difficulties with the original rule” discussion).

10. James W. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 307 (1938); *see also* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 1–7 (1987) (tracing the origins of group litigation to medieval England).

proceed as an exercise of the court's equity powers.¹¹ This practice was recognized by former Equity Rule 38.¹²

Commentators periodically sought to discern patterns within the cases proceeding pursuant to the equity power. For example, in the mid-nineteenth century, Justice Story articulated three categories of exceptions: questions of common or general interest; suits by previously associated parties; and cases involving parties too numerous to be brought before the court.¹³ In 1909, Thomas Street proposed an alternative classification of two categories: "true" class actions, where the subject of the suit was property upon which a class of persons claim an interest; and "spurious" class actions in which personal liability, not property, was at issue.¹⁴

After the merger of law and equity, class actions were recognized in the 1938 revisions to the Federal Rules of Civil Procedure,¹⁵ which drew upon both Story's and Street's classifications but provided a new alternative categorization based upon the nature of the rights at issue.¹⁶ As the Advisory Committee explained in 1938, new Rule 23 followed Equity Rule 38 in providing for certification of a class where the question to be litigated was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."¹⁷ Three categories of rights were recognized as appropriate for class actions: rights held jointly by a class; several rights involving property; and several rights involving a common question and common relief.¹⁸ In practice, the terms "true," "hybrid," and "spurious" were frequently applied to these categories, and stubbornly persisted into contemporary usage.¹⁹ That unfortunate practice caused ongoing confusion by implying a nonexistent con-

11. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921).

12. FED. EQUITY R. 38.

13. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA 123-24 (4th ed. 1848).

14. THOMAS A. STREET, FEDERAL EQUITY PRACTICE §§ 547-548 (1909).

15. FED. R. CIV. P. 23 (1938).

16. YEAZELL, *supra* note 10, at 230-31; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377-79 (1967); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 398 n.201 (1987-88) ("Moore blended the jurisdictional ideas of Street with the 'jural relations' ideas of Story and others.").

17. FED. R. CIV. P. 23 advisory committee's note (1937).

18. FED. R. CIV. P. 23(a)(1)-(a)(3) (1938).

19. See Notes to 1966 Amendments, *supra* note 3, at 97 ("Difficulties with the original rule" discussion).

2010] CERTIFICATION OF EMPLOYMENT CLASS ACTIONS 685

tinuity in class action categories from the nineteenth century through the modern understanding.²⁰ Moreover, the loaded nature of the terms served to undermine the intent of the drafters.²¹

By the 1960s, however, the 1938 categories widely were regarded as a failure in both form and substance. Professor Kaplan, Secretary of the 1966 Advisory Commission on Civil Rules, put it bluntly: “They were confusing. . . . The class-action device, then, had become snarled.”²² The official Advisory Committee Notes described the 1938 classes as “obscure and uncertain.”²³ Professor Cohn, Chairman of the Committee on Federal Rules and Procedure, was more diplomatic, noting that “the expected advantages of

20. *See id.*

21. *See* Statement on Behalf of the Advisory Comm. on Civil Rules to the Standing Comm. on Practice and Procedure of the Judicial Conference of the United States, at 7 (June 10, 1965), <http://www.uscourts.gov/rules/Reports/CV06-1965.pdf> [hereinafter *Committee Statement*] (referring to “the mistaken assumption that (b)(3) is merely the ‘spurious’ action by another name”); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967) (referring, in apparent jest, to “the illicit, outlawed, and patently counterfeited ‘spurious’ ones”). A modern development that can only add to this confusion is the use of the term “hybrid” for the questionable practice of creating classes partially certified under subdivision (b)(2) and partially certified under (b)(3), *see, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998), as well as for cases in which Rule 23(b)(3) safeguards are judicially grafted onto a class certified under Rule 23(b)(2), *see, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 93–95 (D.C. Cir. 1997) (permitting opt-out rights in the context of a settlement class). Certain scholars have sanctioned this approach, despite its lack of authorization in the Federal Rules. *See, e.g.*, George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 259–60 (1996). While a detailed critique of such practices is beyond the scope of this Article, we note that they appear to be inconsistent with the Supreme Court’s admonition that lower courts are to apply Rule 23 as promulgated. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (“The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context.”); *see also, e.g.*, *Kern v. Siemens Corp.*, 393 F.3d 120, 122, 126–29 (2d Cir. 2004) (refusing to approve “opt-in” class not authorized by Rule 23); *McManus v. Fleetwood Enters. Inc.*, 320 F.3d 545, 554 (5th Cir. 2003) (explaining that such judicial modifications would “undo the careful interplay between Rules 23(b)(2) and (b)(3)” by permitting plaintiffs to pursue substantial monetary claims without “requiring [them] to meet the rigorous Rule 23(b)(3) requirements” of predominance and superiority). We also note that allowing such claims raises significant Due Process Clause, Seventh Amendment and Rules Enabling Act concerns. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118, 120–21 (1994) (identifying Due Process Clause concerns); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir. 2008); *In re Simon II Litig.*, 407 F.3d 125, 139 (2d Cir. 2005).

22. Kaplan, *supra* note 16, at 380–85.

23. Notes to 1966 Amendments, *supra* note 3, at 97.

this tripartite categorization did not materialize.”²⁴ Thus eulogized, they were “put to rest” by the Committee.²⁵

Due to these concerns, substantial revisions to Rule 23 were made in the form of the 1966 amendments, through which the modern class action was born.²⁶ Those revisions responded to “an insistent demand and need for going forward to develop improved methods of handling disputes affecting groups.”²⁷ To effectuate this goal, the drafters sought to identify and affirm those class action categories that had emerged in practice as sound and legitimate, and to define those categories in practical terms, rather than by reference to abstract principles:

The Advisory Committee . . . perceived, as lawyers had for a long time, that some litigious situations affecting numerous persons “naturally” or “necessarily” called for unitary adjudication. The problem was how to elaborate this insight while avoiding the pitfalls of abstract classification on the style of 1938. . . . [T]he Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*. The revised rule was written upon the framework thus revealed[.]²⁸

Perhaps in no place was this approach more clear than in the new Rule 23(b), which contained three alternative routes to certification. Subdivisions (b)(1) and (b)(2) were the product of the “sorting out” of existing effective group-based litigation.²⁹ They were intended to capture specific categories of actions that, by virtue of familiarity and experience, the Committee could confidently assert were appropriate for a representative class model.³⁰

Subdivision (b)(1) captured a defined subset of cases, such as those involving riparian landowners, security holders, or claimants to a limited fund, that inherently required class-wide resolution.³¹

24. Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213 (1955–66).

25. *Id.*

26. FED. R. CIV. PROC. 23 (amended 1966).

27. *Committee Statement*, *supra* note 21 at 7.

28. Kaplan, *supra* note 16, at 386.

29. *Id.*; *Committee Statement*, *supra* note 21, at 4–5 (describing “the standard cases covered by (b)(1) and (b)(2)”).

30. Subdivision (b)(1) is further divided into two distinct categories ((A) and (B)), emphasizing the drafters’ express organization of the existing body of class actions into a descriptive scheme, complete with its own hierarchical structure.

31. Notes to 1966 Amendment, *supra* note 3, at 100–01; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999).

Thus, as framed, a class could be certified if “prosecuting separate actions by or against individual class members would create a risk” of “varying adjudications” that “would establish incompatible standards of conduct”³² or because a decision on the merits would “inescapably . . . alter the substance of the rights of others having similar claims.”³³

Subdivision (b)(2) was designed to “secure for the class any appropriate injunctive or declaratory relief” in the face of conduct applying generally to the class.³⁴ Professor Kaplan explained that “subdivision (b)(2), [builds] on experience mainly, but not exclusively, in the civil rights field.”³⁵ Similarly, the Advisory Committee Notes provide: “Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”³⁶

Finally, the drafters added subdivision (b)(3), a “relatively flexible” category of action “located at a growing point in the law.”³⁷ The Committee explained that this category was developed to provide “improved methods of handling disputes affecting groups.”³⁸ It was also controversial; at the time it was adopted, dissenters viewed (b)(3) as too unbounded and too much at odds with the basic principle that judgments could not bind parties not before the court.³⁹ Accordingly, subdivision (b)(3), and only subdivision (b)(3), was supplemented by “further protective devices.”⁴⁰ These additional limits were crafted to inform the determination of superiority and to minimize the ill-effects of abuse. Specifically, safeguards in the form of mandatory notice and opt-out procedures were designed for subdivision (b)(3) alone. Thus, (b)(3) certification was viewed as appropriate where “questions of law or fact com-

32. FED. R. CIV. P. 23(b)(1).

33. *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975); *see also Ortiz*, 527 U.S. at 833; *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999).

34. Kaplan, *supra* note 16, at 389; *see also* FED. R. CIV. P. 23(b)(2).

35. Kaplan, *supra* note 16, at 389.

36. Notes to 1966 Amendments, *supra* note 3, at 102.

37. *Committee Statement*, *supra* note 21, at 5, 7; YEAZELL, *supra* note 10, at 238 n.2, 246–47 (explaining structure of Rule 23 subdivisions).

38. *Committee Statement*, *supra* note 21, at 7.

39. *Id.* at 8–9; Frankel, *supra* note 21, at 45–46; Kaplan, *supra* note 16, at 394–400. These concerns are hardly unjustified. Subdivision (b)(3) itself is essentially a grant of discretion to the court to make the determination “that a class action is superior to available methods.” FED. R. CIV. P. 23(b)(3)(A)–(D) (enumerating requirements for superiority determination).

40. *Committee Statement*, *supra* note 21, at 8.

mon to class members predominate over any questions affecting only individual members” and “a class action is superior to other available methods” of adjudication.⁴¹

Professor Kaplan was unapologetic about the novel and potentially expansive nature of subdivision (b)(3), noting that it reaches cases where “there are no such clear indicia for use of class actions as in the prior examples [of (b)(1) and (b)(2)].”⁴² “New [Rule] 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created.”⁴³ Writing a year after the adoption of the new Rule, and in specific reference to subdivision (b)(3), he noted that “[i]n the actual handling of *pioneer cases* under the rule, the courts have prevailingly shown good understanding in spelling out and applying the delimiting criteria.”⁴⁴ Such cases included tort claims affecting large numbers of people.⁴⁵

Thus, from the beginning, it was understood that the new Rule 23 “effected broad and challenging innovations.”⁴⁶ Rule 23(b)(1) applied to certain claims that inherently require class resolution, Rule 23(b)(2) applied to certain claims that inherently result in class relief, and Rule 23(b)(3) applied to all other claims.

The class certification requirements in Rule 23 remained largely unchanged until 2003.⁴⁷ The 2003 amendments did not alter Rule 23(b), yet they provide additional guidance on the class certification decision. Specifically, the 2003 amendments “call at-

41. FED. R. CIV. P. 23(b)(3); *see also* *Amchem Prods. v. Windsor*, 521 U.S. 591, 623–24 (1997) (explaining that the predominance requirement is “far more demanding” than the commonality requirement of Rule 23(a), and asks whether the proposed class is “sufficiently cohesive” for class treatment).

42. Kaplan, *supra* note 16, at 389.

43. *Id.* at 399.

44. *Id.* at 395 (emphasis added).

45. Notes to 1966 Amendments, *supra* note 3, at 103.

46. Frankel, *supra* note 21, at 39.

47. In 1998, Rule 23 was amended to provide for permissive interlocutory review of class certification orders where “the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely to be dispositive of the litigation.” FED. R. CIV. P. 23(f) advisory committee’s note (1998). Because cases for which the permissive 23(f) interlocutory appeal is granted of necessity involve “changing areas of uncertainty in class litigation,” *id.*, the majority of appellate decisions addressing the propriety of the newly expansive use of 23(b)(2) classes are made in connection with interlocutory review. The 1998 amendments do not otherwise alter the class certification decision. *See also* Julian W. Poon et al., *Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?*, CERTWORTHY 8 (DRI Appellate Advocacy Comm., Chicago, Ill.) (Winter 2009), available at <http://www.dri.org/open/NewsLetterArchive.aspx?com=0010>.

attention to the court's authority—already established in part by Rule 23(d)(2)—to direct notice of certification of a Rule 23(b)(1) or (b)(2) class.”⁴⁸ As the Advisory Committee Notes explain, “[m]embers of a class certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice,” although “there may be less need for notice than in a (b)(3) class.”⁴⁹ This, explained the Advisory Committee, is because “there is no right to request exclusion from a (b)(1) or (b)(2) class.”⁵⁰ Because the characteristics of those mandatory classes may reduce the need for notice, and the cost of providing notice “could easily cripple actions that do not seek damages,” the Rules provided that the trial court may often determine not to direct notice.⁵¹

Thus, under the presently formulated Rule 23, to be certified as a class action, a case must meet the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy; and fit within one of the provisions of Rule 23(b).⁵² A certification order must make findings on these points and specify the “claims, issues, and defenses” to be tried on a class basis.⁵³ A district court is not just empowered, but obligated, to resolve any factual differences that bear on the Rule 23 prerequisites to certification.⁵⁴

II. RECENT RULE 23(B)(2) EMPLOYMENT CLASS ACTIONS

Rule 23(b)(2) was relatively quiescent from its adoption in 1966 through the end of the twentieth century. The past decade, however, has seen a significant increase in Rule 23(b)(2) litigation, as plaintiffs' lawyers, primarily in employment discrimination cases, have sought to avoid the requirements and protections of Rule 23(b)(3). Rule 23(b)(2) has been invoked in recent years to certify classes of thousands or even millions of persons.

The largest and highest profile of these cases is *Dukes v. Wal-Mart Stores, Inc.*, a putative Title VII class action brought on behalf

48. See FED. R. CIV. P. 23 advisory committee's notes (2003).

49. *Id.*

50. *Id.*; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 & n.13 (1999).

51. FED. R. CIV. P. 23 advisory committee's notes (2003).

52. FED. R. CIV. P. 23; see, e.g., *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007).

53. FED. R. CIV. P. 23(c)(1)(B).

54. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); *Oscar Private Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007); *In re Initial Pub. Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

of a nationwide class of all current and former female employees of Wal-Mart over a period of eleven years (and growing).⁵⁵ In that case, the district court certified a Rule 23(b)(2) class estimated at the time to exceed 1.5 million women despite the fact that plaintiffs sought punitive damages of billions of dollars as well as back pay.⁵⁶ Similarly, in *Ellis v. Costco*,⁵⁷ plaintiffs sought and obtained (b)(2) certification of a nationwide class of current and former female employees denied promotion to management positions since 2002. In that case, despite claims for punitive and compensatory damages, the district court granted certification in reliance on a declaration stating that plaintiffs' "primary motivation" was to change Costco's behavior.⁵⁸

In *Hohider v. United Parcel Service, Inc.*, a district court certified a nationwide (b)(2) class of all current and former UPS employees who took medical leave and were allegedly deterred from returning to work.⁵⁹ The class, which may have had more than 36,000 members, was the largest ever certified under the Americans with Disabilities Act.⁶⁰ It included persons with a wide variety of physical and mental impairments, real or imagined, of varying severity, who took leaves of differing lengths, for different reasons, under numerous and widely divergent policies and procedures.⁶¹ And, as in *Dukes* and *Ellis*, it involved claims for significant monetary relief, specifically punitive and compensatory damages and back pay.⁶² The district court found it could read the compensatory punitive damages claims out of the complaint and defer consideration of the claims for monetary relief (particularly back pay) until a later date.⁶³

55. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *reh'g granted*, 556 F.3d 919 (9th Cir. 2009) (granting en banc review of certification of Title VII class). The authors are counsel for a party on this case. For an interesting discussion of the substantive issues raised by *Dukes* and similar cases, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009); see also Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 TEX. REV. L. & POL. 163 (2009).

56. See *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1196–97 (9th Cir. 2007) (Kleinfeld, J. dissenting).

57. 240 F.R.D. 627 (N.D. Cal. 2007). The authors are counsel for an amicus on this case.

58. *Id.* at 642.

59. 243 F.R.D. 147, 245 (W.D. Pa. 2007). The authors are counsel for a party on this case.

60. *Id.* at 219–20.

61. *Id.* at 154.

62. *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 173 (3d Cir. 2009). The Third Circuit, in a sweeping decision, reversed the certification order.

63. See *Hohider*, 243 F.R.D. at 243–44.

Such attempts to push Rule 23(b)(2) past its historical bounds are not limited to the context of alleged discrimination. Plaintiffs' attorneys also have attempted to obtain Rule 23(b)(2) certification in cases involving wage-and-hour claims. For example, in *Sepulveda v. Wal-Mart Stores, Inc.*, plaintiff assistant managers brought claims seeking classification as "non-exempt" under California's labor laws, and sought unpaid wages and penalties, as well as an injunction barring Wal-Mart from continuing the challenged practice.⁶⁴ In that case, while the district court denied certification under Rule 23(b)(2) because of the monetary relief claimed, a three-judge Ninth Circuit panel reversed that determination.⁶⁵

These cases have arisen, in part, because the Supreme Court has thus far declined to clarify the contours of subdivision (b)(2), particularly where monetary relief is sought by the plaintiffs. The Supreme Court has twice agreed to decide whether awarding monetary relief in a (b)(2) class action, without opt-out rights for absent class members, violates the Due Process Clause.⁶⁶ The Court ultimately did not answer the constitutional question in either case, and thus it "is an open question . . . in the Supreme Court . . . whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue."⁶⁷

In the absence of guidance from the Supreme Court, the lower federal courts have divided on the applicability of Rule 23(b)(2) to claims for monetary relief. The majority rule holds that such claims may be certified under Rule 23(b)(2) only if the money is "inciden-

64. 237 F.R.D. 229, 245 (C.D. Cal. 2006). The authors are counsel for a party on this case.

65. *Sepulveda v. Wal-Mart Stores, Inc.*, 275 F. App'x 672 (9th Cir. 2008). Both the *Ellis v. Costco* and *Sepulveda v. Wal-Mart* cases are stayed at various stages of appeal to the Ninth Circuit Court of Appeals pending the en banc court's decision in *Dukes*. Attempts to certify such classes are not limited to district courts within the Ninth Circuit. In *Brown v. Nucor Corp.*, a putative class action brought in the District of South Carolina, plaintiffs sought back pay, compensatory damages and punitive damages, and moved for Rule 23(b)(2) certification. *See* 576 F.3d 149 (4th Cir. 2009). Certification of that class was denied because the class lacked commonality, a holding reversed by a divided Fourth Circuit. *Compare id.* at 156–57, *with id.* at 162–64 (Agee, J. dissenting); *see also, e.g.*, *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006). Whether the claims for monetary relief bar certification under that circuit's prior decision in *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), remains an open question.

66. *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (raising but not resolving this question); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118, 121–22 (1994) (same).

67. *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

tal” to an injunction or declaration.⁶⁸ The minority rule is that monetary claims may be certified under Rule 23(b)(2) if money is not the plaintiffs’ “primary purpose” in pursuing the litigation.⁶⁹ As we develop below, both of these approaches are inconsistent with the framework set forth by the Supreme Court in *Ortiz* for analyzing the mandatory provisions of Rule 23.⁷⁰

III. THE *ORTIZ* FRAMEWORK

Although the Supreme Court has thus far passed up the opportunity to construe Rule 23(b)(2), the Court has not been entirely silent on the application of Rule 23(b). In *Ortiz*, the Court engaged in an extensive analysis of Rule 23(b)(1), which, like Rule 23(b)(2), does not require notice nor permit opt-outs in class actions certified under that subdivision. In our view, the teachings of *Ortiz* have tremendous significance in the (b)(2) context.

A central insight of the *Ortiz* decision is that the “mandatory” provisions of Rule 23(b)—those that do not require notice or allow opt-out—must be carefully applied to ensure that the procedural class action device does not transgress the rights of either the defendant or the absent class members.

Ortiz involved the settlement of several hundred thousand asbestos claims.⁷¹ The settling parties sought certification of a mandatory class comprised of all past, present, and future claimants.⁷² They relied on Rule 23(b)(1)(B), which authorizes certification of a class “when claims are made by numerous persons against a fund insufficient to satisfy all claims.”⁷³ Their theory was that the available assets, a contribution from the manufacturer plus the proceeds of various insurance policies, would not be enough to cover all the claimants’ claims.⁷⁴ The lower courts allowed the case to

68. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); see also *Reeb*, 435 F.3d at 649–50; *Thorn*, 445 F.3d at 331; *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int’l Union of Operating Eng’rs*, 216 F.3d 577, 580–81 (7th Cir. 2000).

69. *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 162–63 (2d Cir. 2001), *disapproved*, *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 35–38, 42 (2d Cir. 2006); *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

70. For a discussion of the split among circuits as to how to evaluate these questions, see Kirk, *supra* note 55 at 171–73.

71. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

72. *Id.* at 825–26.

73. Notes to 1966 Amendments, *supra* note 3, at 101.

74. *Ortiz*, 527 U.S. at 825–27.

proceed as a class action, but the Supreme Court reversed the certification order.⁷⁵

In *Ortiz*, the Court held that the “limited fund” category of class actions was delineated by the pre-1966 precedents and, in particular, the defining characteristics laid down by such cases.⁷⁶ This constraint, the Court explained, had three justifications: the Advisory Committee’s deliberately retrospective approach to mandatory class actions;⁷⁷ the Rules Enabling Act’s prohibition against altering substantive rights;⁷⁸ and the Due Process Clause limitations on resolving damage claims asserted by absent parties.⁷⁹

The *Ortiz* Court carefully examined the historical antecedents of Rule 23(b)(1) to ascertain the scope of actions encompassed by that provision.⁸⁰ The Court explained:

Rule 23(b)(1)(B) speaks from a vantage point within the class, from which the Advisory Committee spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.⁸¹

Among the types of claims to which Rule 23(b)(1) was specifically addressed are actions in which claims are made by numerous persons against a fund insufficient to satisfy all claims.⁸² The class in *Ortiz* was certified under this “limited fund” rationale.⁸³ The Court surveyed the pre-1966 cases allowing classes to proceed on that basis, and derived from them three “conditions” that must be met in limited fund cases: the fund must be inadequate to pay all the claims; the whole fund must be devoted to pay the claims; and the claimants must be treated equitably among themselves.⁸⁴

75. *Id.* at 830.

76. *Id.* at 842.

77. *Id.*

78. *Id.* at 845.

79. *Id.* at 846.

80. *Id.* at 834.

81. *Id.* at 833 (citing Kaplan, *supra* note 16, at 338) (alteration in original); *see also* Notes to 1966 Amendments, *supra* note 3, at 100 (“The difficulties which would be likely to arise if resort were had to separate actions by . . . the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.”); *id.* at 101 (“In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit.”).

82. *Id.* at 101.

83. *Ortiz*, 527 U.S. at 838–39.

84. *Id.*

The *Ortiz* Court held that the characteristics drawn from the pre-1966 cases were both sufficient and presumptively necessary preconditions to certification.⁸⁵ “[T]his limiting construction,” the Court explained, “finds support in the Advisory Committee’s expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims.”⁸⁶

The same analysis can and should be conducted with respect to subdivision (b)(2). As Professor Kaplan explained, subdivisions (b)(1) and (b)(2) were crafted in light of an empirical approach. Those cases that had a demonstrable suitability to class-based adjudication were the basis for the categories created.⁸⁷ Their prior acceptance and stability is captured by the Committee’s subsequent description of them as “the standard cases covered by (b)(1) and (b)(2).”⁸⁸ Accordingly, those categories of cases could be tried as class actions without the additional analysis required by Rule 23(b)(3), or the safeguards of Rule 23(c)(2)(B).

Beyond the substance of the referenced “standard cases,” the manner in which the Committee defined these categories was important. In part, the drafters were performing the traditional work of commentators in a common law system: deriving patterns and categories from the broad run of cases. But in seeking to “avoid[] the pitfalls of abstract classification,” they eschewed the traditional technique of abstracting from those patterns and categories broad principles that future courts were to apply to novel fact patterns.⁸⁹ Instead, they defined the categories as concretely as they were able, and provided example precedents.⁹⁰ Through these descriptive classifications, they intended to create bounded sets of actions that years of practice had found suitable for “automatic” class treatment.⁹¹ There was nothing in the contemporaneous record to suggest that these categories were intended to operate prospectively, as flexible tools to be applied by the courts to emerging situations.⁹² To the contrary, subdivision (b)(3) and the Committee’s discussion of its terms clearly demonstrate that, as Justice Souter would later

85. *Id.* at 842.

86. *Id.*

87. Kaplan, *supra* note 16, at 386.

88. *Committee Statement*, *supra* note 21, at 7.

89. Kaplan, *supra* note 16, at 386.

90. *Id.* at 386–87.

91. *Id.*

92. *Id.* at 90.

phrase it, subdivision (b)(3) was intended to be the “Rule’s growing edge.”⁹³

Each of the bases for the Supreme Court’s limitation of the “limited fund” category of Rule 23(b)(1)(B) equally justifies confining the “civil rights” category of Rule 23(b)(2) to the precedents, with their defining characteristics, decided before 1966 and expressly incorporated by the Advisory Committee into the Notes to the 1966 amendments. Rule 23(b)(2), like subdivision (b)(1), is deliberately retrospective. Both subdivisions raise Rules Enabling Act problems if applied beyond their intended scope, and neither provides for opt-out rights. Therefore they raise identical due process concerns.

Importantly, in *Ortiz* itself, the Supreme Court emphasized that “the text of Rule 23(b)(1)(B) . . . covers more historical antecedents than the limited fund.”⁹⁴ Thus *Ortiz* articulates the mode of analysis that courts are to use in analyzing certification requests under Rule 23(b)(1); that *Ortiz* happened to involve the “limited fund” category hardly suggests that the same analysis is not equally applicable to the other three categories of Rule 23(b)(1), or to the other mandatory class category, Rule 23(b)(2). On the contrary, consistent principles of interpretation suggest that the same analytical method should be applied to all categories of mandatory classes.⁹⁵

IV. APPLYING THE *ORTIZ* FRAMEWORK TO RULE 23(B)(2)

The *Ortiz* Court explained that “when subdivision (b)(1)(B) was devised . . . the object was to stay close to the historical model.”⁹⁶ That statement is equally true for Rule 23(b)(2), which was premised on a specific category of cases where group rights had previously been effectively litigated.

The *Ortiz* Court drew the defining characteristics of a permissible “limited fund” class action from the pre-1966 precedents identified by the Advisory Committee, finding that “[t]he cases [cited in the Notes] show what the Advisory Committee must have assumed

93. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 862 (1999).

94. *Id.* at 842.

95. See Mark A. Perry & Paul Blankenstein, *The Inapplicability of Rule 23(b)(1) to ERISA Class Actions*, BNA WORKPLACE L. REP., December 5, 2008, at 1.

96. 527 U.S. at 842; see also *id.* at 843 (“[T]he Committee intended subdivision (b)(1) to capture the ‘standard’ class actions recognized in pre-Rule practice.”) (citation omitted).

would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has a right to secede.”⁹⁷ The cases cited by the Advisory Committee to illustrate the mandatory Rule 23(b)(2) category similarly demonstrate the appropriate operation of this provision. And, as in *Ortiz*, the historical antecedents reveal a far more limited approach to class certification than the lower federal courts have recently adopted. The examples of proper (b)(2) certifications provided by the Advisory Committee (as well as further examples offered by Professor Kaplan in his 1966 analysis) are vintage, *Brown*-era desegregation actions. Every single one of them, as explained below, involved a challenge to de jure racial segregation. These cases, litigated before the Civil Rights Acts of 1964 (with one exception) and 1991, sought neither compensatory nor punitive damages, were not tried before juries, and awarded few, limited attorneys’ fees.

Read in concert, several common features emerge from these cases. While all were adjudicated on a class-wide basis, several of them involved little or no discussion of class certification.⁹⁸ It appears that there was little serious debate by this point about the propriety of class treatment for claims seeking an injunction to end de jure segregation.⁹⁹ Where the courts did address that question, however, the discussion was illuminating: several made the point that certification was not an issue of great importance, given the nature of the injunctive relief sought.¹⁰⁰ As the Fifth Circuit explained in *Bailey v. Patterson*, a case seeking desegregation of a common carrier, “[w]e find it unnecessary to determine, however,

97. *Id.* at 838.

98. *Northcross v. Bd. of Educ.*, 302 F.2d 818 (6th Cir. 1962); *Mannings v. Bd. of Pub. Instruction*, 277 F.2d 370 (5th Cir. 1960); *Todd v. Joint Apprenticeship Comm. of Steel Workers*, 223 F. Supp. 12 (N.D. Ill. 1963).

99. *Buckner v. County Sch. Bd.*, 332 F.2d 452, 454 (4th Cir. 1964) (“The right of the plaintiffs to obtain injunctive relief for the class they represent as well as individual relief for themselves is clear beyond doubt.”); *Green v. Sch. Bd.*, 304 F.2d 118, 124 (4th Cir. 1962) (“[T]he individual appellants are entitled to relief, and also they have the right to an injunction on behalf of the others similarly situated.”); *cf.* *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (“The decisions of this court are divided on the question of whether appellants have standing to represent not only themselves but the class of all Negroes similarly situated. The remand by the Supreme Court in the present case would seem to indicate an affirmative answer. The Court specifically noted that this is a class action.”) (internal citations omitted).

100. *Id.*; *see also* *Potts v. Flax*, 313 F.2d 284, 289–90 (5th Cir. 1963) (“[I]f it was error to treat the case as a class suit and enter such a decree, such error, if any, was harmless since the decree for all practical purposes would have been the same had it been confined to the Teal or Flax children.”).

2010] CERTIFICATION OF EMPLOYMENT CLASS ACTIONS 697

whether this action was properly brought under Rule 23(a) The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of the appellants but also for all persons similarly situated.”¹⁰¹

Where the opinions cited by the drafters of Rule 23 discuss the substance of the certification question, they are consistent in finding that the absence of individualized issues is the critical factor allowing the cases to proceed as a class. For example, in *Orleans Parish School Board v. Bush*: “Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students.”¹⁰² In *Frasier*, a case concerning the desegregation of the University of North Carolina, the court expressly provided that its decree did not reach the individualized circumstances of particular plaintiffs. In response to the University’s claim that it would be unable to exercise its legitimate discriminatory function of merit-based admissions, the court stated:

The action in this instance is within the provisions of Rule 23(a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications.¹⁰³

Finally, in *Potts*, the court went through a more complete certification analysis, noting that the large number of students made joinder impractical, representation was able, and, “there was not the slightest suggestion either on the trial (or since) that within that large mass there was any substantial conflict either in interest or in the legal positions to be advanced.”¹⁰⁴

This line of cases left the Committee confident that subdivision (b)(2) actions were appropriate for class relief and presented no

101. *Bailey*, 323 F.2d at 206.

102. 242 F.2d 156, 162 (5th Cir. 1957); *see also* *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 311 F.2d 107, 109 (4th Cir. 1962) (“Whether the School Board is assigning pupils, involuntarily, on the basis of race is a question of fact which is common to all of these objecting plaintiffs. The right of each to some relief will turn upon the resolution of that common question of fact. The complaint does not present those disparate factual controversies which the District Court envisioned.”).

103. *Frasier v. Bd. of Tr. of Univ. of N.C.*, 134 F. Supp. 589, 593 (M.D.N.C. 1955).

104. *Potts*, 313 F.2d at 289.

serious concerns when adjudicated as such. Advisory Committee Chair Professor Cohn noted that while (b) (2) was “new . . . the rule appears to be catching up to the present day practice of many courts.”¹⁰⁵ Indeed, the applicability of representative litigation to these segregation disputes was seen as so self-apparent that “a line of decisions, commencing under the original version of rule 23, has held that certification of a class action is unnecessary when the plaintiff seeks injunctive or declaratory relief that extends to an entire class.”¹⁰⁶

Only one of the exemplary cases was brought under Title VII of the Civil Rights Act of 1964. *Hall v. Werthan Bag Corp.* was an employment discrimination class action instituted under the pre-1966 Rule 23.¹⁰⁷ The defendant maintained that a class action could not be brought under Title VII, apparently relying on pre-Title VII cases holding that class actions were not appropriate when the alleged discrimination was not based on an expressly discriminatory policy.¹⁰⁸ The court rejected that position out of hand, coining the oft-quoted phrase, “[r]acial discrimination is by definition a class discrimination.”¹⁰⁹ The court then went on to distinguish between the common interest in the eradication of discrimination, which it found suitable for class treatment, and the individualized questions of redress for past conduct, which it did not:

This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. . . . But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class. The court is of the opinion, therefore, that a significant question of fact common to all members of the class exists in this case insofar as the complaint seeks the removal of the alleged discriminatory policies. *To the extent that*

105. Cohn, *supra* note 24, at 1216.

106. George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 700–01 (1980).

107. 251 F. Supp. 184, 185 (M.D. Tenn. 1966).

108. *Id.*

109. *Id.* at 186; *see, e.g.*, *Tijerina v. Henry*, 398 U.S. 922, 922 n.2 (1970) (Douglas, J., dissenting from dismissal) (quoting *Hall*). *But see* *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (“The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.”).

*it seeks redress for past effects of the alleged discrimination, however, the controlling questions of fact are not common to the entire class.*¹¹⁰

The *Hall* court's explicit consideration of the question of monetary relief, the only such reference to monetary relief in the historical antecedents, confirms that such claims are inconsistent with Rule 23(b)(2) certification. The court ultimately concluded that "the complaint herein properly states a class action under Rule 23(a) insofar as it seeks a prohibitive injunction."¹¹¹ But the court specifically excluded "whatever back pay or reinstatement which might be sought as ancillary relief" from class treatment on the grounds that only the named plaintiff had exhausted his administrative remedies regarding those claims.¹¹² Even absent an administrative exhaustion requirement, which plainly can never be satisfied by unnamed and absent plaintiffs,¹¹³ the court's analysis strongly suggests that individualized relief could never receive mandatory class treatment because "the controlling questions of fact are not common to the entire class."¹¹⁴

Hall points the way toward a clear distinction between the civil rights cases recognized by the drafters of Rule 23 as "standard" class actions and modern employment actions. The modern cases display obvious and substantial differences from the category of cases described by subdivision (b)(2). All of the historical antecedents involved conduct that affected every class member alike—a facially discriminatory policy—and a request for injunctive relief to the exclusion of individuated damages. Modern employment cases, in contrast, typically involve conduct that affects each plaintiff differently, for which individually tailored monetary relief is sought.

The question raised by *Ortiz* is whether the nature and scope of those differences is sufficient to disqualify a modern employment class action from certification under subdivision (b)(2). Analysis of the historical antecedents within the framework set forth by the Supreme Court suggests that the answer is yes. Specifically, those cases suggest that the highly individuated claims at the heart of the modern employment class action are a far cry from the challenges to explicit exclusionary policies addressed in the antecedent cases, and that the drafters of Rule 23 did not contemplate the monetary claims at the heart of most contemporary employment cases when crafting Rule 23(b)(2).

110. *Hall*, 251 F. Supp. at 186 (emphasis added).

111. *Id.* at 188.

112. *Id.*

113. *Cf. Fed. Express v. Holowecki*, 552 U.S. 389 (2008).

114. *Hall*, 251 F. Supp. at 186.

V.
EMPLOYMENT CLAIMS GENERALLY SHOULD NOT
BE CERTIFIED UNDER RULE 23(B)(2)

The *Ortiz* Court drew from the historical antecedents three characteristics that are presumptively necessary preconditions to certification under Rule 23(b)(1). The historical antecedents to subdivision (b)(2) likewise yield defining features of any class action certified under that provision.

First, Rule 23(b)(2) by its terms permits certification only of claims brought on grounds generally applicable to the class. Many courts have described this through the concept of “cohesiveness,” which looks at whether a case involves class-wide or individualized questions.¹¹⁵ This concept embodies the “naturalness” of litigating a claim on a class-wide basis, as explained by Professor Kaplan.¹¹⁶

The categorical discrimination cases provide the historical context for the “generally applicable” requirement and illustrate the type of claim that can meet that requirement. In every one of the historical antecedents, the class plaintiffs challenged a single policy that on its face discriminated against each of them equally (*e.g.*, no black children may attend this school). Some private employers have historically adopted similar blanket restrictions (“no Irish need apply”). Modern employment cases, by contrast, are increasingly brought on behalf of a class of individuals with fundamentally distinct and individualized claims. For example, as the Third Circuit recognized in the *Hohider* case, failure to accommodate claims brought under the Americans with Disabilities Act, which necessitate individualized determinations of disability, qualification and reasonableness of a requested accommodation, raise fundamentally individualized claims which may be incapable of class-based litigation under Rule 23(b)(2) because they are not brought on grounds generally applicable to the class.¹¹⁷

The second feature of Rule 23(b)(2) made clear by the antecedents is that class-based adjudication of the type of claims for monetary relief regularly sought under Title VII and other civil rights statutes, whether the back pay authorized by the 1964 Civil Rights Act or the compensatory and punitive damages authorized by the 1991 Civil Rights Act, was not contemplated by the drafters

115. See *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (“[A] [23(b)(2)] class must be cohesive . . .”) (citing cases).

116. Kaplan, *supra* note 16, at 386.

117. *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 184–86, 193–96, 200 (3d Cir. 2009).

2010] CERTIFICATION OF EMPLOYMENT CLASS ACTIONS 701

of the 1966 amendments to Rule 23. Not one case cited in the Advisory Committee Notes allowed class resolution of monetary claims.¹¹⁸ And the only case identified in 1966 to consider the question, *Hall*, declined to certify such claims.

Instead, the drafters permitted Rule 23(b)(2) adjudication only of injunctive and declaratory claims—a distinction between the legal and equitable remedies well known at the time of both the 1938 and 1966 versions of Rule 23. Rule 23(b)(2) permits certification if “final injunctive relief or corresponding declaratory relief” is appropriate with respect to “the class as a whole.” As the Advisory Committee Notes to the 1966 amendments explain, Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”¹¹⁹

While the drafters might not have foreclosed all claims for monetary relief in a (b)(2) action, the available remedies are best understood as limited to the kinds of monetary relief that a Chancellor could award in equity.¹²⁰ If a claim requests legal relief, that is, if it must be tried to a jury on request of either party by statute or under the Seventh Amendment,¹²¹ then it cannot be certified under Rule 23(b)(2).¹²²

This distinction has arisen most often in employment class actions in the context of claims for back pay relief under Title VII. Since the 1970s, courts regularly certified Rule 23(b)(2) classes seeking back pay on the basis that such claims are “equitable,” with little further analysis.¹²³ Recently, however, that justification, and class claims for back pay generally, are receiving significantly increased scrutiny. For example, the Fourth Circuit has squarely rejected certification of claims for back pay on that basis because the text of Rule 23(b)(2) says “nothing whatsoever about equitable relief.”¹²⁴ That court, and others, have suggested that Rule 23(b)(2) certification might be appropriate in cases only where injunctive and declaratory relief predominate despite the presence of a re-

118. *See supra* Part IV.

119. Notes to 1966 Amendments, *supra* note 3, at 102.

120. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002) (explaining that all back pay awards are not the same; some are money damages claims, pure and simple, regardless of how they are labeled).

121. U.S. CONST. amend. VII.

122. *Cf. Millsap v. McDonnell Douglas*, 368 F.3d 1246, 1260 (10th Cir. 2004).

123. *See, e.g., Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 259–60 (5th Cir. 1974).

124. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (“[I]f the Rule’s drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so.”).

quest for back pay.¹²⁵ In most cases, however, the history of Rule 23(b)(2) suggests that the highly individualized nature of such a back pay claim should preclude certification because the claim is not on grounds generally applicable to the class.

More broadly, the historical context establishes that it is overly facile to note that Rule 23(b)(2) was drafted in light of “civil rights cases” and that employment discrimination claims are a species of civil rights cases. The historical antecedents make clear that subdivision (b)(2) was designed to capture some civil rights cases—involving categorical discrimination and only injunctive relief—and not others. Under *Ortiz*, a case falling without the principles articulated in the antecedents cannot be certified as a mandatory class.

Indeed, the Advisory Committee Notes make clear that Rule 23(b)(2) was not intended for civil rights class actions alone. Two alternative hypothetical commercial claims are also identified: claims for “specific or declaratory relief” challenging continued use of a forbidden price differential, and claims “to test the legality of a tying condition.”¹²⁶ Thus, by its terms, the alternative category of cases is limited to non-monetary claims. Indeed, *Ticor Title Insurance Co. v. Brown*, in which the Supreme Court questioned whether monetary relief could ever be sought in a Rule 23(b)(2) class, involved monetary relief in connection with the settlement of tying claims.¹²⁷

That this was the drafters’ intent is confirmed by the Advisory Committee Notes in connection with subdivision 23(b)(3), which provides that where plaintiffs asserted “private damages claims . . . arising out of concerted antitrust violations” by contrast, such claims if suitable for class-based treatment were to be litigated

125. *Id.*; see also *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006).

126. While Professor Kaplan addressed the antecedent civil rights cases in his article regarding the 1966 amendments, see Kaplan, *supra* note 16, there was no mention of the hypothetical application of Rule 23(b)(2) to certain categories of antitrust cases. A review of antecedent class cases confirms, however, that this was the manner of class-based litigation prior to the 1966 amendments. For example, in *P. W. Hussler, Inc. v. Simplicity Pattern Co.* the court conditioned class-based adjudication of Robinson-Patman Act claims seeking monetary relief on the fact that the class procedure was non-binding—i.e., that it afforded opt-out rights. 25 F.R.D. 264, 268 (S.D.N.Y. 1960).

127. 511 U.S. 117 (1994). A typical tying claim involves a manufacturer selling a product to a customer only on the condition that the buyer purchases another specified product. See, e.g., *Eastman Kodak Co. v. Image Technical Servs. Co.*, 504 U.S. 451, 458 (1992) (allegations of tying purchase of Kodak service for photocopiers to purchase of replacement parts).

under Rule 23(b)(3).¹²⁸ Thus, while the drafters suggested that class claims for injunctive or declaratory relief regarding the legality of a tying arrangement could be certified under Rule 23(b)(2), cases involving tying claims and pursuing monetary relief are included as examples of claims where the appropriateness of certification should be considered only under Rule 23(b)(3).¹²⁹ The same distinction can and should be drawn in employment cases.¹³⁰

The modern incarnation of employment class actions, which seek monetary damages, including back pay, compensatory damages and punitive damages, falls well outside the historical antecedents to Rule 23(b)(2). The plaintiffs almost invariably challenge a wide range of employer conduct, which affects each class member differently (and some not at all). And at least since 1991, the monetary remedies authorized by federal law are triable by jury.¹³¹

Under the guidance of *Ortiz*, such cases must be certified only under Rule 23(b)(3), which was designed to capture the “growing edge” of class litigation.¹³² Unlike mandatory actions certified under subdivisions (b)(1) or (b)(2), members of a (b)(3) class have an automatic right to notice and an opportunity to opt out of the class. In addition, the named plaintiff bears the burden of proving that common issues predominate and that the class mechanism is a superior way of resolving the dispute.¹³³ Just as “the Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B),” and “was consciously retrospective with intent

128. Notes to 1966 Amendments, *supra* note 3, at 103.

129. The cases cited in the Advisory Committee Notes for Rule 23(b)(3) included tying cases in which monetary damages were sought. *See Kainz v. Anheuser-Bush, Inc.*, 194 F.2d 737 (7th Cir. 1952). Notably, the drafters included both cases in which certification was considered appropriate, and those in which class treatment had been denied as guidance to courts and practitioners. *See Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567, 590, 595 (10th Cir. 1961) (affirming class action adjudication of price fixing claims seeking treble damages); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 87, 95 (7th Cir. 1941) (finding price fixing claims seeking treble damages could not be litigated on a class basis); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 483–84 (S.D. Cal. 1957) (declining to certify price fixing claims seeking treble damages as ill-suited to class-based treatment).

130. For an analysis of the contrary view—that the antecedent cases “demonstrate that historically Rule 23(b)(2) has been used to enjoin invidious discrimination policies and practices,” and that Congress intended to expand the remedies available to those addressing “systematic discrimination in the workplace” through this subsection—see *Reeb v. Ohio Dep’t of Rehab’l Corr.*, 435 F.3d 639, 653–55 (6th Cir. 2006) (Keith, J., dissenting). *See also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 426–40 (5th Cir. 1998) (Dennis, J., dissenting).

131. 42 U.S.C. § 1981a(c) (2006).

132. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 862 (1999).

133. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–17 (1997).

to codify pre-Rule categories under Rule 23(b)(1),”¹³⁴ so too with Rule 23(b)(2).

CONCLUSION

Like the companion provisions in Rule 23(b)(1), the mandatory certification authorized by Rule 23(b)(2) should be confined to cases fitting within the historical antecedents to that provision. Such cases have two defining features: they challenge action or inaction directed to the class as a whole, rather than individual members; and they seek only relief that, historically, could have been awarded by a court of equity. Modern employment discrimination cases—premised on allegations of intentional misconduct and seeking legal monetary relief—do not share either of these characteristics. Accordingly, they should not be certified under Rule 23(b)(2); they should proceed as a class action, if at all, under the more rigorous and protective requirements of Rule 23(b)(3).

134. *Ortiz*, 527 U.S. at 842.

**WHAT WE DON'T KNOW MIGHT HURT US:
SUBJECTIVE KNOWLEDGE AND THE
EIGHTH AMENDMENT'S DELIBERATE
INDIFFERENCE STANDARD FOR SEXUAL
ABUSE IN PRISONS**

KATHERINE ROBB*

I'm afraid to go to sleep, to shower or just about anything else. I am afraid that when I am doing these things, I might die at any time. Please, sir, help me.¹

-Rodney Bruntmyer

INTRODUCTION

At age sixteen, Rodney Bruntmyer was sentenced to eight years in prison for setting a dumpster on fire.² He was raped and then removed from, and against his wishes returned to, the general population.³ There he was raped again and repeatedly forced to perform oral sex on other inmates.⁴ At age seventeen, Rodney hung himself in his cell.⁵ His mother recalls that when she talked to the warden regarding transferring her son to a safe place, she was told, "Rodney needs to grow up . . . this happens every day, learn to deal with it. It's no big thing."⁶

Prison rape is a big thing. Conservative estimates place the rate of sexual abuse in prison at thirteen percent at least.⁷ In the

* J.D., University of California, Davis School of Law, 2006; B.A., Vassar College, 2002. The author thanks Professor Tobias B. Wolff and the editorial staff of the *New York University Annual Survey of American Law* for their valuable insights and comments.

1. *The Cost of Victimization: Why Our Nation Must Confront Rape—Personal Accounts from Survivors of Prison Sexual Assaults: Hearing Before the Nat'l Rape Elimination Comm.* (June 14, 2005) [hereinafter *Hearing Before the Nat'l Rape Elimination Comm.*] (statement of Linda Bruntmyer), available at http://www.cybercemetery.unt.edu/archive/nprec/20090820160743/http://nprec.us/docs/PersonalAccounts_Bruntmyer.pdf (last visited Feb. 7, 2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. 42 U.S.C. § 15601(2) (2006); see also NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 3 (2009) [hereinafter

past twenty years, the number of inmates who have been sexually assaulted likely exceeds one million.⁸ Juveniles are five times more likely to be sexually assaulted in adult facilities than in juvenile facilities.⁹ Inmates with mental illnesses, who account for seven percent of federal inmates and sixteen percent of state inmates, are more likely to be sexually assaulted.¹⁰ This is not a small segment of society. More than 7.3 million Americans are in the correctional system, which costs taxpayers more than \$68 billion annually.¹¹ At 2001 incarceration rates, it is estimated that one out of every fifteen Americans born in 2001 will spend time in prison.¹² People, however, are rarely incarcerated forever. Each year, more than 600,000 people leave prison.¹³ When they leave, the consequences of their incarceration experience can be devastating. Prisoner infection rates for sexually transmitted diseases are far greater than the general American population¹⁴ and victims of prison rape are more

NPREC REPORT], available at http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF (stating that “the most rigorous research produced since [the first study of prison abuse published in 1968]—mainly of sexual abuse among incarcerated men—has yielded prevalence rates in the mid-to-high teens, but none of these are national studies”).

8. § 15601(2).

9. § 15601(4); see also NPREC REPORT, *supra* note 7, at 19 (“According to [the Bureau of Justice Statistics], 7.7 percent of all victims in substantiated incidents of violence perpetrated by prisoners in adult facilities in 2005 were under the age of 18.”). Female juveniles are at greater risk than males; according to data collected by the Bureau of Justice Statistics in 2005–2006, “36 percent of all victims in substantiated incidents of sexual violence were female, even though girls represented only 15 percent of youth in residential placement in 2006.” *Id.* at 17.

10. § 15601(3).

11. NPREC REPORT, *supra* note 7, at 2; see also Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563, 563 (2004) (stating that more people have been incarcerated than the populations of twenty-eight states and the District of Columbia combined).

12. See Schiraldi, *supra* note 11, at 563–64.

13. Michael B. Mushlin, Foreword, *Prison Reform Revisited: The Unfinished Agenda October 16–20, 2003*, 24 PACE L. REV. 395, 398 (2004).

14. These higher infection rates also apply to tuberculosis and hepatitis B and C. § 15601(7). Since sexual activity is not allowed in prisons, condoms are also rarely available, increasing the transmission of sexual diseases. In 2000, six percent of all deaths in federal and state prisons were due to HIV/AIDS and 25,088 inmates were known to be infected with HIV/AIDS. § 15601(7); see also NPREC REPORT, *supra* note 7, at 129 (“Michael Blucker tested negative for HIV when he was admitted to the Menard Correctional Center in Illinois in 1993, but approximately a year later, after being raped multiple times by other prisoners, Blucker tested positive.”).

likely to become homeless and require government assistance.¹⁵ As ninety-five percent of prisoners are eventually released,¹⁶ most of these people will re-enter the community, rejoining their husbands, wives, and children, and bringing their newly acquired sexually-transmitted diseases and emotional trauma with them.

Sexual assault in prison takes multiple forms: guards abuse prisoners and prisoners abuse other prisoners. Current research indicates that guard-on-prisoner rape appears to be more prevalent among male guards and female inmates while prisoner-on-prisoner rape appears more prevalent among male inmates.¹⁷ That being said, research in this area is still nascent and society's view of women as sexual predators is limited; thus, the rates of female-on-female inmate sexual abuse may be much higher.¹⁸ Consequently, this Article focuses solely on inmate-on-inmate sexual abuse involving male prisoners. Additionally, this Article only addresses sexual abuse during incarceration and does not touch on the groundswell of related issues in the larger community-corrections landscape, such as the experiences of parolees, nor does it deal with immigration facilities.

The main recourse for an individual who is sexually abused while incarcerated is to file suit against prison officials alleging an Eighth Amendment violation for cruel and unusual punishment.¹⁹ The legal standard for proving an Eighth Amendment failure-to-protect action requires substantial risk of serious harm, determined

15. § 15601(11) ("Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance.").

16. T.J. Parsell, *Unsafe Behind Bars*, N.Y. TIMES, Sept. 18, 2005, at LI17; see also Alan Gustafson, *Oregon Tallies Prison Rapes*, STATESMAN JOURNAL (Salem, OR), May 21, 2004, at 1A.

17. See NPREC REPORT, *supra* note 7, at 62 ("Case law, policy, and common perceptions of sexual abuse in correctional facilities have focused on male officers abusing their authority with female prisoners."). Additionally, civil suits involving sexual abuse of female prisoners at the hands of male guards tend to be more successful than other suits. See Catherine Tsai, *Colo. Judge Sends Message with Prison Rape Penalty*, THE ASSOCIATED PRESS, Aug. 8, 2009, at 1, available at <http://abcnews.go.com/US/wireStory?id=8283908> (last visited Feb. 7, 2010) (describing a case in which a judge awarded a \$1.3 million settlement to a female inmate who was sexually abused by a guard).

18. See NPREC REPORT, *supra* note 7, at 7 ("Research to date has focused on vulnerability to abuse by other prisoners, rather than by staff, and on the risks for men and boys rather than for women and girls.").

19. This is done through either a *Bivens* suit per *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), if the prisoner is in federal prison, or a 42 U.S.C. § 1983 complaint if the prisoner is in a state prison.

using an objective standard; an official's knowledge of the risk of harm to the prisoner, proven by subjective, or actual, knowledge; an official's failure to respond reasonably, determined using an objective reasonable person standard; causation; and injury. The parameters for the deliberate indifference standard were set forth in *Farmer v. Brennan*,²⁰ in which the Court held that the knowledge of risk of harm to the prisoner must be subjective knowledge. Thus, deliberate indifference is more similar to a criminal rather than a civil standard of requisite knowledge.²¹

The two-pronged deliberate indifference standard conflates the questions of whether the victimized prisoner required protection and whether he consented to the act. Because the first prong (the subjective knowledge of the prison official) focuses solely on a mental component, the plaintiff is nearly always forced to rely on circumstantial evidence and inference to prove this element. The complexity of proving knowledge with only circumstantial evidence has rendered the standard, as applied among the courts, discordant.

Subjective knowledge is acutely problematic in this area of the law. For example, if prison guards believe inmates are not entitled to protection or protection is impossible, as appears to have been the case with Rodney Bruntmyer,²² then the deliberate indifference standard cannot be met because subjective knowledge will never be found. Further, courts typically focus their attention on the attributes of the alleged aggressor in order to determine whether subjective knowledge of risk existed.²³ Yet research shows that victim attributes are better indicators of the potential risk of sexual abuse.²⁴ As a result, the examination of circumstantial evidence

20. 511 U.S. 825 (1994). The Court noted that prison officials may avoid liability through proof that they were "unaware even of an obvious risk to inmate health or safety" or if they "responded reasonably to the risk." *Id.* at 844.

21. As the Court stated, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

22. This was evidenced by the prison warden's statement that "this happens every day, learn to deal with it. It's no big thing." *Hearing Before the Nat'l Rape Elimination Comm., supra* note 1.

23. *See, e.g.,* Riccardo v. Rausch, 375 F.3d 521 (7th Cir. 2004); Durrell v. Cook, 71 Fed. Appx. 718 (9th Cir. 2003); Billman v. Indiana Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995); Brown v. Scott, 329 F. Supp. 2d 905 (E.D. Mich. 2004).

24. *See* Christopher Hensley et al., *Examining the Characteristics of Male Sexual Assault Targets in a Southern Maximum-Security Prison*, 20 J. INTERPERSONAL VIOLENCE 667, 672 (2005) [hereinafter Hensley, *Targets in a Southern Maximum-Security Prison*]; NAT'L INST. OF CORRECTION, ANNUAL REPORT TO CONGRESS: PRISON RAPE ELIMINATION ACT (PREA) PUBLIC LAW 108-79, APPENDIX A: RAPE AND COERCIVE SEX

and the inferences drawn therein are often misguided, and few Section 1983 inmate-on-inmate rape cases make it to trial.²⁵ Conse-

IN AMERICAN PRISONS: INTERIM FINDINGS AND INTERPRETATION ON PRELIMINARY RESEARCH 27, 31 (2004); NPREC REPORT, *supra* note 7, at 70–74 (discussing various characteristics linked with vulnerability); *see also* Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. INTERPERSONAL VIOLENCE 595, 599 (2003) [hereinafter Hensley, *Male Oklahoma Correctional Facilities*].

25. The cases reviewed in this article consist of all Section 1983 Eighth Amendment cases decided after *Farmer* in which the plaintiff specifically alleged rape. Of the nine cases reviewed in this article, only one appears to have made it to a jury, and in that case the jury's decision was overturned. Riccardo v. Rausch, No. Civ. 99-372-CJP, 2002 WL 32741124 (S.D. Ill. Mar. 7, 2002), *rev'd*, 375 F.3d 521 (7th Cir. 2004). In 1995, the Sixth Circuit considered the victim's characteristics and determined that the plaintiff's claim withstood summary judgment. Taylor v. Michigan Dep't of Corrs., 69 F.3d 76 (6th Cir. 1995). Also in 1995, the Seventh Circuit overturned a summary judgment finding in favor of the defendants allowing the plaintiff time to locate the names of the officials responsible for his housing when the plaintiff was raped by an HIV positive inmate whom, according to the plaintiff, prison officials knew had a propensity to rape. Billman v. Indiana Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995). In 1996, the Seventh Circuit upheld summary judgment in favor of the defendants in a case where prison records indicated the alleged rapist had committed a previous sexual assault and the victim was supposed to be single-celled because he was an informant. Langston v. Peters, 100 F.3d 1235 (7th Cir. 1996). In 1997, the Seventh Circuit dismissed a plaintiff's case after finding no subjective knowledge for two instances of rape and determining that the third alleged rape was barred from consideration due to an interdisciplinary committee's finding that the act was consensual. Lewis v. Richards, 107 F.3d 549 (7th Cir. 1997).

In 2003, the Ninth Circuit overturned a summary judgment finding in favor of the defendants despite the fact that no sexual assault occurred when a prisoner was housed with another prisoner who had been labeled an "aggressive homosexual" and whose prison file indicated several instances of sexual assault. Durrell v. Cook, 71 Fed. Appx. 718 (9th Cir. 2003). That same year, the Ninth Circuit upheld summary judgment in favor of the defendants when the inmate who was raped expressed fear at being housed with another inmate because he was a homosexual and the alleged rapist was previously caught naked in bed with another prisoner but there was no force allegation. Harvey v. California, 82 Fed. Appx. 544 (9th Cir. 2003).

In 2004, the Sixth Circuit held that a claim withstood summary judgment in favor of the defendants on the basis that subjective knowledge could be found from the rumor that the assailant was a predatory homosexual rapist even though no such classification was in his case file. Post v. Taft, 97 Fed. Appx. 562 (6th Cir. 2004). That same year, the Fifth Circuit refused to examine the district court's finding that a question of fact regarding subjective knowledge existed. Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004). Also that same year, the Seventh Circuit overturned a jury finding on the basis that no reasonable jury could have believed that the defendant was deliberately indifferent because when the defendant questioned two inmates together about whether they had a problem housing together,

quently, the Eighth Amendment avenue of redress is virtually nonexistent.

In order to combat this problem, a better method for parsing the subjective knowledge standard is needed to ensure that courts correctly apply the deliberate indifference standard. Such a method should rely more on research findings that accurately reflect what is known about prison rape so that it will not merely reflect individuals' deep-seated beliefs. The research and mandates articulated by the Prison Rape Elimination Act of 2003 (PREA)²⁶ can assist in this process. PREA called for systematic research of prison rape and asked that the federal government and the states collaborate to eliminate prison rape.²⁷ The circumstantial evidentiary landscape of subjective knowledge, and hence deliberate indifference, can and should be bolstered through the adoption and application of PREA's standards and mandates.

Additionally, in order to find redress that is not hampered by oft-misdirected subjective knowledge determinations, certain plaintiffs should explore other avenues of protection, such as filing a Fifth or Fourteenth Amendment Equal Protection Clause claim instead of an Eighth Amendment claim. Pursuing such a claim drops the subjective knowledge element from the analysis because intent to discriminate can be found through an objective standard, and plaintiffs can thus avoid the quagmire of parsing issues such as consent. If guards protect heterosexual inmates more than homosexual or bisexual inmates, or perhaps female prisoners more than male prisoners, then the Equal Protection Clause may be invoked.

Part I of this Article discusses the *Farmer* standard of deliberate indifference and reviews the opacity of the standard and its lack of unified application among the courts through case law. It also examines potential reasons for why such sporadic application occurs through the review of empirical research and social psychological categorization methods. Part II discusses how to combat such opacity by bolstering the subjective knowledge circumstantial evidence presentation. PREA can be used to ensure that guards' and courts' analysis of circumstantial evidence and subsequent inferences drawn coincide with the true landscape of sexual assault in prisons. Additionally, Part II discusses the possibility of using the Equal Protection Clause as an alternative claim to the Eighth Amendment for certain prisoners.

neither inmate affirmatively indicated he did. *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004).

26. 42 U.S.C. §§ 15601–09 (2006).

27. § 15602.

I.
THE DELIBERATE INDIFFERENCE STANDARD AND
ITS PROBLEMATIC APPLICATION

A. *The Farmer Deliberate Indifference Standard*

Farmer v. Brennan,²⁸ decided in 1994, is one of the most recent Supreme Court cases that dealt with the parameters of the Eighth Amendment. Prior to *Farmer*, the most important case dealing with the standards for determining whether certain prison conditions violated the Eighth Amendment was *Wilson v. Seiter*.²⁹ To fully understand *Farmer*, a brief summary of *Wilson* is necessary. In *Wilson*, an Ohio prisoner alleged an Eighth Amendment violation based on numerous conditions of confinement.³⁰ The Supreme Court's opinion directly addressed whether a prison official's culpable state of mind must be proven in order to establish that prison conditions constituted cruel and unusual punishment.³¹

Justice Scalia, delivering the majority opinion for five of the Justices, stated that some mental component must be attributed to the defendant official before the official's conduct could qualify as punishment and thus be subject to the Eighth Amendment.³² Thus, both an objective and subjective component are required for a finding of cruel and unusual punishment.³³ The objective component, upon which all nine Justices agreed,³⁴ requires that the deprivation suffered by the inmate be "sufficiently serious."³⁵ The subjective component, according to the *Wilson* majority, is one of "wantonness," which "does not have a fixed meaning but must be determined with 'due regard for difference in the kind of conduct against which an Eighth Amendment objection is lodged.'"³⁶ Gen-

28. 511 U.S. 825 (1994).

29. 501 U.S. 294 (1991).

30. *Id.* at 296. Wilson alleged "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Id.*

31. *Id.* Prior to the Supreme Court granting certiorari, the district court granted summary judgment for the defendants and the Court of Appeals for the Sixth Circuit affirmed. *Id.*

32. *Id.* at 302-03.

33. *Id.* at 298-303.

34. *Id.* at 306-11 (White, J., concurring).

35. *Id.* at 298 (majority opinion) (citing *Rhodes v. Chapman*, 454 U.S. 337 (1981)).

36. *Id.* at 302.

erally, the majority equated this to a deliberate indifference standard.³⁷

Justices White, Marshall, Blackmun, and Stevens concurred solely in the *Wilson* judgment.³⁸ These Justices argued that only an objective standard was necessary for Eighth Amendment conditions of confinement claims, that a deliberate indifference intent requirement was inconsistent with precedent, and that the majority's punishment analysis, which requires a subjective intent component for Eighth Amendment claims, was incorrect.³⁹ With the Court's creation of a subjective component for Eighth Amendment claims as a foundation, the *Farmer* court addressed what the subjective component of "deliberate indifference" actually meant.

In *Farmer*, a pre-operative male-to-female transsexual inmate brought a *Bivens* suit⁴⁰ for violation of her Eighth Amendment right

37. *Id.* at 303.

38. *Id.* at 306 (White, J., concurring).

39. *Id.* at 306–10. Justices White, Marshall, Blackmun, and Stevens believed that the search for a subjective deliberate indifference element would lead to serious deprivations of prisoners' Eighth Amendment right to be free from cruel and unusual prison conditions. *Id.* at 310. Justice White stated:

Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue.

In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

Id. They noted that prison officials could simply cite lack of funds as a defense, arguing that they did not intend the conditions; rather they simply did not have enough funds to correct the condition. *Id.* at 311. This, in turn, would negate their subjective intent and hence no Eighth Amendment violation could be proven. *Id.*

40. Prisoners incarcerated in federal facilities can file a civil suit for violation of the Eighth Amendment through a *Bivens* complaint. In *Bivens v. Six Unknown Named Agents*, the Supreme Court created a federal cause of action for damages when a federal official violates a citizen's Fourth Amendment rights. 403 U.S. 388 (1971). The creation of a cause of action allowing one to sue federal officials for violation of one's constitutional rights was extended to include one's Eighth Amendment rights in *Carlson v. Green*, 446 U.S. 14 (1980). In *Carlson*, the Court held that a *Bivens* suit on behalf of a prisoner who died from lack of medical attention to injuries was valid even though the administratrix's allegations could also form a claim under the Federal Tort Claims Act (FTCA). *Id.* at 23–24. Additionally, a *Bivens* suit may be preferable to a FTCA claim because it allows for punitive damages, the option of a jury trial, and it levies damages against the individual official rather than the United States. *Id.* at 22. FTCA suits prohibit punitive damages. *Id.* (citing 28 U.S.C. § 2674). Additionally, plaintiffs cannot opt for a jury in an FTCA suit. *Id.* at 22–23 (citing 28 U.S.C. § 2402). Finally, an FTCA claim is only valid if the state in which the alleged misconduct occurred would permit such a cause of action. *Id.* at 23 (citing 28 U.S.C. § 1346(b)).

to be free from cruel and unusual punishment. Dee Farmer's theory was that prison officials failed to protect her from being beaten and raped by another inmate and that their failure to protect her constituted an Eighth Amendment violation.⁴¹ The district court held that actual knowledge of the danger to inmate Farmer's safety would be required for an Eighth Amendment violation, and because there was no proof that the prison officials had such actual knowledge, the court granted the defendants' motion for summary judgment.⁴² The Seventh Circuit affirmed without an opinion.⁴³

In examining the meaning of "deliberate indifference," the Supreme Court was clear that the term did not mean negligence or specific purpose or intent.⁴⁴ The Court stated that deliberate indifference meant recklessness.⁴⁵ Recklessness, however, has differing civil and criminal meanings.⁴⁶ The civil meaning is an objective standard, which asks whether the risk of harm was known or so obvious that it should have been known;⁴⁷ conversely, the criminal standard is a subjective standard, which asks whether the defendant had actual knowledge of the risk to the prisoner.⁴⁸

Petitioner Farmer argued that the objective standard used in *Canton v. Harris*⁴⁹ should be applied.⁵⁰ The Court, however, held that *Canton's* objective standard did not apply to Eighth Amendment cases based on condition of confinement because in such cases, a specific inquiry into the official's mind is required.⁵¹ Justice Souter, writing for the *Farmer* majority, concluded that the correct standard for deliberate indifference is the criminal standard of sub-

41. *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

42. *Id.* at 831–32.

43. *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992).

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

45. *Id.* at 836–37.

46. *Id.*

47. *Id.* at 836 (citing RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

48. *Id.* at 837.

49. 489 U.S. 378 (1989).

50. *Farmer*, 511 U.S. at 840. In *Canton*, the Court held that a valid Section 1983 action could be brought against a municipality for failure to train officers. In so holding, the Court applied an objective test for deliberate indifference, stating:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.

Canton, 489 U.S. at 390.

51. *Farmer*, 511 U.S. at 841.

jective knowledge.⁵² As Justice Souter explained, “the official must

52. *Id.* at 837. Both Justice Blackmun and Justice Stevens concurred in the judgment, but stated that, despite their concurrence, they did not think a subjective element should be required for an Eighth Amendment cruel and unusual punishment claim regarding prison conditions. *Id.* at 851–52 (Blackmun, J., concurring). Justice Thomas, also concurring in the judgment, reiterated his *Hudson v. MacMillian*, 503 U.S. 1 (1992), and *Helling v. McKinney*, 509 U.S. 25 (1993), belief that conditions of confinement cannot be considered punishment. *Farmer*, 511 U.S. at 859–62 (Thomas, J., concurring); 503 U.S. at 27 (Thomas, J., dissenting); 509 U.S. at 43 (Thomas, J., dissenting). Thomas expressed his serious doubts regarding the holding of *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), which held that prison conditions are subject to the Eighth Amendment; however, because overturning *Estelle* was not an issue before the Court, based on the *Wilson* precedent that rejected the malicious standard for prison conditions, the Court’s holding that the next highest standard—that of “actual knowledge of the type sufficient to constitute recklessness in the criminal law”—is the best standard available while adhering to stare decisis. *Farmer*, 511 U.S. at 861–62.

Hudson dealt with an excessive force claim and whether injuries (bruises, swelling of the face, and a cracked dental plate) that were deemed minor could constitute serious injury and hence qualify for an Eighth Amendment violation claim. 503 U.S. at 4. The majority held that serious injury is not required for an Eighth Amendment violation. *Id.* at 10. The court held that the appropriate standard with which to judge excessive force claims is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Id.* at 7. Further, the malicious and sadistic determination should turn on “contemporary standards of decency.” *Id.* at 8–9. Justice Thomas, joined by Justice Scalia, dissented, stating, “[A] use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.” *Id.* at 18 (Thomas, J., dissenting). Justice Thomas, without a complete explanation of his reasoning, equated “serious deprivation” (which he stated is always required for an Eighth Amendment violation and has always been required by precedent) with “serious injury.” *Id.* at 22. Thus Justice Thomas admonished the majority, stating that by not requiring a serious injury component, the majority has done away with the serious deprivation that lies at the heart of an Eighth Amendment claim. *Id.* at 22–23.

Helling considered whether the risk of harm from tobacco smoke could form the basis for an Eighth Amendment claim for relief. 509 U.S. at 25, 27–28. The Court held that an unreasonable risk of serious damage to future health could constitute an Eighth Amendment claim, but respondent would need to prove both the objective and subjective elements necessary for an Eighth Amendment claim. *Id.* at 35. Further, in order to prove the objective element, respondent would need to show that he was exposed to unreasonably high levels of tobacco smoke, which in turn would require not only scientific and statistical evidence, but also an assessment of whether such exposure violates contemporary standards of decency and is not simply a risk that “today’s society chooses to tolerate.” *Id.* at 35–36. Justice Thomas, again joined by Justice Scalia, dissented, explaining that he “would draw the line at actual, serious injuries and reject the claim that exposure to the risk of injury can violate the Eighth Amendment.” *Id.* at 42 (Thomas, J., dissenting) (emphasis in original). Justice Thomas also reiterated his long-held belief that punishment only includes what is meted out by a statute, judge, or jury, and by definition

both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*"⁵³

The Court's holding allows a factfinder to consider the obviousness of the risk in determining subjective knowledge, but an extremely obvious risk does not constitute per se subjective knowledge.⁵⁴ On the other hand, an official cannot escape liability by showing that, although he was aware of a general substantial risk to inmate safety, he was not aware of a specific risk to the complainant.⁵⁵ Thus deliberate indifference can be found if a prison official has subjective knowledge of a general risk to the prison population at large. Additionally, the *Farmer* Court held that regardless of the subjective knowledge of the prison officials, if they responded reasonably to the risk, then they could not be held liable, even if a prisoner suffered serious injury.⁵⁶ Finally, the Court stated that a petitioner need not suffer physical injury before bringing suit.⁵⁷ Instead a petitioner may seek injunctive relief to prevent a substantial risk of serious harm from becoming actual harm.⁵⁸

B. The Complexity of the Deliberate Indifference Standard

While the deliberate indifference test itself may seem simple, courts' application of the standard is all over the map because inferences are drawn based on circumstantial evidence, and such inferences are often faulty. To fully understand the complexity of the subjective knowledge prong of deliberate indifference, a brief hypothetical regarding consent may be instructive. Consider a hypothetical rape trial. Imagine the man, John, asserts the affirmative defense that he did not believe that having sex with his wife, Jane,

does not include the actions of prison officials and staff. *Id.* at 38. Therefore, actions by prison officials and staff are not subject to the Eighth Amendment. *Id.* at 40.

53. *Farmer*, 511 U.S. at 837 (emphasis added).

54. *Id.* at 842.

55. *Id.* at 843.

56. *Id.* at 845.

57. *Id.*

58. *Id.* The Court laid out such a case as follows:

[T]o survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.

Id. at 846.

without her consent, constituted rape. In order to find John guilty of rape, the jury could find that John knew having sex with Jane without her consent was wrong or that John should have known that having sex with Jane without her consent was wrong. The former is a subjective standard, meaning that the man had actual knowledge that what he did was illegal. The latter is an objective standard, meaning that a reasonable man should have known that what he did was illegal.

To get closer to the prison rape context, the hypothetical must be taken one step further. Instead of John on trial for having sex with Jane without her consent, imagine that Larry, John and Jane's landlord, was sued for not protecting Jane from John's sexual advances. In order to find against Larry, the jury would have to find that Larry knew that to let John have sex with Jane without her consent was wrong or that Larry should have known that allowing John to have sex with Jane without her consent was wrong. Unlike the previous hypothetical, however, the jury would have to reach two additional findings. First, the jury would have to find that Larry knew that John would try to have sex with Jane without her consent. Without this, Larry would not know that there is any danger from which Jane needed protection. Second, the jury would have to find that Jane did not actually consent to sex with John. If she did consent, then Larry was not responsible for protecting her because John's actions were legal. Thus, in a failure-to-protect case there are essentially two questions: did Larry know that Jane was entitled to protection, and did Jane consent? In an Eighth Amendment failure-to-protect case, these two questions are conflated.

This conflation allows several situations to occur without a functional avenue of recourse. First, a guard may not know the prisoner is entitled to protection. Second, a guard could know he is supposed to protect a prisoner, but the guard may believe that there is no possibility that the prisoner would not consent. This would be similar to Larry's belief that Jane will always consent, such that he never takes action to protect her. Third, a guard could know that he is supposed to protect the prisoner, and the guard may believe there is a possibility that the prisoner would not consent, but if the guard simply does not care or does not want to protect the prisoner, the guard can say that he thought the prisoner consented, and thus there was no danger from which to protect the prisoner in the first place. The idea that guards may use the con-

flated questions to allow inmates to rape one another may seem outlandish; however, research reveals it is not farfetched.⁵⁹

This would be of less consequence if courts did not also participate in the conflation. Unfortunately, that does not appear to be the case. The following review of the post-*Farmer* male inmate-on-inmate Section 1983 Eighth Amendment claims involving rape allegations demonstrates that courts have struggled to clearly and consistently apply the deliberate indifference standard. The cases are examined within the context of the two conflated questions previously discussed.

C. *Conflated Question One: Is the Prisoner Entitled to Protection?*

1. Research indicates some guards do not believe certain inmates are entitled to protection.

Research indicates that some officers do not believe an inmate deserves to be protected because the officer does not see the sexual act as something illegal. A 2000 study by Helen M. Eigenberg sampled all correctional officers in one rural midwestern state.⁶⁰ The study found that 4% of officers did not believe an inmate was raped if he was threatened with bodily harm; 5% of officers did not believe an inmate was raped if he was physically overpowered; 26% of officers did not believe an inmate was raped if the perpetrator threatened to call the victim a snitch if he did not perform sexual acts; 27% of officers did not believe an inmate was raped if he was forced to chose between paying off a debt with sexual acts or by being beaten, and he chose the former; 36% of officers did not believe an inmate was raped if the inmate was a snitch who engaged in sexual acts for protection; and 44% of officers did not believe an inmate was raped if the inmate was a snitch who engaged in sexual acts for protection but then demanded cigarettes afterward.⁶¹ Here, 5% of officers did not think a rape occurred when an inmate was physically overpowered—the most standard definition of rape—and 27% did not believe that coercive sex acts constituted rape even though they are considered rape under PREA and by most states. If these officers do not believe in the legal definitions of rape, they cannot meet the subjective deliberate indifference

59. See discussion *infra* Parts I.C.1. & I.D.1.

60. Helen Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 438 (2000) [hereinafter Eigenberg, *Correctional Officers' Definitions*]. The sample achieved a fifty-three percent response rate and was representative regarding age, race, and gender. *Id.* at 438–39.

61. *Id.* at 442.

standard because they do not think that the objective element ever occurred and thus will never have knowledge of the risk.

The notion that nothing is happening in these situations that would require the officers to protect the inmates is still prevalent, as evidenced by a two-year study conducted by Dr. Mark Fleisher, which was funded by a nearly one million dollar grant from the National Institute of Justice within the U.S. Department of Justice.⁶² Fleisher stated that rape is rare, that inmate sex is consensual, that it is “often engaged in as a way to win protection or privileges,” and that the “[p]rison rape worldview doesn’t interpret sexual pressure as coercion. Rather, sexual pressure ushers, guides, or shepherds the process of sexual awakening.”⁶³ Regardless of Fleisher’s position concerning the prison rape worldview, PREA specifically defines rape to include “the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person *achieved through the exploitation of the fear* or threat of physical violence or bodily injury.”⁶⁴ If inmates engage in sexual acts to “win protection,” then the inmates are afraid of something; otherwise they would not need protection. Inmates that exploit that fear for sexual acts are, by PREA’s definition, committing rape.⁶⁵ Imagine the response that would be garnered if, instead of speaking about male prisoners, Fleisher were talking about male-female rape when he said that sexual pressure guides one’s sexual awakening.

Furthermore, Cindy Struckman-Johnson, a psychology professor at the University of South Dakota and a member of the National Prison Rape Elimination Commission, states that Fleisher’s study is not in proper scientific form.⁶⁶ There is no literature review, no raw data, and no full explanation of Fleisher’s research methods or

62. MARK S. FLEISHER & JESSIE L. KRIENERT, *THE CULTURE OF PRISON SEXUAL VIOLENCE* (Nov. 2006) (unpublished report submitted to the U.S. Department of Justice, <http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>); *see also* Dr. Mark Fleisher—Curriculum Vitae, <http://dept.kent.edu/ispv/bios/CV%20PDFs/Fleisher%20CV.pdf>.

63. Kim Curtis, *A Disputed Study Claims Rape is Rare in Prison*, USA TODAY, Jan. 17, 2006, at 1, *available at* http://www.usatoday.com/news/nation/2006-01-17-prison-rape_x.htm (last visited Feb. 12, 2010).

64. 42 U.S.C. § 15609(9)(C) (2006) (emphasis added).

65. These instances of rape without actual physical force outnumber the instances involving the use of force. *See* NPREC REPORT, *supra* note 7, at 42 (detailing a study that found that “[n]onconsensual experiences included sex in return for offers of favors or protection (8.7 percent), sex due to pressure or force other than physical force (8.8 percent), and sex with physical force or the threat of physical force (6.4 percent).”).

66. Curtis, *supra* note 63.

subjects.⁶⁷ The U.S. Justice Department had not yet endorsed or published Fleisher's study,⁶⁸ and although it seems unlikely that it would be published at this point in time, the issue remains.

Also, some guards simply believe that certain prisoners, namely homosexual, bisexual, and transgendered inmates, should not be protected from rape. A 1984 study revealed officers were more willing to protect heterosexual inmates from rape than homosexual inmates.⁶⁹ A 2000 study revealed that 16% of prison officers felt homosexual inmates who are raped get what they deserve.⁷⁰ Seventeen percent of officers felt inmates who dress or talk in a feminine manner deserve to be raped, and 23% of officers believed that inmates who previously engaged in consensual sex acts deserve to be raped.⁷¹ Finally, 24% of officers believed that inmates who took money or cigarettes for prior consensual sexual acts deserve to be raped.⁷² Overall, the officers in the study endorsed condemning attitudes towards homosexuality,⁷³ and these officers were more likely to blame the victim.⁷⁴ When officers have these beliefs, they can simply say that they thought the victim consented, making subjective knowledge, and thus deliberate indifference, virtually impossible to prove. This issue can play out in several ways in courts. First, a guard may believe the prisoner was not entitled to protection or deserved to be raped, and he may simply state that he did not know the prisoner was in danger. Second, and far more prevalent and difficult to parse, guards, and in turn courts, may look at aggressor attributes rather than victim attributes.⁷⁵ By misplacing the focus from victim traits to aggressor traits, inherited biases about victims can remain in play. Based on the case law, this may be part of what is occurring.

Since beliefs are based on knowledge, we need to make sure these individuals have the right knowledge, or at least the knowledge that Congress has chosen to accept through PREA. Humans come to know things through direct knowledge or through inferential knowledge. Prison officials use inferences to set up the entire prison system, and inferential knowledge is the bedrock of subjec-

67. *Id.*

68. *Id.*

69. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 48 *FED. PROBATION* 46, 48 (1984).

70. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 442.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 444.

75. *See* discussion *infra* Parts I.C.1–2.

tive knowledge proven through circumstantial evidence. When people focus on the aggressor's "monster" status, they may be using categories that are readily accessible but have a poor fit,⁷⁶ and this in fact appears to be what is happening.

2. Case law indicates courts focus on aggressor attributes in determining deliberate indifference.

In *Brown v. Scott*,⁷⁷ Gary Brown, citing concern for his safety, requested a transfer away from his cellmate, who was rumored to be a predatory homosexual rapist.⁷⁸ The request was not granted.⁷⁹ Three days later Brown's cellmate raped him.⁸⁰ In July 2003, the magistrate judge, who had an order of reference to conduct all pre-trial proceedings, filed a report recommending that the defendant's motions for dismissal and summary judgment be denied.⁸¹ The defendant filed an objection to the recommendation, after which the district court conducted a *de novo* review of the motions, report, and recommendation.⁸² After the review, the district court

76. Inferential knowledge largely depends on categorization. The categories people use are determined largely by two factors: accessibility and fit. RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 61–62 (1995). Accessibility deals with the people perceiving the situation. *Id.* at 69. It depends on the current task or goal of the person, the natural accessibility of certain groups to a person, and the person's relationship to those being categorized. *Id.* The task at hand, i.e., finding a mate versus finding an employee, can shape the accessibility of categories. Some categories are more accessible to an individual because of her or his personal or social needs, such as who she or he works with or the community in which he or she lives. Certain categories can be more accessible because they are frequently used, such as male and female. Finally, the categorizing of individuals' relationships to the group of people being categorized can influence the accessibility of the group because groups are often founded around in-groups (someone in the same group as the person making the categorization) and out-groups (someone in a different group from the person making the categorization). *See id.* at 70. Certain categories seem to be relied upon because our social and historical landscape makes them readily accessible, such as gender. *See id.* On the other hand, fit depends on the person being categorized. *Id.* at 69. It is an indication of how well the category or subcategory actually fits the categorized person. *Id.* Fit is often derived from stimuli factors, such as what a person looks like or events that prime certain categories. *Id.* at 66–67. For example, an election can bring out categorization based on political party when it would otherwise not be considered a good fit. This foundational principle of categorization, based on accessibility and fit, is the backbone of inferential knowledge.

77. 329 F. Supp. 2d 905 (E.D. Mich. 2004).

78. *Id.* at 907.

79. *Id.*

80. *Id.*

81. *Id.* at 908.

82. *Id.* at 909.

found that a genuine factual dispute existed and that Brown properly stated an Eighth Amendment claim; therefore, the district court denied defendant's motions to dismiss and for summary judgment based on qualified immunity.⁸³ The court stated that the combination of "the rumor that the plaintiff's cell mate was a known homosexual who forced other inmates to have sex with him" and the common knowledge that the cellmate was a member of the Moabites (a group that assaulted vulnerable white inmates) could lead a jury to conclude that a substantial risk of harm to the plaintiff existed and that the defendant disregarded that risk by not transferring Brown.⁸⁴ The court so ruled despite the defendant's testimony that he had reviewed the cellmate's file and it did not contain a predatory homosexual classification.⁸⁵ Even though the court ruled for the plaintiff, it still looked at the aggressor's, and not the victim's, characteristics. Furthermore, while the classification of "predatory" may be a valid indicator of a sexual aggressor, homosexuality is not. As Human Rights Watch stated, "The myth of the 'homosexual predator' is groundless."⁸⁶ It appears that the judge may have used a readily accessible category, sexuality of the aggressor, to determine whether a risk was apparent, even though research does not indicate such a category has a good fit.⁸⁷

In *Billman v. Indiana Department of Corrections*,⁸⁸ inmate Jason Billman was raped by his cellmate, Darrell Crabtree, who was HIV positive.⁸⁹ Billman alleged that prison officials knew from a prior incident that Crabtree had a propensity to rape other inmates and that Crabtree was HIV positive.⁹⁰ Billman could not, however, name any of the prison officials who were responsible for housing him with Crabtree, and the district court dismissed his complaint

83. *Id.* at 914.

84. *Id.* at 912.

85. *Id.* at 907.

86. HUMAN RIGHTS WATCH, REPORT, APR. 2001: NO ESCAPE: MALE RAPE IN U.S. PRISONS 52 (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/report.html>.

87. See REVIEW PANEL ON PRISON RAPE, REPORT ON RAPE IN JAILS IN THE U.S.: BASED ON PUBLIC HEARINGS AND REVIEW OF DOCUMENTARY EVIDENCE BY THE REVIEW PANEL ON PRISON RAPE—FINDINGS AND BEST PRACTICES 9–10 (Dep't of Justice Dec. 29, 2008), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_final-report_081229.pdf.

88. 56 F.3d 785 (7th Cir. 1995).

89. *Id.* at 788.

90. *Id.* Neither Billman's complaint nor the decision state what evidence was given to support the statement that Crabtree had a propensity to rape other inmates.

with prejudice as frivolous.⁹¹ The Seventh Circuit reversed, holding that Billman's complaint was sufficient because, as a prisoner, he had less access to discovering the defendants' names than a plaintiff who was not incarcerated.⁹² In determining whether enough evidence was presented regarding the defendant's deliberate indifference to overturn the lower court's dismissal, Judge Posner stated:

It is no doubt true that if the official who assigns inmates to cells knew that Crabtree had a propensity to rape his cellmates and was HIV-positive, his assigning Billman to the same cell without, at the least, warning Billman and, perhaps, without then giving him a chance to reject the assignment would be deliberate indifference for the consequences of which—the fear and humiliation by the rape and the fear of contracting the AIDS virus (and therefore eventually AIDS) from it—he would be liable to Billman in damages.⁹³

Billman's claim was then reinstated and the lower court was instructed to allow Billman some method of researching the defendants' names.⁹⁴ Again, this case proceeded on the basis of the alleged perpetrator's characteristics. That is not to say this was an entirely incorrect approach. Certainly a "propensity to rape other inmates" should indicate a potential risk. But the court here seemed to place special importance on Billman's HIV status. While this is certainly of great concern, HIV status has not appeared through research to be a salient fit for determining whether one poses a risk as a sexual aggressor.⁹⁵

91. *Id.* at 787.

92. *Id.* at 790.

93. *Id.* at 788–89.

94. *Id.* at 790. It is unclear what happened with the *Billman* case as nothing further was published. Billman may have been unable to locate the defendants' names, the case may have settled, or the district court may have ended up issuing an unpublished decision.

95. Nearly all the research dealing with prison rape examines the victim's characteristics. The Review Panel on Prison Rape (RPPR) appears to have conducted the sole study of aggressor traits. It found perpetrators were likely to be of bigger stature or build; past victims of sexual assault; experienced repeat offenders; having history of acting out or engaging in violence including sexual assault; creditors of victims; desirous of power or control; more verbal or aggressive or extroverted; extremely self-confident; manipulative or knowing of human psychology; serving a longer term sentence; gang affiliated; and mentally challenged. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9–10. The report did not recognize homosexuality or HIV status as likely perpetrator characteristics. *Id.* It is possible that HIV status was not considered among the factors analyzed; however, homosexuality was found to be a salient victim characteristic, so this category was a part of the study and not found to be related to perpetrator characteristics.

In *Langston v. Peters*,⁹⁶ decided the year after *Billman*, inmate Eugene Langston was moved to segregated custody after being in protective custody for four years because he provided information about a murder.⁹⁷ Despite the fact that Langston was supposed to be housed by himself in a single cell, he was moved to a cell with Eric Rayfield, an inmate serving a murder sentence⁹⁸ and who had previously sexually assaulted a cellmate.⁹⁹ This prior sexual assault was recorded in Rayfield's file, but not in the Online Tracking System, which was the only source of information reviewed before placing the two prisoners together.¹⁰⁰ After they were housed together, Rayfield raped Langston.¹⁰¹ The Seventh Circuit upheld summary judgment for the defendant.¹⁰² The court stated that "ignoring internal prison procedures [of housing Langston in a single-cell unit] does not mean that a constitutional violation has occurred."¹⁰³ Further, Langston did not show that "there existed at [the prison] a serious risk of sexual assault, or that he was within a group targeted for such assaults."¹⁰⁴ This case is interesting because although the Seventh Circuit was presented with a set of facts similar to those of *Billman*, it ruled the opposite way. Langston's indicators of potential victimization, his informant status, and the fact that he was previously in protective custody,¹⁰⁵ should have at least been examined. The court, however, dismissed these factors outright. Perhaps the difference was that Rayfield was not HIV positive. Thus, an easily accessible category that indicated a risk of a "monster" did not appear.

In *Durrell v. Cook*,¹⁰⁶ inmate Paul Durrell brought an Eighth Amendment claim for injury caused by being housed for one week,

96. 100 F.3d 1235 (7th Cir. 1996).

97. *Id.* at 1236.

98. *Id.*

99. *Id.* at 1239. It is interesting to note that Langston's move to a cell with Rayfield did not occur until after Langston assaulted a correctional officer. *Id.* at 1236.

100. *Id.* at 1239.

101. *Id.* at 1236.

102. *Id.* at 1241.

103. *Id.* at 1238.

104. *Id.* at 1240.

105. The RPPR found that being in protective custody is a common characteristic of victims of inmate-on-inmate sexual abuse. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 8. Prison rape is often about power and belonging or not belonging to the hierarchy of the prison. Those that snitch are essentially demonstrating their lack of belonging within a prisoner hierarchy, which makes them more likely to be targets for sexual abuse. See HUMAN RIGHTS WATCH, *supra* note 86, at 73.

106. 71 Fed. Appx. 718 (9th Cir. 2003).

against his protests, with an inmate whom Durrell called an “aggressive homosexual.”¹⁰⁷ Durrell did not allege that he was ever actually raped, but did allege that he was injured trying to defend himself from his cellmate.¹⁰⁸ The prison system’s computer record for Durrell’s cellmate revealed that the cellmate had anally raped a sixteen-year-old boy, assaulted other inmates, and threatened to rape another inmate.¹⁰⁹ The Ninth Circuit held that the plaintiff had alleged sufficient facts to remand for a deliberate indifference determination despite the fact that no rape actually occurred.¹¹⁰ The court stated that the information from the computer alone could constitute deliberate indifference.¹¹¹ Thus, the Ninth Circuit overturned the lower court’s grant of summary judgment on the basis of qualified immunity.¹¹² This was found despite the fact that, as the dissent points out, there was no evidence that the named defendants were personally involved in Durrell’s housing assignment.¹¹³ Additionally, the inmate with whom Durrell was housed “had been double-celled with other inmates without incident for years before his assignment with Durrell, and prison officials did not know that he posed a danger to his cellmates,” and the computer record did not denote a recent history of outstanding issues that would have indicated that Durrell should not have been housed with the inmate.¹¹⁴

107. *Id.* at 719.

108. *Id.* (“[Durrell] claims that he was injured defending himself from his cellmate, and sought medical attention for his injury (though this is disputed).”).

109. *Id.*

110. *Id.* at 720.

111. *Id.* at 719.

112. *Id.*

113. *Id.* at 720 (McKeown, J., dissenting).

114. *Id.* The dissent also notes that a year earlier in *Estate of Ford v. Ramirez-Palmer*, the Ninth Circuit held that prison officials who housed Ford—who was killed by his cellmate—with an inmate classified as a “predator” who “had an extensive history of violent behavior toward inmates and staff, including eleven separate assaults, one of which involved stabbing an inmate seventeen times” and had recently been taken off his medication, were entitled to qualified immunity, meaning a reasonable official could have deemed that double-celling was reasonable. *Id.* (citing *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1051 (9th Cir. 2002)). The discrepancy between *Ford* and *Durrell* appears to indicate that the Ninth Circuit drew a distinction between “aggressive homosexuals” (a label given to the inmate by Durrell in his complaint, not the prison system) and “violent predators” (a label given to the inmate by the prison system). Knowledge of the former is enough to meet the deliberate indifference standard, but the latter is not. This is especially interesting considering that the violent predator index appears to be a better indicator, as Ford was actually attacked, while Durrell was never physically harmed.

The *Durrell* case is fascinating in that it allowed an Eighth Amendment claim to go forward in a case in which no assault actually occurred.¹¹⁵ When compared to a case mentioned by the dissent, *Estate of Ford v. Ramirez-Palmer*,¹¹⁶ which the court decided the prior year, the result is more interesting. In *Ford*, the Ninth Circuit held that prison officials who housed Jeffrey Ford, who was killed by his cellmate James Diesso, were entitled to qualified immunity.¹¹⁷ Diesso was classified as a “predator,” had an extensive history of violence towards inmates and staff, including stabbing another inmate who was described as an “effeminate homosexual,” and had recently been taken off his medication.¹¹⁸ In reaching the *Ford* decision, the Ninth Circuit stated, “we cannot say that a reasonable correctional officer would have clearly understood that the risk of serious harm was so high that he should not have authorized the double-celling.”¹¹⁹ Yet in *Durrell* the court stated that if, on remand, deliberate indifference were found, then “no reasonable officer could have believed that defendants’ conduct was lawful, so defendants are not entitled to qualified immunity.”¹²⁰ The discrepancy between *Ford* and *Durrell* indicates that without attention to traits proven through research to be good risk indicators, courts’ decisions on reasonableness are virtually impossible to predict, which only makes guards’ ability to make reasonable decisions more difficult.

In *Riccardo v. Rausch*,¹²¹ the Seventh Circuit overturned a jury verdict awarding Anthony Riccardo \$1.5 million in compensatory damages in an Eighth Amendment failure-to-protect action.¹²² Shortly after entering the Cook County Jail, Riccardo was anally raped by his cellmate.¹²³ Riccardo was later transferred to Centralia Correctional Center, where he told a prison psychologist that he did not feel safe.¹²⁴ After violating prison rules, Riccardo was placed in segregation and then declined to return to the general

115. While *Durrell* claimed that he was injured defending himself from his cellmate and sought medical attention for the injury, this was disputed. *Durrell*, 71 Fed. Appx. at 719.

116. 301 F.3d 1043.

117. *Id.* at 1053.

118. *Id.* at 1046–47.

119. *Id.* at 1051.

120. *Durrell*, 71 Fed. Appx. at 719.

121. 375 F.3d 521 (7th Cir. 2004).

122. *Id.* at 523.

123. *Id.* at 524.

124. *Id.*

population.¹²⁵ At one point, Riccardo informed guards that his cellmate in the segregation unit had stolen some of his property, that he thought the cellmate might belong to the Latin Kings gang, and that the gang may try to kill him.¹²⁶ Because Centralia allowed inmates to veto housing with inmates whom they state are their enemies, the prison had to find Riccardo a new cellmate.¹²⁷ After this was done, however, Riccardo's new cellmate requested a transfer after a few days.¹²⁸ Thereafter, prisoner Juan Garcia offered to help Riccardo retrieve the property his original cellmate allegedly stole.¹²⁹ Riccardo took this as a bad sign and told the day shift guard, Lieutenant Alemond, that he feared he would be in danger if housed with Garcia.¹³⁰ Alemond said he would "take care of it," but did nothing.¹³¹

Lieutenant Rausch came on duty that evening after Alemond left.¹³² Riccardo told Rausch privately that he feared for his life if he were housed with Garcia.¹³³ Rausch replied that there was no other place for the two and that housing could not be refused while both of the prisoners were in segregated housing.¹³⁴ Rausch then brought the two inmates, Garcia and Riccardo, together and asked each if they had a problem sharing a cell with the other.¹³⁵ Riccardo shook his head no and Rausch placed the two inmates in the same cell.¹³⁶ Two evenings later Garcia attempted to anally rape Riccardo and then forced Riccardo to perform oral sex.¹³⁷

Despite the jury verdict that found deliberate indifference on the part of Rausch, the Seventh Circuit found that "no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk."¹³⁸ The majority explained its reasoning:

125. *Riccardo*, 375 F.3d at 524. Segregation at Centralia Correctional Center at that time did not mean single-celled, but rather housed with other prisoners in a separate location from the general population.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 525.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 529 (Williams, J., dissenting). Garcia also forcibly shaved Riccardo's head. *Id.*

138. *Id.* at 526 (majority opinion).

Riccardo argues, and the jury evidently concluded, that Rausch should have believed the first statement, communicated in private, rather than the second, communicated in Garcia's presence. A rational jury could have thought that guards should give priority to statements made in private. . . . Still, what Rausch should have believed is not the right question; we need to know what he *did* believe. No reasonable jury could have found, in light of Riccardo's denial of "a problem" with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm.¹³⁹

The majority opinion stated that data regarding violence within the prison and inmates' tracking records in identifying potential aggressors could have helped,¹⁴⁰ but that "a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion."¹⁴¹ This data request, as the dissent notes, sets forth a requirement, not supported by Supreme Court precedent, whereby the prisoner must "bolster his own account with a special showing containing material such as statistical evidence of a 'strong correlation between prisoners' professions and actual violence.'"¹⁴²

More interestingly, the Seventh Circuit completely overlooked several key objective indicators. First, inmates who have been raped once, as Riccardo was, are at a greater risk of being raped again.¹⁴³ Second, research shows that aggressor activity is often marked by overt friendly gestures that are made in an effort to trap potential targets.¹⁴⁴ Third, by placing the two prisoners together and asking

139. *Id.* at 527.

140. The court asserted that Riccardo could have made a case by demonstrating "[h]ow many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened?" *Id.*

141. *Id.* at 528.

142. *Id.* at 533 (Ripple, J., dissenting from denial of rehearing en banc). Note that Riccardo filed a petition for rehearing and rehearing en banc; however, the petition was denied. *Id.* Four of the ten deciding judges dissented to the denial of the rehearing en banc. *Id.*

143. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 6.

144. It is unclear from the decision whether Riccardo told Rausch that one of the reasons he feared Garcia was because Garcia had offered to help him reclaim his property. If Riccardo had told Rausch that, it would be another factor indicating Rausch had subjective knowledge that Riccardo was at risk. See HUMAN RIGHTS WATCH, *supra* note 86, at 60 ("The perpetrator may initially appear to be a friend, even an apparent protector, but will take advantage of his acquaintance with the

if they had a problem with each other, Rausch may have created a risk to Riccardo by alerting Garcia that Riccardo had talked to a guard about the housing situation, which made Riccardo look scared or like a snitch. These are both qualities that increase an inmates' likelihood of being raped.¹⁴⁵

victim to intimidate and coerce him into sexual contact.”). Letters to Human Rights Watch from prisoners, which are included as part of their report, further describe these techniques:

[One technique to force a prisoner into sex is that] one of the bad guys will set up a power play. This is accomplished by him having two or three of his friends stop down on the prisoner of his choice in a strong manner as if to fight or beat up this prisoner. This usually puts the choosen [sic] prisoner in great fear of those type guys [sic]. The prisoner that set up this will be close by when this goes down. His roll is to step in just before the act gets physical. He defends the choosen [sic] prisoner by taking on the would be offenders. This works to gain the respect and trust of the choosen [sic] prisoner. After this encounter the choosen [sic] prisoner is encouraged to hang out with his new friend. This is repeated once or twice more to convice [sic] the choosen [sic] one of the sincere loyalties of the prisoner that set all this up They become very close, the choosen [sic] one feels compelled to show his thanks by giving at first monetary favors to his protector and it progress [sic] to the point where this guy that set up the attacks on him will not accept just the money. He starts to insist on the choosen [sic] one to give him sexual favors The fear of him, the choosen [sic] one, is that if he do [sic] not have this one Protector the rest of the guys will be back after him. After all it is better to have one person that you give sexual favors than it would be to have to be forced to do the act by two or more prisoners at the same time.

What is more prevalent at TCIP . . . is best called “coercion.” I suppose you have an idea what these engagements entail. The victim is usually tricked into owing a favor. Here this is usually drugs, with the perpetrator seeming to be, to the victim, a really swell fellow and all. Soon, however, the victim is asked to repay all those joints or licks of dope—right away. Of course he has no drugs or money, and the only alternative is sexual favors. Once a prisoner is “turned-out,” it’s pretty much a done deal. I guess a good many victims just want to do their time and not risk any trouble, so they submit. . . . The coercion-type abuses continue because of their covert nature. From the way such attacks manifest, it can seem to others, administrators and prisoners, that the victims are just homosexual to begin with. Why else would they allow such a thing to happen, people might ask.

Id. at 67. As Human Rights Watch summarizes, “At some point, the perpetrator insists that the debt be repaid via sexual favors. Again, if the victim hesitates, the perpetrator may make it terrifyingly clear to him that refusal is not an option, but this last step is often unnecessary.” *Id.* at 68; *see also* NPREC REPORT, *supra* note 7, at 70 (describing how “[i]nitial offers of friendship or protection may suddenly become manipulative or morph into demands for ‘payback.’”); REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9 (noting that perpetrators of sexual assault in prisons are more likely to be creditors of the victim).

145. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 7 (noting that victims of sexual assault in prisons are more likely to project feelings of fear).

Furthermore, as the *Riccardo* dissent points out, subjective knowledge is a question of fact to be determined by a jury. As Judge Williams stated in his dissent:

[I]t is clear that Lt. Rausch's credibility and sincerity are integral components to the usefulness of this interaction [Rausch's sit-down with both Riccardo and Rausch]. In essence, the majority accepts Lt. Rausch's assertion that his second discussion with Ricardo in front of Garcia was a sincere investigation of the potential risk to Riccardo. However, the jury found otherwise.¹⁴⁶

As the district court originally held, “[c]redibility had to have been the key to the jury’s analysis, thus the court cannot interject its own credibility determinations.”¹⁴⁷ The original jury (or trial judge) should decide questions of fact as opposed to an appellate court because the jury observed all the testimony and evidence presented and is therefore better suited to evaluate character, honesty, and believability.¹⁴⁸ Yet the Seventh Circuit, in tossing out the jury’s fact-finding results under the guise of subjective knowledge, overturned the factual determination of the district court. Once again, the majority focused solely on the aggressor’s attributes, asking for data “identifying potential aggressors,”¹⁴⁹ even though research demonstrates that it is easier to identify those who are at risk of being assaulted as opposed to those that are at risk of committing an assault.¹⁵⁰

In *Taylor v. Michigan Department of Corrections*,¹⁵¹ decided the year after the *Farmer* decision, inmate Timothy Taylor was raped after he was transferred from a minimum-security prison with single cells to one with dormitory style housing.¹⁵² Taylor was five feet tall, weighed 120 pounds, was mildly retarded, had youthful features, and suffered from a seizure disorder.¹⁵³ The Sixth Circuit overturned the district court’s grant of the defense motion for summary judgment.¹⁵⁴ The Sixth Circuit held that Taylor presented a

146. *Riccardo*, 375 F.3d at 531 (Williams, J., dissenting).

147. *Riccardo v. Rausch*, No. Civ. 99-372-CJP, 2002 WL 32741124, at *9 (S.D. Ill. Mar. 7, 2002).

148. See, e.g., *Sanville v. McCaughtry*, 266 F.3d 724, 737 (7th Cir. 2001) (“Whether a prison official had the requisite knowledge is a question of fact.”) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

149. *Riccardo*, 375 F.3d at 527.

150. HUMAN RIGHTS WATCH, *supra* note 86, at 52.

151. 69 F.3d 76 (6th Cir. 1995).

152. *Id.* at 78.

153. *Id.*

154. *Id.* at 84.

viable claim and that a jury should decide whether the warden knew that conditions posed a substantial risk of harm to prisoners like Taylor, whether he knew there was no procedure in place to protect vulnerable inmates from being transferred to dangerous conditions, and whether despite that knowledge he failed to adopt reasonable policies to protect Taylor.¹⁵⁵ This is the only decision on record that considered the victim's characteristics when determining whether subjective knowledge existed, yet this is what courts should examine because it is a more accurate indication of risk of sexual assault.

There are myriad factors at play in these decisions. But it is fascinating that courts typically look at aggressor attributes, which are a poor fit for inferring risk, while ignoring victim attributes, which are a good fit. It seems possible that this may occur at least in part due to underlying beliefs that the victim is not worthy of protection.

D. *Conflated Question Two: Did the Prisoner Consent?*

1. Research indicates homosexuality is often equated with consent.

Prison rape may be improperly viewed as consensual sex because some guards believe that a homosexual man would never refuse to have sex with another man; thus, a homosexual inmate can never actually be raped. Peter Nacci and Thomas Kane, whose research focuses on sexual conduct in prisons, found that officers equated homosexuality and bisexuality with voluntariness.¹⁵⁶ In a three-month study of the Philadelphia prison system, Alan Davis found that "homosexual liaisons" were often deemed to occur after threats of or actual gang rape and that prison officials simply considered such activities consensual.¹⁵⁷ This set of beliefs allows guards to answer the second conflated question in the negative because the guard believes that homosexuals and bisexuals will always consent;¹⁵⁸ thus there is no illegal act from which the guards need to protect the prisoners.

Indeed, some prison officials may hold notions of masculinity that deny that a "true man" can ever be raped. This notion is best

155. *Id.*

156. Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 8 *FED. PROBATION* 46, 48 (1984).

157. A. Davis, *Sexual Assaults in the Philadelphia Prison System*, in *THE SEXUAL SCENE* (John H. Gagnon & William Simon, eds., 1970).

158. See, e.g., Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Back-Drop for "Deliberate Indifference,"* 92 *J. CRIM. LAW & CRIMINOLOGY* 127, 178 (2001).

explained by Dr. Helen Eigenberg, a professor at the University of Tennessee at Chattanooga, who undertook a detailed examination of correctional officers' attitudes and their contribution to the prison rape epidemic.¹⁵⁹ The notion is that "men" cannot actually be raped because "men" are those with power, control, and sexual dominance—people who would die fighting off a rapist rather than become a victim.¹⁶⁰ As Eigenberg writes, "[I]t is essential to portray male rape victims as weak, homosexuals—as effeminate men—*because in our culture the definition of masculinity does not allow for male rape victims.*"¹⁶¹ Eigenberg asserts that when viewing prison rape within the broader context of all rape literature one finds that "traditional definitions about gender role socialization and homosexuality may facilitate victim blaming."¹⁶²

This lack of the ability to recognize "men" as being potential victims of rape leads to the well-documented description of "situational homosexuality."¹⁶³ In the prison rape argot those who are coerced or physically threatened into sexual acts are deemed "situational homosexuals."¹⁶⁴ This allows rape to be considered "consensual homosexual behavior" while "the victims' behavior has been used to explain and legitimize their victimization."¹⁶⁵ This set of beliefs allows a guard to transform a rape into a consensual sex act therefore avoiding liability for failing to protect the inmate by saying that the victim was a consensual participant. Such belief systems can be seen in the following cases.

2. Case law indicates victim sexuality is a disregarded salient risk factor and situational homosexuality can be used to find consent.

In *Harvey v. California*,¹⁶⁶ Paul Harvey was raped by Smith, his cellmate.¹⁶⁷ Previously, Harvey had told Sergeant Parks that he was

159. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60.

160. *Id.* at 437–38.

161. *Id.* at 437 (emphasis in original).

162. *Id.* at 438.

163. *Id.* at 437; *see also* Helen Eigenberg, *Homosexuality in Male Prisons: Demonstrating the Need for a Social Constructionist Approach*, 17 CRIM. JUST. REV. 219 (1992).

164. *See* Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 437 (describing how the literature defines situational homosexuality as "heterosexual men engaging in sex with other men because of the situational nature of their sexual deprivation," thus ignoring the process by which new inmates are coerced into participating in sexual behavior); *see also* HUMAN RIGHTS WATCH, *supra* note 86, at 52 ("Although gay inmates are much more likely than other inmates to be victimized in prison, they are not likely to be perpetrators of sexual abuse.").

165. Eigenberg, *Correctional Officers' Definitions*, *supra* note 60, at 438.

166. 82 Fed. Appx. 544 (9th Cir. 2003).

167. *Id.* at 545.

nervous about being housed with another prisoner because he (Harvey) was a homosexual.¹⁶⁸ Several years earlier, Smith was caught naked in bed with another prisoner; however, the Ninth Circuit rejected this circumstantial evidence as irrelevant in establishing subjective knowledge because there was no allegation of force in that instance.¹⁶⁹ In upholding the district court's grant of summary judgment in favor of the defendants, the Ninth Circuit held that:

Even if Harvey told Parks that he was nervous about being placed in a cell with another prisoner because Harvey was a homosexual, this is not sufficient to show that Parks knew there was a risk from this *particular* prisoner. Nor is it sufficient to show deliberate indifference that the other prisoner, Smith, had been caught naked in bed with another prisoner several years before. Since there was no allegation of force in that case, Parks did not have sufficient reason to know or suspect that there was a risk Smith would rape Harvey. . . . Since Harvey did not allege that Parks knew of the risk, and presented no evidence from which a jury could reasonably infer that Parks in fact knew, Harvey states no Eighth Amendment claim.¹⁷⁰

There are several flaws with the Ninth Circuit's holding. First, the Ninth Circuit misapplied *Farmer* by stating that Harvey had to demonstrate that there was a risk "from this *particular* prisoner."¹⁷¹ In *Farmer*, the Supreme Court specifically stated that an official need only know that there is a substantial risk to inmate safety in general.¹⁷² Second, the Ninth Circuit's dismissal of the prior Smith incident because there was no allegation of force was presumptuous. It illustrates notions of "situational homosexuality" and some guards' beliefs that homosexuals deserve to be raped. Third, Harvey expressed his fear of harm due to his homosexuality, and research indicates that homosexuals may be at a greater risk of sexual

168. *Id.*

169. *Id.*

170. *Id.* (emphasis in original).

171. *Id.*

172. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). As an example the Court states, "If, for example, prison officials were aware that inmate 'rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station,' . . . it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." *Id.* at 843 (quoting *Hutto v. Finney*, 437 U.S. 678, 681-82 & n.3 (1978)).

abuse in prisons than heterosexuals.¹⁷³ Here again the court looked to the features of the aggressor, perhaps precisely because the victim's attributes clash with deep-seated beliefs about homosexuality and consent.

In *Lewis v. Richards*,¹⁷⁴ inmate Tommy Lewis brought an Eighth Amendment failure-to-protect claim.¹⁷⁵ Lewis was sexually assaulted three times.¹⁷⁶ Lewis claimed his first attackers were members of the Gangster Disciples, a gang with significant membership and power within the prison.¹⁷⁷ The Seventh Circuit held there was no evidence that prison officials had specific knowledge of a risk to Lewis before the initial attack.¹⁷⁸ Lewis was then transferred to a different dormitory.¹⁷⁹ In the new dormitory, he was sexually assaulted, choked, and stabbed in the bathroom by two different members of the Gangster Disciples.¹⁸⁰ Lewis told the court that prisoners in the dormitory had called him a "snitch"; the Seventh Circuit, however, found that because Lewis did not tell the prison officials that inmates had called him a snitch, the guards could not have known he was at risk for the second attack and that the prison fulfilled its obligation to Lewis by transferring Lewis after the first attack.¹⁸¹ While the lawsuit regarding the first two incidents was pending, Lewis was placed in the suicide unit and then in the general population of the prison's psychiatric unit, prior to an anticipated move to protective custody.¹⁸² While in the general population of the psychiatric unit, three inmates raped him.¹⁸³ Lewis claimed that those inmates stated that they were raping him for "Schaefer," one of the inmates involved in the second attack.¹⁸⁴ The prison held an internal disciplinary hearing regarding the event during which Lewis was charged and found guilty of engaging in consensual sexual activity and he lost six months good-credit

173. See, e.g., Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 670–71 (describing past research that examined the relationship between victim sexuality and sexual assault in prisons); Hensley, *Male Oklahoma Correctional Facilities*, *supra* note 24, at 597–98 (same); NPREC REPORT, *supra* note 7, at 73–74.

174. 107 F.3d 549 (7th Cir. 1997).

175. *Id.* at 551.

176. *Id.* at 551–52.

177. *Id.* at 551.

178. *Id.* at 553.

179. *Id.* at 551.

180. *Id.* at 551–52.

181. *Id.* at 554.

182. *Id.* at 552.

183. *Id.*

184. *Id.*

time.¹⁸⁵ Lewis did not appeal the disciplinary verdict but did amend his civil suit to include the third alleged rape.¹⁸⁶

The Seventh Circuit held that although there was a material question of fact regarding the defendant's subjective knowledge for the third rape, the results of the prison's internal disciplinary hearing, which occurred while the prison was being sued by Lewis, barred Lewis' third allegation under *Heck v. Humphrey*.¹⁸⁷ The Sev-

185. *Id.* Good-credit time is time earned by inmates if they stay out of trouble. This time can then be deducted from one's original sentence; looked at another way, one is deemed to have served the amount of time one is incarcerated plus one's good-credit time. The practice and exact name for the credit varies from state to state and is provided statutorily. The Federal Bureau of Prisons also awards such credit. 18 U.S.C. § 3624(b).

186. *Lewis*, 107 F.3d at 552.

187. *Id.* at 555 (applying *Heck v. Humphrey*, 512 U.S. 477 (1994)). In *Heck*, a prisoner who was convicted of voluntary manslaughter by an Indiana state court brought a Section 1983 action against the two prosecutors and the police investigator seeking compensatory and punitive damages for "unlawful, unreasonable, and arbitrary investigation," knowing destruction of exculpatory evidence, and use of an "illegal and unlawful voice identification procedure" in court. *Heck*, 512 U.S. at 478-79. *Heck* required the Court to decide whether a Section 1983 claim for damages that calls into question the legality of a conviction or confinement is valid. *Id.* at 483. The Court held that it is not valid because Section 1983 is based on general tort principles and those tort principles would not permit a collateral attack on a criminal decision through a civil suit. *Id.* at 486. Thus, the only way to pursue a Section 1983 claim for actions that lead to a criminal conviction would be to have the criminal conviction invalidated. *Id.* at 486-87.

In deciding *Heck*, the Court briefly reviewed its holdings in *Preiser v. Rodriguez* and *Wolff v. McDonnell*. *Id.* at 481-82 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974)). In *Preiser*, the Court examined the overlap between Section 1983 actions and habeas corpus petitions. *Heck*, 512 U.S. at 480-81. In this case, prisoners brought a Section 1983 action challenging their confinement and seeking release. *Preiser*, 411 U.S. at 476. The Court held that, while such a claim may technically fall under the language of Section 1983, it must instead be brought under a habeas corpus petition. *Id.* at 489. *Heck* was distinguished from *Preiser* because in *Preiser*, respondents sought a speedy release, while in *Heck*, the prisoner sought damages and the Court examined whether a damages claim would be cognizable in a Section 1983 action. *Heck*, 512 U.S. at 481.

In *Wolff*, a prisoner brought a Section 1983 action seeking restoration of good-time credits and damages for the deprivation of his civil rights due to the process by which his credits were taken away. *Wolff*, 418 U.S. at 542-43. The Court noted that *Preiser* precluded the claim for restoration of good time credits; however, the damages claim was actionable because it did not call into question the validity of the denial of the good-time credits (the result) but rather the method of denying the good-time credits (the process). *Id.* at 554-55. As the Court explained in *Heck*, the *Wolff* Court never decided whether a Section 1983 action that called into question the validity of a result was actionable. *Heck*, 512 U.S. at 482. Thus, the Court undertook to decide that issue in *Heck*. The *Heck* Court also clarified that *Wolff* did

enth Circuit, in applying *Heck*, held that if the court awarded damages to Lewis it would call into question the result of the prison's inner disciplinary finding that Lewis engaged in prohibited consensual sex.¹⁸⁸ Thus, the court held that unless the disciplinary hearing was invalidated, Lewis had no claim for the third attack even though the court noted that there were disputed issues of material fact.¹⁸⁹ Additionally, regarding the first two allegations of rape, the Seventh Circuit held that because the plaintiff did not present "evidence of the number or frequency of incidents of inmate-on-inmate violence at [the prison where the assault occurred]," the case could not survive the summary judgment stage.¹⁹⁰

The Seventh Circuit's reasoning is flawed. *Heck* dealt with whether a prisoner had a valid Section 1983 action if the action brought into question the underlying validity of a criminal conviction or the confinement resulting from that criminal conviction.¹⁹¹ Internal prison disciplinary findings are not tantamount to a criminal conviction.¹⁹² Lewis's claim did not call into question his basic conviction or his confinement in prison. The issue addressed in the disciplinary hearing was whether the defendant at the hearing was raped, which turned on the question of whether Lewis consented. If an internal disciplinary committee can decide this issue and then block an Eighth Amendment Section 1983 decision through *Heck*, then every prison is incentivized to have a disciplinary committee review every instance of sexual contact and deem it consensual. The Seventh Circuit's decision in *Lewis* thus creates a situation in which the prison system is not only the defendant, but also the judge and the jury. The additional fact that the disciplinary hearing regarding the third incident occurred while Lewis's civil suit for the first two Eighth Amendment failure-to-protect claims was pending casts further doubt on the logic of the Seventh Circuit's holding. There may have been additional factors at work in *Lewis*, which are not contained within the appellate record, but the case is illustrative of a "situational homosexuality" determination being used to block the case from moving forward.

not mean that a prisoner could recover damages "measured by the action loss of good time," but rather damages that measured the "deprivation of civil rights" through the use of improper procedures. *Id.*

188. *Lewis*, 107 F.3d at 555.

189. *Id.*

190. *Id.*

191. *Heck*, 512 U.S. at 483.

192. *See, e.g.*, *Walpole v. Hill*, 472 U.S. 445, 456 (1985) (citing *Wolff*, 418 U.S. at 556); *Wolff*, 418 U.S. at 556.

In *Johnson v. Johnson*,¹⁹³ Roderick Johnson, a black homosexual prisoner, brought an Eighth Amendment and two equal protection claims¹⁹⁴ after being sexually assaulted over an eighteen-month period.¹⁹⁵ Johnson was transferred to the Allred Unit, where he was placed in the general population despite the fact that prison officials knew he was a “homosexual, and possessed an effeminate manner,”¹⁹⁶ and was previously housed in safekeeping, which is reserved for vulnerable inmates.¹⁹⁷ Upon his transfer, Johnson stated that the Unit Classification Committee (UCC) told him that they “don’t protect punks on this farm.”¹⁹⁸ Johnson was raped almost immediately after entering the general population and began an eighteen-month stint during which he was claimed as various prisoners’ sexual servant.¹⁹⁹ He informed numerous officials of his rapes, requested medical attention, sought help from guards, filed multiple “life-endangerment” forms, and wrote letters to prison officials.²⁰⁰ Johnson’s requests were repeatedly rebuffed or investigated without interviewing any of the inmates mentioned in the complaints, such that no corroboration for his complaints was found.²⁰¹ He did, however, meet with the UCC seven times to request a transfer.²⁰² Each time the UCC refused to transfer him; according to Johnson, they told him to fight off the other inmates or submit and insinuated that because he was a homosexual, he probably enjoyed the sexual assaults.²⁰³ Johnson was finally transferred and placed in safekeeping housing after he contacted the ACLU.²⁰⁴

Johnson’s original complaint stated three causes of action: an Eighth Amendment violation based on the officials’ failure to protect him; an equal protection claim that the defendants denied him protection because he was black; and an additional equal protection claim that the defendants denied him protection because he was a homosexual.²⁰⁵ The defendants responded with a denial of

193. 385 F.3d 503 (5th Cir. 2004).

194. *Id.* at 514.

195. *Id.* at 512–13.

196. *Id.* at 512.

197. *Id.*

198. *Id.*

199. *Id.* at 512–13.

200. *Id.* at 513.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 514.

almost all the charges.²⁰⁶ Three defendants then moved for judgment on the pleadings for the two equal protection claims, and this motion was granted by the court without opposition from the plaintiff.²⁰⁷ In November 2002, all the defendants filed a motion to dismiss all causes of action for failure to exhaust administrative remedies²⁰⁸ as required by the Prison Litigation Reform Act.

Under the Prison Litigation Reform Act (PLRA), a prisoner must exhaust all administrative remedies before filing a Section 1983 suit.²⁰⁹ Additionally, the PLRA limits recovery stating that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”²¹⁰ The majority of circuits take the position that this limitation is only for compensatory damages, and thus nominal or punitive damages and injunctive and declaratory relief are excluded.²¹¹ What level of sexual abuse constitutes physical injury is unclear.²¹² Furthermore, the PLRA states that if a prisoner has three cases dismissed as malicious, frivolous, or for failure to state a claim while he is incarcerated or detained, he may not proceed in another action *in forma pauperis* unless he is in imminent danger of serious physical

206. *Id.*

207. *Id.*

208. *Id.*

209. 42 U.S.C. § 1997e (2006).

210. § 1997e(e).

211. *See, e.g.*, JOHN BOSTON, THE LEGAL AID SOCIETY, PRISONERS' RIGHTS PROJECT, THE PRISON LITIGATION REFORM ACT 99–100 (Sep. 2004), *available at* www.wnylc.net/pb/docs/plra2cir04.pdf. Regarding nominal and punitive damages, *see* Searles v. Van Bebber, 251 F.3d 869, 881 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 252–53 (3d Cir. 2000); *but see* Davis v. Dist. of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998). Regarding the availability of injunctive and declaratory relief, *see* Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Perkins v. Kansas Dep't of Corrs., 165 F.3d 803, 807 (10th Cir. 1999); Davis v. Dist. of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

212. For example, the Second Circuit held this means the injury must be more than de minimis and stated that the sexual assaults alleged in the case qualified as a physical injury “as a matter of common sense.” *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *see also* *Kemner v. Hemphill*, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (“[W]here only fear and intimidation are used, it might appear that no physical force is present. But that is error.”); *Nunn v. Michigan Dep't of Corr.*, No. 96-CV-71416, 1997 WL 33559323, at *4 (E.D. Mich. 1997). However, the Western District of Virginia dismissed a prisoner's complaint regarding female staff that routinely viewed him in the nude for lack of physical injury. *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 566 (W.D. Va. 2000).

injury.²¹³ However it is still unclear whether all forms of sexual assault would qualify as physical injuries. If they did not, a prisoner's valid suit could be dismissed because he had three prior cases dismissed for failure to state a claim.²¹⁴ Additionally, the Supreme Court held in 2001 that administrative exhaustion is required even if it cannot provide the relief requested, such as money damages.²¹⁵ Furthermore, even if the grievance procedure is faulty or illegal, the prisoner must follow it.²¹⁶ Thus, the defendants in *Johnson* as-

213. 28 U.S.C. § 1915(g) (2006). Several circuits have held that "imminent danger of serious physical injury" includes risk of future injury. See *McAlphin v. Toney*, 281 F.3d 709, 711 (8th Cir. 2002); *Gibbs v. Cross*, 160 F.3d 962, 965-66 (3d Cir. 1998). Further, an ongoing risk of assault from another prisoner qualifies for the imminent danger exception. *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998).

214. See, e.g., *Brown v. City of Philadelphia*, No. 08-2419, 2009 U.S. App. LEXIS 10790, at *1 (3d Cir. May 21, 2009); *Jackson v. Johnson*, 475 F.3d 261, 265, 267 (5th Cir. 2007); *Bozeman v. Johnson*, No. 2:07-CV-290, 2007 U.S. Dist. LEXIS 26590, *1 (M.D. Ala. Apr. 10, 2007).

215. *Booth v. Churner*, 532 U.S. 731, 733-34 (2001); see also *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Prior to the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), there was a circuit split regarding total versus mixed claim exhaustion. The Second Circuit held that if dismissal for failure to exhaust administrative procedures is proper for one claim, but exhaustion was fulfilled for another claim, then both claims need not be dismissed, only the claim for which exhaustion was not fulfilled. *Ortiz v. McBride*, 380 F.3d 649, 663 (2d Cir. 2004). However, the Sixth, Eighth, and Tenth Circuits have all required total exhaustion and dismissed cases demonstrating only mixed exhaustion. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10th Cir. 2004); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). In *Jones*, the Supreme Court held that within one action unexhausted claims may be dismissed, but exhausted claims may proceed. 549 U.S. at 218-22. Fulfilling exhaustion is not a swift process. Several circuits have held that exhaustion requires pursuing one's grievances through the highest level of administrative review. *Post v. Taft*, 97 Fed. Appx. 562, 563 (6th Cir. 2004); *Smith v. Sundquist*, 33 Fed. Appx. 798, 799 (6th Cir. 2002); *Lyons-Bey v. Curtis*, 30 Fed. Appx. 376, 378 (6th Cir. 2002); *Dixon v. Page*, 291 F.3d 485, 489-91 (7th Cir. 2002). This includes waiting for a response from the highest administrative level before filing in court. *Tolbert v. McGrath*, No. C 02-5465, 2002 WL 31898207, at *1 (N.D. Cal. Dec. 27, 2002); see also *Williams v. Cooney*, No. 01 CV 4623, 2004 WL 434600, at *3 (S.D.N.Y. Mar. 8, 2004). Additionally, the prisoner must wait for the response even if it is untimely. See, e.g., *Daniels v. California Dep't of Corrs.*, No. C 02-2088CRB(PR), 2003 WL 21767466, at *2 (N.D. Cal. Jul. 29, 2003). However, the district court of Delaware did hold that the exhaustion requirement was met when prison authorities failed to respond to a prisoner's complaint for four years because the court assumed that such a delay exceeded the amount of time allowed for prison authorities to respond under the grievance procedure. *Woulard v. Food Serv.*, 294 F. Supp. 2d 596, 602 (D. Del. 2003).

216. See, e.g., *Ferrington v. Louisiana Dep't of Corrs.*, 315 F.3d 529, 531 (5th Cir. 2002) (requiring prisoner to follow the institution's grievance procedure even

serted that the plaintiff's claims were barred because he failed to fully exhaust all his administrative remedies prior to filing his complaint with the district court.²¹⁷

Also in November 2002, the remaining defendants facing equal protection claims filed a motion for judgment on the pleadings, asserting qualified immunity.²¹⁸ While these motions were pending, the defendants filed a motion for summary judgment on the Eighth Amendment claim.²¹⁹ The district court denied the January 2003 motion for summary judgment and also rejected defendants' failure-to-exhaust claims and qualified immunity assertions, finding that there was a question of fact regarding the subjective knowledge of various prison officials.²²⁰ Afterward, the defendants requested a ruling on their prior motion for judgment on the pleadings.²²¹ The district court denied that motion,²²² and denied as moot the failure-to-exhaust and qualified immunity claims asserted in defendants' various November 2002 motions.²²³ The defendants then filed two notices of appeal, one appealing the order denying summary judgment and one appealing the order denying the motion for judgment on the pleadings.²²⁴ The district court certified and the Fifth Circuit granted leave to rule on the interlocutory appeals regarding the denials of qualified immunity and failure-to-exhaust administrative remedies.²²⁵

The Fifth Circuit stated that it lacked interlocutory discretion and thus could not review the district court's finding that a question of fact existed regarding defendant's subjective knowledge.²²⁶ The court could and did, however, review the evidence presented to determine if the defendant was entitled to summary judgment on qualified immunity grounds.²²⁷ The Fifth Circuit found that the non-UCC defendants (various prison officials) were entitled to

though the Louisiana Supreme Court had held that the procedure was unconstitutional).

217. *Johnson v. Johnson*, 385 F.3d 503, 514 (5th Cir. 2004).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 515.

224. *Id.*

225. *Id.*

226. *Id.* at 523–24.

227. *Id.* at 524. Qualified immunity is granted to officials when their actions do not violate "clearly established law." Clearly established law is determined through an objective analysis, i.e., was one's behavior objectively unreasonable at the time behavior was committed? Qualified immunity can be granted to officials

qualified immunity because they responded reasonably by referring Johnson's complaints for further investigation.²²⁸ The court held that the UCC defendants, however, were not entitled to qualified immunity because Johnson's allegations that they responded with statements like "fuck or fight" and insinuated that Johnson enjoyed being raped could be viewed by a jury as an unreasonable method of discharging their duty to protect prisoners.²²⁹

The Eighth Amendment is supposed to reflect "contemporary standards of decency."²³⁰ Perhaps our contemporary standards of decency parallel those of the officers who believe homosexual prisoners deserve to be raped. If that is the case, it would not matter if the officers protected their actions by saying they thought the victim consented. But if this is not the case, then the standards for analyzing and proving an Eighth Amendment violation should be changed to reflect this. At the heart of the issue is consent.²³¹ Individual views of what constitutes consent vary from person to person. The United States' jury system creates a method of aggregating the different opinions in order to create societal standards. By allowing the consent question to be answered by society at large, we draw boundaries between acceptable and unacceptable conduct. Unfortunately, this societal interpretation of consent is lost in the prison context. Instead of being a part of society, prisons and prisoners have become the "other," and an extremely small number of peo-

who commit illegal acts if, at the time of commission, those acts did not clearly violate established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

228. *Johnson*, 385 F.3d at 526.

229. *Id.* at 527. Regarding Johnson's Equal Protection claims, the Fifth Circuit dismissed the racial claim for failure to exhaust administrative remedies, as required by the PLRA. *Id.* at 523. However, Johnson's sexual orientation-based Equal Protection claim withstood summary judgment. *Id.* Further, the Fifth Circuit rejected defendants' argument that Johnson failed to provide any examples of non-homosexual prisoners that were treated better in a similar situation, stating, "It is unclear how a prisoner is supposed to possess identifying information regarding other inmates' treatment at the complaint stage." *Id.* at 531. This stands in contrast to the Seventh Circuit's requests for data regarding other instances of rape and violence in the prison for an Eighth Amendment claim to withstand summary judgment. *Riccardo v. Rausch*, 375 F.3d 521, 527 (7th Cir. 2004).

230. *Hudson v. MacMillian*, 503 U.S. 1, 7-8 (1991) (stating that in an Eighth Amendment excessive force case, the way to judge excessive force claims is to examine whether the force was applied in "a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm" and that "contemporary standards of decency" should be used to determine whether the action in question was malicious and sadistic).

231. Of course there are instances in which an individual's consent is irrelevant because he or she is deemed incapable of giving free consent, but those situations are not the subject matter of this Article.

ple control the boundaries of acceptable conduct for inmates, guards, and prison officials. When it comes to sex in prisons this non-representative sample of prison officials and judges have become the decision-makers on consent, and therefore the only creators of the proper normative behavior for prisons and prisoners. This must change because prisons and prisoners are a part of society as a whole, and society as a whole should be responsible for determining normative consequences.

II.

COMBATING THE CONFLATION WITH HELP FROM THE PRISON RAPE ELIMINATION ACT AND EQUAL PROTECTION

A. *PREA and The National Prison Rape Elimination Commission*

The Prison Rape Elimination Act of 2003 (PREA) authorized the Bureau of Justice Statistics (BJS) to gather statistics on prison rape.²³² The Review Panel on Prison Rape (RPPR) then reviewed such statistics and held public hearings to aid the BJS in identifying common characteristics of rape victims and perpetrators, as well as discerning the correctional facilities with the highest and lowest incidences of prison rape.²³³ On December 29, 2008, the RPPR released its *Report on Rape in Jails in the U.S.*, which described certain findings regarding common characteristics of victims and aggressors, and a list of best practices based on the RPPR's review of the BJS data and the public hearings.²³⁴ These best practices fall into the following categories: training of staff and inmates; classification of inmates; surveillance; reporting; investigation; prosecution; and relevant policies and practices.²³⁵ The National Prison Rape Elimination Commission (NPREC) examined the RPPR's report and conducted numerous hearings across the nation with various individuals and entities involved with the issue.²³⁶ The NPREC then

232. 42 U.S.C. § 15603 (2006).

233. § 15603(b)(3)(A).

234. REVIEW PANEL ON PRISON RAPE, *supra* note 87. The jails selected to participate in the hearings were not necessarily the three with the highest and lowest incidences of sexual victimization because the BJS's victimization rates were based on a sample of inmates from 282 jail facilities as opposed to a complete enumeration, which makes its findings subject to sampling error. *Id.* at 3–6. The Review Panel on Prison Rape made the final selection of the facilities based on the data in the tables within the BJS' survey that contained the tabulated results of the surveys by facility and state. *Id.*

235. *Id.* at 19–28.

236. NPREC REPORT, *supra* note 7.

proposed national standards in June 2009.²³⁷ The Attorney General of the United States must publish a final rule adopting national standards no later than one year after receiving the official NPREC report.²³⁸ The NPREC published nine findings and a multitude of best policies and practices.²³⁹

It is vital that the NPREC standards regarding data collection,²⁴⁰ data storage, publication and destruction,²⁴¹ data review

237. *Id.* The Report acknowledges the tension in the Commission's mandates, stating, "Congress conferred upon the Commission an enormous responsibility: developing national standards that will lead to the prevention, detection, and punishment of prison rape. Yet Congress also and appropriately required us to seriously consider the restrictions of cost, differences among systems and facilities, and existing political structures." *Id.* at v.

238. 42 U.S.C. § 15607(a)(1). It should be noted that pursuant to § 15606(e)(3), the standards proposed by the National Prison Rape Elimination Commission cannot "impose substantial additional costs compared to the costs presently expended by Federal, State, or local prison authorities."

239. NPREC REPORT, *supra* note 7. The nine findings are as follows: "(1) Protecting prisoners from sexual abuse remains a challenge in correctional facilities across the country. Too often, in what should be secure environments, men, women, and children are raped or abused by other incarcerated individuals and corrections staff." *Id.* at 3. "(2) Sexual abuse is not an inevitable feature of incarceration. Leadership matters because corrections administrators can create a culture within facilities that promotes safety instead of one that tolerates abuse." *Id.* at 5. "(3) Certain individuals are more at risk of sexual abuse than others. Corrections administrators must routinely do more to identify those who are vulnerable and protect them in ways that do not leave them isolated and without access to rehabilitative programming." *Id.* at 7. "(4) Few correctional facilities are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it. Dramatic reductions in sexual abuse depend on both." *Id.* at 9. "(5) Many victims cannot safely and easily report sexual abuse, and those who speak out often do so to no avail. Reporting procedures must be improved to instill confidence and protect individuals from retaliation without relying on isolation. Investigations must be thorough and competent. Perpetrators must be held accountable through administrative sanctions and criminal prosecution." *Id.* at 11. "(6) Victims are unlikely to receive the treatment and support known to minimize the trauma of abuse. Correctional facilities need to ensure immediate and ongoing access to medical and mental health care and supportive services." *Id.* at 14. "(7) Juveniles in confinement are much more likely than incarcerated adults to be sexually abused, and they are particularly at risk when confined with adults. To be effective, sexual abuse prevention, investigation, and treatment must be tailored to the developmental capacities and needs of youth." *Id.* at 16. "(8) Individuals under correctional supervision in the community, who outnumber prisoners by more than two to one, are at risk of sexual abuse. The nature and consequences of the abuse are no less severe, and it jeopardizes the likelihood of their successful reentry." *Id.* at 19. "(9) A large and growing number of detained immigrants are at risk of sexual abuse. Their heightened vulnerability and unusual circumstances require special interventions." *Id.* at 21.

240. The proposed standard reads:

for corrective action,²⁴² and audits of standards²⁴³ be adopted by

The agency collects accurate, uniform data for every reported incident of sexual abuse using a standardized instrument and set of definitions. The agency aggregates the incident-based sexual abuse data at least annually. The incident-based data collected includes, at a minimum, the data necessary to answer all questions from the most recent version of the BJS Survey on Sexual Violence. Data are obtained from multiple sources, including reports, investigation files, and sexual abuse incident reviews. The agency also obtains incident-based and aggregated data from every facility with which it contracts for the confinement of its inmates.

Id. at 85.

241. The proposed standard reads:

The agency ensures that the collected sexual abuse data are properly stored, securely retained, and protected. The agency makes all aggregated sexual abuse data, from facilities under its direct control and those with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means. Before making aggregated sexual abuse data publicly available, the agency removes all personal identifiers from the data. The agency maintains sexual abuse data for at least 10 years after the date of its initial collection unless Federal, State, or local law allows for the disposal of official information in less than 10 years.

Id. at 86.

242. The proposed standard reads:

The agency reviews, analyzes, and uses all sexual abuse data, including incident-based and aggregated data, to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training. Using these data, the agency identifies problem areas, including any racial dynamics underpinning patterns of sexual abuse, takes corrective action on an ongoing basis, and, at least annually, prepares a report of its findings and corrective actions for each facility as well as the agency as a whole. The annual report also includes a comparison of the current year's data and corrective actions with those from prior years and provides an assessment of the agency's progress in addressing sexual abuse. The agency's report is approved by the agency head, submitted to the appropriate legislative body, and made readily available to the public through its Web site or, if it does not have one, through other means. The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but it must indicate the nature of the material redacted.

Id. at 87.

243. The proposed standard reads:

The public agency ensures that all of its facilities, including contract facilities, are audited to measure compliance with the PREA standards. Audits must be conducted at least every three years by independent and qualified auditors. The public or contracted agency allows the auditor to enter and tour facilities, review documents, and interview staff and inmates, as deemed appropriate by the auditor, to conduct proper audits. The public agency ensures that the report of the auditor's findings and the public or contracted agency's plan for corrective action (DC-3) are published on the appropriate agency's Web site if it has one or are otherwise made readily available to the public.

the Attorney General as part of the promulgated standards because they are vital for plaintiffs who seek to prove deliberate indifference.²⁴⁴ Besides greater collection, retention, and analysis of data, the NPREC's findings and recommended standards regarding staff training and prisoner classification are most helpful in increasing a plaintiff's opportunity to prove subjective knowledge.

1. Staff Training: Ensuring Conflated Question One Regarding Entitlement to Protection is Answered Correctly

Before subjective knowledge can ever be proven, one must ensure that all correctional employees understand that each and every prisoner is entitled to serve his or her time free of sexual abuse. Further, all correctional employees must understand that PREA's definition of rape is the law, and thus even if there is no evidence of physical force, an inmate who participates in a sex act due to fear was in fact raped.²⁴⁵ Prisons need to mandate training for all employees and volunteers, and each needs to acknowledge in writing that such individual has participated in and understood the training.²⁴⁶ This helps to parse the first conflated question (whether the prisoner was entitled to protection) by ensuring that a clear written record exists establishing that each prison official knew that each prisoner is entitled to protection. These trainings must cover the definitions of sexual assault under PREA, that sexual abuse in prison at any level and between any parties is not allowed, the latest research in victim and aggressor identification, and best practices for prison management. The content of these trainings must be written and maintained by each facility. Additionally, prison employees need to record all allegations of abuses, substantiated or not, and all allegations need to be maintained in both the accuser's and the accused's files. Currently some facilities only maintain records of incidents for which officials substantiated the allega-

Id. at 88.

244. Courts have specifically requested the use of this data in order to prove deliberate indifference. *See, e.g.,* Riccardo v. Rausch, 375 F.3d 521, 527 (7th Cir. 2004) (stating that Riccardo "might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence" by relying on data such as murder and assault rates or the number of violent events that were preceded by requests for protection).

245. 42 U.S.C. § 15609(9)(C).

246. *See* NPREC REPORT, *supra* note 7, at 6 ("Only through training can staff understand the dynamics of sexual abuse in a correctional environment, be well informed about the agency's policies, and acquire the knowledge and skills necessary to protect prisoners from abuse and respond appropriately when abuse does occur.").

tions.²⁴⁷ When proving deliberate indifference the fact that there were prior accusations of sexual abuse regarding a prisoner involved in another alleged assault, be it the alleged attacker or the alleged victim, regardless of whether they were substantiated, has circumstantial value for proving the officials' knowledge of risk, and it is critical that such records are maintained.

Some of the NPREC's standards require an examination of how well corrections employees work in a sexual assault zero-tolerance environment and require that those results be factored into hiring and promotion decisions.²⁴⁸ Psychological tests can and should be administered to help determine which employees are better suited to facilitate the elimination of prison rape.²⁴⁹ A record of the test administered, the date of administration, and the results should be placed in each employee's file. Plaintiffs could then use such test results in order to help bolster proof of deliberate indifference. While certainly not conclusive, these tests could shed light on how prison employees view the conflated questions.

Finally, society needs to come at this from new perspectives. One of NPREC's recommendations is for all facilities to "take a simple step to protect youth from sexual abuse: encourage all residents during intake to tell staff if they fear being abused."²⁵⁰ A National Institute of Corrections study finds that inmates' views on their own vulnerability are essential in properly screening and protecting inmates.²⁵¹ Yet when particular victim's views were known, as in *Harvey* and to a certain extent in *Riccardo*, it was disregarded by the courts. Thus, courts should be included in the training. Judges are busy people, and they may not know about or fully understand the scope and mandates of PREA. For prison sexual abuse to be eliminated, however, judges need to fully comprehend and appreciate the congressional mandate set forth in PREA. Furthermore, they need to familiarize themselves with prisoner sexual abuse at-risk categories. They need to draw inferences from categories with a good fit, as opposed to simply categories that are readily accessible. In the absence of specialist judges, it is the plaintiff's responsibility to

247. *Id.* at 41.

248. *Id.* at 56.

249. *See id.* Emotional stability, especially in connection with anger and impulse control, along with dependability, rationality, and maturity, are all factors that indicate that a correctional officer will be more successful at maintaining a zero-tolerance atmosphere. *Id.*

250. *Id.* at 149.

251. *Id.* at 76.

educate the presiding judge about PREA and the research regarding at-risk categories.

2. Prisoner Classification: Building a Stronger Case for Correctly Answering Conflated Question Two Regarding Consent

A 2000 study of a maximum-security prison in the South examined prison sexual assault targets and their sexual orientations prior to and during incarceration.²⁵² Chi-square tests²⁵³ measuring differences between characteristics of an entire sample population versus a target population (in this case inmates that had been sexually threatened) found that the only significant differences between the sample group and the target group were sexual orientation prior to incarceration and sexual orientation during incarceration.²⁵⁴ Thus, homosexuals and bisexuals were overrepresented as victims, which indicates they are much more likely targets for sexual victimization in prison.

252. Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 672.

253. In chi-square tests, one is determining the chi square value, which is stated as χ^2 . This value allows one to test hypotheses about the distribution of observations into categories. One starts with a baseline assumption that the observed frequencies are the same (except for chance variation) as the expected frequencies. If the frequencies one actually observes are different from the expected frequencies, then the value of χ^2 increases from the baseline of 0. It is also necessary to determine the degrees of freedom, which is stated as *df*. This value tells one the statistical significance of χ^2 by testing it against a table of chi-square distributions, according to the number of degrees of freedom (*df*) from one's sample, which is the number of categories minus 1. Finally, one needs to know the significance of the figure, which is stated as *p*. This value is essentially a way of determining whether the χ^2 value one found is probable or not on its own regardless of the test one ran. The lower the p-value, the less likely that one's result would have naturally occurred, and thus the more statistically significant the outcome. If a p-value is less than 0.05 (corresponding to a five percent chance of naturally occurring regardless of one's tested hypothesis), it is usually deemed statistically significant, although p-values of closer to 0.01 (corresponding to a one percent chance of naturally occurring regardless of one's tested hypothesis) are more desirable. For a discussion of chi square tests, see R.L. Plackett, *Karl Pearson and the Chi-Squared Test*, 51 INT'L STAT. REV. 59, 61-64 (1983).

254. Hensley, *Targets in a Southern Maximum-Security Prison*, *supra* note 24, at 674. Prior to incarceration, 15.5% of the sample described their sexual orientation as bisexual, and 5.6% of the sample described their sexual orientation as homosexual. Of the targets, however, 38.5% described themselves as bisexual prior to incarceration, and 11.5% described themselves as homosexual prior to incarceration ($\chi^2 = 16.17$, *p* .01, *df* = 2). *Id.* at 675. Regarding sexual orientation during incarceration, 5% of the sample identified as homosexual, and 26% of the sample identified as bisexual. *Id.* Of the targets, 11.8% identified as homosexual, and 46.2% identified as bisexual ($\chi^2 = 11.04$, *p* .01, *df* = 2). *Id.*

A 2003 study in three Oklahoma correctional facilities found similar overrepresentation of homosexuals and bisexuals as victims of sexual threats.²⁵⁵ Overall, the study identified young, white, bisexual, and homosexual males as more likely targets of victimization.²⁵⁶ This is confirmed by research conducted on behalf of the National Institute of Corrections, which revealed the most likely male prison rape targets are, “young, white, small, and feminine physical features [sic] and body movements; he has no prison experience; and he has no friends or companions or social support.”²⁵⁷ The RPPR, NPREC, and Human Rights Watch found similar victim characteristics.²⁵⁸ Given this research, judges are making a mistake when, as in *Harvey*,²⁵⁹ they fail to take into account the victim’s characteristics as a factor that could create subjective knowledge of risk in a guard’s mind.

By using victimology to classify and house prisoners more effectively, prisons can decrease the rate of sexual abuse within the facility without adding much cost. Additionally, by mandating classification for each prisoner, the results of which should be written down and remain part of each inmate’s permanent file, a record of subjective knowledge is begun. That record, along with the aforementioned training, can combine to show subjective knowl-

255. Hensley, *Male Oklahoma Correctional Facilities*, *supra* note 24, at 602. Of the sample, 8% identified as homosexual; whereas of the victims, 16% identified as homosexual. *Id.* Also, 13.2% of the sample identified as bisexual and 42% of the victims identified as bisexual. *Id.*

256. *Id.*

257. NAT’L INST. OF CORRECTION, *supra* note 24, at 27.

258. The RPPR found that the common characteristics of victims of inmate-on-inmate sexual victimization were: a young or youthful appearance, smaller stature and build, physical disability, past victim of sexual assault, first time in jail or new to the facility, homosexual or transgender, mentally ill or learning disabled or lower IQ, low self-confidence or projection of feelings of fear, non-aggressive, lack of gang affiliation, a criminal history of prostitution or sex offenses or less serious crimes, reputation among the staff as untruthful, access to or lack of access to money, promiscuous or provocative behavior, in protective custody, and male inmates with feminine mannerisms or features. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 6–8. The NPREC identified the following categories as more at risk: young, small, and naïve; previously traumatized; disabled and at risk; and gender non-conforming, which includes non-heterosexual, transgender, and intersex inmates. NPREC REPORT, *supra* note 7, at 70–74. Human Rights Watch identified the following victim characteristics: “young, small in size, physically weak, white, gay, first offender, possessing ‘feminine’ characteristics such as long hair or a high voice; being unassertive, unaggressive, shy, intellectual, not street-smart, or ‘passive’; or having been convicted of a sexual offense against a minor.” HUMAN RIGHTS WATCH, *supra* note 86, at 52.

259. *Harvey v. California*, 82 Fed. Appx. 544 (9th Cir. 2003).

edge and hence deliberate indifference in a far clearer and more consistent manner than is currently being applied by the courts. As the NPREC wrote:

Through training, investigators can learn the characteristics of an objective investigative process and outcome and how to recognize and reject stereotypes that hinder objectivity. They may learn, for example, not to assume that a sexual encounter is consensual simply because there are no discernable physical injuries or because the alleged victim or perpetrator is homosexual. Although training cannot overcome deeply rooted prejudices, when it is accompanied by good supervision, investigators are more likely to remain objective as they weigh the evidence and formulate their findings.²⁶⁰

Per the NPREC's recommendations, "[e]vidence-based screening must become routine nationwide, replacing the subjective assessments that many facilities still rely on and filling a vacuum in facilities where no targeted risk assessments are conducted," and "[t]o be effective, the results of these screenings must drive decisions about housing and programming."²⁶¹

The Federal Bureau of Prisons and the California Department of Corrections and Rehabilitation already use written instruments to screen incoming prisoners for sexual abuse risk.²⁶² Prisoners need to be classified, not only when entering the facility but, as the NPREC standards recommend, "within 6 months of the initial screening and every year thereafter in prisons, and within 60 days of the initial screening and every 90 days thereafter in jails."²⁶³ Additionally, per the National Institute of Corrections' recommendations, correction agencies should review their classification and screening procedures once a year with a formal evaluation done every three years.²⁶⁴

Courts need to be educated about what traits are a good fit so that they examine the proper information when determining whether subjective knowledge of sexual assault risk existed. Although the research on perpetrator characteristics is less robust,

260. NPREC REPORT, *supra* note 7, at 113; *see also* NAT'L INST. OF CORR., REPORT TO THE CONGRESS OF THE U.S. ON THE ACTIVITIES OF THE DEP'T OF JUSTICE IN RELATION TO THE PRISON RAPE ELIMINATION ACT (Public Law 108-79) 6 (Jul. 2006), available at <http://nicic.org/Downloads/PDF/Library/02212.pdf>.

261. NPREC REPORT, *supra* note 7, at 8.

262. *Id.* at 76. The NPREC recognized that "[c]ourts have commented specifically on the obligation of correctional agencies to gather and use screening information to protect prisoners from abuse." *Id.* at 8.

263. *Id.* at 77.

264. *Id.*

prisoners should also be screened for any such known attributes, and such screening and its results should be recorded in an inmate's permanent record file, especially since courts are already focused on these characteristics. The RPPR found that perpetrators of inmate-on-inmate sexual victimization were likely to be of bigger stature or build; past victims of sexual assault; experienced repeat offenders; having a history of acting out or engaging in violence including sexual assault; creditors of victims; desirous of power or control; more verbal, aggressive, or extroverted; extremely self-confident; manipulative or knowing of human psychology; serving a longer term sentence; gang affiliated; and mentally challenged.²⁶⁵ Aggressor characteristics such as homosexuality and HIV status were not found to be common perpetrator characteristics,²⁶⁶ despite the aforementioned examinations of these attributes in *Brown*, *Billman*, and *Durrell*.

The RPPR's findings are not surprising given that research on rape indicates the majority of rapes are based on power dynamics,²⁶⁷ and in prisons inmates are essentially stripped of all power.

265. REVIEW PANEL ON PRISON RAPE, *supra* note 87, at 9–10.

266. *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 86, at 52 (noting that perpetrators normally view themselves as heterosexual).

267. One clinical study reveals rape is “a pseudosexual act, complex and multidetermined, but addressing issues of hostility (anger) and control (power) more than passion (sexuality).” A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 2* (1979). Sexual access to another can be gained by consent, pressure, or force. *Id.* Rape researchers have identified three basic rape patterns: “(1) the *anger rape*, in which sexuality becomes a hostile act; (2) the *power rape*, in which sexuality becomes an expression of conquest; and (3) the *sadistic rape*, in which anger and power become eroticized.” *Id.* at 13 (italization in original); see also A. Nicholas Groth, Ann Burgess, & Lynda Holmstrom, *Rape: Power, Anger, and Sexuality*, 143 AM. J. PSYCHIATRY 1239, 1240–42 (1977). In anger rape, the rapist feels wronged, hurt, or mistreated, and the rape discharges the individual's feelings of frustration, anger, and resentment. A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 16* (1979). In power rape, the rapist is attempting to confirm his competence and validate his masculinity. *Id.* at 31. As Groth explains, “Sexuality becomes a means of compensating for underlying feelings of inadequacy and serves to express issues of mastery, strength, control, authority, identity, and capability.” *Id.* at 25. Sadistic rape involves the eroticization of aggression and often involves elements of ritual or torture. *Id.* at 44. Researchers examining convicted rapists estimated that fifty-five percent of the rapes presented to them were power rapes, forty percent were anger rapes, and five percent were sadistic rapes. *Id.* at 58. The researchers estimated that power rapes outnumber anger rapes by significantly more than the fifteen percent found in their study because their data sample consisted only of convicted rapists, and it is easier to convict for anger rape because a greater showing of hostility during the act makes it easier to prove lack of consent. *Id.* In prisons, many of the traditional signifiers of power, such as independence, autonomy, authority, and sexual access to wo-

Prisons should also look into incorporating tests developed by psychologists that deal with power issues into their screening and categorization processes. The Macho Personality Constellation measures callused sexual attitudes toward women, a conception of violence as manly, and a view of danger as exciting.²⁶⁸ The Aggressive Sexual Behavior Inventory measures sexual force, drugs and alcohol, verbal manipulation, angry rejection, anger expression, and threat in men.²⁶⁹ Research revealed a correlation between the Macho Personality Constellation and the Aggressive Sexual Behavior Inventory.²⁷⁰ This supports research by others indicating that males with many “masculine” characteristics and few “feminine” characteristics, and males with few of either characteristics are more inclined to rape.²⁷¹ While these tests are not conclusive, they could certainly be one more layer in creating categories with better fit for the courts to examine when deciding whether subjective knowledge can be found in Eighth Amendment failure-to-protect claims.

men, are eliminated. Teresa Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291, 300 (2000). As a result, alternative hierarchies are created to signify masculinity and power. *Id.* at 301–02. These hierarchies tend to center on sexual dominance and subordination. *Id.* at 301. “Men” have the most power; “queens,” below men, are generally one to two percent of the population and are distinguished by their willingness to be submissive sexual partners; and “punks” are prisoners who have been forced into sexual submission. *Id.* at 302–03.

268. Donald L. Mosher & Mark Sirkin, *Measuring a Macho Personality Constellation*, 18 J. RES. PERSONALITY 150, 151 (1984).

269. Donald Mosher & Ronald Anderson, *Macho Personality, Sexual Aggression and Reactions*, 20 J. RES. PERSONALITY 77, 83–84 (1986).

270. F. STEPHAN MAYER & KAREN SUTTON, PERSONALITY: AN INTEGRATIVE APPROACH 498 (1996).

271. Researchers in the area of sex and gender have argued for the following gender classifications: male-typed, female-typed, androgynous, undifferentiated, and cross-sex typed. Janet T. Spence, Robert Helmreich, & Joy Stapp, *The Personal Attributes Questionnaire: A Measure of Sex-Role Stereotypes and Masculinity-Femininity*, Abstract, 4 JSAS CATALOG OF SELECTED DOCUMENTS IN PSYCHOL. 43 (1974). A man with many masculine characteristics and few feminine characteristics is considered male-typed. *Id.* A female with many feminine characteristics and few masculine characteristics is considered female-typed. *Id.* A female or male with many masculine and feminine characteristics is considered androgynous. *Id.* A female or male with few masculine or feminine characteristics is considered undifferentiated. *Id.* Finally, males with many feminine characteristics and few masculine characteristics, and females with many masculine characteristics and few feminine characteristics are considered cross-sex typed. *Id.* Individuals who are strongly male-typed or undifferentiated tend to be more inclined to sexual aggressiveness and rape. MAYER & SUTTON, *supra* note 270, at 540.

3. Amending the Prison Litigation Reform Act to Enhance the Ability to Prosecute Prison Rape Cases

As previously stated, under the PLRA, prisoners must exhaust all administrative remedies before filing a Section 1983 suit, and no action can be brought without a “prior showing of physical injury.”²⁷² In order to ensure prisoners report their rapes, the PLRA should be explicitly amended to state that “physical injury” includes any rape as defined by PREA. Without this amendment, oral sodomy and sexual fondling, both of which are defined as rape by PREA, could be deemed non-actionable under the PLRA because they do not create “physical injury.” For that matter, some acts of carnal knowledge and sexual assault with an object could be deemed to leave no physical injuries if they are achieved through the exploitation of fear or threat of physical violence.

It is also important to make such an amendment because the PLRA states that if a prisoner has three cases dismissed as malicious, frivolous, or for failure to state a claim while he is incarcerated or detained, he may not proceed in another action *in forma pauperis* unless he is in imminent danger of serious physical injury.²⁷³ While several circuits have held that “imminent danger of serious physical injury” includes risk of future injury,²⁷⁴ and an ongoing risk of assault from another prisoner has been ruled to qualify for the imminent danger exception by the Eighth Circuit,²⁷⁵ it is unclear whether all forms of rape under PREA would qualify as physical injuries. If they did not, a prisoner’s valid suit could be dismissed because he had three prior cases dismissed for failure to state a claim.

In addition to specifying that “physical injury” includes rape, the PLRA should be amended to include an expedited process for PREA-defined rape claims. The PLRA was designed to eliminate frivolous prisoner lawsuits, but with its broad sweep, it took with it serious instances of fundamental violations. The Supreme Court held in 2001 that administrative exhaustion is required even if it cannot provide the relief requested, such as money damages.²⁷⁶ In 2002, the Supreme Court held that exhaustion is required for all prisoner suits, regardless of whether they are for general circum-

272. 42 U.S.C. § 1997e(a), (e) (2006).

273. 28 U.S.C. § 1915(g) (2006).

274. *See* McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002); Gibbs v. Cross, 160 F.3d 962, 965–66 (3d Cir. 1998).

275. Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998).

276. Booth v. Churner, 532 U.S. 731, 733–34 (2001).

stances, particular episodes, excessive force or other Eighth Amendment violations.²⁷⁷

While requiring prisoners to follow some set of administrative procedures prior to filing suit in court is valuable, it is important to understand these procedures and their implications. Typically, all grievances must be timely filed.²⁷⁸ If they are not, and the prison does not make an exception and allow the prisoner to file despite the lack of timeliness, the prisoner can be seen as not fulfilling administrative exhaustion, and his or her case could be dismissed if the defendant raises the affirmative defense of failure-to-exhaust.²⁷⁹ In the federal system, there is a four-step grievance procedure.²⁸⁰ Within twenty days of the event triggering the complaint, an inmate must attempt an informal resolution and then, if dissatisfied with the result, file a written “request for administrative remedy” using a designated form.²⁸¹ While extensions may be granted for reasons of valid delay, doing so is not required.²⁸² Further, while being hospitalized for injuries would likely qualify, it is unclear whether internal physical injuries not seen by staff or psychological trauma would be considered valid reasons for delay. Instances of rape should be reported as soon as possible in order to allow evidence to be gathered prior to it being destroyed. However, given the physical and emotional trauma of rape, requiring a victim to attempt an informal resolution within twenty days of the attack may not be feasible. Further, it is unclear what sort of “informal resolution” would be appropriate for a rape victim.

To ensure prison rape victims have a clear path to resolve their abuse, the PLRA should be amended to either eliminate the exhaustion requirement for prison sexual abuse victims or set a separate, more direct exhaustion path that takes into account victims’

277. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). In 2007, in *Jones v. Bock*, 549 U.S. 199 (2007), the Court resolved a circuit split regarding total versus mixed claim exhaustion—that is, whether an entire action could be dismissed if one claim within the action did not meet the exhaustion procedures—holding that, within one action, claims that had fulfilled the exhaustion requirements should proceed and claims that had not fulfilled the exhaustion requirements could be dismissed. *Id.* at 218–22. To clarify, the Court also held that failure to exhaust constitutes an affirmative defense under the PLRA and is not part of the pleading requirements for prisoners. *Id.* at 912.

278. *See, e.g., Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999).

279. *See Pozo*, 286 F.3d at 1025; *Harper*, 179 F.3d at 1312.

280. 28 C.F.R. §§ 542.13–.15 (2006); *see also Yousef v. Reno*, 245 F.3d 1214, 1220 (10th Cir. 2001).

281. 28 C.F.R. §§ 542.13–.14 (2006).

282. § 542.14(b).

needs. By amending only the exhaustion requirement, but not the three-strikes requirement, it is unlikely that prisoners would file frivolous suits regarding these matters. Admitting that one was raped makes one appear weak and vulnerable, and a prisoner does not want to be perceived as such; therefore, it is unlikely that prisoners will begin to file fabricated or frivolous suits if such an amendment was passed. Thus, the original intention of the PLRA, the reduction of frivolous lawsuits, would be maintained, while prisoners' constitutional rights would be well-protected. Additionally, PREA's mandate to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States"²⁸³ and "protect the Eighth Amendment rights of Federal, State and local prisoners"²⁸⁴ would be closer to fulfillment.

The NPREC urged that both these amendments to the PLRA be made, recommending that:

Congress amend two aspects of the PLRA for victims of sexual abuse: the requirement that prisoners exhaust all internal administrative remedies before their claims can proceed in court and the requirement to prove physical injury to receive compensatory damages, which fails to take into account the very real emotional and psychological injuries that often follow sexual assault.²⁸⁵

The NPREC also called for correctional agencies to "deem that victims of sexual abuse have exhausted their administrative remedies within 90 days after the abuse is reported—or within 48 hours in emergency situations—regardless of who reports the incident and when it allegedly occurred."²⁸⁶ Congress should heed these recommendations. Without such changes, it is unlikely that prisoners will attempt to run the gauntlet of reporting their abuse, which is vital to prosecuting and ending it. The best deterrent to prison rape is to ensure that each incident is fully investigated and if appropriate, prosecuted to its fullest extent. Only then will we likely see an actual decrease in prison rape.

B. Equal Protection as an Alternative to the Eighth Amendment For Certain Prisoners

The almost complete dearth of Eighth Amendment failure-to-protect from male inmate-on-inmate rape cases that survive sum-

283. 42 U.S.C. § 15602(1) (2006).

284. § 15602(7).

285. NPREC REPORT, *supra* note 7, at 10.

286. *Id.*

mary judgment, coupled with the myriad summary judgment decisions ignoring research findings, indicates that before we allow Justice White's warnings about allowing serious deprivations of constitutional rights to "go unredressed due to an unnecessary and meaningless search for 'deliberate indifference'"²⁸⁷ to ring true, we should look for alternative avenues of redress while using PREA to bolster plaintiffs' ability to prove deliberate indifference in Eighth Amendment cases. Indeed, as previously mentioned, ensuring prison rapists are prosecuted to the fullest extent possible is probably one of the most effective ways to reduce prison rape. Even if the alleged rapist is already serving a long sentence, it clearly establishes the individual as a risk to the general population. This would help in proving subjective knowledge if another incident arose, and it should result in a curtailment of the limited freedoms of such prisoner. Yet, such rapes are rarely prosecuted.

Sexual contact in prisons is an extremely murky issue. There are clear consent issues to deal with and difficult hurdles to prosecution. But that does not mean investigation and prosecution should be ignored. As discussed, some research indicates that homosexual inmates are at a much higher risk for sexual abuse than heterosexual inmates.²⁸⁸ If guards protect heterosexual inmates more than homosexual or bisexual inmates, or ignore homosexual and bisexual grievances while attending to heterosexual grievances, then the Equal Protection Clause may be invoked. Alternatively, if there are gender differences between protection levels and grievance procedures, then an equal protection claim may be a more beneficial avenue of redress. By pursuing an equal protection claim the quagmire of subjective knowledge may be avoided because the issue of consent is separated from the analysis. While some level of intent must be proven for a Fifth or Fourteenth Amendment Section 1983 action, just as it must be proven for an Eighth Amendment Section 1983 action, the standards are different; intent to discriminate is subject to an objective standard.²⁸⁹ Thus, circumstantial evidence that is often rejected in Eighth

287. *Wilson v. Seiter*, 501 U.S. 294, 311 (White, J., concurring).

288. See NPREC REPORT, *supra* note 7, at 7–8 (citing a study of medium-security men's facilities in California that found the rate of abuse among heterosexual prisoners was 9%, while the rate among gay prisoners was 41%).

289. See *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997) (stating "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" (emphasis added.)); see also *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) ("In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be 'plainly obvious.'") (citing *Bd. of the*

Amendment cases, such as departures from established practices,²⁹⁰ could be used to prove discrimination under equal protection.

While the equal protection standard for sexual orientation is rational review, it seems unlikely that a court would find subjecting non-heterosexual inmates to prison rape while protecting heterosexual inmates is rational. In *Nabozny v. Podlesny*,²⁹¹ the Seventh Circuit upheld a student's equal protection argument based on gender and sexual orientation for disparate treatment he received while being bullied at school for being homosexual.²⁹² The Seventh Circuit also held the defendants were not entitled to qualified immunity.²⁹³ In so holding, the court stated, "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation"²⁹⁴ While the abuse alleged by Nabozny was extreme and lasted several years, the court's willingness to find a valid equal protection argument without relying on *Romer v. Evans*,²⁹⁵ which was decided after oral arguments in *Nabozny*, indicates the potential strength of equal protection for certain prisoners as an alternative to Eighth Amendment claims. Additionally, in *Stemler v. City of Florence*,²⁹⁶ the Sixth Circuit held that Stemler had a valid claim for an equal protection violation if she could prove that Kentucky officers, even if they had probable cause, arrested her simply because they thought she was a lesbian.²⁹⁷

Under *Turner v. Safley*,²⁹⁸ courts typically apply a deferential standard of review for prisoner classifications that infringe on a prisoner's fundamental rights. The *Turner* standard asks whether the classification that burdens prisoners' rights is "reasonably re-

County Comm'rs, 520 U.S. 397 (1997)). A standard invoking "obviousness" connotes an objective as opposed to subjective standard.

290. See, e.g., *Langston v. Peters*, 100 F.3d 1235 (7th Cir. 1996).

291. 92 F.3d 446 (7th Cir. 1996).

292. *Id.* at 460-61.

293. *Id.* at 458.

294. *Id.*

295. 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution that prevented protected status under the law for homosexuals violated the equal protection clause because it was not rationally related to a legitimate state interest).

296. 126 F.3d 856 (6th Cir. 1997).

297. *Id.* at 872. Stemler failed to show this in subsequent state court proceedings, however. See *Stemler v. City of Florence*, 350 F.3d 578, 590 (6th Cir. 2003) (noting on subsequent appeal that the issue of Stemler's equal protection claim was resolved in state court, which found "the officers had no improper motive" in arresting Stemler).

298. 482 U.S. 78 (1987).

lated to legitimate penological interests”²⁹⁹ and examines four factors: whether the regulation has a valid and rational connection to a legitimate government interest; whether there are alternative means available for the inmate to exercise the right that is burdened; the impact that allowing the right to be unburdened would have on prison officials and resources; and whether there are ready alternatives to the regulation.³⁰⁰ It is unclear how refusing, through policy or practice, to fully investigate and prosecute rape allegations in prison to the extent they would be investigated and prosecuted outside of prison could be legitimately related to penological interests. The *Farmer* Court, in fact, specifically stated that “gratuitously allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objectiv[e],’”³⁰¹ yet “[d]espite the fact that most incidents of sexual abuse constitute a crime in all 50 States and under Federal law, very few perpetrators of sexual abuse in correctional settings are prosecuted.”³⁰² Only a fraction of cases are referred to prosecutors, and the NPREC repeatedly heard testimony that prosecutors decline most of these cases.³⁰³

If Eighth Amendment protection claims cannot succeed because of the subjective knowledge barriers, inmates should still be allowed the relief of seeing their rapists punished for breaking the law. Indeed, society should demand it. If the NPREC recommended national standards that included a prohibition on differential treatment based on sexual orientation (actual and perceived), prisoners would find themselves with greater and necessary protections.

Furthermore, the *Turner* standard does not apply to all limitations of prisoners’ constitutional rights. In *Johnson v. California*,³⁰⁴ the Supreme Court stated that it had “applied *Turner’s* reasonable-relationship test *only* to rights that are ‘inconsistent with proper incarceration.’”³⁰⁵ Under cases such as *Bounds v. Smith*,³⁰⁶ prisoners

299. *Id.* at 89.

300. *Id.* at 89–91.

301. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517 (1984) (Stevens, J., concurring in part and dissenting in part)).

302. NPREC REPORT, *supra* note 7, at 119.

303. *Id.*

304. 543 U.S. 499 (2005).

305. *Id.* at 510 (emphasis in original). The Court then applied the strict scrutiny standard to an unwritten California prison policy of racially segregating prisoners for sixty days upon entry into the prison system or transfer to a different prison. *Id.* at 515.

306. 430 U.S. 817 (1977).

have a fundamental right of access to courts,³⁰⁷ and by refusing to gather evidence, such as failing to administer a rape kit immediately after a prisoner alleges he was raped, the prison is denying the prisoner the ability to prove his case and may thereby be denying the prisoner's fundamental right of access to the courts. Furthermore, allowing a disciplinary committee finding to block an alleged rape prosecution and an Eighth Amendment violation claim as was done in *Lewis* could be seen as violating the rights set forth in *Bounds*.

Regarding the right to police protection, which arguably includes the full investigation of crimes, it has been established that if police protection exists, a state cannot discriminate in providing such protection.³⁰⁸ Additionally, decisions to prosecute based on arbitrary classifications or standards such as race or religion are actionable under the Equal Protection Clause.³⁰⁹ To succeed on such a claim, the plaintiff would need to show that he was treated differently in comparison with others who were similarly situated.³¹⁰ The determination of such comparison class should be carefully decided. If a prisoner compares himself to a non-incarcerated person the distinction might be too great, and a finding of similarity might not be found. It may be easier for prisoners to make comparisons to other prisoners. Currently, the cases receiving the most attention, investigation, and prosecution are allegations of rape of female prisoners by male guards.³¹¹ Thus, using this group as the comparison point might be the easiest for male prisoners.

307. *See id.* at 818–19.

308. *E.g.*, *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000); *Hayden v. Grayson*, 134 F.3d 449, 452 (1st Cir. 1998); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988).

309. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (claim based on selective prosecution based on race); *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (quoting *Armstrong*, 517 U.S. at 464).

310. *See, e.g.*, *Kosta v. Connolly*, 709 F. Supp. 592, 595–96 (E.D. Pa. 1989).

311. Compare HUMAN RIGHTS WATCH REPORT, DEC. 1996: ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, available at <http://hrw.org/reports/1996/Us1.htm>, with HUMAN RIGHTS WATCH, *supra* note 86; see also Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004); Jeff Eckhoff, *3 Iowa Inmates Share \$160,000 to Settle Suits: The Sex Abuse Charges Against a Guard Push Officials to Do More to Protect Prisoners*, DES MOINES REGISTER, Jan. 9, 2006, at 1A; Alan Johnson, *Efforts Under Way to End Illegal Sex, Prisons Chief Says*, THE COLUMBUS DISPATCH, Mar. 18, 2004, at B3 (commenting on efforts to curtain illegal sex with inmates at the Ohio Reformatory for Women); Jeff Seidel & Dawson Bell, *\$100 Million Ends Prisoner Sex-Abuse Suit: Women Started Their Legal Fight in 1996*, DETROIT FREE PRESS, Jul. 16, 2009, at A1; Maggie Shepard, *Prison Guard Charged in Rapes—Four Female Inmates Have Accused Officer*, ALBUQUERQUE TRIB., Oct. 10, 2007, at A1; Michelle Van Natta,

Undoubtedly, establishing an equal protection claim would be an uphill battle because in such cases, a plaintiff must prove that there was some sort of discriminatory intent.³¹² Written policies regarding investigating and prosecuting sexual assault cases are unlikely to be facially discriminatory. Thus, in the absence of facial discrimination, discriminatory intent would have to be shown.³¹³ For prosecutorial equal protection claims, a discriminatory purpose that resulted in a discriminatory effect must be shown.³¹⁴ Since disparate impact is not conclusive evidence of discriminatory intent,³¹⁵ the level of records, data, and statements that would need to be gathered in order to establish discriminatory intent would be great. After all, the defendants could easily argue that prison sexual assault cases are not investigated or prosecuted due to few reports of attack, destruction of evidence prior to reports of the abuse, lack of witnesses, and unreliable witnesses. Further, they may argue that tax dollars are better spent on cases with a greater probability of a victorious outcome. However, given the Eighth Amendment cases reviewed, this level of evidence required would not be any greater than what is necessary to establish deliberate indifference.

Legal services organizations, prisoner rights organizations, and other bodies that provide legal advice to prisoners and create informational materials for prisoners filing their own lawsuits should consider investigating equal protection as an avenue of redress. Further, prisoners should be informed of the possibility of using equal protection in prison rape situations so that prisoners can look for and gather the type of evidence that would be required to prove

Rape Crisis in Womens Prison: Sexual Violence in Illinois Prisons and the (Lack of) Systematic Response by Illinois Sexual Assault Crisis Intervention Organizations, 4 AREA CHICAGO (AREA Chicago, Chicago, IL), Apr. 6, 2007, available at <http://www.area-chicago.org/p/issues/issue-4/rape-crisis-womens-prison/>; Lee Williams & Esteban Parra, *Ex-Guard: Prison Sex Hushed Up: Inmates Not in Position to Say No to Correctional Officers, Advocates Say*, THE NEWS J. (Wilmington, Del.), Dec. 11, 2005, at 1A; *The Montel Williams Show: Women Raped in Prison* (Jan. 17, 2006). Perhaps part of the reason female prisoner rape cases are investigated and prosecuted more often is because the pregnancies that can result from these crimes serve as proof of the sexual act. With male prisoner rape, locating such physical evidence of the attack is much more difficult. Society as a whole may also still feel more comfortable recognizing women as rape victims as opposed to men.

312. *E.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 248 (1976).

313. *Semple v. City of Moundsville*, 963 F. Supp. 1416, 1433 (N.D. W. Va. 1997).

314. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003).

315. *Arlington Heights*, 429 U.S. at 264–65.

such a claim. As of now, most prisoner self-help litigation manuals only discuss the filing of Eighth Amendment claims, yet, as demonstrated, those claims are rarely successful.³¹⁶

CONCLUSION

The issues surrounding prison rape are vast and varied. To take hold of the problem, society needs to look at all its layers. The *Farmer* standard is one layer. Correctional employees' underlying beliefs about prisoners, sexuality, and sexual abuse is another. The ways in which deep-seated beliefs may conflate with facts in courts' subjective knowledge determinations is another layer. Creating research to better educate society to understand the factors behind prison rape and the true risks to various prisoners is yet another layer. Discovering the confidence and creativity to find new avenues of addressing that landscape, such as the use of the Equal Protection Clause, is still another layer. All of these layers must be examined to achieve PREA's mandate of eliminating prison rape.

Certainly, the protection of constitutional rights and human dignity is a convoluted path. But as Winston Churchill's words echo, "[T]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."³¹⁷ Now is the time to answer Rodney Bruntmyer's entreaty, "[p]lease, sir, help me."³¹⁸ This Article is cer-

316. For examples of prisoner self-help manuals, see CENTER FOR CONSTITUTIONAL RIGHTS & THE NATIONAL LAWYERS GUILD, *THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON*, available at <http://www.jailhouselaw.org/CCRNLGJHL.pdf>; COL. HUM. RTS. L. REV., *A Jailhouse Lawyer's Manual* (8th ed. 2009), available at <http://www3.law.columbia.edu/hrlr/ejlm.php>; HEATHER MACKAY & THE PRISON LAW OFFICE, *THE CALIFORNIA STATE PRISONER'S HANDBOOK: A COMPREHENSIVE PRACTICE GUIDE TO PRISON & PAROLE LAW* (4th ed. 2008); JOHN W. PALMER & STEPHEN E. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* (7th ed. 2004); ROBERT TOONE & THE SOUTHERN POVERTY LAW CTR., *PROTECTING YOUR HEALTH & SAFETY: PRISONER'S RIGHTS* 54–70 (2002). See generally Just Detention International, *Online Resources*, www.justdetention.com. Interestingly, in the current edition of *Constitutional Rights of Prisoners* (the first edition was in 1973), there are only a few pages within the nearly 800-page book that deal with Eighth Amendment claims for sexual abuse. Further, *The Jailhouse Lawyer's Handbook* does not even cover filing an Eighth Amendment claim for failure-to-protect from sexual assault, much less touch on potential alternative constitutional actions.

317. Winston Churchill, Home Secretary, House of Commons Speech (Jul. 20, 2010), available at <http://hansard.millbanksystems.com/commons/1910/jul/20/class-iii>.

318. *Hearing Before the Nat'l Rape Elimination Comm.*, *supra* note 1.

760 NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 65:705

tainly not a solution to prison rape. But hopefully, it can be a part of such a solution.

FIREARM FEDERALISM

ANTHONY P. BADARACCO*

CONTENTS

Introduction	761	R
I. Defining National Rights in a Federal Republic	763	R
A. Incorporation: Uniform Protection of Fundamental Rights	763	R
1. Before Incorporation: Background.....	764	R
2. A Brief History of Incorporation	765	R
B. Federalizing Rights: Alternatives to Uniform Incorporation	771	R
1. The “Refined Incorporation” Model	771	R
2. Tailoring Rights	773	R
3. Rights Federalism: Justice Harlan’s <i>Roth</i> Dissent	775	R
II. Firearms: Modernizing the Obsolete	777	R
A. <i>District of Columbia v. Heller</i> and the Individual Right to Bear Arms	777	R
1. The <i>Heller</i> Decision	777	R
2. Judicial Reactions	781	R
3. Scholarly Reactions	783	R
B. A Proposal: Federalize the Right to Keep and Bear Arms	785	R
1. Interest Balancing	785	R
2. Explicit State Interest.....	787	R
3. Uniquely Polarizing.....	788	R
4. Lack of Bright Lines.....	790	R
5. Lack of Minority Interest	792	R
Conclusion	793	R

INTRODUCTION

The Second Amendment¹ is one of the least settled areas of American constitutional law, and until very recently, it was surely one of the least discussed. But the Supreme Court’s 2008 decision

* J.D. Candidate, Class of 2010, New York University School of Law. In preparing this Note, I am grateful for the assistance of Professor Roderick M. Hills, Jr., as well as the excellent editorial work of the Board of the *New York University Annual Survey of American Law*, particularly Christina Kuhn and Jeana Bisnar.

1. U.S. CONST. amend. II.

in *District of Columbia v. Heller*² has unleashed a swell of litigation challenging various states' and municipalities' gun laws as well as a stream of scholarship.³

If one counts only the Court's rather narrow holding that the Second Amendment does not allow Congress to pass an absolute ban on handgun ownership for lawful self-defense,⁴ libertarians appear to have scored a major victory against gun control laws. Yet paradoxically, the likely result of *Heller* is not that gun control laws will diminish in reach but rather that they will be effectively nationalized. State and local governments have traditionally enjoyed a great deal of latitude in passing gun control laws,⁵ but if the Supreme Court incorporates the Second Amendment against the states, as expected,⁶ their authority to regulate guns may be severely curtailed and the benefits of localized regulation will be lost.

This Note argues that while incorporating the Second Amendment against the states may be inevitable, it would be a costly mistake for federal judges to nationalize the details of gun regulation by setting identical standards for the state and federal governments. Rather, even if the Second Amendment sets a constitutional floor for the protection of the right to keep and bear arms, states should retain substantial discretion to regulate gun possession, use, and sales.

To date, gun *rights* advocates have spoken primarily in terms of individual rights, while gun *control* advocates have framed the issue in terms of safety. Neither side has devoted much attention to federalism, but indeed, the choice as to which level of government will set gun policies is critical. The Second Amendment, by its nature, is ideally situated to enjoy the structural protections of federalism.⁷ While the modern incorporation doctrine assumes that a right should look identical regardless of which level of government it is

2. 128 S. Ct. 2783 (2008).

3. See *infra* Part II.A.2–3.

4. *Heller*, 128 S. Ct. at 2821–22.

5. See *id.* at 2816–17 (noting the wide variety of restrictions on the possession, carrying, and sale of guns commonly issued by the states).

6. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 312–13 (2009); Robert Levy, *District of Columbia v. Heller: What's Next?*, CATO UNBOUND, July 14, 2008, <http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next>. The Justices have recently decided to hear arguments this Term specifically on the question whether the Second Amendment should be incorporated against the states. See Nat'l Rifle Ass'n of Am., Inc. v. Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. Chicago, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

7. See *infra* Part II.

asserted against,⁸ there are several reasons to allow for local variation in gun policies.

First, individual gun rights must be balanced against the states' responsibility to ensure public safety. Second, this state interest is explicit in the Amendment's text,⁹ although its meaning has shifted over time.¹⁰ Third, gun regulation is so polarizing as to make it impossible to please everyone in a large republic with national laws. Fourth, neither the Second Amendment nor the *Heller* opinion provides any sort of constitutional bright line to guide policymaking at the national level. Finally, gun rights today do not implicate any substantial minority interests, eliminating the most common justification for nationalizing rights.¹¹ This Note argues that these considerations outweigh the arguments in favor of nationalization. In short, the benefits of federalism are too powerful to ignore.

I. DEFINING NATIONAL RIGHTS IN A FEDERAL REPUBLIC

A. *Incorporation: Uniform Protection of Fundamental Rights*

In recent decades, the Supreme Court has overturned countless state laws on the grounds that they conflict with various provisions in the Bill of Rights. For instance, the First Amendment's Free Exercise¹² and Establishment Clauses,¹³ the Fourth Amendment's exclusionary rule,¹⁴ and the Fifth Amendment's Double Jeopardy Clause¹⁵ have all been successfully invoked to invalidate the actions of state governments. In each case, the Court's analysis focuses primarily on the substantive provision in question; the Four-

8. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); see also *infra* note 68.

9. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

10. See *infra* Part II.B.2 and notes 186–89.

11. See *infra* Part II.B.5.

12. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws that violate the Free Exercise Clause).

13. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that the Establishment Clause "means at least this: Neither a state nor the Federal Government can set up a church").

14. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule against a state government for the first time).

15. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause "should apply to the States through the Fourteenth Amendment").

R

R

teenth Amendment tends to drop out of the discussion, even though each of the underlying amendments, on its face, applies only against the federal government. This is critical, because the Supreme Court's invalidation of state laws has consequences in the balance of power both among the three branches of the federal government and between the national and state governments. This Note concerns itself with the latter issue—federalism. In particular, it will argue that the inevitable result of incorporating rights, under the Court's doctrine of selective incorporation, is uniformity in enforcement of the rights in question, which is not a desirable outcome with respect to the Second Amendment right to keep and bear arms. It is beyond the scope of this Note to provide a complete history of incorporation, but a discussion of some basic propositions is warranted nonetheless.

1. Before Incorporation: Background

Today, it is natural to look at the Bill of Rights simply as a powerful set of limitations on government, without distinguishing between the various levels of government against which a right protects. But our founding generation would have no doubt been shocked to see the Supreme Court invalidate so many state laws on the basis of conflict with the federal Constitution. Indeed, the Bill of Rights was originally seen as a constraint only on the federal government.¹⁶ The text clearly reflects this idea; the opening clause of the Bill reads: "Congress shall make no law . . ."¹⁷ Even Alexander Hamilton, the great centralizer, agreed that the Bill of Rights did not apply to the states.¹⁸ In the entire Bill, only the First Amendment explicitly references any particular level of government.¹⁹

However, at least one scholar has noted the fact that the original 1787 Bill sent to the states for ratification began with an additional two amendments that were not rights-based at all but rather dealt with representation and remuneration in Congress.²⁰ According to Akhil Amar, this supports the inference that the remaining provisions, particularly our first eight amendments, were intended

16. For a thorough discussion of this point, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492–1520 (1987).

17. U.S. CONST. amend. I.

18. See, e.g., THE FEDERALIST NO. 83, at 468 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer.").

19. U.S. CONST. amend. I.

20. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 8–19 (1998).

to apply only to Congress despite the lack of exclusive reference to the federal government.²¹ A reader from the Founding era would thus have likely conceived of a Bill of Rights, preceded by the “Congress shall make no law” language, that applied only to the federal government.²²

In the common law, this view found its ultimate expression in the 1833 case of *Barron v. City Council of Baltimore*.²³ *Barron*’s narrow holding was that the Takings Clause of the Fifth Amendment limits only the federal government and not states or municipalities.²⁴ But Chief Justice Marshall seemed to recognize that much more was implied; this was the first time the Court was called upon to apply a provision of the Bill against a state government. While he acknowledged that this was a doctrinal question “of great importance,” Marshall rejected it without “much difficulty,”²⁵ writing perfunctorily that the Bill of Rights should not apply to the states.²⁶ This may have been dictum, but in any event the more expansive interpretation of *Barron*—that none of the provisions in the Bill of Rights limits the states²⁷—would remain the law for nearly 100 years.

2. A Brief History of Incorporation

In the years before the *Barron* case was decided, at least three notable jurists had argued that various elements of the Bill of Rights limited state governments.²⁸ Justice William Johnson explicitly argued in an 1820 case that the Fifth Amendment’s Double Jeopardy Clause “operates equally” on the state and federal governments.²⁹ William Rawle’s 1825 treatise on constitutional law argued vigorously that many of the provisions of the Bill of Rights could be in-

21. *See id.* at 20–22.

22. *See* U.S. CONST. amend. I.

23. 32 U.S. (7 Pet.) 243 (1833).

24. *Id.* at 250–51 (holding that the Takings Clause “is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states”).

25. *Id.* at 247.

26. *Id.* at 250 (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

27. Modern commentators typically cite *Barron* for this proposition. *See, e.g.*, Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1528 (2005) (“[T]he landmark case of *Barron* . . . famously held in 1833 that the proscriptions delineated in the Bill of Rights did not apply to the subfederal polities.”).

28. *See* AMAR, *supra* note 20, at 145.

29. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 33–34 (1820) (Johnson, J., concurring).

voked against the states.³⁰ As late as 1833, the same year that *Barron* came down, Justice Henry Baldwin held while riding circuit that elements of the First, Second, and Fourth Amendments applied with at least some force against state governments.³¹

These were fringe arguments, but it is notable that they predated the Civil War Amendments, and most importantly the Fourteenth Amendment—the incorporation mechanism that Justices Black, Frankfurter, and Brennan would later use to subject the state governments to the limitations of the Bill of Rights.³² These nineteenth century authors effectively reached the same result, although a majority of the Supreme Court never applied any element of the Bill of Rights against a state government without the aid of the Fourteenth Amendment. Instead, *Barron* would hold the day.

The Fourteenth Amendment substantially changed the relationship between the federal government and the states. In relevant part, the Amendment reads as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”³³ This language may appear to overturn *Barron*, and in fact there is strong historical support for the position that the “privileges or immunities” language was intended to incorporate the Bill of Rights against the states. For example, Congressman John Bingham, the principal author of Section 1 of the Fourteenth Amendment, declared repeatedly in a prominent 1866 floor speech on the Amendment that the Privileges or Immunities Clause directly applied the Bill of Rights against the state governments.³⁴ Over the course of several months in 1866 and 1867, Representative Bingham repeatedly emphasized to his colleagues that the Fourteenth Amendment was necessary to overrule *Barron*’s restrictive view of the Bill of Rights.³⁵

30. WILLIAM RAWLE, A VIEW ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120–30 (Philadelphia, H.C. Carey & I. Lea 1825).

31. *Magill v. Brown*, 16 F. Cas. 408, 419, 427 (C.C.E.D. Pa. 1833) (No. 8952) (interpreting Pennsylvania state law with the gloss of the federal religion clauses); AMAR, *supra* note 20, at 145 & 355 n.48 (citing *Johnson v. Tompkins*, 13 F. Cas. 840, 849–52 (C.C.E.D. Pa. 1833) (No. 7416) (applying the Second and Fourth Amendments)).

32. See *infra* discussion accompanying notes 53–73.

33. U.S. CONST. amend. XIV, § 1.

34. CONG. GLOBE, 39th Cong., 1st Sess. 1088–94 (1866) (remarks of John Bingham); see also AMAR, *supra* note 20, at 181–83 (discussing Bingham’s efforts in drafting and advocating passage of Section 1 and citing numerous contemporary authorities strongly suggesting incorporation through the Privileges or Immunities Clause).

35. See AMAR, *supra* note 20, at 181–83.

R

R

R

R

Thaddeus Stevens, House leader of the Joint Committee on Reconstruction, argued just before the Amendment went to a vote in the House that “the Constitution . . . is not a limitation on the States. This amendment supplies that defect.”³⁶ Jacob Howard, Senate leader of the same Committee, suggested that to the “privileges and immunities [already enjoyed by the citizens of all states] should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution.”³⁷

All of this suggests that the 1866 Reconstruction Congress that passed the Fourteenth Amendment intended that the first eight amendments to the Constitution, which previously limited only the federal government, would now be counted among the privileges and immunities held by all citizens against the states. Notably, this would have included the Second Amendment, meaning that nothing further would be needed for an individual to invoke his right to own a gun against a state government. However, the Supreme Court quickly stepped in to foreclose any such interpretation.

In the *Slaughter-House Cases*,³⁸ Justice Miller’s opinion for the Court upheld a state scheme granting a monopoly to a corporation of New Orleans butchers, denying the claims of other butchers that the scheme violated the Thirteenth and Fourteenth Amendments.³⁹ In so doing, Miller eviscerated the Privileges or Immunities Clause by holding that it protected only those rights the federal government already protected and enforced against the states through the Supremacy Clause.⁴⁰

Justice Field dissented, worrying that a “citizen of a State is now only a citizen of the United States residing in that State.”⁴¹ He believed that the Privileges or Immunities Clause incorporated against the states a set of substantive rights held by all American citizens.⁴²

36. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

37. *Id.* at 2765; see also AMAR, *supra* note 20, at 181–87 (discussing Bingham’s, Stevens’, and Howard’s roles in the passage of the Fourteenth Amendment).

38. 83 U.S. (16 Wall.) 36 (1873).

39. 83 U.S. at 57–60, 66, 79–81 (holding, inter alia, that the right to freely choose one’s profession is not a privilege or immunity guaranteed to individuals against state governments).

40. *Id.* at 79–80. Note that Miller’s distinction between state and federal citizenship was premised largely on a crucial misquotation of the Art. IV, § 1 Privileges and Immunities Clause. See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627, 646 (1994).

41. 83 U.S. at 95 (Field, J., dissenting).

42. See *id.* at 96 (arguing that the Fourteenth Amendment protects “the natural and inalienable rights which belong to all citizens”).

Justice Bradley dissented as well, going so far as to explicitly list several provisions of the Bill of Rights that he believed were now among the privileges and immunities enjoyed by all.⁴³

Justice Miller's view of the Privileges or Immunities Clause won the day, but "virtually every modern commentator is in agreement" that he was "clearly wrong."⁴⁴ Professor Amar has argued that *Slaughter-House* "has the effect of rendering the privileges or immunities clause wholly unnecessary" by holding that the clause guarantees only those rights already covered by the Supremacy Clause.⁴⁵ Laurence Tribe wrote that the Court "incorrectly gutted the Privileges or Immunities Clause."⁴⁶ Sanford Levinson called the opinion "shoddily justified."⁴⁷ Walter Murphy called it an "intellectual shambles."⁴⁸ Some lawyers and commentators would like to see the Clause revived,⁴⁹ and others are perfectly satisfied to see it lay dead,⁵⁰ but in any event today it stands for almost nothing.

43. *Id.* at 118–19 (including free exercise of religion, free speech, free press, the right of assembly, freedom from unreasonable searches and seizures, and suggesting that Section 1 of the Fourteenth Amendment might also incorporate certain unenumerated rights).

44. Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986); see also Aynes, *supra* note 40, at 628 ("Miller's majority opinion was indeed based on an incorrect reading of the Fourteenth Amendment . . ."); *id.* at 627 (citing LEONARD W. LEVY, *The Fourteenth Amendment and the Bill of Rights*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64, 69 (1972) ("one of the most tragically wrong opinions ever given by the Court."); LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 201 (1975) ("defying the plain intention of the Constitutors").

45. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258–59 (1992). In Justice Field's words, it became "a vain and idle enactment." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

46. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297–98 n.247 (1995) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7-2 to 7-4, at 550–59 (2d ed. 1998)).

47. Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989).

48. Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 5 (1987).

49. Alan Gura, who argued the *Heller* case, is a prominent example. See, e.g., Complaint at 11, *McDonald v. City of Chicago*, No. 08-CV-3645, at 11 (N.D. Ill. filed June 26, 2008), 2008 WL 2571757.

50. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (arguing that the clause is "properly . . . a dead letter").

The *Slaughter-House* Court may have foreclosed the availability of the Privileges or Immunities Clause as a vehicle for incorporating the Bill of Rights against the states, but in any case most of the Bill has been incorporated, albeit through the textually awkward vehicle of the Due Process Clause of the Fourteenth Amendment.⁵¹ Historically, the methodology of incorporation has not always been clear, and in fact various Justices of the Supreme Court have at times defended several different methods of applying national rights against the states.⁵²

Justice Black, for example, argued for many years that the Fourteenth Amendment was intended to apply the entire Bill of Rights against the states in the same way that it applied them against the federal government.⁵³ This approach came to be known as “total” or “complete” incorporation.⁵⁴ Initially, Black argued in his *Adamson v. California*⁵⁵ dissent that the structure of the Fourteenth Amendment “as a whole” incorporated the Bill of Rights against the states.⁵⁶ More than twenty years later, he settled on the Privileges or Immunities Clause as the particular mechanism of incorporation.⁵⁷ No majority of the Court, however, has seen fit to alter the *Slaughter-House* Court’s severe limitation of the Clause.⁵⁸ While four Justices supported some form of total incorporation in *Adamson*, it has “never commanded a majority of the Court.”⁵⁹

Justice Frankfurter, on the other hand, argued against a formal approach to incorporation, preferring the substantially more open-ended view that the Fourteenth Amendment requires states to re-

51. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

52. See AMAR, *supra* note 20, at 139–40, for a general discussion of the three particular methods of incorporation discussed here. R

53. See *Betts v. Brady*, 316 U.S. 455, 474–75 (1942) (Black, J., dissenting); HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 34 (1968); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 25 (1980) (discussing some of the mechanical problems associated with Black’s approach). Note, however, that Justice Black defined the Bill of Rights as the first *eight* amendments only, leaving out the more purely structural protections of the Ninth and Tenth Amendments. See, e.g., AMAR, *supra* note 20, at 139, 219, 222 (discussing the reasoning that required this distinction). R

54. See BLACK, *supra* note 53, at 36, 40. R

55. 332 U.S. 46 (1947).

56. *Id.* at 71–74 (Black, J., dissenting).

57. See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

58. See ELY, *supra* note 53, at 23 (noting that the Supreme Court quickly withdrew from *Slaughter-House*’s narrow interpretation of the Equal Protection Clause, but that “the Court hasn’t moved an inch on Privileges or Immunities”). R

59. Rosen, *supra* note 27, at 1533 (discussing the Justices’ votes in *Adamson*, 332 U.S. 46). R

spect those principles of fundamental fairness and ordered liberty reflected by—but not necessarily explicitly stated in—the due process guarantees of the federal Constitution.⁶⁰ In his last published work, Justice Frankfurter continued to argue that states must honor the various requirements of the Bill of Rights “because they are fundamental (not because they are contained in [the text of an amendment]).”⁶¹ Interestingly, this approach allows for the protection of rights at different levels of government by different constitutional standards,⁶² a consequence that is clearly not allowed by Black’s total incorporation.⁶³

Justice Brennan later advocated for a third approach, combining elements of both Black’s and Frankfurter’s theories.⁶⁴ The result, which came to be known as “selective incorporation,” involved fully incorporating each provision of the Bill of Rights that a majority of Justices considered fundamental.⁶⁵ Doctrinally, the question is whether a state’s action implicates a right that is “implicit in the concept of ordered liberty.”⁶⁶ Crucially, at least since the Court’s 1969 decision in *Benton v. Maryland*,⁶⁷ once this test is met, the scope of the constitutional right is identical whether it is invoked against the federal government or any of the states.⁶⁸ Each level of government is held to an identical standard.⁶⁹

60. *Adamson*, 332 U.S. at 59–68 (1947) (Frankfurter, J., concurring).

61. Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 749 (1965).

62. See Rosen, *supra* note 27, at 1528.

63. At least on this point, the second Justice Harlan took an approach similar to Frankfurter’s. See *Roth v. United States*, 354 U.S. 476, 498–504 (1957) (Harlan, J., concurring in part and dissenting in part).

64. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 540–47 (1986) (discussing the landmark cases incorporating each of the most recognizable rights contained in the first eight amendments).

65. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

66. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

67. 395 U.S. 784 (1969).

68. See *id.* at 795 (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” (citations omitted)); see also Rosen, *supra* note 27, at 1535; *infra* text accompanying notes 84–88.

69. See AMAR, *supra* note 20, at 140. It is important to note, however, that incorporated rights set a constitutional floor but not a ceiling. In other words, states can guarantee greater protection of constitutional rights to their citizens than the United States Constitution requires, but they cannot offer less. For a recent case, see *People v. Weaver*, 909 N.E.2d 1195, 1198–1203 (N.Y. 2009) (holding that the New York state Constitution prevents police from monitoring a suspect’s

R

R

R

This approach, which might reasonably be called “mechanical incorporation,” has prevailed in the Supreme Court, with the result that “virtually every clause of the Bill [has] be[en] deemed fundamental,”⁷⁰ and each such clause can now be invoked against the federal government or the states. The Justices have repeatedly “held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the states.”⁷¹ The only exceptions are the Fifth Amendment’s Grand Jury Clause, the Seventh Amendment’s Civil Jury Clause, the Second Amendment, and the Third Amendment.⁷² So, while as a matter of doctrine Justice Brennan’s model of selective incorporation has held the day, Justice Black’s vision of total incorporation has nearly come true in practice. This year, in fact, the Court will hear arguments on the question of “[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.”⁷³

B. *Federalizing Rights: Alternatives to Uniform Incorporation*

As we have seen, incorporation was not inevitable, and neither was the mechanical form of incorporation that we have today. In recent years, scholars have proposed several alternatives that might better allow for desirable variation among the states.

1. The “Refined Incorporation” Model

Akhil Amar has developed a model that he calls “refined incorporation.”⁷⁴ Like Justice Black, he acknowledges that the Fourteenth Amendment incorporates some of the Bill of Rights, but argues that some of the provisions in the Bill are not “rights of citizens” but rather “at least in part rights of states.”⁷⁵ According to

car for an extended period using a GPS device, even though the United States Supreme Court held that a strikingly similar practice was permissible under the Fourth Amendment in *United States v. Knotts*, 460 U.S. 276, 282 (1983)).

70. AMAR, *supra* note 20, at 140.

71. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

72. *See Rosen, supra* note 27, at 1515 & n.2.

73. *See Nat’l Rifle Ass’n of Am., Inc. v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

74. AMAR, *supra* note 20, at xiv–xv. At least one scholar responded by calling Professor Amar’s book “the best book ever written about the Bill of Rights,” while acknowledging that it was in fact to date “the *only* book on the Bill of Rights as a whole.” Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might be About Structure After All*, 93 NW. U. L. REV. 977, 977 (1999).

75. AMAR, *supra* note 20, at xiv.

R

R

R

R

Professor Amar, the crucial question is therefore not simply whether a right appears in the Bill, or whether it is fundamental, but “whether the provision guarantees a privilege or immunity of individual citizens rather than a right of states or the public at large.”⁷⁶ A natural consequence of addressing this question, and perhaps the most crucial insight of Amar’s work, is that “a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment.”⁷⁷ In other words, a constitutional right may be protected differently against each level of government.

As Amar points out, incorporating some rights would be nonsensical. The Tenth Amendment is the clearest example: how could one possibly protect against state action infringing “[t]he powers . . . reserved to the States?”⁷⁸ It is not clear what this would mean.⁷⁹ The First Amendment’s Establishment Clause also cannot be incorporated without overcoming substantial grammatical obstacles. As originally conceived, it “stood as a pure federalism provision . . . agnostic on the substantive issue of establishment,” mandating simply that Congress leave the issue to the states and refrain from establishing a national church.⁸⁰ If we accept this textualist understanding of the Establishment Clause, it would make little sense to apply it against a state government.⁸¹ Finally, incorporating the Due Process Clause of the Fifth Amendment through the analogous clause of the Fourteenth Amendment would be

76. *Id.* This distinction is crucial. Professor Amar argues that while the original Bill of Rights “tightly knit together citizens’ rights and states’ rights,” since states were commonly perceived as the best guarantors of liberty, the Fourteenth Amendment “unraveled this fabric, vesting citizens with rights *against* states.” *Id.* at 215.

77. *Id.* at xiv.

78. U.S. CONST. amend. X. Admittedly, the Amendment speaks to popular sovereignty as well as federalism, but as Professor Amar points out, to the extent that it protects federalism, “it makes little sense” to apply it against the states, and to the extent that it affirms a principle of popular sovereignty, it “adds little” to the Article IV Republican Government Clause, “which has always applied against the states.” AMAR, *supra* note 20, at 280.

79. To my knowledge, no one has proposed incorporating the Tenth Amendment.

80. AMAR, *supra* note 20, at 246.

81. However, that understanding has changed, and the Establishment Clause has been incorporated along with nearly all of the remainder of the Bill. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

R

R

wholly superfluous, since the language of the two clauses is identical.⁸²

Refined incorporation solves many of these awkward structural problems associated with mechanical incorporation. To the extent that a particular clause was intended to protect individuals, it can be incorporated against the state governments as one of the privileges or immunities of United States citizenship, whereas the clauses intended to protect states—federalism provisions—should not be. If the Second Amendment does indeed protect an individual right,⁸³ then under this model it may be an excellent candidate for incorporation. But the more general point is that even a provision that has been incorporated can take a different form depending on which level of government it is asserted against.

2. Tailoring Rights

Mark Rosen, elaborating on this last point, has approached federalized rights—those left to be defined at the state level, instead of by the national government—from a different angle, developing a model that he calls “Tailoring.”⁸⁴ Rosen points out that the Court’s incorporation doctrine includes the idea that once “it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, *the same constitutional standards apply against both the State and Federal Governments.*”⁸⁵ Essentially, once a particular provision has been incorporated through the Fourteenth Amendment, it holds the federal and state governments to the same standard.⁸⁶ Rosen calls this form of incorporation “One-Size-Fits-All,”⁸⁷ but it is simply another name for what Amar calls “mechanical incorporation.”⁸⁸

In contrast, Tailoring “contemplates that the doctrinal details developed in the federal context might not all transfer over to the states.”⁸⁹ Rosen accepts the foundational idea behind selective incorporation—that the appearance of a right in the first eight

82. ELY, *supra* note 53, at 27.

83. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

84. Rosen, *supra* note 27, at 1516.

85. *Id.* at 1535 (emphasis in Rosen’s treatment of the original) (quoting *Benton v. Maryland*, 395 U.S. 784 (1969)).

86. As just one example of this approach, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995) (adopting a principle of “congruence between the standards applicable to federal and state racial classifications”) (cited by Rosen, *supra* note 27, at 1516).

87. See Rosen, *supra* note 27, at 1535.

88. See AMAR, *supra* note 20.

89. Rosen, *supra* note 27, at 1536.

R

R

R

R

R

R

amendments is “strong evidence” that it is “sufficiently fundamental” so as to belong in the list of rights applied against the states,⁹⁰—while agreeing with Akhil Amar that the doctrinal details of rights enforcement can vary across the different levels of a federal government.⁹¹ In fact, Rosen does not argue that selective incorporation, holding the federal and state governments to the same standards, should be discarded altogether. Rather, he concludes that One-Size-Fits-All incorporation should simply be “softened” from a “categorical requirement” to a presumption that can be rebutted for one of five broad reasons in cases where Tailoring makes good sense.⁹²

First, to the extent that constitutional law exists to remedy failures of democratic political processes, we should recognize that effective political participation is easier at local levels than it is at the national level. Therefore federal courts should not thwart local efforts to correct problems of under- or over-representation in government.⁹³ Second, the “varying geographical scopes” of federal and state regulation suggest that local regulations tend to interfere less with “marketplace” values in different localities nationwide.⁹⁴ Third, since exit costs diminish at lower levels of government and citizens can move between lower-level jurisdictions to find a more suitable set of regulations and rights-protecting policies, Tailoring should “increase[e] the welfare of voter-consumers.”⁹⁵ Fourth, each American citizen is a member of more than one polity, and tailoring rights at a lower level reduces the threat of majorities forcing undesirable policies onto politically weaker minorities.⁹⁶ Fifth, the different levels of government often have divergent interests

90. *Id.*

91. *Id.* at 1537; *see also* AMAR, *supra* note 20, at xiv.

92. Rosen, *supra* note 27, at 1517.

93. *See id.* at 1582–96; *accord* ELY, *supra* note 53, at 101–02 (arguing for a “representation-reinforcing orientation” of rights enforcement instead of a “judicial imposition of ‘fundamental values’”).

94. Rosen, *supra* note 27, at 1601–03.

95. *See id.* at 1611. Professor Rosen approvingly references Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), for the theory that “local governments compete for citizens by offering different packages of public goods,” increasing efficiency and leading to differentiated packages of policies and public goods. Rosen, *supra* note 27, at 1608; *see also* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 312 (1974) (“Different communities, each with a slightly different mix, will provide a range from which each individual can choose that community which best approximates *his* balance among competing values.”).

96. *See* Rosen, *supra* note 27, at 1615–21. Interestingly, Rosen argues that this principle is fully consistent with Rawlsian equality principles, even though Rawls himself tended to “overlook[] federalism” as a solution for majoritarian overreach. *Id.* at 1625–26.

R

R

R

R

R

R

and unique responsibilities, and these differences should inform courts' development of rights balancing tests.⁹⁷

3. Rights Federalism: Justice Harlan's *Roth* Dissent

Even without emphasizing localism as a beneficial value, a pragmatic case can be made that states and the federal government should not necessarily be held to identical standards in enforcing a given right. Half a century ago, the second Justice Harlan's famous separate opinion in *Roth v. United States*⁹⁸ made such an argument. In that case, the Court rejected First Amendment challenges to two obscenity statutes, one federal and the other from California, holding that the same standard applies regardless of which level of government was regulating speech.⁹⁹ Justice Harlan disagreed, arguing that one case involved balancing a state's power against the limitations of the Fourteenth Amendment, while the other required balancing the federal government's more limited power against the confines of the First Amendment.¹⁰⁰ Without developing a complex doctrinal model, Justice Harlan simply looked to federalism where it is most effective.¹⁰¹

Harlan argued that the basic differences between the First and Fourteenth Amendments should not be ignored.¹⁰² The First Amendment, in his view, declares that federal officials lack substantive power to regulate speech, or at least the sort of speech in question.¹⁰³ The Fourteenth Amendment, on the other hand, limits states only to the extent that the right in question rises to the level of "ordered liberty."¹⁰⁴ This leaves states some latitude to regulate in protecting public health, safety, and welfare; Harlan did not specify just how much latitude, but believed that it included at least the ability to protect against unsolicited mailings of pornographic

97. *Id.* at 1627–29.

98. 354 U.S. 476 (1957). Justice Harlan's opinion is a concurrence in one of the two combined cases and a dissent in the other. 354 U.S. at 496–508 (Harlan J., concurring in part and dissenting in part).

99. *See id.* at 492–93 & n.31.

100. *See id.* at 498.

101. *See id.*

102. *See id.* at 504 (“[I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results.”).

103. *Id.* at 504 (“Congress has no substantive power over sexual morality.”).

104. *Id.* at 501 (citing *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937)).

materials.¹⁰⁵ It is worth noting that Mark Rosen's second justification for Tailoring—that local regulations tend to threaten the marketplace of ideas less than national ones—is a direct reflection of Justice Harlan's distinction between the two levels of government.¹⁰⁶ While pointing to the states' broader sphere of constitutional powers, Harlan also asserted that the states posed a lesser threat to liberty than the federal government.¹⁰⁷ In other words, states' efforts to protect against unsolicited pornography pose a much smaller threat to free speech than would a federal program applied across all fifty states.

Each of these three models—Amar's, Rosen's, and Harlan's—addresses some of the difficult problems associated with defining and protecting national rights in a federal republic. They illustrate the importance of recognizing that rights can take different forms when asserted against different levels of government—as Harlan's dissent demonstrates, *Roth* would have come out differently under any of the three models—and more importantly they demonstrate that alternatives to mechanical incorporation are available. This Note argues that even if the Supreme Court incorporates the Second Amendment against the states later this Term, states should retain the authority to tailor gun regulations to their own localized circumstances. Before arguing that gun rights should remain federalized, it will be helpful to examine recent constitutional arguments surrounding the Second Amendment.

105. *Id.* at 502.

106. Compare Rosen, *supra* note 27, at 1602 (“The quantum of the constitutionally problematic interference is smaller if the regulation is the product of a municipality rather than the federal government, because a nationwide proscription interferes with these interests more than a city-wide prohibition does.”), with *Roth*, 354 U.S. at 506 (Harlan, J., concurring in part and dissenting in part) (“[I]t seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nationwide suppression of the book, and so long as other States are free to experiment with the same or bolder books. . . . But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book.”).

107. *Roth*, 354 U.S. at 505–06 (Harlan J., concurring in part and dissenting in part).

II.
FIREARMS: MODERNIZING THE OBSOLETE

A. District of Columbia v. Heller *and the Individual Right to Bear Arms*

The Second Amendment reads as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁰⁸ This is one of the more inscrutable provisions in the Constitution, largely because the first, or prefatory, clause, and the second, or operative, clause seem at first to suggest two very different sorts of rights. Many have argued that the most natural reading of the Amendment is that individuals’ right to carry a firearm for the purpose of self-defense, or any other lawful purpose, cannot be infringed.¹⁰⁹ Others have argued with strong support that the Amendment protects the states’ ability to maintain effective militias, and that it pertains to individuals only in connection with militia service.¹¹⁰ The difference is crucial; there are potentially two separate rights at work here, with important consequences for incorporation. If the Second Amendment were a right held by the states, then incorporation would not be sensible.¹¹¹ However, if it protects a right of individual citizens to keep and bear arms, then incorporation would be justifiable.

1. The *Heller* Decision

The Supreme Court did not have occasion to address this central interpretive question until 2008, when in the landmark *Heller* case, it finally attempted to settle “the meaning of the Second Amendment.”¹¹² The Justices split 5-4, conceiving of two very different sorts of rights. Writing for the majority, Justice Scalia looked to grammar,¹¹³ other constitutional provisions,¹¹⁴ eighteenth century texts,¹¹⁵ and historical commentaries, cases, and legislative materials¹¹⁶ in concluding that “the Second Amendment confer[s]

108. U.S. CONST. amend. II.

109. See, e.g., Respondent’s Brief at 2–4, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

110. See, e.g., Brief for Petitioners at 11–12, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

111. See *supra* Part I.B.1.

112. *Heller*, 128 S. Ct. at 2788.

113. *Id.* at 2788–90.

114. *Id.* at 2790–91.

115. *Id.* at 2791–2805.

116. *Id.* at 2805–17.

an individual right to keep and bear arms.”¹¹⁷ Clearly comfortable with a right that extends past service in the militia, the Court held that the District of Columbia’s ban on handgun possession in the home, coupled with its “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,” violated the Second Amendment.¹¹⁸

In his dissent, Stevens was willing to concede that the Second Amendment protects an individual right, but only in a much more narrow sense.¹¹⁹ Emphasizing the language of the prefatory clause,¹²⁰ as well as historical evidence of the meaning of “keep and bear Arms,”¹²¹ he would have held that “the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.”¹²²

Breyer departed further from the majority. After a thorough historical inquiry,¹²³ he agreed with Stevens that the Amendment protects firearm ownership only in the context of the militia.¹²⁴ However, he also believed that the right is not absolute but rather subject to interest balancing, leaving a wide “zone” open to “regulation by legislatures.”¹²⁵

Justice Scalia’s majority opinion flatly rejected these arguments, denying that the right to bear arms could be subjected to interest balancing by a legislature.¹²⁶ While conceding that the original purpose of the Second Amendment was to protect state militias, Scalia insisted that the “*central component* of the right itself” was not militia service per se but rather self-defense.¹²⁷

However, Scalia conceded that the right to bear arms is not unconditional. For example, the Second Amendment contains no protection for types of weapons “not typically possessed by law-abid-

117. *Id.* at 2799.

118. *Id.* at 2821–22.

119. *Id.* at 2822 (Stevens, J., dissenting).

120. *Id.* at 2824–26.

121. *Id.* at 2827–30.

122. *Id.* at 2831.

123. *Id.* at 2848–50 (Breyer, J., dissenting).

124. *See id.* at 2847 (“[T]he Second Amendment protects militia-related, not self-defense-related, interests.”).

125. *Id.* at 2848.

126. *See id.* at 2821 (majority opinion) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

127. *Id.* at 2801 (emphasis in original).

ing citizens for lawful purposes.”¹²⁸ Citing English common law materials and early cases, the Court also acknowledged the “historical tradition of prohibiting the carrying of dangerous and unusual” firearms.¹²⁹ Scalia included a non-exhaustive list of “presumptively lawful regulatory measures” covering a wide range of regulations on gun ownership and use commonly in effect in jurisdictions across the United States today.¹³⁰ These include restrictions on the status of the owner, gun-free locations, and conditions on legal firearm sales.¹³¹ The list, however, does not mention other common restrictions, such as trigger-lock laws that are less restrictive than those of the District of Columbia, restrictions on carrying guns in churches, or any others.

Most importantly for this Note, neither Scalia’s opinion nor either of the dissents addressed in any way the question of federalism. *Heller* tells us that the Second Amendment protects an individual right to bear arms, the core of which is ownership for lawful self-defense, although certain reasonable legislative restrictions on that right are presumptively permissible.¹³² However, we do not know which levels of government can pass which sorts of regulations, and the *Heller* case did nothing to resolve this uncertainty. Instead, the Court’s opinion deliberately left open the question of incorporation.¹³³ In justifying its central holding that the Second Amendment is an individual right, Justice Scalia argued that it should be “unsurprising” that such a central question would have remained unresolved for so long due to the relatively recent historical development of the incorporation doctrine.¹³⁴ Even after *Heller*, the right to own a gun is one of the few rights contained in the first

128. *Id.* at 2815–16 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939), the only post-Civil War Second Amendment case before *Heller*, which held that a ban on sawed-off shotguns did not violate the Amendment).

129. *Id.* at 2817 (internal quotation marks omitted).

130. *Id.* at 2816–17 & n.26.

131. *See id.* at 2816–17 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

132. *See id.*

133. *See id.* at 2813 n.23 (declining to address the issue of “incorporation, a question not presented by this case”).

134. *Id.* at 2816 (“For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.”).

eight amendments to the Constitution that has not yet been applied against the states.¹³⁵

Of course, the *Heller* court was not required to address the question of state limitations on gun ownership; any such discussion would have been dictum since the District of Columbia is a federal municipality. For this reason, *Heller* was an unusual test case whose relevance to other municipalities is not clear. However, numerous lawsuits have already been filed all over the country, citing *Heller* and arguing that its logic and holding should be applied against state and local governments as well.¹³⁶

Most prominently, Alan Gura, following his successful representation of Dick Heller before the Supreme Court, immediately filed a lawsuit on behalf of six plaintiffs challenging Chicago's similar ban on handgun ownership.¹³⁷ Submitting his complaint the day after *Heller* was decided, he argued that the Fourteenth Amendment—through both the Privileges or Immunities and Due Process Clauses—incorporates the Second Amendment right to keep and bear arms against states and municipalities.¹³⁸ Gura went so far as to argue that “the right to keep and bear arms was the right whose incorporation was most urgently desired.”¹³⁹ Gura admits that the

135. See Rosen, *supra* note 27, at 1515 & n.2.

136. Three circuit courts have already addressed the question, reaching very different results. See *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009) (holding that *Heller* did not overrule the longstanding principle that the Second Amendment only limits the federal government); *Nordyke v. King*, 563 F.3d 439, 446, 457 (9th Cir. 2009) (finding that *Heller* left the question open, but that the Fourteenth Amendment incorporates the Second Amendment against the states); *Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009) (deciding that if there is to be a shift away from precedent declining to incorporate the Second Amendment against the states, it is for the Supreme Court to do so). The Supreme Court has in fact granted certiorari to address the question of incorporation in the Seventh Circuit case. See *Nat'l Rifle Ass'n of Am., Inc.*, 567 F.3d 856, *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

137. See Complaint, *McDonald v. City of Chicago*, No. 08-CV-3645 (N.D. Ill. June 26, 2008), 2008 WL 2571757.

138. See *id.* at ¶ 48 (“The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment”); *id.* at ¶ 49 (“The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.”). Gura further argues that Chicago violates the Equal Protection Clause by making certain firearms “unregisterable.” *Id.* at 59.

139. Memorandum of Points and Authorities in Support for Plaintiffs' Motion for Summary Judgment at 7, *McDonald v. Chicago*, No. 08-CV-3645 (N.D. Ill. July 31, 2008), 2008 WL 3334070.

Slaughter-House Cases “foreclosed” incorporation of gun rights as a privilege or immunity of United States citizenship, but argues forcefully that the weight of more recent scholarship and case law suggests that *Slaughter-House* was wrong and should be revisited.¹⁴⁰ Barring this difficult step, he claims that the right to bear arms “clearly meets” the Court’s standard for incorporation through the Due Process Clause.¹⁴¹ Gura will soon test these arguments before the Supreme Court.¹⁴²

2. Judicial Reactions

In recent months, three circuit courts have addressed the question of incorporation head on. The Second Circuit spoke first, holding in January of 2009 that a New York state ban on the possession of nunchakus¹⁴³ does not violate the Second Amendment.¹⁴⁴ Relying primarily on the Supreme Court’s 1886 decision in *Presser v. Illinois*,¹⁴⁵ the court found that “it is settled law” that the Second Amendment binds only the federal government.¹⁴⁶ The Second Circuit panel acknowledged *Heller*’s declaration of an individual right to bear arms but emphasized the *Heller* Court’s reluctance to incorporate the right against the states.¹⁴⁷ Ultimately, the Second Circuit refused to go further than the Supreme Court. It is worth noting briefly that then-Judge Sonia Sotomayor signed on to the *per curiam* opinion along with two other circuit judges.¹⁴⁸ Of course, it is not clear whether her position may change now that she is less constrained by precedent in her new role as a Justice.

140. *See id.* at 5–6.

141. *See id.* at 8–13 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149, 150 n.14, 155 (1968)).

142. *See Nat’l Rifle Ass’n of Am., Inc. v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

143. Nunchakus are defined as weapons comprised of two rigid objects “joined together by a thong, rope, or chain” and intended to be swung at a victim. *See Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009). While they are not firearms, the court, without any comment, treated them as “arms” within the meaning of the Second Amendment. *See id.* at 58–60.

144. *Id.* at 59.

145. 116 U.S. 252 (1886).

146. *Maloney*, 554 F.3d at 58–59 (citing *Presser*, 116 U.S. at 265 (declining to apply the Second Amendment against the states); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir. 2005) (relying on *Presser* to uphold a state law against a Second Amendment challenge)).

147. 554 F.3d at 58–59 (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783, 2813 n.23 (2008)).

148. *Id.* at 57.

By contrast, in April of 2009, Judge O’Scannlain wrote for a unanimous panel of Ninth Circuit judges that the Second Amendment right to bear arms, as enunciated in *Heller*, ranks as fundamental and does apply against state governments.¹⁴⁹ Reviewing late eighteenth-century legal history, the passage of the Civil War Amendments, the literature of Akhil Amar and other scholars, and the language of the *Heller* opinion, the court found that gun rights are “characteriz[ed] the same way other opinions described enumerated rights found to be incorporated.”¹⁵⁰ The court acknowledged the Second Circuit’s interpretation of *Presser* and *Heller*, but openly disagreed.¹⁵¹ Instead, the Ninth Circuit found that incorporation was not only plausible by analogy, but was in fact one of “*Heller*’s suggestions.”¹⁵² The court also pointed out that *Presser* “did not discuss selective incorporation through the Due Process Clause,” now the primary vehicle for incorporating rights against the states.¹⁵³ In any event, while the Second Circuit found that *Heller*’s silence on the issue foreclosed incorporation,¹⁵⁴ the Ninth Circuit was undeterred, holding that the Due Process Clause incorporates the Second Amendment against the states.¹⁵⁵

Finally, in June of 2009, the Seventh Circuit, in a decision written by Judge Easterbrook and joined by Judges Posner and Bauer, weighed the two opinions by the Second and Ninth Circuits and sided with the former in declining to apply the Second Amendment against the states.¹⁵⁶ The court relied heavily on *Presser* as well as *United States v. Cruikshank*,¹⁵⁷ finding that they were “open to reexamination by the Justices themselves when the time comes,” but not to an inferior appeals court.¹⁵⁸

However, the court also relied heavily on another factor that the Second Circuit did not explicitly discuss—federalism, which it called “an older and more deeply rooted tradition than is a right to

149. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (“We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.”).

150. *Id.* at 451–57.

151. *See id.* at 457 n.16 (citing *Maloney*, 554 F.3d at 58–59).

152. *Id.*

153. *Id.*

154. *See Maloney*, 554 F.3d at 59.

155. *See Nordyke*, 563 F.3d at 457–58.

156. *See Nat’l Rifle Ass’n of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) (citing *Nordyke*, 563 F.3d 439; *Maloney*, 554 F.3d 56).

157. 92 U.S. 542 (1875) (holding that the Second Amendment only applies to the national government).

158. *Nat’l Rifle Ass’n*, 567 F.3d at 858.

carry any particular kind of weapon.”¹⁵⁹ Pointing to the states’ traditional role as policy laboratories, Judge Easterbrook argued that differences in policy across state lines should be “cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule.”¹⁶⁰ In other words, while the Second Circuit simply relied on precedent when it declined to incorporate the Second Amendment, the Seventh Circuit affirmatively offered its support for the idea of a federalized right.

No doubt noting this split among the circuits, the Supreme Court will soon reexamine the field of gun rights, addressing the question of incorporation directly.¹⁶¹ In the meantime, several scholars have weighed in.

3. Scholarly Reactions

Many scholars today seem to assume that incorporation is inevitable. Judge J. Harvie Wilkinson of the Fourth Circuit recently published a blistering critique of the *Heller* opinion as non-textual, antidemocratic, anti-federalist, and likely to cause an endless wave of litigation.¹⁶² On the federalism front, he writes that “the Court would hardly have gone to such great lengths to recognize” a strong, individual right to keep and bear arms “if it did not plan to incorporate that right against the states as well.”¹⁶³ To the same end, he points out that the Court “proceeded to all but label” *Cruikshank*,¹⁶⁴ an 1875 case decades older than the incorporation doctrine, “erroneous” for failing to engage in the sort of incorporation inquiry seen in later cases.¹⁶⁵ Finally, Wilkinson argues that the *Heller* Court’s not-so-subtle hints at a future Second Amendment docket, coupled with its deliberately non-exhaustive list of presumptively legal gun regulations, strongly suggest that state and local regulations will be invalidated by the Supreme Court “when, to the surprise of no one, it incorporates the Second Amendment against the states.”¹⁶⁶

Many others have agreed. Robert Levy, Gura’s co-counsel in the *Heller* case, wrote that the Second Amendment “will no doubt

159. *Id.* at 860.

160. *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

161. *See Nat’l Rifle Ass’n*, 567 F.3d 856, *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

162. Wilkinson, *supra* note 6.

163. *Id.* at 312.

164. 92 U.S. 542 (1875).

165. Wilkinson, *supra* note 6, at 312.

166. *Id.* at 313.

R

R

be incorporated,” leaving only the question whether it will occur through the Due Process Clause or as a privilege or immunity of U.S. citizenship.¹⁶⁷ Professor Chemerinsky thinks that “now that five Justices have found an individual right to have guns . . . incorporation will follow.”¹⁶⁸ Others have pointed to powerful pro-gun interest groups, strong opinions on both sides, and the *Heller* Court’s wide-open language about permissible regulations in predicting a rapid and widespread stream of lower court cases challenging state and local regulations.¹⁶⁹ Some have resorted to hyperbole, predicting an “avalanche” of Second Amendment claims challenging various restrictions on gun ownership.¹⁷⁰ In addition, Akhil Amar recently expressed his view that incorporation will happen soon, noting the convergence of two trends: a recent groundswell of liberal scholarship focusing on incorporation, and also the fact that “nearly every provision of the Bill of Rights” has been incorporated.¹⁷¹ Indeed, even before *Heller* was decided, without the benefit of any cases holding that the Second Amendment protects an individual right, some scholars had openly called for incorporation.¹⁷²

However, too much focus is on the matter of incorporation per se. As this Note has argued, even an incorporated right need not apply equally to the states and the federal government. An unwieldy federal docket of Second Amendment cases is not inevitable: the key is to let federalism work by simply leaving most regulatory authority with the state governments. There are several good reasons to focus on federalism rather than incorporation, emanating from the models of incorporation advanced by Professors Amar and Rosen as well as Justice Harlan. Even if the Second Amendment is

167. Levy, *supra* note 6.

168. Erwin Chemerinsky, *The Heller Decision: Conservative Activism and its Aftermath*, CATO UNBOUND, July 25, 2008, <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/the-heller-decision-conservative-activism-and-its-aftermath/>.

169. See Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. L. REV. 2035, 2040–42 (2008).

170. Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/>.

171. John Schwartz, *Conflicting Rulings on Guns Open Way to Supreme Court Review*, N.Y. TIMES, June 17, 2009, at A14 (quoting Akhil Reed Amar).

172. See, e.g., Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 1 (2007) (“The Second Amendment, alternately maligned . . . and praised . . . , should be recognized by the United States Supreme Court to apply to the several States through the Fourteenth Amendment privileges or immunities clause or, alternatively, through the due process clause.”).

formally incorporated against the states in the near future, states should retain substantial discretion to regulate guns free from federal interference.

B. A Proposal: Federalize the Right to Keep and Bear Arms

As we have already seen, under the Court's doctrine of selective incorporation, national rights are applied against the states when they are held to be so fundamental as to be "implicit in the concept of ordered liberty."¹⁷³ By mechanically incorporating a national right against state governments, the Supreme Court restrains the discretion of states to determine the scope of that right, shifting interpretive responsibility from each individual state to the federal judiciary. For a number of reasons, this is not a desirable result. The inevitable result of mechanical incorporation is uniformity—each state would be held to the same standard as the federal government.¹⁷⁴ In some situations, however, it would be far more sensible to allow states some range of discretion to enforce federal rights according to their own unique circumstances. This will require a more refined model of incorporation, one that allows states and local governments to tailor gun policies to their own unique situations. There are at least five reasons why the discretion to develop the details of gun regulation should be left to states rather than the federal courts.

1. Interest Balancing

First, even the most ardent libertarian gun-rights advocate must admit that guns, whether used in the military or in civilian self-defense, lawfully or unlawfully, are capable of killing people. So, while gun ownership may be a component of the liberty protected by the Bill of Rights, a countervailing interest in protecting human life lies on the other side. In fact, if we accept the Court's characterization of gun rights as being centered around a core right to self-defense, as opposed to military service,¹⁷⁵ then a power-

173. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937); *see also supra* text accompanying notes 64–69 (discussing the mechanism of selective incorporation).

174. *See Benton v. Maryland*, 395 U.S. 784, 795 (1969).

175. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008) (pointing out that the District of Columbia's ban on handgun ownership "makes it impossible for citizens to use them for the core lawful purpose of self-defense"). It would be an understatement to call this a controversial view. Justice Breyer mocks Justice Scalia's use of limited historical authority to support the "far-reaching proposition that the Second Amendment's primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders." *See id.* at 2869 (Breyer, J., dissenting).

ful interest in life must be balanced on each side—potential gun victims' interest in physical security on the one side, and lawful gun owners' interest in defending themselves on the other. In more general terms, any gun regulation will necessarily curtail someone's right to self-defense with a firearm.

Justice Scalia's majority opinion in *Heller* purported to categorically reject Justice Breyer's proposed interest-balancing approach.¹⁷⁶ Yet Scalia recognized that the District of Columbia has a powerful interest in combating gun violence, which can be addressed using a number of policy tools.¹⁷⁷ Each of these would restrict private citizens' rights to lawful handgun ownership.¹⁷⁸ In other words, Justice Scalia may not call it interest balancing, but he acknowledges that the District of Columbia must make difficult choices about how to regulate guns.¹⁷⁹

Balancing state and individual interests, even in the face of fundamental, enumerated constitutional rights, is nothing new. For example, Justice Brandeis' dissent in *Pennsylvania Coal Co v. Mahon*¹⁸⁰ argued that in the Fifth Amendment context "every restriction upon the use of property . . . deprives the owner of some right theretofore enjoyed . . . [b]ut a restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."¹⁸¹ Regulatory takings, of course, are not the same as gun control, and Brandeis' dissent is not law, but the reasoning is analogous: local governments must have some ability to regulate in ways designed to protect their citizens, even when constitutional rights

176. *Id.* at 2821 (majority opinion) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

177. *See id.* at 2822.

178. *See id.* ("We are aware of the problem of handgun violence in this country The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns.").

179. Some scholars also deplore the practice of interest balancing, or at least the rhetoric. *See, e.g.,* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711–15 (1994) (arguing that interest balancing is not inevitable and calling instead for greater focus on "defining the boundaries on political authority").

180. 260 U.S. 393 (1922).

181. *Id.* at 417 (Brandeis, J., dissenting); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (sustaining a municipality's zoning regulations over due process objections, while positing that "while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation").

are implicated.¹⁸² The federal government must sometimes be able to do so as well,¹⁸³ but surely federal regulations are more troubling than state ones, if only because they apply to the citizens of all fifty states, eliminating any possibility of policy experimentation by the states.

Brandeis argued that within federal constitutional limits “it is for a state to say how its public policy shall be enforced.”¹⁸⁴ Similarly, when it comes to guns, states must have some latitude. As with property rights, citizens’ use of guns is necessarily subject to regulation, since the state has a powerful interest in maintaining public safety. One can enjoy many rights without endangering public safety—the free exercise of religion, or jury service, or the right to competent counsel are all examples—but the right to gun ownership has the potential to be deadly.¹⁸⁵ Because gun laws implicate the state governments’ interest in maintaining public safety, the Second Amendment is not the sort of purely individual right that is well-suited to mechanical incorporation. Rather, states must be able to tailor gun laws to their own citizens’ needs.

2. Explicit State Interest

Second, the states’ regulation of gun use arguably deserves more latitude than that of other issues implicating guarantees in the Bill of Rights, because unlike any other constitutional rights, the state interest is present in the text of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State”¹⁸⁶ To be sure, the militia-protecting function of gun

182. Indeed, in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Court allowed that “government may execute laws or programs that adversely affect recognized economic values.” *Id.* at 124. The *Penn Central* balancing test reflects the need to balance state and private interests. *See id.* at 123–24.

183. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 174–75 (1979) (holding that “Congress could assure the public a free right of access” to a formerly private marina as an exercise of its Commerce Clause power, even though this would nearly amount to a taking).

184. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 421 (1922) (Brandeis, J., dissenting).

185. Even other activities that a state might disdain, whether flag burning or nude dancing or telemarketing, do not implicate the same sort of strong interest that states hold in maintaining public safety.

186. U.S. CONST. amend. II. At least one prominent scholar has argued that the presence of this prefatory, or “justification” clause, should not be read to distinguish the Second Amendment from other rights, since such clauses were commonplace in contemporary state constitutional provisions. *See Eugene Volokh, The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998). This is clearly an important historical insight, as Professor Volokh convincingly argues that prefatory

ownership is less relevant today than it was when the Bill of Rights was ratified,¹⁸⁷ but nevertheless it remains an explicit constitutional priority, and therefore in addition to the state's interest in protecting its citizens we must add an interest in militia maintenance.¹⁸⁸ This could change, by constitutional amendment or at least a congressional statute, but today the unamended text by its own terms continues to protect state militias. Judge Wilkinson writes that *Heller* was wrongly decided in part because of its "absence of a commitment to textualism."¹⁸⁹ But even if Wilkinson is right, and *Heller* was wrong, the state continues to retain a prominent place in the text. So, even if the Second Amendment protects an individual right, textualists should at least acknowledge the states' interest in gun regulation.

3. Uniquely Polarizing

Third, while some degree of gun regulation is surely necessary, gun control is one of the most deeply polarizing, divisive issues across the nation today,¹⁹⁰ suggesting that it is particularly important that the level of government that takes responsibility for regulating is as accountable to its citizens as possible.¹⁹¹

The gun rights lobby is one of the most powerful in the country, and it exists with no effective counterpart, although Americans

clauses are often both underinclusive and overinclusive. *Id.* at 804–06. But while he may be correct that prefatory clauses often do not precisely reflect the will of constitutional drafters, he cannot overcome the fact that our Second Amendment is the only surviving rights provision in our Constitution that contains such a clause. Presuming that its inclusion was deliberate, it would be odd to say that it has *no* content.

187. The Supreme Court has long recognized that the National Guard now represents "the modern Militia" contemplated by the Constitution. *Maryland v. United States*, 381 U.S. 41, 46 (1965).

188. Even if the core of the modern Second Amendment is self-defense, there is a deep common law tradition that recognizes it as a "declar[ation] that a well regulated militia is necessary to the security of a free state." RAWLE, *supra* note 30, at 125; *see also* AMAR, *supra* note 20, at 147 (discussing the theory that the Bill of Rights was not so much law-creating as "declaratory of certain fundamental common-law rights").

189. Wilkinson, *supra* note 6, at 254. Judge Wilkinson's textualist critique of *Heller* appears as the first of his four primary arguments, lending it particular emphasis. *Id.*

190. *See* KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 6 (2006) (presenting statistics about Americans' desire for stronger gun control laws, but noting the overwhelming effectiveness of advocacy organizations, especially the National Rifle Association, in thwarting legislative efforts to tighten gun control laws).

191. *See generally* ELY, *supra* note 53.

R

R

R

hold very strong opinions on both sides.¹⁹² Citizens of Alabama and California may look at gun control in widely different ways. And of course, there is plenty for lawyers to argue about; after all, the result in *Heller* was not obvious or inevitable.¹⁹³ As Mark Rosen argues, it is in precisely this sort of situation, when citizens' interests vary and the law is unclear, that it is most important that regulation take place at a more local level of government.¹⁹⁴

There remains the substantial problem that localized gun regulation inevitably leads to negative externalities. As gun control skeptic James Jacobs has pointed out, "Some communities wishing to ban private possession of firearms in public places . . . will find their ambition undermined by a neighboring community's policy of allowing liberal access to firearms."¹⁹⁵ This is not a problem unique to guns—decentralization of any sort of regulation may produce externalities—but decentralizing gun regulation may have unusually serious consequences since guns can easily move across jurisdictional lines when purchased, meaning that any one town's use and possession regulations are affected by its neighbor's purchasing regulations.¹⁹⁶

For this reason, local governments may find that restrictions on gun possession and use may be most effective, since they will capture guns purchased both within and outside of their jurisdic-

192. Kristen Goss has persuasively argued that while a powerful undercurrent of support for gun control runs through American society, no effective "movement" has mobilized on the national level to combat the National Rifle Association because "opponents of gun control have accommodated themselves better to the stubborn realities and political inconveniences of a fragmented, federalist system than have the supporters of gun control whose strategies were . . . politically naïve." Goss, *supra* note 190, at 30; *see also id.* at 22–30.

193. *See* Wilkinson, *supra* note 6, at 271 (citing MARK V. TUSHNET, *OUT OF RANGE: WHY THE SUPREME COURT CAN'T END THE BATTLE OVER GUNS* xvi (2007) (arguing, after a thorough survey of the legal and historical literature, that "the arguments about the Second Amendment's meaning are in reasonably close balance")).

194. *See* Rosen, *supra* note 27, at 1601–03; *see also supra* Part I.B.2.

195. JAMES JACOBS, *CAN GUN CONTROL WORK?* 224 (2002).

196. *See* ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 142–43 (3d ed. 2004) ("[D]espite our country's geographic size and diversity, the ease of long-distance travel means that the flow of arms from low-regulation to high-regulation states continues nearly unabated."). Professor Spitzer's book calls for much stricter gun control laws, finding that "meaningful gun regulation must be federal." *Id.* at 144. However, his pre-*Heller* conclusion that "there is no constitutional barrier to stricter gun laws, even including a ban on the possession of handguns," is clearly incorrect today, and his policy arguments in favor of increasing federal regulation fail to address many of the arguments advanced in this Note. *Id.* at 146; *see also id.* at 142–158.

R

R

tion.¹⁹⁷ Such regulations are likely preferable to sales restrictions, which can easily be evaded by cross-border transactions. There are also other options available, without simply resorting to regulation at a higher level of government. Heavier policing of gun entry into jurisdictions is an option, although not one without cost. Finally, jurisdictions may be able to negotiate and create collaborative schemes to regulate gun ownership and use in various ways.

In any event, the costs to local regulatory initiatives associated with movement of guns across jurisdictional borders are outweighed by the many other benefits of decentralization. Leaving the details of gun regulation to the states will be more likely to leave citizens free from regulations they do not support; if nothing else, one can move to a different state with more suitable gun regulations. In other words, individual citizens' welfare is more likely to be maximized when more regulatory authority is vested in states and municipalities.

4. Lack of Bright Lines

Fourth, while implying that some types of gun regulation are acceptable and others are not, the *Heller* decision offers no bright lines to distinguish them.¹⁹⁸ The Second Amendment itself offers no meaningful guidance, either. So, for instance, how can we know whether a ban on carrying handguns near a church is one of Justice Scalia's "presumptively lawful regulatory measures"¹⁹⁹ or rather something that goes to the core of handgun ownership? Gun rights are arguably so tied up with both crucial self-defense interests and unacceptable gun violence that principled policy, whether regulatory or libertarian, may be simply impossible at the national level.

The level of government that promulgates regulations may make a significant difference. After all, it is not at all clear how the federal government might justify constitutionally meaningful limitations on regulation. As noted above, neither constitutional text nor precedent is helpful.²⁰⁰ So, Judge Wilkinson argues that if federal courts continue to involve themselves in scrutinizing local gun regulations, they will "be forced . . . to decide contentious questions

197. See JACOBS, *supra* note 195, at 224–25 (“[A] community that wishes to enforce its ‘no guns on the streets’ law is free to do so, aggressively arresting and prosecuting unlicensed gun carriers.”).

198. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (asserting that some gun regulations do not violate the Second Amendment).

199. *Id.* at 2817 n.26.

200. See *supra* discussion accompanying notes 108–111.

without clear constitutional guidance.”²⁰¹ He compares the countless “subsidiary issues” surrounding gun regulations to “a thicket . . . that will thoroughly ensnare” the Court if it decides to engage in any substantial judicial scrutiny of local gun regulations.²⁰² States, at the very least, have a narrower reach in formulating policy and are more directly accountable to their citizens; it is surely easier for a disgruntled citizen to appear at his state legislature and petition for a change in policy than it is to appear in Congress. Finally, it is far less burdensome, as a last resort, to move to a state with more salutary gun laws than it is to move to another country.²⁰³

An added benefit is that allowing states a degree of latitude in passing gun control regulation tends to encourage innovation. One of the greatest advantages of federalism is that states can act as laboratories, tailoring policies to their own polities and finding new solutions to policy problems.²⁰⁴ Judge Wilkinson, for example, points favorably to Richmond, Virginia’s approach to gun control, which is markedly different from the District of Columbia’s and arguably more effective.²⁰⁵ In the past decade, Richmond has “reduced firearm-related violence dramatically,” while retaining lax restrictions on gun sales, by “severely punishing all gun crimes, including those as minor as illegal possession.”²⁰⁶ Crucially, “[o]ther cities . . . have visited to see what Richmond is doing.”²⁰⁷

If the federal courts attempt to set uniform federal standards for gun regulation, they will inevitably “limit the space in which states and cities can innovate.”²⁰⁸ Cities like Washington and Richmond differ in many ways, and something substantial is lost if they cannot experiment and tailor their gun laws to protect their citizens’ lives and liberty. The stakes are high when it comes to gun regulation, and scholars like James Jacobs have concluded that we

201. Wilkinson, *supra* note 6, at 275. He argues that the inevitable result will be something like the Court’s abortion jurisprudence, in which it issues a series of opinions attempting to balance powerful interests on both sides of the debate, without any “relationship between [the right] and the text or structure of the Constitution.” *Id.* at 257–58.

202. *Id.* at 280.

203. *See id.* at 320–21 (arguing that citizens unhappy with restrictive gun laws “remain free to move to other localities more protective of gun rights Under the Court’s rigid national rule, moreover, no one will be able to exercise the liberty to live in a city in which handguns are prohibited”).

204. *See id.* at 319.

205. *Id.*

206. Gary Fields, *Going After Crimes—and Guns*, WALL ST. J., Aug. 5, 2008, at A12.

207. *Id.*

208. Wilkinson, *supra* note 6, at 320.

simply cannot afford to lose the experimentation, innovation, and empirical comparisons that are possible only when regulation is localized.²⁰⁹

5. Lack of Minority Interest

Fifth, and finally, there is a deep and powerful sense in American constitutional law, at least since the famous fourth footnote in *United States v. Carolene Products Company*,²¹⁰ that federal courts should protect individual rights with the highest degree of scrutiny when the rights of discrete and insular minorities are implicated or when participation in the political process is at stake.²¹¹ Arguing that these two interests are inextricably linked, John Hart Ely has called for a “participation-oriented, representation-reinforcing approach to judicial review.”²¹² In adjudicating cases that do not directly implicate participation in the political process, courts may stand on firmer ground by deferring to legislative judgments on contentious matters.

This view enjoys particularly strong support in the context of incorporation. John Harrison has argued that the Fourteenth Amendment is not about substance but rather “equality through and through;”²¹³ it was intended not to set national standards for state regulation, but rather to ensure that state laws—whatever their substance—would be applied in a race-neutral way.²¹⁴ Placing the Fourteenth Amendment squarely in the context of racism suggests that states should be largely free of federal intervention as they regulate gun rights, so long as they do so in a race-neutral way.

209. See also JACOBS, *supra* note 195, at 224 (“The firearms traditions in small town and urban America are different. Level of trust and anonymity is different. The level of policing is different. . . . There is much that could be learned from evaluating the efforts of jurisdictions that have a solid political consensus to implement such initiatives. If it turns out that they can be done well in one jurisdiction, that alone will encourage other jurisdictions to follow suit.”).

210. 304 U.S. 144 (1938).

211. See *id.* at 152–53 n.4 (noting for the first time that “prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry”).

212. ELY, *supra* note 53, at 87 (citing 304 U.S. at 152–53 n.4); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005) (arguing that a heightened standard of judicial review is appropriate when enforcing the “Constitution’s democratic objective”).

213. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1454 (1992).

214. See *id. passim*.

R

R

This is not a trivial point. The Second Amendment has some historical significance in protecting freed slaves in the late nineteenth century. The Freedman's Bureau Act, after all, explicitly affirmed free blacks' right to arms,²¹⁵ and part of the purpose of the Fourteenth Amendment was indisputably to ensure that blacks would not be disarmed.²¹⁶ However, no one alleges that gun rights are a core element of racial equality today, and, after all, *Heller* clearly prevents legal disarmament, rendering much of this historical discussion moot. We tend not to perceive racial minorities' rights as closely tied to gun rights.²¹⁷

Uniformity in enforcing federal rights is more important in cases where protection of minority rights is a core concern. This is not such a case; guns are generally not part of identity. In terms of racial equality, regulation of guns at the federal level would add little or nothing, while coming at great cost to the states' ability to make policy judgments according to their own citizens' wishes.

CONCLUSION

After many years of effectively lying dormant, the Second Amendment has quickly and suddenly become relevant. The *Heller* Court held that it is an individual right to keep and bear arms: the government cannot ban handgun ownership. Soon, the Court will determine whether the states will be held to the same standard as the federal government regarding gun regulation. This Note has argued that whether or not the Second Amendment is formally incorporated against the states, it would be a costly mistake for the federal government to set uniform standards for gun regulation throughout the fifty states.

The federal courts should leave the details of gun regulation to local governments for several reasons. First, the Second Amendment may protect an individual right, but it is not purely individual—the states retain a powerful interest, and a deep responsibility,

215. See AMAR, *supra* note 20, at 196 n.* (citing the Freedman's Bureau Act, 14 Stat. 173, 176 (1866) (guaranteeing freed slaves the "full . . . benefit of all laws and proceedings concerning personal liberty, personal security, and [property,] including the constitutional right to bear arms") (emphasis added)).

216. See *id.* (discussing the close connection between the Freedman's Bureau Act, the 1866 Civil Rights Act, and the Fourteenth Amendment, which were all passed by the same Republican Congress).

217. In theory, gun rights could implicate racial authority if, say, a city did not adequately police minority neighborhoods. In 2009, however, at least in the sorts of cities where legal challenges to gun regulations tend to be brought, self-help with firearms is discouraged. We tend to rely on police for safety, and there are surely legitimate legal avenues for challenging racially unequal police protection.

to ensure their citizens' safety. While the state interest in maintaining a militia, explicit in the Second Amendment's text, is anachronistic, our substantial reliance on state-run police forces for physical security means that states continue to retain a crucial interest in regulating guns.²¹⁸ Unlike the rights to free speech and judicial process, the exercise of gun rights is dangerous and implicates important state policies. In addition, because gun culture and gun violence vary so much across state lines, federal policymakers cannot maintain safety across the nation while complying with *Heller*; effective policymaking at the national level is impractical. Finally, gun ownership does not sufficiently implicate any discrete and insular minority groups in modern America so as to justify judicial intrusion into local regulatory processes.

While recognizing that decentralization carries risks—particularly because guns can be carried across state borders—this Note argues that these considerations suggest that gun regulation should remain largely localized. The Supreme Court has declared that the Second Amendment is an individual right and that an absolute ban on effective gun ownership is unconstitutional, but it should not go further at the expense of federalism. The Court should not delve into the details of gun regulation; instead, it should accept a federalized Second Amendment.

218. Cf. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1308–10 (2009) (noting that the modern state's monopoly on legitimate violence "relieve[s] individuals of the necessity for self-protection").

**UNITED STATES V. INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION:
ANALYZING THE CIVIL RICO
SUIT AND ITS
IMPLICATIONS FOR THE FUTURE**

ELIZABETH DONDLINGER*

INTRODUCTION

Labor racketeering—organized crime’s exploitation of labor unions¹—has been around almost as long as the unions themselves. Indeed, when it comes to some unions, it can be very difficult to separate the two. One such union, the International Longshoremen’s Association (ILA), has been referred to as “virtually a synonym for organized crime in the labor movement,” suffering the practical rule of Cosa Nostra² for decades. The government, at both the state and federal level, has made periodic efforts to rid the union of organized crime, from the Waterfront Commission’s attempts to combat corruption in the 1950s, to the successful civil Racketeer Influenced and Corrupt Organizations Act (RICO) suit against a number of ILA local chapters in 1993. Despite the success against *local* labor chapters, however, it was not until 2005 that the powers of a civil RICO suit were brought to bear against the *international* ILA organization, in *United States v. International Longshoremen’s Ass’n (ILA International Case)*.³ Yet surprisingly, the court in that case dismissed the action for failure to state a claim on which relief could be granted based on three major flaws with the complaint: (1) inadequate incorporation of exhibits; (2) deficient

* J.D. Candidate, Class of 2010, New York University School of Law; B.A. 2007, Rice University. I would like to thank Professor Jim Jacobs for his advice and guidance, and also the editors of the *New York University Annual Survey of American Law*, especially Jennifer Bindel and Anthony Badaracco, for their hard work. Special thanks also go to my family for their support and to Ross Wyman for the coffee.

1. JAMES JACOBS, *MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* 1 (2006).

2. I use the term “Cosa Nostra” in this Note rather than the commonly used “La Cosa Nostra” in an effort to be more historically accurate. Mob member Joseph Valachi was the first on record to refer to the American Mafia as “Cosa Nostra,” meaning “our thing.” The subsequent addition of “La” to the beginning of the phrase is ungrammatical (“the our thing”). See JACOBS, *supra* note 1, at xi.

3. 518 F. Supp. 2d 422 (E.D.N.Y. 2007).

pleading of certain offenses; and (3) an incoherent RICO enterprise.⁴

Since the Department of Justice has been extremely successful in its civil RICO prosecutions against mob-infiltrated labor unions, including the recent litigation against the ILA locals, this result merits scrutiny. Specifically, it raises the question of whether the court's ruling represents a straightforward legal decision consistent with the existing civil RICO landscape, or whether it actually denotes a substantial change in judicial interpretation of RICO. This Note concludes that two of the complaint's defects, namely the inadequate incorporation of exhibits and the deficient pleading of predicate acts, are fairly uncomplicated and curable. On the other hand, the court's rationale for rejecting the RICO enterprise may prove more troubling for the federal government.

In the *ILA International Case*, the government had alleged that the common purpose of the enterprise was "to exercise corrupt control and influence over labor unions and businesses operating on the Waterfront . . . in order to enrich" the defendants, but it simultaneously claimed that not all members of the enterprise shared this "common" purpose.⁵ The court refused to find the existence of an enterprise that did not have one common purpose shared by all defendants, and it posited that it would be extremely difficult, if not impossible, for the government to assert a common purpose which would encompass all defendants. While the litigation in this case is ongoing as of this Note's publication, the court's skepticism towards the RICO enterprise raises an issue that had previously escaped examination, and the government may have to develop new strategies to escape the dismissal of its amended complaint. Regardless of whether the government's litigation is ultimately successful in this case, the court's opinion could influence future jurisprudence.

Part I briefly elucidates the importance of the case, tracing the ILA's history of corruption, the use of the RICO statute as a weapon for combating such corruption, and the successful civil RICO case previously brought against the ILA locals. Part II turns to the case itself, examining its outcome in detail. To assist in understanding the case's conclusion, and whether it represents a substantial change to civil RICO interpretation, this Note compares it to the RICO suit against the ILA locals. This analysis ultimately reveals that although the court's findings of fault with the document incor-

4. *Id.*; see also *infra* Part II.B.

5. *Id.* at 432.

poration and the pleading of the offenses was, perhaps, unremarkable, the government should be concerned about the court's rejection of the alleged RICO enterprise. Finally, Part III explains why, regardless of the outcome of this specific case, the court's concerns with the RICO enterprise could have repercussions for future litigation, and offers two suggestions for how the government may adapt its strategies accordingly.

I.

THE IMPORTANCE OF THE *ILA* *INTERNATIONAL CASE*

A. *Cosa Nostra and the ILA*

The International Longshoremen's Association (ILA) first appeared in the late nineteenth century.⁶ While its activities originally centered on the Great Lakes region, its influence soon spread across the country,⁷ and "nowhere was the ILA's expansion to have more of a lasting influence on the union than its arrival in the Port of New York."⁸ Within the New York area, the ILA's activities revolved around the "Waterfront," a term generally used to encompass several ports, including the ports of New York and New Jersey, their common harbor, and a conglomeration of business and commercial activities taking place within that area.⁹

Criminal groups controlled the ILA even before *Cosa Nostra* took the reins.¹⁰ Paolo Vaccarelli, also known as Paul Kelly, the leader of the brutal Five Points Gang, introduced a criminal ele-

6. The Beginnings of the ILA, http://www.ilaunion.org/history_begin.html (last visited Feb. 3, 2010).

7. Creation of the ILA, http://www.ilaunion.org/history_creation.html (last visited Feb. 3, 2010).

8. ILA Membership Grows, http://www.ilaunion.org/history_membership.html (last visited Feb. 3, 2010).

9. Amended Complaint at ¶ 1, *United States v. Int'l Longshoremen's Ass'n.*, 518 F. Supp. 2d 422 (E.D.N.Y. 2007) (No. 05-CV-3212), 2006 WL 730989 [hereinafter *ILA International Complaint*]. The Waterfront gained notoriety in the 1954 film "On the Waterfront," in which longshoreman Terry Malloy, played by Marlon Brando, famously fought back against his mob-controlled union's corrupt boss. *See ON THE WATERFRONT* (Horizon Pictures 1954) ("I coulda been a contender.").

10. The ILA was far from the first union to fall under mob control. As far back as the nineteenth century, labor unions have faced organized crime infiltration. *See* JACOBS, *supra* note 1, at 7. In addition, by the early twentieth century, some unions were actually inviting professional criminals to join them, hiring them for protection in clashes with employers. *Id.* at 24. These gangsters, however, found the unions comfortable places to stay after their immediate services were no longer needed, and they sought to retain control through various methods, including brute force. *Id.* at 24. Of course, all of this is not to suggest that

ment to Waterfront activities in the early twentieth century.¹¹ It was Irishman Joseph P. Ryan, however, who brought the Waterfront solidly into the depths of corruption with his rise to the ILA presidency in 1927.¹² With the Irish taking hold of the north piers, the Italians saw an opportunity in Brooklyn, and Emil Camarda became the ILA International vice president and official head of six Brooklyn locals.¹³ In 1937, Anthony Anastasio followed as vice president of the International and president of the largest ILA local, Local 1814, maintaining control until his death in 1963.¹⁴ Under Anastasio's leadership, the ILA became intertwined with Cosa Nostra: Anastasio's own organized crime group was taken over by the Gambino crime family.¹⁵ Indeed, organized crime and corruption became so tangled with the ILA that in 1953, the American Federation of Labor, with whom the ILA had been affiliated, instructed the ILA to remove criminals and corrupt officials from office.¹⁶ The ILA did not meet the AFL's demands, and the union was expelled from the AFL that same year.¹⁷ After Anastasio's death, his positions as president of Local 1814 and vice president of the International were handed down to his son-in-law, Anthony

most or even many labor unions suffer from organized crime's influence. In addition, the words of historian John Hutchinson bear repeating:

Corruption owes little more to immoral union leaders than it does to predatory employers who, throughout the history of American business, have sought by cheating and violence to circumvent the strictures of competition, unionization, and the law. It is a companion of the corruption in politics and law enforcement which for generations has characterized some of the major cities of the nation, sheltering the guilty and embroiling the innocent in crime. . . . It thrives in the procedural jungle of the American criminal law. It stems from the social conditions of the cities It has, finally, drawn strength from a public philosophy which, in electing for the competitive society, has tended to trumpet only its virtues, according either praise or tolerance to the victors in a battle lightly burdened with rules.

JOHN HUTCHINSON, *THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS* 7-8 (1972).

11. HUMBERT S. NELLI, *THE BUSINESS OF CRIME* 245-46 (1976).

12. *See id.* Starting with Ryan's ILA presidency in 1927 and continuing for at least the next twenty-five years, the Irish were able to control the Hudson River piers based on Ryan's winning personality; he was "tolerant of poor morals and the evils of the industry, light in his claims on the employers, casual in his concern for the longshoremen." *Id.* *See also* HUTCHINSON, *supra* note 10, at 95.

13. NELLI, *supra* note 11, at 245-46. The six locals were 327, 327-1, 338, 338-1, 1199, and 1199-1. *Id.*

14. ALAN A. BLOCK, *THE BUSINESS OF CRIME* 162-63 (1991). *See also* JACOBS, *supra* note 1, at 26.

15. JACOBS, *supra* note 1, at 26.

16. *Id.* at 82-83.

17. *Id.* at 83.

Scotto, who later assumed a leadership role in the Gambino family as a capo (captain), further cementing Cosa Nostra control.¹⁸

Under the mob's influence, Waterfront activities grew to include stealing from the piers, hijacking vessels between the piers and the terminals, collecting employer kickbacks in exchange for work guarantees, and loan-sharking.¹⁹ Cosa Nostra control spread throughout the Port of New York, with the Gambino family controlling the New York side, and the Genovese family controlling the New Jersey side.²⁰ Local and federal initiatives to control the mob's influence were irregular and yielded only moderate success. The New York-New Jersey Waterfront Commission, formed in 1953, made some attempt to rid the harbor of organized crime.²¹ Its efforts, however, also had the unintended consequence of spreading the mob's influence as far south as Miami; ILA affiliates sent packing by the Waterfront Commission merely made their way toward sunnier skies and new opportunities for power.²² The 1970s saw a dramatic FBI-led investigation, known as UNIRAC (for "union racketeering"), which attempted to combat ILA corruption in New York, Miami, Wilmington, Charleston, and Mobile.²³ UNIRAC led to over one hundred convictions, but, by the next decade, the Reagan-appointed President's Commission on Organized Crime (PCOC) concluded that "[c]orrupt practices . . . already have begun to return to the Atlantic and Gulf Coast docks."²⁴ During its 1981 hearings on Waterfront crime and corruption, the Senate Permanent Subcommittee on Investigations noted that corruption "bred by organized crime [was] still 'business as usual' in some port cities,"²⁵ and "convicted union officials . . . still [held] office or exert[ed] control over the ILA through associates or surrogates."²⁶ By 1984, the Senate Permanent Subcommittee on Investigations noted that,

18. BLOCK, *supra* note 14, at 163–64.

19. NELLI, *supra* note 11, at 247.

20. JACOBS, *supra* note 1, at 50.

21. *Id.*

22. BLOCK, *supra* note 14, at 151.

23. JACOBS, *supra* note 1, at 50–51.

24. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS* 65 (1986).

25. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 309 n.176 (alterations in original) (citing *Waterfront Corruption: Hearings before the Permanent Subcomm. on Investigations, Comm. on Governmental Affairs*, 97th Cong. 3 (1981) (statement of Sen. Sam Nunn)).

26. *Id.* (alterations in original) (citing *Waterfront Corruption: Hearings before the Permanent Subcomm. on Investigations, Comm. on Governmental Affairs*, 97th Cong. 4 (1981) (statement of Sen. Sam Nunn)).

R

R

payoffs were a part of virtually every aspect of the commercial life of a port. Payoffs insured the award of work contracts and continued contracts already awarded. Payoffs were made to insure labor peace and allow management to avoid future strikes. Payoffs were made to control a racket in workmen's compensation claims. Payoffs were made to expand business activity into new ports and to enable companies to circumvent ILA work requirements. . . . [Shipping companies] treat payoffs as a cost of doing business.²⁷

Periodic clean-up attempts failed to prevent the PCOC from bemoaning, fifty years after Cosa Nostra took control, that the ILA remained "virtually a synonym for organized crime in the labor movement."²⁸

B. *Combating Mob Influence in Unions through RICO*

The long history of corruption within labor unions such as the ILA not only led to commissions and investigations but also the creation of legislation intended, in part, to save the unions from the mob. When Senator John L. McClellan introduced the Organized Crime Control Act in 1969, he spoke of combating organized crime's takeover of legitimate organizations, including labor unions, and he expressed concern that unions "have been persuaded for labor peace to countenance gambling, loansharking and pilferage."²⁹ Thus, the Organized Crime Control Act, which includes the RICO statute, was intended as a weapon against labor racketeering from the start.

RICO proscribes "racketeering activity,"³⁰ which the statute defines to include felonies such as "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or

27. BLOCK, *supra* note 14, at 145 (citing PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, WATERFRONT CORRUPTION, S. REP. NO. 98-154, at 1 (1984)).

28. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 24, at 33.

29. Blakey, *supra* note 25, at 257. McClellan also spoke against what he saw as the consequences of organized crime's move into unions:

Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from manipulation of welfare and pension funds and insurance contracts. . . . All of this, of course, makes a mockery of much of the promise of social legislation of the last half century.

Id.

30. Organized Crime Control Act of 1970, 18 U.S.C. § 1962 (2006).

dealing in a controlled substance or listed chemical”³¹ Of course, all of the listed offenses were illegal before RICO. The specified “racketeering activities” are of keen importance, however, as RICO specifically punishes a “pattern of racketeering activities,” not a single action.³² The requisite “pattern of racketeering activities” is defined as “at least two acts of racketeering activity” occurring within a ten-year period.³³ In addition, to establish a RICO violation it is necessary to prove the existence of an “enterprise,” which may take one of two forms.³⁴ First, an enterprise may be “any individual, partnership, corporation, association, or other legal entity.”³⁵ Second, it can be “any union or group of individuals associated in fact, though not a legal entity.”³⁶ This latter type of enterprise is known as an “association in fact.”³⁷ The Supreme Court has held that the definition of “enterprise” encompasses purely illegitimate as well as legitimate organizations.³⁸

There are four major categories of RICO violations.³⁹ First, the statute prohibits a person from using any income derived from a pattern of racketeering activity, or the proceeds from such income, to acquire an interest in, establish, or operate an enterprise.⁴⁰ Second, it is a violation for a person to acquire an interest in an enterprise, or control an enterprise, through a pattern of racketeering activity.⁴¹ Third, it is unlawful to conduct or participate in an enterprise’s affairs through a pattern of racketeering activity.⁴² Finally, RICO forbids conspiracy to violate any of the first three provisions.⁴³

31. § 1961(1)(A)–(B).

32. §§ 1961(5)–1962(a).

33. *Id.* The ten-year period excludes any period of incarceration. § 1961(5).

34. § 1962(c).

35. § 1961(4). The Supreme Court has stated that this type of enterprise “encompasses organizations such as corporations and partnerships, and other ‘legal entities.’” *United States v. Turkette*, 452 U.S. 576, 581 (1981).

36. § 1961(4). The Supreme Court has pointed out that the primary difference between the two categories of enterprise is that “[e]ach category describes a separate type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not. The latter is not a more general description of the former.” *Turkette*, 452 U.S. at 582.

37. 5B FEDERAL PROCEDURE, LAWYERS EDITION § 10:219 (2008).

38. *Turkette*, 452 U.S. at 580–81.

39. These summaries of RICO violations are, necessarily, greatly simplified.

40. § 1962(a); *see also* G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”: *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 349 (1979–1980).

41. § 1962(b); *see also* Blakey & Goldstock, *supra* note 40.

42. § 1962(c); *see also* Blakey & Goldstock, *supra* note 40.

43. § 1962(d); *see also* Blakey & Goldstock, *supra* note 40.

The last item to note in the statute is the provision allowing for two types of civil remedies for RICO violations.⁴⁴ First, victims of RICO violations may sue violators for treble damages.⁴⁵ Second, the Attorney General of the United States may bring proceedings against RICO violators.⁴⁶ If the government is successful, a civil RICO suit may wrest control of an enterprise from a defendant, forbid a defendant from taking part in similar enterprises in the future, and dissolve the enterprise itself.⁴⁷

The civil remedies available have given the government a significant advantage in combating criminal organizations: in a civil RICO suit, the government need only prove violations by a preponderance of the evidence rather than by the stricter “beyond a reasonable doubt” standard they would face in a criminal trial for the same offenses.⁴⁸ Therefore, even if the government is unable to prove criminal liability, it can impose massive penalties and organizational reform through civil RICO liability. Indeed, over the years, the government has instigated almost two dozen civil RICO labor racketeering lawsuits—and it has never lost a case.⁴⁹

44. § 1964. Criminal penalties exist as well, although they are outside the purview of this Note. Briefly, they include fines, imprisonment, and forfeiture of property. § 1963. While individual defendants in this case have been prosecuted under the criminal RICO provisions, *see generally infra* Part II.B.1–2, this Note focuses on the civil RICO angle.

45. § 1964(c).

46. § 1964(b).

47. § 1964(a) (A court may “order[] any person to divest himself of any interest, direct or indirect, in any enterprise; impos[e] reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . ; or order[] dissolution or reorganization of any enterprise . . .”).

48. “Since the government is seeking civil remedies—rather than criminal penalties—under the RICO statute, it must prove each element of the statute by a preponderance of the evidence.” *United States v. Local 1804-1, Int’l Longshoremen’s Ass’n*, 812 F. Supp. 1303, 1309-10 (S.D.N.Y. 1993) (citing *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302 (7th Cir. 1987); *United States v. Local 560, Int’l Bhd. of Teamsters*, 780 F.2d 267, 279–80 n.12 (3rd Cir. 1985); *United States v. Local 359, United Seafood Workers*, 705 F. Supp. 894, 897 (S.D.N.Y. 1989), *aff’d in part, remanded in part*, 889 F.2d 1232 (2d Cir. 1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (“That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards . . .”).

49. *See* JACOBS, *supra* note 1, at 143.

C. The Previous ILA Civil RICO Suit

One important civil RICO suit, *United States v. Local 1804-1, International Longshoremen's Ass'n (ILA Local Case)*,⁵⁰ culminated in 1993. The *ILA Local Case* is relevant to this Note for two reasons. First, it represents one of a very small number of civil RICO labor racketeering cases that have actually gone to trial,⁵¹ and it therefore provides one of the fullest pictures of the judicial perspective on such lawsuits. Second, the *ILA Local Case* is extremely similar to the subsequent case tackling the international organization, the *ILA International Case*, on which this Note focuses, and it therefore provides an excellent point of comparison from which to examine the latter case.⁵²

The *ILA Local Case* included as defendants six ILA local affiliates,⁵³ thirty-six current and former officers of the locals, members of the Genovese and Gambino crime families, two Waterfront employers, and two Waterfront employers' organizations.⁵⁴ The locals, the Waterfront employers, and the employers' organizations were included as nominal defendants, meaning they did not stand accused of committing RICO violations themselves. The government included the nominal defendants in the complaint only to obtain complete relief.⁵⁵ Before the court made its determination of liability, however, all but four defendants defaulted or entered consent agreements with the government.⁵⁶

50. 812 F. Supp. 1303.

51. Out of all the civil RICO cases involving labor unions, only two required trials: the *ILA Local Case* and *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984). One additional case required a hearing for the court to grant the government's request for preliminary injunction, which was later converted to a final decree. See *United States v. Local 30, United Slate, Tile, and Composition Roofers*, 686 F. Supp. 1139 (E.D. Pa. 1988), *aff'd* 871 F.2d 401 (3d Cir. 1989). All other civil RICO labor racketeering cases "were resolved by negotiated consent decrees that included appointment of a trustee or monitor." JACOBS, *supra* note 1, at 143.

52. See *infra* notes 633–666 and accompanying text.

53. Specifically locals 1804-1, 1588, 1814, 1809, 824, and 1909. *Local 1804-1*, 812 F. Supp. at 1308 n.1.

54. *Id.*

55. See *id.* at 1308 n.2. By "complete relief," the court presumably meant that the nominal defendants were included in the RICO enterprise in order to allow for the civil RICO statutory relief, including reorganization of the enterprise and appointment of trustees over the locals.

56. *Id.* The remaining four were Donald Carson, Anthony Gallagher, George Lachnicht, and Venero Mangano. *Id.* Carson was the secretary-treasurer of Locals 1587 and 1588 from 1972–1988, and he was the executive vice president of the International. *Id.* at 1317. Gallagher "is connected with several high level figures in the Genovese family" and he "owned a number of Waterfront business." *Id.* at

The government alleged that the enterprise conducted its affairs through a pattern of racketeering activity, a RICO violation,⁵⁷ and that each defendant had committed numerous predicate acts.⁵⁸ The enterprise alleged in the complaint was the “Waterfront,” or “the ‘unholy alliance’ among the ILA, ILA union officials, Waterfront businessmen, members of the Genovese organized crime family in New Jersey, and members of the Gambino organized crime family and their henchmen, the Westies, in Brooklyn and Manhattan.”⁵⁹ The enterprise’s alleged common objective was “the corrupt control and influence of Waterfront industry and labor unions in order to enrich themselves and their associates.”⁶⁰ After a bench trial, the court concluded that there was an association-in-fact RICO enterprise.⁶¹ The court also found that the defendants remaining in the suit had engaged in predicate acts, violating RICO.⁶²

The court’s opinion in the *ILA Local Case* is essential to evaluating the opinion and repercussions of the subsequent *ILA International Case*. As the *ILA International* court noted in its opinion,

The predicate acts alleged in the ILA Local Civil RICO Case are different in the details than the predicate acts alleged in this action, but similar in the overall picture they convey of the Waterfront unions and businesses having been infiltrated by agents of organized crime for the purpose of pressing those legitimate businesses and organizations into service as “cash cows” for the Mafia.⁶³

1317. Lachnicht was a longshoreman and vice president of Local 1588 for roughly thirty years. *Id.* at 1318. Mangano, at the time of the trial, was the underboss of the Genovese crime family. *Id.* at 1316.

57. See Organized Crime Control Act of 1970, 18 U.S.C. § 1962(c) (2006).

58. *Local 1804-1*, 812 F. Supp. at 1309. In its amended complaint, the government also alleged violation of § 1962(b), as well as two violations of § 1962(d) in conspiring to violate § 1962(b) and (c). The government alleged the same predicate acts for each claim. The court notes, however, that “[a]pparently the government has abandoned these [additional] claims, for it failed to propose findings of fact and conclusions of law with regard to these claims.” *Id.* at 1309 n.5.

59. *Id.* at 1310.

60. Amended Complaint ¶ 70, *United States v. Local 1804-1, Int’l Longshoremen’s Ass’n*, 812 F. Supp. 1303 (S.D.N.Y. 1993) (Nos. 90-CV-0963; 90-CV-5618) [hereinafter *ILA Local Complaint*].

61. *Local 1804-1*, 812 F. Supp. at 1315.

62. *Id.* at 1349–50. The predicate acts included embezzlement, extortion, Taft-Hartley Act violations, and wire fraud. See *id.*

63. *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422, 447 (E.D.N.Y. 2007).

Additionally, both cases alleged that the “Waterfront Enterprise” was composed of “Waterfront businesses and organizations as well as organized crime families and their agents,”⁶⁴ and they alleged the same common purpose of the enterprise.⁶⁵ Finally, the *ILA International* court itself recognized that “the closest parallel to the theory of the Government’s case and the types of relief it seeks in this case is the civil action in [the *ILA Local Case*].”⁶⁶ Therefore, it is both relevant and helpful to examine the two cases for parallels.

II.

UNITED STATES V. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

On July 6, 2005, the federal government commenced a civil RICO lawsuit against the international ILA organization.⁶⁷ The complaint alleged that “the Genovese and Gambino crime families conspired with their associates occupying high-ranking positions in legitimate Waterfront operations, particularly the ILA and several associated labor organizations, to extend and maintain the influence of organized crime through a pattern of racketeering activity including extortion, money laundering, and mail and wire fraud.”⁶⁸ Unlike the RICO suit involving the ILA locals, the case against the international organization culminated years later⁶⁹ with the dismissal of the complaint.⁷⁰ Considering the government’s stellar track record in civil RICO cases involving mob-infiltrated labor unions,⁷¹ this result merits serious consideration. Was the dismissal in the *ILA International Case* based on straightforward legal flaws in the

64. *Id.* The alleged enterprises differed slightly; for example, the *ILA International Case* obviously named the international ILA organization as a member of the enterprise, while the *ILA Local Case* did not. However, “a substantial degree of overlap exists.” *Id.* at 448.

65. *See id.* at 448.

66. *Id.* at 446.

67. The government’s first complaint was filed on this date. Complaint, *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422 (E.D.N.Y. 2007) (No. 05-CV-3212). An amended complaint was subsequently filed on February 21, 2006. *ILA International Complaint*, *supra* note 9. This Note will examine only the amended complaint, and all references to the complaint refer to the February 21 filing.

68. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 426.

69. The decision in the *ILA International Case* was issued on November 1, 2007. *Id.* at 422.

70. *See id.* (dismissed under FED. R. CIV. P. 12(b)(6) for failure to state a claim on which relief could be granted).

71. *See supra* note 49 and accompanying text.

complaint, or does it represent a break from past RICO interpretation? And what does the outcome mean for future civil RICO suits?

A. *Facts of the Suit*

The suit involved three groups of defendants: nominal defendants, ILA officer defendants, and Cosa Nostra defendants. The government did not allege that the nominal defendants had committed any RICO violations, but it joined them in order to facilitate “the full relief sought in this action.”⁷² The nominal defendants included, first and foremost, the ILA, but also the Management-International Longshoremen’s Association Managed Health Care Trust Fund (MILA),⁷³ the Metropolitan Marine Maintenance Contractors’ Association (METRO),⁷⁴ METRO-ILA Funds,⁷⁵ the Board of Trustees of each METRO-ILA Fund, the ILA executive vice president, the ILA general vice president, the ILA general organizer, and twenty-four vice presidents.⁷⁶ The Cosa Nos-

72. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 427. The court noted that the nominal defendants were presumably joined under FED. R. CIV. P. 19(a), although the government did not specifically cite to the Rule; in any event, none of the nominal defendants objected that their joining in this action fell outside the scope of Rule 19, so the court did not examine the issue further. *See id.* at 427 n.5. For the reader’s background:

Rule 19(a) is applicable when nonjoinder would have either of the following effects. First, it would prevent complete relief from being accorded among those who are parties to the action or, second, the absentee claims an interest relating to the subject matter of the action and is so situated that the nonparty’s absence from the action will have a prejudicial effect on that person’s ability to protect that interest or will leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. . . . There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them.

7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1604 (3d ed. 2008).

73. MILA is a benefit fund that provides the majority of ILA members with health insurance. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 428.

74. METRO is “an association of employers engaged in interstate commerce on the Waterfront, who . . . employ ILA members.” *Id.* at 428–29.

75. METRO and ILA Locals 1804-1 and 1814 created several funds together: the METRO-ILA Fringe Benefit Fund, the METRO-ILA Pension Fund, and the METRO-ILA Individual Account Retirement Fund. *Id.*

76. *Id.* at 427–29.

tra defendants in the suit were identified as Peter Gotti,⁷⁷ Anthony Ciccone,⁷⁸ Jerome Brancato,⁷⁹ and James Cashin.⁸⁰ The ILA officer defendants were John Bowers, Sr.,⁸¹ Robert E. Gleason,⁸² Harold J. Daggett,⁸³ Arthur Coffey,⁸⁴ and Albert Cernadas.⁸⁵

The government's complaint alleged that the ILA officer defendants and the Cosa Nostra defendants committed two violations of RICO: conspiracy to acquire an interest in an enterprise through racketeering activity and conspiracy to participate in an enterprise through racketeering activity.⁸⁶ The government alleged fifteen predicate racketeering acts, including extortion,⁸⁷ conspiracy to extort,⁸⁸ wire fraud,⁸⁹ mail fraud,⁹⁰ money laundering,⁹¹ and money conspiracy.⁹² Again, the government did not assert that the nominal defendants committed any RICO violations.⁹³

77. Gotti was allegedly the boss of the Gambino crime family. *See id.* at 429. He ceased to be an active defendant in the case when he entered a consent decree with the government, which resolved the government's claims against him and enjoined him from "participating in the affairs of the ILA or the Waterfront Enterprise in any way." *Id.*

78. Ciccone was alleged to be a captain in the Gambino crime family. *See id.*

79. Brancato was alleged to be a soldier in the Gambino family. *See id.*

80. Cashin was alleged to be an associate of the Genovese organized crime family as well as a former ILA official. *See id.*

81. Bowers was executive vice president of the ILA for twenty-four years before becoming president in 1987. *See id.* at 429. The government also claimed that Bowers was an associate of the Genovese family. *See id.* at 430.

82. Gleason was the ILA's secretary-treasurer and a member of MILA Board. *See id.* at 430.

83. Daggett was the ILA's assistant general organizer, Local 1804-1's president, and an MILA Board member. *See id.* He was further alleged to be a Genovese family associate. *See id.*

84. Coffey was the vice president of the ILA Executive Council as well as an official in various ILA district and local organizations and a member of the MILA Board. *See id.*

85. Cernadas was the executive vice president of the ILA and a MILA Board member. *See id.* Cernadas also entered into a consent decree with the government, under which he resigned from his ILA positions and agreed not to hold any position in the ILA or the Waterfront Enterprise at any time in the future. *See id.*

86. *See id.* at 431. Specifically, "The Amended Complaint alleges two counts of RICO conspiracy—conspiracy to violate 18 U.S.C. § 1962(c) . . . in violation of § 1962(d) . . . and conspiracy to violate § 1962(b) in violation of § 1962(d)." *Id.*

87. *Id.* at 433, 435, 438–42.

88. *Id.*

89. *Id.* at 433, 435, 438–40.

90. *Id.* at 436–38.

91. *Id.* at 441.

92. *Id.*

93. *See id.* at 427 n.5.

The government alleged that the “Waterfront Enterprise” was composed of:

[T]he ILA and certain of its subordinate components, namely, the Atlantic Coast District, the South Atlantic & Gulf Coast District, Locals 1, 824, 1235, 1588, 1804-1, 1814, 1922, 1922-1, and 2061; certain current and former ILA officials; certain welfare benefit and pension benefit funds managed for the benefit of ILA members, namely, MILA, the METRO-ILA Funds, the ILA Local 1922 Health and Welfare Funds, the ILA-Employers Southeast Florida Ports Welfare Fund; certain businesses operating on or about the Waterfront; an “employer association” operating on or about the Waterfront, namely METRO; certain members and associates of the Genovese and Gambino crime families; and certain businesses operating in the Port of Miami.⁹⁴

The government claimed the enterprise’s purpose was to “exercise corrupt control and influence over labor unions and businesses operating on the Waterfront, the Port of Miami and elsewhere in order to enrich themselves and their associates.”⁹⁵

The government sought several varieties of relief, such as the enjoinder of any defendant found to have violated RICO from having any involvement with the ILA and its funds, holding a position of trust in any labor union, or having any involvement with any pensions or welfare trusts.⁹⁶ Most importantly, the government asked the court to appoint a trustee for the ILA and its funds in order to provide strict oversight and combat corruption.⁹⁷ The ILA moved to dismiss, in a motion attacking the complaint as it applied to all defendants.⁹⁸

B. The Outcome: Consistent with Existing RICO Law or Substantially Different?

In the end, the court concluded that the complaint was fatally flawed in three respects. Specifically, the court found that the incorporation of the attached pleadings was defective, the allegations of the predicate acts were deficient, and the allegations of a RICO enterprise were incoherent. As discussed, the outcome in the *ILA International Case* was strikingly different from that of the *ILA Local*

94. *Id.* at 431–32 (quotations omitted).

95. *Id.* at 432.

96. See *ILA International Complaint*, *supra* note 9, at 76–77, 79–81.

97. See *id.* at 78–79, 82–84.

98. See *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 459.

Case, in spite of the fact that the two cases bear many similarities of form, involving similar predicate acts, many of the same defendants, and similar enterprises with identical purposes.⁹⁹ This Note proceeds to compare the flawed elements of the *ILA International* complaint with the successful *ILA Local* complaint and the court's subsequent holdings. In doing so, this Note explores whether the *ILA International Case* substantially deviates from past interpretations of RICO law, as well as what the court's holdings will mean for the government in the future.

1. Sufficiency of the Complaint Under Rule 8(a)

The court in the *ILA International Case* quickly concluded that the pleading in the complaint was "incoherent" and violated Federal Rule of Civil Procedure 8(a)¹⁰⁰ for three major reasons.¹⁰¹ First, the court took issue with the incorporation of the government's exhibits. The government attached to the complaint more than 400 pages of exhibits, including criminal indictments and civil pleadings from previous litigation.¹⁰² However, the court noted that "nowhere in the . . . Complaint does the Government expressly incorporate by reference any portions of the attached exhibits."¹⁰³ For example, in identifying Albert Cernadas as a defendant, the complaint noted that he had been indicted for certain offenses in a criminal case, then stated, "A copy of the Indictment is annexed as Exhibit 1."¹⁰⁴ Discussing the same prosecution in reference to defendant Arthur Coffey, the complaint instructed, "See Exhibits 1 and 2."¹⁰⁵ In detailing the alleged predicate acts, the complaint's language continued to be imprecise; to take one example:

On March 17, 2003, Defendants ANTHONY CICCONE and JEROME BRANCATO were convicted of violating and conspiring to violate RICO in *United States v. Gotti, et al.*, No. 02 Cr. 606 (FB), found to have committed racketeering acts . . . and convicted of committing these acts as separate counts in the indictment.¹⁰⁶

99. *See supra* notes 6363–66 and accompanying text.

100. FED. R. CIV. P. 8(a) ("[A] pleading that states a claim for relief must contain," *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief.").

101. *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 460.

102. *See id.* at 460–61.

103. *Id.* at 461.

104. *ILA International Complaint*, *supra* note 9, ¶ 20.

105. *Id.* ¶ 23.

106. *Id.* ¶ 113.

The government did not, however, specifically state that it was incorporating any attached document or any specific paragraph; rather, “[e]ach exhibit [wa]s simply noted in passing”¹⁰⁷

The lack of explicit incorporation became even more significant when the court pointed out that essential elements of predicate acts were not found on the face of the complaint, such as the “use of threatened or actual force and the identity of the victim with respect to several of the extortion acts, or a use of the mails or wires with respect to most of the mail or wire fraud acts”¹⁰⁸ While the government argued that the elements were incorporated by reference to exhibits, the court disagreed, pointing out that the complaint did not *expressly* incorporate any specific sections of the exhibits.¹⁰⁹ Rather, the court acerbically stated that it was “compelled to decline the Government’s request to abolish or ignore the modest pleading requirements imposed on it by Federal Rule of Civil Procedure 8(a).”¹¹⁰

In evaluating the incorporation flaws in the *ILA International Case*, a comparison to the *ILA Local Case*, which expressly incorporated exhibits, is illustrative.¹¹¹ In contrast to the language in the *ILA International* complaint, the complaint in the *ILA Local Case* attached the indictments and judgments of conviction from multiple criminal cases, then explicitly incorporated specific counts of the attachments; for example:

Copies of the indictment and the judgments of conviction . . . are attached to this Complaint as Exhibit A. Plaintiff incorporates by reference Counts 1 through 6, 8 through 11, and 13 through 84 of that indictment and repeats and realleges those counts as if fully set forth herein.¹¹²

The complaint employed similar language to incorporate sections of additional indictments, informations, and judgments of

107. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 462.

108. *Id.* at 461. For further discussion of the missing elements, see *infra* Part II.B.2.

109. See *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 461. The court recognized that there is “no prescribed procedure for referring to incorporated matter,” but “the references to prior allegations must be direct and explicit, in order to enable the responding party to ascertain the nature and extent of the incorporation.” *Id.* (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (3d ed. 2008)).

110. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 461.

111. In fact, the court made such a comparison. See *id.* at 462 n.71.

112. *ILA Local Complaint*, *supra* note 60, ¶ 75.

conviction.¹¹³ The specificity of the *ILA Local* complaint highlights the flaws in the *ILA International* complaint's incorporations.

Furthermore, the *ILA International* court pointed out that, aside from a lack of express incorporation, two major problems remained with the complaint. First, "the Government's proposed method of pleading necessary elements of its RICO claim by incorporating factual allegations contained in several prior lengthy criminal and civil RICO pleadings is . . . a blatant violation of Rule 8(a)(2) . . .,"¹¹⁴ which requires a plaintiff to give a "short and plain statement of the claim showing that the pleader is entitled to relief."¹¹⁵ Noting that one of the purposes of this requirement is to put the defendant on notice of the claim against him,¹¹⁶ the court stated that the voluminous attachments did not provide fair notice of the RICO claims.¹¹⁷ Indeed, the court posited that accepting the complaint and attachments in their present form would force the defendants to "respond in their Answer not only to each of the 258 paragraphs of the . . . Complaint, but also to each and every paragraph of every attached pleading . . ."¹¹⁸ The *ILA Local* complaint only highlights this flaw. As noted, the *ILA Local* complaint expressly incorporated specific sections of exhibits, rather than referring to attachments as a whole. Therefore, the defendants in the *ILA Local Case* were on notice of the relevant allegations without sifting through hundreds of additional pages.

Finally, while the *ILA International* court could theoretically incorporate the exhibits in their entirety, rather than puzzling out which paragraphs the government intended to incorporate, the court pointed out that a third, even deeper issue would arise under comprehensive incorporation: such a strategy "would render the . . . Complaint utterly incoherent."¹¹⁹ Several attached exhibits alleged the existence of several different enterprises, many of them dissimilar from the Waterfront Enterprise of the *ILA International* complaint. The *ILA International Case*, of course, alleged ILA involvement in the enterprise, as did an attached complaint from another civil suit.¹²⁰ However, attached criminal indictments indicated that the ILA had been an unwitting victim of the mob's

113. *See id.* ¶¶ 78, 83, 86, 87, 89, 90, 91.

114. *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 463.

115. FED. R. CIV. P. 8(a)(2).

116. *See Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 463 (citing *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)).

117. *Id.* at 463.

118. *Id.* at 464.

119. *Id.* at 462 n.72.

120. *See id.* at 445.

activities and not a member of any RICO enterprise.¹²¹ As the court succinctly stated, “[I]f all of the allegations in the prior pleadings are deemed to be incorporated into the . . . Complaint, then the . . . Complaint would become an unintelligible morass of self-contradictory allegations.”¹²²

Considering each of the government’s arguments in support of incorporating the exhibits in the complaint, the court’s decision seems undeniably correct. In addition, it is not inconsistent with the RICO interpretations used in the *ILA Local Case*. The complaint in the *ILA Local Case* expressly and carefully incorporated the necessary information from the attached exhibits, and it properly put the defendants on notice as to what the allegations against them were. Moreover, the incorporated exhibits in the *ILA Local* complaint were not contradictory. The divergence between the two complaints satisfactorily accounts for the difference in outcome.

2. Sufficiency of the Pleading of Certain Predicate Offenses

While the complaint’s failure to adhere to Rule 8(a) would be sufficient to justify dismissal under Rule 12(b)(6), the *ILA International* court further identified two major flaws in the pleading of several predicate acts: failure to adequately plead the elements of mail and wire fraud, and failure to adequately plead the elements of extortion.

a. The Pleading of Mail and Wire Fraud

First, the court noted that nine of the alleged predicate acts constituted violations of mail and wire fraud statutes.¹²³ Federal Rule of Civil Procedure 9(b) states that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”¹²⁴ This heightened pleading requirement “applies to allegations of mail or wire fraud alleged as predicate acts in a RICO complaint.”¹²⁵ As a result, a RICO complaint alleging mail or wire fraud must set forth “the contents of the communications, who was involved, where and when they took place, and ex-

121. *See id.* at 443–44.

122. *Id.* at 462–63 n.72.

123. *Id.* at 477 & n.92.

124. FED. R. CIV. P. 9(b).

125. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 479 (citing *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d Cir. 2004); *see also* *Bernstein v. Misk*, 948 F. Supp. 228, 239 (E.D.N.Y. 1997); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1251.1 (3d ed. 2004)).

plain why they were fraudulent,”¹²⁶ although the messages need not carry fraudulent statements themselves, so long as they “are used to further the fraudulent scheme.”¹²⁷

The court concluded that the government’s allegations of mail and wire fraud fell short of these standards for at least three reasons. First, the government did not specifically identify the use of mail or wires in the majority of the alleged fraud schemes.¹²⁸ The government argued that it satisfied this element through the incorporation of several criminal indictments, which themselves alleged specific mailings and wire use.¹²⁹ As previously discussed, however, the attempt to incorporate the lengthy exhibits into the complaint itself violated Rule 8(a)(2), and therefore the allegations could not be considered part of the complaint. The government’s argument failed.¹³⁰

Furthermore, even if the indictments could be incorporated, the complaint would still be inadequate under the heightened pleading requirement of Rule 9(b).¹³¹ The allegations in the attached indictments merely identified dates, names, and addresses related to certain telephone conversations or mailings, without specifying any precise statements or indicating how the statements related to the fraudulent schemes.¹³² Under Rule 9(b), the allegations would not be adequate.

Finally, in three of the specified fraudulent schemes, the government did not even attempt to incorporate allegations of wire and mail use, arguing that specific pleading was unnecessary, as “[e]vidence of mailings made in furtherance of the other fraud schemes alleged in the Complaint has been produced by the United States or is otherwise available to, or in the possession of, the Defendants.”¹³³ Unfortunately for the government, the court rejected this novel position.¹³⁴ While conceding that in some cases

126. *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 479 (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993)).

127. *Id.* at 479 (citing *Schmuck v. United States*, 489 U.S. 705, 714–15 (1989)).

128. *See id.* at 478.

129. *See id.*

130. *See id.* at 478–79; *see also supra* Part II.B.1.

131. *See Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 479–80.

132. *See id.* at 480.

133. *Id.*

134. *Id.* at 481. The court noted, “The Government cites no authority in support of the proposition that a RICO plaintiff can satisfy Rule 9(b)’s pleading requirement by simply asserting that evidence of wrongdoing is ‘available to, or in the possession of, the Defendants’” *Id.* at 480.

specific pleading is not possible and therefore not strictly required, such as when the necessary information is in the “exclusive control” of the defendants,¹³⁵ the court rejected such leniency in this case.¹³⁶ Rather, it explained, “If the Government possesses these mailings, as it logically must in order to produce them to the defendants, then it should have no trouble conforming the allegations in the . . . Complaint to the requirements of Rule 9(b) with respect to them.”¹³⁷ Additionally, if the evidence was in the exclusive control of the defendants, the government should have alleged as much; it also should have alleged that the messages furthered the fraudulent scheme or contained fraudulent statements.¹³⁸ As the government failed to note *any* use of mail or wires in relation to these schemes, however, the complaint clearly failed to meet the pleading requirements.¹³⁹ In consequence, the court found the complaint to be defective, beyond the issues with the Rule 8(a) requirements. The analysis of the mail and wire fraud schemes pleadings does not seem to present any break with precedent; indeed, a portion of the opinion was devoted to rejecting the government’s creative interpretation of Rule 9(b).¹⁴⁰ Comparison with the *ILA Local Case* further demonstrates that the *ILA International* court’s decision on this point was very straightforward.

The government in the *ILA Local Case* did not allege any wire fraud, and it alleged only one violation of the mail fraud statute in its complaint. The government claimed that certain defendants embezzled funds from Local 1814 and covered up their activities by sending false annual reports to the United States Federal Election Commission.¹⁴¹ In contrast to the inadequate allegations of the use of the mail in the *ILA International Case*, the complaint in the *ILA Local Case* identified the senders and recipients of the mailings, the relevant time frame, the statements contained in the mailings, and why those statements were fraudulent:

The defendants named in ¶ 92 above, for the purpose of executing the scheme to defraud described herein, placed and caused to be placed in an authorized depository, to be delivered by the United States Postal Service to the United States

135. *Id.* at 480 (evaluating such a holding in *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987)).

136. *Id.* at 480–81.

137. *Id.* at 481.

138. *See id.*

139. *See id.*

140. *See id.* at 480–81.

141. *ILA Local Complaint*, *supra* note 60, ¶¶ 92–96.

Federal Elections Commission, annual reports from 1981 through 1988 inclusive, which annual reports contained the false representations and material omissions of fact identified in ¶¶ 92–95 above.¹⁴²

Therefore, as the plaintiff in the *ILA Local Case* specifically alleged all the necessary elements of mail fraud, including those required under the heightened pleading standard, it comes as no surprise that the *ILA International* complaint was dismissed, while the *ILA Local* complaint was not.

b. The Pleading of Extortion

The *ILA International* court further determined that the government failed to adequately plead all of the elements of extortion in two predicate acts.¹⁴³ Extortion, according to federal statute, is “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”¹⁴⁴ The *ILA International* complaint conspicuously lacked any allegations of the use of force, violence, or fear in relation to two claimed predicate acts of extortion.¹⁴⁵ The government attempted to circumvent this issue, arguing that it had no burden to prove that any of the alleged extortion schemes involved direct threats, since “[w]here a union has a long history of corruption, fear can be invoked in subtle and indirect ways.”¹⁴⁶ The court, however, pointed out that the government was unable to cite any authority to support the claim that “extortion . . . may be pleaded without even identifying the victims of the alleged extortion and indicating that *some* use or threat of force, however indirect, was used to compel their consent to part with property.”¹⁴⁷

The government also advanced a second, more convoluted argument as to why the extortion allegations in the complaint were sufficient. It claimed the allegations of extortion were supported by previous appellate rulings in two criminal cases, which upheld the convictions of two of the *ILA International* defendants for extortion based on the same acts alleged in the *ILA International Case*.¹⁴⁸ The court disagreed with this logic as well, pointing out that neither of

142. *Id.* ¶ 96.

143. *See Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 483.

144. Hobbs Act, 18 U.S.C. § 1951(b)(2) (1946).

145. *See Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 483.

146. *Id.* at 482 (quoting *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 812 F. Supp. 1303, 1343 (S.D.N.Y. 1993)).

147. *Id.* at 483.

148. *See id.* at 482.

the cited opinions confronted the issue of whether every element of extortion was satisfactorily alleged in the pleadings, and “even if they had, the resolution of those cases would not be dispositive” of whether the complaint was satisfactory.¹⁴⁹ In the end, the court maintained that the plaintiff’s failure to allege any force, threat, or violence in relation to the extortion allegations meant that the government failed to state claims of extortion.¹⁵⁰

The result in the *ILA International Case* is entirely compatible with the *ILA Local Case*. Examining the language of the *ILA Local* complaint, it is clear that the allegations of extortion in that case did, in fact, conform to pleading requirements, explicitly stating all necessary elements. For instance, in claiming the extortion of Local 1804-1 members, the government asserted that the

Defendants . . . obtained and attempted to obtain money and property from the membership of 1804-1 . . . with . . . [the members’] consent induced by the wrongful use of actual and threatened force, violence, and/or fear, including fear of physical and economic injury; that is, that among other means, the defendants did create and attempt and conspire to create a climate of intimidation and fear which demonstrated that ILA Local 1804-1 was under the control of, and acting on behalf of, La Cosa Nostra figures.¹⁵¹

More specific allegations followed, including a list of mob figures and other criminals occupying Local 1804-1 offices and a list of violent incidents “publicly connected to La Cosa Nostra in order to maintain control of ILA Local 1804-1 and the Waterfront.”¹⁵² This pattern of alleging the appropriate elements of the offense of extortion, followed by further details, appears throughout the complaint.¹⁵³ Considering the obvious differences in the pleadings of

149. *Id.* at 482–83.

150. *See id.* at 483.

151. ILA Local Complaint, *supra* note 60, ¶ 76.

152. *Id.* ¶ 77.

153. *See id.* ¶¶ 80, 99, 102, 104. Moreover, it is interesting to note that the *ILA Local* court was not disposed to allow the government to slip predicate offenses through without fully satisfying its burden; it ultimately determined after trial that two alleged predicate acts of extortion remained unproven by the government, specifically because the government was unable to prove the element of actual or threatened force, violence, or fear. *See United States v. Local 1804-1, Int’l Longshoremen’s Ass’n*, 812 F. Supp. 1303, 1326, 1334, 1337–38 (S.D.N.Y. 1993). While explicitly noting that “fear can be invoked in subtle and indirect ways,” *id.* at 1335, the *ILA Local* court was no more willing than the *ILA International* court to ignore the required elements of extortion.

extortion between the two cases, the difference in outcome is unsurprising.

Despite the similarities between the cases, the *ILA International* court's finding of inadequately incorporated exhibits and inadequately pleaded predicate acts was consistent with existing RICO interpretation. The issues that the government faces in the ongoing case¹⁵⁴ are not based on novel interpretations of RICO law. Moreover, the government most likely will be able to fix the two flaws through more comprehensive pleading, including specific incorporation of exhibits and allegations of all relevant elements of the predicate acts.

3. The Alleged Waterfront Enterprise as an "Association-in-Fact"

Beyond the complaint's violation of Rule 8(a) and its inadequate pleading of predicate offenses, the court unexpectedly found another major flaw in the failure to allege an enterprise satisfying the requirements of RICO.¹⁵⁵ While the court's rulings on the other two flaws appear consistent with the existing legal landscape and suggest that the flaws are curable, the ruling on the RICO enterprise is inconsistent with the *ILA Local Case*, which had proven similar in so many other respects. Indeed, the court's interpretation of RICO as it relates to the enterprise in this case could be considered a substantial modification of prior RICO interpretation and one that may trouble the government in the future.

In making its decision, the *ILA International* court first reviewed the pleading requirement for a RICO enterprise, observing that it is necessary to "plead and prove the existence of a group of individuals or other legal entities operating as a continuing unit with a formal or informal structure and united by some common purpose in order to state a valid claim."¹⁵⁶ The court then went on to conclude

154. A second amended complaint is currently before the court. *See* Second Amended Complaint, Int'l Longshoremen's Ass'n, CV-05-3212 (E.D.N.Y. Jan. 2, 2008) [hereinafter Second Amended Complaint].

155. *Int'l Longshoremen's Ass'n*, 512 F. Supp. 2d at 475.

156. *Id.* at 474. This explicit pleading requirement applies to an "association-in-fact," one type of RICO enterprise; any enterprise composed of more than one individual or organization, which together do not comprise a legal entity, is considered an association-in-fact. *See supra* notes 36–37 and accompanying text. An association-in-fact differs from an alleged enterprise consisting of a legal entity, such as a single corporation. *See id.* To be precise, a legal entity must also operate as a unit with a structure, united by a common purpose, to be considered an enterprise, but it is generally easy to satisfy these elements based on the legal definition of the entity. *See, e.g.,* United States v. Kirk, 844 F.2d 660, 664 (9th Cir. 1988); Bennett v. Berg, 685 F.2d 1053, 1060–61 (8th Cir. 1982).

that the alleged enterprise in the complaint was insufficient to satisfy the requirements of RICO.¹⁵⁷

One obvious problem with the alleged enterprise, which the court duly noted, was its ambiguity.¹⁵⁸ First of all, it failed to indicate which specific individuals and legal entities were involved in the enterprise. Its reference to “certain current and former ILA officials,” “certain members and associates of the Genovese and Gambino crime families,” and “certain businesses operating in the Port of Miami” was far from clear.¹⁵⁹ Additionally, the complaint “le[ft] a plethora of unanswered questions” as to purpose, membership, structure.¹⁶⁰ Based solely on these facts, it was virtually inevitable that the alleged enterprise would be found deficient. These problems, however, are curable, requiring only that the government be more thorough in making its allegations.

The more troublesome issue for the government is the court’s finding that the alleged enterprise was incoherent, based on the fact that the nominal defendants did not share the enterprise’s common purpose.¹⁶¹ The nominal defendants, as previously discussed, were joined in the litigation to effect full relief; they were not accused of any wrongdoing or any RICO violation.¹⁶² While the government contended that the common purpose of the enterprise was “to exercise corrupt control and influence over labor unions and businesses operating on the Waterfront, the Port of Miami and elsewhere in order to enrich themselves and their associates,”¹⁶³ the

157. See *Int’l Longshoremen’s Ass’n*, 512 F. Supp. 2d at 477.

158. See *id.* at 475.

159. *Id.* at 431–32.

160. *Id.* at 475. The court continues with a list of missing information:

For example, who are the unnamed ‘current and former ILA officials’ and ‘certain businesses operating on or about the Waterfront’ that are members of the Waterfront Enterprise? What criteria distinguish a Waterfront entity that is a member of the Waterfront Enterprise from one that is not? What is the organizational structure of the Waterfront Enterprise? Who is in charge of it? How are instructions conveyed between its members? How does one become a member of, or terminate membership in, the Waterfront Enterprise? . . . [W]hat common purpose unites the members of the Waterfront Enterprise, what is the purpose of the enterprise itself?

Id. The “examples” seem, perhaps, excessive; one could envision an adequately pleaded association-in-fact without specific details on how instructions are conveyed between its members. The point, however, is that the complaint sorely lacks basic information regarding the structure, function, and indeed existence of the enterprise—and this point is well-taken.

161. *Id.* at 476–77.

162. *Id.* at 427; see also *supra* note 722 and accompanying text.

163. ILA International Complaint, *supra* note 9, ¶ 68.

court ultimately found that “the ‘common purpose’ alleged in paragraph 68 [of the complaint was] only the Racketeering Defendants’ common purpose, not the common purpose of the Waterfront Enterprise.”¹⁶⁴ Explicit questioning during oral argument revealed the true nature of the alleged common purpose, undermining the claim as it applied to the nominal defendants. The colloquy between the judge and the Assistant United States Attorney during oral argument is enlightening:

THE COURT: When in Paragraph 68 [of the complaint] you say, the defendants’ common purpose, does that include the nominal defendants as well?

[GOVERNMENT]: It does not.

. . . .

[GOVERNMENT]: Your Honor, the United States tried to take great pains . . . in distinguishing between the ILA and the Metro Funds and MILA and people such as Mr. Daggett and Mr Bowers and Mr. Gleason

THE COURT: So when in paragraph 68 it provides, the defendants’ common purpose, that does not include the nominal defendants?

[GOVERNMENT]: That is correct, Your Honor.¹⁶⁵

For the government to state that certain defendants and alleged members of the enterprise did not share the purpose of the enterprise seems, at best, self-defeating, and at worst, an admission that no common purpose existed. As an association-in-fact enterprise *must* have a common purpose to be cognizable, a lack of common purpose means no enterprise legally exists.¹⁶⁶

Moreover, even if the government explicitly claimed that the nominal defendants shared the enterprise’s common purpose, the allegation would prove untenable: the nominal defendants, who were not accused of wrongdoing or any RICO violation, logically could not share the fraudulent purpose of “exercise[ing] corrupt control”¹⁶⁷ over the Waterfront.¹⁶⁸ As a result, the court believed that, even under a generous interpretation,

164. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 476–77.

165. *Id.*

166. *See* *United States v. Turkette*, 452 U.S. 576, 583 (1981) (noting that an association-in-fact enterprise is “a group of persons associated together for a common purpose of engaging in a course of conduct”).

167. ILA International Complaint, *supra* note 9, ¶ 68.

168. Hypothetically, the government may be holding on to evidence that the nominal defendants have engaged in fraudulent and corrupt conduct, although it

[T]he . . . Complaint depicts the Waterfront Enterprise as a quasi-discrete commercial ecosystem, populated by various entities interconnected in a web of personal and commercial relationships that evolves organically as each entity *pursues its own interests, some of which coincide with those of other denizens of the Waterfront commercial habitat and others being quite adversely aligned*.¹⁶⁹

Therefore, it refused to “abet the Government’s effort to stretch the concept of a racketeering enterprise beyond all recognition in order to bring various otherwise disinterested parties within its scope, even for the worthwhile purpose of combating the influence of organized crime on the Waterfront.”¹⁷⁰ As an enterprise must be united by a common purpose to satisfy RICO, the allegation of this enterprise was doomed to fail.

This ruling, while logically coherent, was also strikingly novel. The court’s refusal to incorporate the nominal defendants into the RICO enterprise, based on the lack of any common purpose, represents a significant break from existing RICO interpretations. Comparison to the *ILA Local Case* emphasizes the difference.

In contrast to the *ILA International* court’s decision, the court in the *ILA Local Case* found in favor of the government and imposed civil RICO liability on the defendants.¹⁷¹ As part of this decision, the court specifically found the existence of a RICO enterprise.¹⁷² In terms of the defendants involved, the *ILA Local Case* is very similar, though not identical, to the *ILA International Case*.¹⁷³ Likewise, in both cases the government identified the union groups and several organizations only as nominal defend-

chose, for some reason, not to pursue the nominal defendants for violating RICO (which encompasses most, if not all, varieties of corrupt activity). This scenario seems highly unlikely, however, considering the aggressive breadth and reach of the complaint, and this Note assumes that the nominal defendants are not accused of RICO violations or any wrongdoing because the government does not have evidence that they engaged in any fraudulent or corrupt conduct.

169. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 475–76 (emphasis added).

170. *Id.* at 477.

171. *See supra* note 62 and accompanying text.

172. *See supra* note 61 and accompanying text.

173. *See supra* notes 63–66 and accompanying text.

ants, not RICO violators,¹⁷⁴ and it also alleged the same common enterprise purpose in both.¹⁷⁵

Given the similarities between the purported enterprises in the two cases, therefore, the difference in result is striking. In contrast to the holding of the *ILA International Case*, the court in the *ILA Local Case* specifically held that the government had demonstrated the existence of the Waterfront enterprise.¹⁷⁶ The evidence the *ILA Local* court relied upon consisted of public records, expert and eyewitness testimony, and the fruits of electronic surveillance.¹⁷⁷ Indeed, based primarily on these reports, the court explicitly found that Cosa Nostra had controlled the Waterfront since the 1950s.¹⁷⁸ Further, the court cited a string of cases to support the claim that the mob's stranglehold continued unabated to date¹⁷⁹ before turning back to the reports and ultimately relying on their conclusions that "the ILA remains a 'nest for waterfront pirates—a racket, not a union.'"¹⁸⁰

After making these findings of fact, the court reviewed its interpretation of an "enterprise," particularly noting that "[t]he language and legislative history of the statute indicates that Congress sought to define the term 'enterprise' as broadly as possible."¹⁸¹ Furthermore, "[t]he statute makes explicit reference to unions and businesses, and several courts have held that unions and businesses

174. *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 812 F. Supp. 1303, 1308 n.2 (S.D.N.Y. 1993); *see also* ILA Local Complaint, *supra* note 60, ¶¶ 51–54 (noting that each employer defendant is "named for purposes of effecting complete relief as a representative of a class of employers which engage in business directly or indirectly affecting the Waterfront and commerce").

175. *See Local 1804-1*, 812 F. Supp. at 1310.

176. *Id.* at 1311–12.

177. *Id.* at 1311. The court took particular notice of three official reports detailing investigations of organized crime and the ILA: (1) PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 24; (2) PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, WATERFRONT CORRUPTION, S. REP. NO. 98-369 (1984); and (3) *Organized Crime: 25 Years After Valachi: Hearings Before the Permanent Subcomm. on Investigations*, 100th Cong. (1988). *Local 1804-1*, 812 F. Supp. at 1312. These reports, as a whole, document the mob's infiltration of the ILA and reveal the extent of organized crime's control over a period of years. *Id.*

178. *Local 1804-1*, 812 F. Supp. at 1313.

179. *See id.* at 1313 & n.13 (citing cases).

180. *Id.* at 1314 (citing PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 24, at 33).

181. *Id.* at 1314. The court further pointed out that a RICO enterprise may be legitimate, illegitimate, or a combination, and that the parties involved in the enterprise need not have any legal or official association between themselves. *Id.* at 1314–15 (citing *United States v. Turkette*, 452 U.S. 576, 580–82, 585 (1981)).

can constitute RICO enterprises.”¹⁸² For instance, the *ILA Local* court noted that the Fulton Fish Market was adjudged to be a RICO enterprise in *United States v. Local 359, United Seafood Workers*,¹⁸³ despite the confluence of businesses and the Seafood Workers union.¹⁸⁴ Based on this law, the *ILA Local* court held that the disparate defendants composed an association-in-fact enterprise.¹⁸⁵

The result in the *ILA Local Case*, concerning the enterprise, is the opposite of the result in the *ILA International Case*. This difference could, theoretically, stem from the fact that the defendants in the *ILA Local Case* did not challenge the existence of the Waterfront Enterprise. Only four defendants, out of an original group of more than eighty, elected to pursue a trial to judgment, as the vast majority of the defendants defaulted or entered into consent decrees.¹⁸⁶ These individuals, moreover, chose not to argue against the Waterfront Enterprise’s existence,¹⁸⁷ and the court specifically acknowledged that the existence of the enterprise was subject to “one-sided . . . trial proofs.”¹⁸⁸

In contrast, the defendants vigorously challenged the alleged enterprise in the *ILA International Case*, claiming it “encompass[e]d a host of unspecified individuals . . . and unspecified businesses . . . whose operations relate in any manner to the transaction of com-

182. *Id.* at 1314 (citing *United States v. Stolfi*, 889 F.2d 378, 380 (2d Cir. 1989)).

183. 705 F. Supp. 894 (S.D.N.Y. 1989), *aff’d in part, remanded in part*, 889 F.2d 1232 (2d Cir. 1989).

184. *Local 1804-1*, 812 F. Supp. at 1315 (citing *Local 359*, 705 F. Supp. at 897). Note, however, that while the *ILA Local* court implies that the court in the Fulton Fish Market case *found* the existence of the enterprise, the language of the opinion actually suggests that the existence of the enterprise may not have been contested, with the court ambiguously stating, “It is agreed that the Fulton Fish Market is an ‘enterprise’ within the meaning of the statute” without further discussion. *Local 359*, 705 F. Supp. at 897.

185. *Local 1804-1*, 812 F. Supp. at 1315.

186. *Id.* at 1308. The four were Donald Carson, Anthony Gallagher, George Lachnicht, and Venero Mangano. *See id.*

187. *Id.* at 1310.

188. *Id.* A number of parties, which had previously settled with the government, proceeded to submit an amicus curiae brief, expressing concern with the one-sided presentation of issues and the possible consequences for the settling parties, should the court’s decision fail to consider all interests. *See id.* Despite the lack of litigation, the *ILA Local* court indicated it had “no intention of merely ‘rubber stamping’ the government’s proposed findings of fact,” and that it endeavored to make “independent inquiries into the evidence presented by the government, and reach[e]d the conclusion that the Waterfront constitutes an enterprise within the meaning of the RICO statute only after careful scrutiny of the government’s case.” *Id.* at 1311.

merce in the Ports of New Jersey, New York, Miami or elsewhere,” and that “no meaningful basis exists on which to fully evaluate the formation of the group, its continuity or structure.”¹⁸⁹ Indeed, even the heading of the ILA’s memorandum on this point was unequivocal: “The Alleged Enterprise is not a Decipherable, Let Alone a Functioning, Unit.”¹⁹⁰ The court in the *ILA International Case* was not blind to the difference in outcome from the *ILA Local Case* but rather was inclined to blame the variation on adversarial strategies.¹⁹¹ Therefore, it is logical to assume that the lack of argument regarding the enterprise’s composition in the *ILA Local Case* may have affected that court’s ultimate decision.

At a deeper level, however, the difference in rulings between the two ILA cases on the existence of the enterprise may not be attributed solely to the ambivalent defense of the *ILA Local Case*. The *ILA Local* court did not expressly consider the validity of the alleged enterprise’s “common purpose” or how that purpose applied to the nominal defendants. While the *ILA Local* defendants may not have litigated the point, the presence of a common purpose is an element of an association-in-fact RICO enterprise, and therefore the factfinder must theoretically determine whether a common purpose exists.¹⁹² Nonetheless, no discussion of the common purpose appears in the court’s ultimate opinion. The court first examined the relationship between organized crime and the ILA, and it then proceeded to conclude that there existed an “asso-

189. *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422, 474–75 (E.D.N.Y. 2007). The defendants did not fully explore the idea that the enterprise’s alleged “common purpose” did not apply to the nominal defendants, but they did note in passing that “many of the constituents of the so-called Waterfront Enterprise frequently have conflicting interests.” Memorandum of Law in Support of Nominal Defendant International Longshoremen’s Ass’n, AFL-CIO’s Motion to Dismiss the Amended Complaint, Or, In the Alternative, To Strike Certain Allegations of the Amended Complaint at 33, *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422 (No. 05-CV-3212), 2006 WL 1785478 [hereinafter Defendant’s Memorandum of Law].

190. Defendant’s Memorandum of Law, *supra* note 189, at 30.

191. *See Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 477 n.91 (“The Court recognizes that the definition of the Waterfront Enterprise in this action, while not precisely identical to the enterprise alleged in the ILA Local Civil RICO Case, is nevertheless quite similar to the enterprise that was held by Judge Sand [in the ILA Local case] to be sufficiently pleaded and proved . . . [A]s Judge Sand noted in his written opinion in the ILA Local Civil RICO Case, the sufficiency of the 1990 [ILA Local case] pleading with respect to the allegations pertaining to the Waterfront Enterprise was never challenged in that case.”).

192. *United States v. Turkette*, 452 U.S. 576, 583 (1981) (An “enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.”).

ciation in fact.”¹⁹³ While the court mentioned the alleged objective enterprise in its preliminary comments,¹⁹⁴ it did not explicitly examine the validity of the allegation, and further, it did not explicitly consider the objective as applied to the nominal defendants.

Without any comments on the issue, it is impossible to determine whether the *ILA Local* court believed it was unnecessary for the stated objective to apply to all nominal defendants, or whether the issue simply escaped the court’s notice amongst the complicated allegations and voluminous evidence, reports, and arguments before it. If the latter, it also remains unclear whether the court would have come to a different conclusion about the existence of the enterprise if it had considered the “common purpose” requirement. It is highly significant, however, that the *ILA Local Case* stands in a long line of civil RICO lawsuits against mob-infiltrated labor unions which included nominal defendants as members of the enterprise.¹⁹⁵

Therefore, it certainly appears that the *ILA International* court’s consideration of the enterprise’s common purpose, and more significantly, its finding that the purpose could not apply to the nominal defendants, represents a substantial twist to existing civil RICO law. However, this determination does not merely signify a noteworthy break from general civil RICO interpretation; it suggests that the government could face serious trouble in future RICO liti-

193. *Local 1804-1*, 812 F. Supp. at 1315.

194. *See id.* at 1310.

195. *See, e.g.*, *United States v. Mason Tenders Dist. Council of Greater New York*, No 94-CV-6487, 1994 WL 742637, at *2 (S.D.N.Y. Dec. 27, 1994) (noting, in judgment of consent decree, the inclusion of nominal defendants, who the government accused of “no wrongdoing whatsoever”); *United States v. Dist. Council*, 778 F. Supp. 738, 757–58 (S.D.N.Y. 1991) (government alleged that “the District Council, its constituent Local Unions and the District Council Benefit Funds . . . constitute an enterprise,” and joined the District Council under Rule 19(a) even though it was not accused of wrongdoing; the court held the “District Council is properly included as a nominal defendant because it would be necessary to effectuate the relief sought by the government”) (citation omitted); *United States v. Local 359, United Seafood Workers*, 705 F. Supp. 894, 897 (S.D.N.Y. 1989) (“The only allegation of crime against the union itself is the claim of illegal receipt of money, in violation of the Taft-Hartley Act, for which the union was convicted in 1981. As the issues are now defined, the Government does not contend that this matter is of any relevance to the question of whether [certain individual defendants] should be replaced by a trustee and later by newly elected officers. However, the union remains as a defendant in the case because it would be affected by the relief the Government requests against [the individual defendants.]”), *aff’d in part, remanded in part*, 889 F.2d 1232 (2d Cir. 1989). Of course, in most RICO cases involving labor unions, the defendants enter consent decrees, and so the issue is not explicitly discussed. *See* JACOBS, *supra* note 1, at 143.

gation against labor unions controlled by the mob. The complaint's Rule 8(a) flaws, its improper pleading of predicate offenses, and its inadequacy in identifying the structure of the enterprise may be cured, theoretically, through more diligent lawyering. In stark contrast, the *ILA International* court's ruling suggests that the problem of formulating a common purpose that envelops the nominal defendants in the enterprise may actually be impossible.

By definition, the nominal defendants in this case were not accused of any wrongdoing.¹⁹⁶ Yet the racketeering defendants, including the ILA officer defendants and the Cosa Nostra defendants, were "alleged to have conspired together to conduct the pattern of racketeering activity set forth in the . . . Complaint."¹⁹⁷ While a RICO enterprise may be composed of both legal and illegal enterprises, all of the entities in an association-in-fact must be united by a common purpose.¹⁹⁸ Even more significantly, the Second Circuit has held unequivocally that "[f]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular *fraudulent course of conduct* and work together to achieve such purposes."¹⁹⁹ It would be difficult for the government to craft an alleged common purpose encompassing both nominal defendants and racketeering defendants, regardless of whether the asserted purpose was fraudulent in nature; it is even more challenging to see how the government may assert that innocent parties share a fraudulent purpose.²⁰⁰

The government attempted to sidestep this issue by claiming that the common purpose of the enterprise did not apply to the nominal defendants.²⁰¹ Pursuit of this strategy, however, would mean that the nominal defendants, including the ILA, could not be considered a part of the enterprise.²⁰² One of the most important forms of relief that the government seeks in civil RICO cases against mob-infiltrated labor unions has been the imposition of a trusteeship over the union, installing a court-appointed steward to investi-

196. See *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 427.

197. *Id.*

198. See *United States v. Turkette*, 452 U.S. 576, 583 (1981).

199. *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 476 (emphasis added, alteration in original) (quoting *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004)); see also *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 447 (2d Cir. 2008); *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 763 (2d Cir. 1994).

200. See *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 476.

201. See *supra* notes 167–68168 and accompanying text.

202. Note again the directive that the members of the enterprise *must* share a common purpose. See *Turkette*, 452 U.S. at 576, 583.

gate and combat internal corruption.²⁰³ For instance, in the *ILA International Case*, the government sought, amongst other relief, the appointment of an officer to oversee the ILA and associated organizations and funds, “until such time as these entities are free from corruption, domination, control, and LCN infiltration”²⁰⁴

This drastic reorganization and oversight of the nominal defendants corresponds to the court’s power under the civil RICO statute to “reorganize . . . any enterprise.”²⁰⁵ Since this remedy specifically applies to RICO enterprises, however, nominal parties not included in the enterprise do not fall under this authority. Failing to include the nominal defendants in the enterprise, therefore, leaves the court without power to effect the massive reorganization and imposition of a trusteeship permitted under the civil RICO statute, and the government’s efforts to reform a union and free it from corruption will become frustrated.

203. In a typical civil RICO suit involving a union and organized crime, [t]he judge is . . . asked to appoint a trustee empowered to initiate disciplinary charges against union officers and members who violate the decree, union constitution, or bylaws; administer the union’s affairs; design and implement a fair election, and monitor a new regime for conformity with the decree, the union’s constitution, and federal laws. . . . ‘Winning’ a civil RICO labor racketeering case by achieving a favorable decree does not necessarily ensure that the racketeer-ridden union will be successfully reformed. These cases are won or lost in the remedial phase.

JACOBS, *supra* note 1, at 142–43. The first case to impose such relief was *United States v. Local 560, Int’l Bhd. of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff’d*, 780 F.2d 267 (3d Cir. 1985). The court in *Local 560* justified the imposition of a trusteeship as necessary due to “the likelihood of continued violations,” and it stated that the trusteeship would remain in effect “for such time as is necessary to foster the conditions under which reasonably free supervised elections can be held.” 581 F. Supp. at 337. Since then, approximately nineteen trusteeships have been imposed over mob-infiltrated labor unions; they have experienced varying levels of success. JACOBS, *supra* note 1, at 242–45.

204. ILA International Complaint, *supra* note 9, at 83.

205. Organized Crime Control Act of 1970, 18 U.S.C. § 1964(a) (2006); *see also Local 560*, 780 F.2d at 295 (“Section 1964(a) of the RICO Act enables the district court, in its discretion, to employ a wide range of civil remedies. . . . Indeed, the House Report which accompanied the proposed RICO Act stated that ‘[it] contains broad provisions to allow for reform of corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.’ . . . Moreover, we take careful note of the Supreme Court’s instruction in *Sedima v. Imvrex Co. Inc.* . . . regarding the interpretation of the RICO Act[:] ‘RICO is to be read broadly. This is the lesson not only of Congress’ self-consciously expansive language and overall approach, but also of its express admonition that RICO is to “be liberally construed to effectuate its remedial purposes.”’ (footnotes and internal citations omitted)).

R

R

The *ILA International* court's decision to analyze the enterprise's common purpose as it applies to nominal defendants leaves the government between a rock and a hard place. Crafting a common purpose which envelopes the nominal defendants seems impossible, while leaving the nominal defendants out of the enterprise would defeat a primary purpose of the civil RICO suit. The court itself acknowledged that excluding the nominal defendants from the enterprise and "limiting the alleged enterprise to that relatively narrow group [of Racketeering Defendants] might create *potentially insurmountable* obstacles to the Government's efforts to impose equitable relief on some of the nominal defendants in this action."²⁰⁶ Therefore, while the court's other findings of flaws in the complaint may be overcome, the court's analysis of the enterprise not only represents a break with prior judicial practice, but it represents a significant challenge that the government will have to face in future litigation.²⁰⁷

III. WHERE DOES THE GOVERNMENT GO FROM HERE?

As discussed, two of the court's holdings in the *ILA International Case*, regarding the inadequate incorporation of exhibits and the deficient pleading of certain offenses, present largely straightforward issues for the government. The holding regarding the enterprise, on the other hand, could create major obstacles in future civil RICO suits against mob-infiltrated labor unions. This Note will now turn to the ongoing litigation in this case and then explain why, even if the government ultimately succeeds in this specific lawsuit, the enterprise problem could persist going forward. It will also offer two potential options that may help the government proceed in future litigation.

A. *The Significance of the Court's Holding for Future Litigation*

Months after the dismissal of the *ILA International* complaint, the government filed an amended complaint.²⁰⁸ Upon examination, it appears that this complaint may be capable of surmounting some of the issues that doomed the first complaint. First, the at-

206. *United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 477 (E.D.N.Y. 2007) (emphasis added).

207. This discussion is not meant to imply that the *ILA International* court's ruling was incorrect—it was simply unexpected.

208. See Second Amended Complaint, *supra* note 154.

tached exhibits are explicitly incorporated.²⁰⁹ This time, the clear incorporation of specific exhibit segments may enable the government to avoid the “unintelligible morass of self-contradictory allegations” which characterized the earlier complaint.²¹⁰

Second, the allegations of predicate acts have been tailored to conform more closely to the pleading requirements. The allegations of mail and wire fraud now include the dates of the communications, the intended recipient of the communication, and in some cases a notation of who initiated the communication.²¹¹ This particularity may be enough to satisfy the heightened pleading requirements for the fraud allegations under Rule 9(b).²¹² In addition, each allegation of extortion includes a statement that the defendants used “wrongful use of threatened and actual force, violence and fear.”²¹³ As a result, it appears that some of the essential elements of the alleged extortion offenses that did not appear on the face of the first complaint are now adequately pleaded.

Third, the government has taken pains to expand its description of the RICO enterprise. In contrast to the vague enterprise alleged to encompass unknown individuals and businesses in the first complaint, the new complaint identifies each individual, group, and organization by name.²¹⁴ In addition, the government has devoted over two pages to describing the enterprise’s organiza-

209. See, e.g., *id.*, ¶ 117 (“The United States incorporates by reference Count I, Racketeering Act I, and Count 3 of the Indictment in *United States v. Gotti, et al.*, No. 02 Cr. 606 (E.D.N.Y.).”).

210. *Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d at 462 n.72.

211. Second Amended Complaint, *supra* note 154, ¶¶ 196, 223.

212. See *supra* note 1244. However, there remains a dearth of allegations as to how the messages furthered the fraudulent schemes, which could cause problems for the government. R

213. Second Amended Complaint, *supra* note 1544, ¶ 122. R

214. *Id.* ¶ 72. In this round, the enterprise is alleged to include

the ILA and ILA Locals 1, 1804-1, 1814, 1922, 1922-1, and 2062; current ILA Executive Officers JOHN BOWERS, ROBERT E. GLEASON and HAROLD J. DAGGETT; former ILA Officers Albert Cernadas, ARTHUR COFFEY and Frank ‘Red’ Scollo; MILA, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; METRO and the METRO-ILA Funds; members and associates of the Genovese and Gambino crime families, particularly ANTHONY ‘SONNY’ CICCONE, JEROME BRANCATO, JAMES CASHIN and the Conspirators Not Named as Defendants as described in paragraphs 41 through 50, namely, George Barone, Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti, Andrew Gigante, Vincent Gigante, Alan Longo, Ernest Muscarella, Michael Ragusa, Lawrence Ricci, Charles Tuzzo, Peter Gotti, Primo Cassarino, Vincent Nasso and Louis Valentino.

Id.

tion and structure.²¹⁵ However, the alleged common purpose of the enterprise remains essentially the same as in the first complaint, albeit in a slightly expanded form.²¹⁶ Furthermore, the government has again included nominal defendants as members of the RICO enterprise,²¹⁷ presumably sharing its common purpose. The complaint suggests no alternate purpose for the nominal defendants.

Litigation is ongoing, and defendants in the case insist that the new complaint is no more acceptable than the previous one.²¹⁸ It does not appear that the amended complaint makes any significant changes to the alleged common purpose of the enterprise or posits any new theory as to how the nominal defendants may share the common purpose. The government's undoing may be its failure to adequately address the *ILA International* court's ruling regarding the enterprise.

Regardless of the outcome of this particular case, however, the *ILA International* court's unusual analysis of RICO law, as it applies to nominal defendants included in an enterprise, will remain noteworthy. If the court dismisses the amended complaint, basing its decision at least in part on the same objection to the enterprise, the court's interpretation of that aspect of RICO law will become further cemented, potentially gaining wider notice and influencing other courts. If, on the other hand, the government ultimately wins its case, the previous holding would still retain significant impor-

215. *Id.* ¶¶ 73–79.

216. *Id.* ¶ 73 (“The purpose of the Enterprise has been to obtain money or other property on the Waterfront and the Port of Miami through extortion or fraud . . .”). The section on the alleged purpose goes on to state that the money and property obtained includes:

(a) ILA union positions, wages, and accompanying employee benefits, from the membership of the ILA; (b) the rights of the ILA membership to democratic participation in union affairs; (c) the rights of the ILA membership to the honest services of the ILA's officers, agents, delegates, employees and representatives; (d) money and economic benefits in benefit plan transactions from ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries; (e) the rights of ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries to the honest services of benefit plan trustees and fiduciaries; and (f) money from businesses.

Id.

217. *See supra* note 214.

218. “[T]he Second Amended Complaint not only repeated, but in some instances compounded, the errors that were fatal to its prior pleading.” Nominal Defendant Int'l Longshoremen's Ass'n, AFL-CIO's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Second Amended Complaint Or, In the Alternative, To Strike Certain Allegations of the Second Amended Complaint at 1, No. 05-CV-3212 (E.D.N.Y. June 30, 2008), 2008 WL 3854641.

tance. Current RICO jurisprudence has already been challenged by the court's initial dismissal of the complaint. In future lawsuits in which nominal defendants are alleged to be members of a RICO enterprise, including cases brought by the Department of Justice, defendants may have a new weapon in their arsenal for challenging the existence of a cognizable enterprise. The mere fact that the *ILA International* court held the enterprise invalid, based on the lack of a common purpose encompassing all defendants, has the potential to substantially alter the legal environment. It only remains to be seen who takes notice of this novel theory. Indeed, in other jurisdictions, the success or failure of the second amended complaint will be irrelevant, as it is only binding precedent in its own federal district; the key question will be whether other courts find the *ILA International* court's reasoning persuasive. Therefore, even if the government eventually wins this particular case, it may find itself facing the same argument and the same "potentially insurmountable obstacles"²¹⁹ in future civil RICO litigation.

B. Potential Strategies for Future Litigation

This Note does not suggest that the government will ultimately prove unable to surmount the challenge posed by the *ILA International Case*. Indeed, several civil RICO cases involving captive labor unions suggest possible strategies for avoiding the enterprise problem. Among these are the dual enterprise model or the respondeat superior model.

First, one of the earliest union RICO cases, *United States v. Local 560, International Brotherhood of Teamsters*,²²⁰ used what this Note will call the "dual enterprise model." In that case, the government alleged the existence of two separate enterprises: the Provenzano Group Enterprise and the Local 560 Enterprise.²²¹ The Provenzano Group, comprised of individuals with ties to Local 560, was alleged to have committed RICO violations.²²² On the other hand, the members of the Local 560 Enterprise, including Local 560, its benefit funds, and its severance pay plan, were innocent of wrongdoing. The lawsuit claimed that the Provenzano Group maintained control of the Local 560 Enterprise through racketeer-

219. *United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 477 (E.D.N.Y. 2007).

220. *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd* 780 F.2d 267 (3d Cir. 1985).

221. *Id.* at 283.

222. *Id.* at 283, 289-90. The group was named after Anthony Provenzano, a ringleader. *Id.*

ing activity, and that the Provenzano Group's purpose was to exploit the union.²²³ The court agreed with the government, finding the existence of both enterprises and holding that the Provenzano Group was liable for RICO violations.²²⁴ Significantly, the court ruled that the "institutional defendants . . . were the victims," and that there was "no basis for retaining [any of the Local 560 Enterprise members] as a defendant in this action, except insofar as it is necessary to retain Local 560 as a nominal defendant to effectuate the equitable relief heretofore specified"²²⁵

The dual enterprise model was thus successful in the *Local 560* case. Three aspects of the model are important. First, alleging two enterprises allows the government to craft two separate "common purposes," one to fit each enterprise.²²⁶ Second, alleging two enterprises allows the court to find one group of defendants liable for RICO violations based on that group's control of the innocent enterprise, while simultaneously finding that the innocent enterprise had committed no wrongdoing.²²⁷ Third, the court's finding that the nominal defendants compose a cognizable RICO enterprise also permits reorganization of that enterprise under the civil RICO statute.²²⁸ Based on these three features, the dual enterprise model could prove promising for the government in overcoming a holding such as that in the *ILA International Case*. It avoids the problem of finding one common purpose to fit both organized crime figures and innocent union participants in a single enterprise, yet the court will still be able to order civil RICO relief. In short, the strategy could circumvent the issue entirely.

But this strategy may not succeed in all jurisdictions, since it relies on an enterprise composed entirely of nominal defendants, having no illegitimate or fraudulent purpose. While associations-in-fact are generally criminal, the Supreme Court has not issued a clear ruling as to whether an association-in-fact, by definition, may also encompass a legitimate enterprise. *United States v. Turkette* held that an association-in-fact may be partly criminal, or it may be *purely* criminal, but it did not comment on whether it may also be purely legitimate.²²⁹ The subsequent case of *Russello v. United States*²³⁰

223. *See id.* at 284, 337.

224. *Id.* at 303–04, 335.

225. *Id.* at 337 (citation omitted).

226. *See id.*

227. *See id.*

228. *See id.*; *see also* § 1964(a) (allowing reorganization of a RICO enterprise).

229. *United States v. Turkette*, 452 U.S. 574, 576, 580 (1981).

230. 104 U.S. 16 (1983).

noted that the definition of “enterprise” includes “legal entities” and “illegitimate associations-in-fact,” but the court likewise failed to indicate whether a legitimate association-in-fact could also be a RICO enterprise.²³¹

The circuits have failed to come to an agreement on this issue. As previously discussed, the Second Circuit requires the individuals composing an association-in-fact RICO enterprise to share “a common purpose to engage in a particular fraudulent course of conduct.”²³² Wholly innocent nominal defendants could not logically share a purpose to engage in fraudulent conduct, so the Second Circuit may reject an enterprise composed solely of nominal defendants.

Some circuits, specifically the First, Seventh, and Eleventh, appear to agree with the Second Circuit that an association-in-fact RICO enterprise must be illegitimate or have an illegitimate purpose.²³³ On the other hand, it is far from clear whether this judicial interpretation is consistent with the original intention of the RICO statute.²³⁴ Moreover, not all circuits require an enterprise’s purpose to involve fraudulent conduct, or they may not have fully considered the question.²³⁵ Notwithstanding the circuit split, the dual

231. *Id.* at 24 (citing *Turkette*, 452 U.S. at 580–93).

232. *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422, 476 (E.D.N.Y. 2007) (quoting *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004)); *see also* *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 447 (2d Cir. 2008); *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993), *aff’d*, 27 F.3d 763 (2d Cir. 1994).

233. *See* *United States v. Cianci*, 378 F.3d 71, 79 (1st Cir. 2004) (“[E]nterprise’ has been interpreted *inter alia* to include (1) legal entities such as legitimate business partnerships and corporations, and (2) illegitimate associations-in-fact marked by an ongoing formal or informal organization of individual or legal entity associates who or which function as a continuing organized crime unit ‘for a common purpose of engaging in a course of conduct.’”) (citations omitted); *Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1325 (7th Cir. 1998) (Posner, J.) (noting that an “association in fact” is “a polite name for a criminal gang or ring”); *United States v. Castro*, 89 F.3d 1443, 1459 (11th Cir. 1996) (defining “an enterprise specifically formed for illegal purposes” as an “association in fact”).

234. *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 *TEMP. L.Q.* 1009, 1025 (1980) (“Associations in fact are often formed for the purpose of engaging in criminal activities, but their purposes may be legitimate as well.”) (citing *COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969*, S. Rep. No. 617, at 158 (1969)).

235. The question, in fact, would not commonly arise, as most association-in-fact enterprises *do* have illicit purposes, such as narcotics distribution or illegal gambling. Some circuits state in their opinions that an enterprise must have a common purpose, without discussing whether the purpose must be criminal; however, the enterprises in these opinions generally have unquestionably criminal pur-

enterprise model of the *Local 560* case could be a potential option for the government in certain jurisdictions, as it avoids the logical inconsistency inherent in a “common purpose” encompassing both RICO violators and nominal defendants.

Of course, this analysis assumes that the government would generally seek to include more than one nominal defendant within the “innocent enterprise” in a civil RICO suit, and therefore it would need to demonstrate an association-in-fact enterprise. If the government only wished to obtain relief against a single nominal defendant, such as one union local, the relevant enterprise would not be an association-in-fact, but rather a legal entity.²³⁶ As legal entities are incontestably enterprises for the purposes of RICO,²³⁷ the government would have no trouble in this scenario following the dual enterprise model of *Local 560*, regardless of a particular jurisdiction’s requirements for an association-in-fact. Presumably, however, the government would seek to impose civil RICO remedies on a number of individuals and legal units in most, if not all, RICO labor cases,²³⁸ and therefore an association-in-fact would be a necessary component of the suit.²³⁹

poses. See *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) (purpose to obtain money through robbery); *United States v. Gray*, 137 F.3d 765, 772 (4th Cir. 1998) (purpose of trafficking drugs); *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995) (purpose of trafficking drugs). This silence, therefore, may indicate either that the question has not been considered or that the purpose need not be criminal.

236. See Organized Crime Control Act of 1970, 18 U.S.C. § 1961 (2006); see also *supra* notes 355–366.

237. *Id.*

238. The *ILA International Case* named upwards of thirty nominal defendants. See *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422, 427–29 (E.D.N.Y. 2007).

239. Another, similar option would be to litigate the case under § 1962(b), as in the *Local 560* case, but to sue each RICO violator individually, rather than fitting all “guilty” defendants together into one guilty enterprise. This strategy would still allow for the separation of the guilty defendants from the innocent union components. The nominal defendants may be included within the innocent enterprise for reorganization purposes, and the fraudulent purpose of each individual RICO violator would not be imputed to the enterprise. Although this strategy may be rather unwieldy due to the sheer number of defendants, it would save the government the effort of proving two separate enterprises instead of one. On the other hand, in order to include all relevant parties within the innocent enterprise, the government would still need to demonstrate an association-in-fact, rather than relying on the existence of a single legal entity. See *supra* notes 36–37 and surrounding text. Therefore, the strategy may be successful in some jurisdictions as an alternative to the dual enterprise model, but the Second Circuit and similar jurisdictions would still require the association-in-fact enterprise to have a fraudulent

Apart from the dual enterprise model, a second potential strategy also appears in the *Local 560* case, as well as a handful of other civil RICO cases: imputing guilt to the institutional units based on the wrongful acts of individual agents based on the common law principle of respondeat superior.²⁴⁰ The principle of respondeat superior has appeared in civil RICO lawsuits involving captive labor unions. For instance, the court in *Local 560* noted that it would be permitted “to attribute the misconduct of the individual defendants to these institutional [nominal] defendants”²⁴¹ if the court found “(1) that the individual defendants committed the acts of racketeering in the scope of their employment, and (2) that they thereby intended to advance the affairs of the institutional defendants.”²⁴² Similarly, the court in *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass’n*²⁴³ imputed the actions of union agents to the union itself. After union employees and agents were convicted of criminal RICO violations, the court held that the individual defendants were estopped from litigating the same claims in a civil RICO suit, and that “[t]he statutory estoppel provided in [RICO] operates against the Union defendant as well, because the Union (the principal) is estopped and bound by the actions of its agents (the Union officials and representa-

purpose in order to be cognizable, and thus the outcome would be the same as under the dual enterprise model.

240. See, e.g., *United States v. Local 295 of Int’l Bhd. of Teamsters*, No. 90-CV-0970, 1991 WL 35497, at *1 (E.D.N.Y. Mar. 8, 1991); *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass’n* 686, F. Supp. 1139, 1166 (E.D. Pa. 1988). Respondeat superior has been defined as follows:

[A]n employer [is] strictly liable—that is to say, regardless of the presence or absence of fault on the employer’s part—for torts committed by his employees in the furtherance of his business; in legalese, it ‘imputes’ the employee’s negligence to his employer, thus making the employer’s own lack of fault immaterial.

Rosenthal & Co. v. Commodity Futures Trading Comm’n, 802 F.2d 963, 966 (7th Cir. 1986). Respondeat superior may still apply when the acts are criminal in nature. See *Local 1814, Int’l Longshoremen’s Ass’n v. N.L.R.B.*, 735 F.2d 1384, 1395 (D.C. Cir. 1984) (citing RESTATEMENT (SECOND) OF AGENCY § 231 at 512 (1957)). It may also apply when the agent’s acts are predominantly motivated by self-interest. *Id.* at 1395 (citing RESTATEMENT (SECOND) OF AGENCY § 236 & cmt. b (1957)).

241. *United States v. Local 560, Int’l Bhd. Of Teamsters*, 581 F. Supp. 279, 337 (D.N.J. 1984), *aff’d* 780 F.2d 267 (3d Cir. 1985).

242. *Id.* Of course, the court in *Local 560* exculpated the nominal defendants, as it did not find that the individual defendants intended to advance the interests of the nominal defendants. See *id.*

243. 686 F. Supp. 1139 (E.D. Pa. 1988).

tives).”²⁴⁴ In a third example, *United States v. Local 295 of International Brotherhood of Teamsters*,²⁴⁵ the government suggested that the union defendants could be held liable for the actions of the individual defendants on a similar theory of vicarious liability.²⁴⁶

In short, case law suggests a straightforward application of agency liability theory to labor unions in civil RICO cases. The key requirements are that the individual defendants committed the predicate acts in the scope of their employment and that the defendants intended their acts to benefit the unions.²⁴⁷ If the government were able to demonstrate these two elements, therefore, the theory could potentially help the government to overcome the challenge presented by the *ILA International* decision.²⁴⁸ Instead of conceding that a union, or nominal defendant, had committed no RICO violations, the government may instead attempt to impute liability based on the actions of the union’s employees and agents. For instance, in the *ILA International Case*, several *ILA* officers stood accused of RICO violations.²⁴⁹ If a court holds that the RICO enterprise’s common purpose must apply to nominal defendants, the government may argue that the theory of vicarious liability supports a common purpose consistent with that of the individual defendants. In addition, this strategy would not be compromised where a jurisdiction requires the common purpose to be fraudulent; imputing liability based on acts of racketeering would presumably comprise a common purpose of racketeering, which is clearly fraudulent.

The difficulty with this strategy may lie in convincing a court that vicarious liability actually translates to a “purpose” to engage in the relevant conduct in the context of a RICO enterprise. A distinction could arise between technical liability for specific acts and an actual purpose to commit the acts, with the latter perhaps requiring an awareness or agreement that the former does not.

No court has directly addressed this specific issue, so it remains unclear whether a court, faced with the issue, would impute a criminal purpose. One could certainly argue that a nominal defendant does not share a common purpose when it is liable merely for the

244. *Id.* at 1166.

245. No. 90-CV-0970, 1991 WL 35497 (E.D.N.Y. Mar. 8, 1991).

246. *Id.* at *1.

247. *Local 560*, 581 F. Supp. 279, 337 (D.N.J. 1984); see also *Local 295 of Int’l Bhd. of Teamsters*, 1991 WL 35497, at *1.

248. See *United States v. Int’l Longshoremen’s Ass’n*, 518 F. Supp. 2d 422, 483 (E.D.N.Y. 2007).

249. See *supra* notes 86–93 and accompanying text.

actions of its agents—actions that the nominal defendant may not even know about. On the other hand, respondeat superior as a theory depends on a kind of legal fiction, and courts are routinely willing to hold entities liable for the actions of their agents. Perhaps the fiction may be extended to find the nominal defendants shared the enterprise's purpose; imputing purpose is not a big step from imputing acts. This strategy remains untested, but it could hold promise for the future. The broadening of the respondeat superior theory used in previous labor racketeering cases could convince a court that nominal defendants may be included in an association-in-fact, even one with a criminal purpose. At the least, it presents the government with another option to avoid a ruling such as that faced in the *ILA International Case*.²⁵⁰

CONCLUSION

Considering organized crime's long-standing infiltration of the ILA, it was curious that the government waited as long as it did to address corruption through RICO. The successful civil RICO suit against the local ILA chapters seemed to pave the way for action against the international unit. When the suit was finally brought, however, the dismissal of the complaint contrasted sharply with the *ILA Local Case's* success, as well as the government's success in all other previous civil RICO suits involving labor racketeering.

Just how momentous was the court's rejection of the complaint in the *ILA International Case*? Does the court's decision indicate that the complaint's fatal flaws were primarily superficial failings that the government may easily rectify? Or do the holdings suggest that the *ILA International* court has made deep, significant changes to RICO interpretation? Upon examination, two issues appear to be fairly superficial: the failure to properly incorporate exhibits, and the failure to adequately plead several predicate acts. Comparison to the *ILA Local Case* supports the observation that the court's rejection of these flaws was consistent with current interpretations of RICO. Moreover, the comparison also reveals that these flaws are curable, as the *ILA Local* complaint avoided many of these flaws despite the similarity of the issues between the two cases.

One holding, on the other hand, appears to be a substantial deviation from prior RICO interpretation, namely the court's rejection of the alleged enterprise, based on the finding that the enterprise's alleged common purpose did not apply to the nominal defendants. Not only is this evaluation of the enterprise signifi-

250. See *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 483.

2010]

U.S. v. INT'L LONGSHOREMEN'S ASS'N

837

cantly different from the *ILA Local Case* and other RICO cases brought against mob-infiltrated labor unions, it could also present a serious challenge for the government in future cases, regardless of how the *ILA International Case* eventually plays out in ongoing litigation. If other defendants or other courts pick up on the court's reasoning in its dismissal of the complaint, they may use or consider the issue in future litigation. As no court appeared to have considered this particular issue previously, the court's ruling could prove influential. The government may be able to avoid the issue in the future by using a dual enterprise or respondeat superior model. As for just how significant the *ILA International* court's ruling will prove to be, only time will tell.

THE LIMITS OF FEDERAL JURISDICTION AND THE F-CUBED CASE: ADJUDICATING TRANSNATIONAL SECURITIES DISPUTES IN FEDERAL COURTS

DANIELLE KANTOR*

INTRODUCTION

While corporate malfeasance has long been prosecuted criminally, the United States also has a tradition of using private actors and civil lawsuits to encourage compliance with securities regulations. Indeed, the aggressive stance of the federal government toward white-collar crime is frequently coupled with an equally aggressive civil litigation strategy, in which massive class actions work to recapture potentially massive pecuniary losses for a potentially massive number of plaintiffs.

It is largely unquestioned that securities fraud perpetrated by American companies and American executives should be prosecuted and litigated in United States courts. Yet the increasing relevance of an integrated, global economy virtually assures the opacity of formerly clear jurisdictional boundaries. The globalized market has and will continue to drive an increasing number of lawsuits with transnational characteristics—foreign classes, foreign defendants, or securities traded on foreign markets—into United States federal courts, long perceived as the most friendly toward plaintiffs. Especially as the global class action comes to play a prominent role in resolving transnational disputes, the question of how to allocate jurisdictional authority among nations becomes increasingly urgent.

If domiciled in France, would it be proper for the United States federal courts to exert jurisdictional authority over Bernie Madoff and his fund? Would the answer change if most of the plaintiffs were French investors? If the securities traded and fraudulently reported were traded on the London exchanges, rather than an American exchange, could litigation to recover losses properly take place in an American federal court? Would it be relevant

* J.D. Candidate, May 2010, New York University School of Law; A.M., Brown University; A.B. Brown University. Thank you to the editors of the *New York University Annual Survey of American Law* for their tremendous efforts, and to Professors Arthur R. Miller and Stephen Choi for comments and advice.

if Madoff himself had come to New York City to plan the fraud with the aid of lawyers, accountants, and bankers?

Currently, there exists no coherent policy that can predictably provide potential litigants with a meaningful *ex ante* answer to any of these questions.¹ Such uncertainty has potentially profound ramifications on economic policy and international relations. In particular, class actions litigated in United States courts, featuring claims against foreign defendants, by a foreign class, involving fraud with respect to securities trading on foreign markets—so-called “f-cubed” cases—raise important questions about the extraterritorial scope of the antifraud provisions of United States securities laws. In the f-cubed context, the unpredictability of procedural law engenders two major problems: first, it presents challenges to international policy and comity among nations; second, it raises concerns regarding international economic policy in general and the health of the American economy in particular.

This Note will examine the proper scope of subject matter jurisdiction over f-cubed securities class actions. Part I examines the nature of f-cubed securities class actions and situates the particular problems this type of lawsuit presents within the larger context of aggregate litigation. Part II analyzes the serious policy challenges posed by f-cubed class actions. Part III describes the discord that exists among the federal courts. Finally, Part IV considers possible resolutions to the jurisdictional problems facing f-cubed securities class actions, taking note of the implications engendered by the unpredictable extraterritorial application of securities laws in the lower federal courts—concerns relating to comity and to economic policy.

This Note posits a potential two-tiered solution to the problem: first, sharp differentiation between wholly foreign plaintiff classes and those comprised of both domestic and foreign plaintiffs; second, permitting *de novo*, interlocutory review when subject matter jurisdiction is asserted over f-cubed class actions, similar to the manner in which courts review class certification determinations.

1. This is particularly important because courts can dismiss cases *sua sponte* for lack of subject matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

I.
THE F-CUBED ACTION AS A CLASS ACTION

Questions surrounding the extraterritorial application of American securities laws have existed for at least a century.² Yet, the dramatic qualitative and quantitative expansion of transnational litigation and an increasingly international corporate environment over the past few decades have brought this issue to the fore.³ The changes wrought by globalization have raised increasingly novel questions about the scope and limits of the extraterritorial application of United States securities laws.⁴

One of the most interesting issues in this area is raised by the f-cubed class action. These lawsuits feature a putative class comprised partly or wholly of foreign plaintiffs, a foreign defendant, and claims relating to securities bought and traded on foreign markets. The increased rate at which multinational class actions are being filed suggests that the issues brought about by f-cubed class

2. *See, e.g.*, *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

3. *See, e.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987) (“The web of international connections in the securities market was then not nearly as extensive or complex as it has become.”); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 41 (2007) (“The consolidation of financial markets, the exponential increase in cross-border financial activity, and the effect of technology on the speed with which information is transmitted have all contributed to . . . interpenetration among securities markets . . .”).

4. This paper deals with “prescriptive jurisdiction” or “legislative jurisdiction,” described as a nation’s ability “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court,” insofar as the law governing the extraterritorial application of securities laws is supposedly circumscribed by congressional intent. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1986). Article III of the Constitution circumscribes the federal courts’ relatively limited ability to assert subject matter jurisdiction. *See* *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895); 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3522 (2008) (“It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction . . . They are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress . . . there is a presumption that a federal court lacks subject matter jurisdiction . . .”) (internal citations omitted). However, this paper also deals with the concept of judicial jurisdiction, a nation’s authority to “subject persons or things to the process of its courts or administrative tribunals.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (1986). In addition, enforcement jurisdiction is defined as a state’s power to “induce or compel compliance . . . with its laws or regulations.” *Id.* § 401(c).

actions will become ever more important, and ever more in need of clear resolution.⁵

A. *The F-Cubed Action and Congressional Silence*

Though Congress has the authority to prescribe the extraterritorial enforcement of United States securities laws, whether it has actually chosen to exercise that authority is by no means clear.⁶ Section 10(b) of the Securities Exchange Act of 1934⁷ (1934 Act) and Securities and Exchange Commission (SEC) Rule 10b-5⁸—the primary antifraud mechanisms—are silent as to the matter of extraterritorial application.⁹ The legislative history of the 1934 Act pro-

5. See Buxbaum, *supra* note 3, at 41 (“First, the rate at which such actions are filed is increasing, and one must assume that U.S. courts will face the ‘foreign cubed’ problem more frequently in the future. Second, a substantial percentage of multinational class claims are clearing the jurisdictional obstacle.”) (internal citations omitted).

6. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249–57 (1991) (noting that the extraterritorial application of the securities laws is within the proper scope of congressional power, but that Congress has not unambiguously asserted that power).

7. Section 10(b) states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (2006).

8. Rule 10b-5 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2007).

9. See, e.g., *SEC v. Banner Fund Int'l*, 211 F.3d 602, 608 (D.C. Cir. 2000) (“The Congress has not indicated clearly whether section 10 of the Securities Exchange Act of 1934 is applicable to cases involving predominantly foreign securities transactions effected to some degree from outside the United States.”); Kauthar SDN

vides little in the way of clarification,¹⁰ and guidance on the subject is largely lacking from the SEC as well.¹¹

Without any guidance from Congress, the SEC, or the Supreme Court regarding the transnational scope of the 1934 Act, the lower federal courts have offered conflicting interpretations.¹² Though the lower courts uniformly utilize two tests—the conduct test and the effects test—to determine whether to exercise jurisdiction over transnational securities fraud in 10b-5 actions, the way in which they apply these tests to f-cubed actions is by no means consistent.¹³ Complicating the inquiry is the fact that courts consider policy ramifications that go well beyond the mechanical application of the tests when evaluating subject matter jurisdiction. These include comity,¹⁴ interests in finality,¹⁵ and whether extending juris-

BHD v. Sternberg, 149 F.3d 659, 663–64 (7th Cir. 1998) (stating that Congress provided “little meaningful guidance on the issue” of extraterritorial application of federal securities laws).

10. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729 (1975) (“Section 10(b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any indication that Congress considered the problem of private suits under it at the time of its passage.”); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987) (“If the text of the 1934 Act is relatively barren, even more so is the legislative history. Fifty years ago, Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States.”).

11. See *Blue Chip Stamps*, 421 U.S. at 730 (“[T]here is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under this provision.”). Some securities laws provisions have been found to not apply extraterritorially. See, e.g., 17 C.F.R. §§ 230.901–.905 (2009). However, the SEC has also noted, in an amicus brief, that it supports expansive extraterritorial application of the securities laws in the f-cubed context. The SEC amicus brief is discussed further *infra* pp. 137–38 and accompanying notes.

12. The Supreme Court only accepted its first f-cubed case for review in late 2009. See *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008), *cert. granted*, 2009 U.S.L.W. 8694 (U.S. Nov. 30, 2009).

13. See, e.g., *Robinson v. TCI/US W. Cable Commc’n Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (describing conduct and effects tests for determining subject matter jurisdiction in securities fraud cases); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121–22 (2d Cir. 1995) (noting that two jurisdictional tests—known as the conduct test and the effects test—have emerged in interpreting the Securities Exchange Act of 1934).

14. See *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 84–90 (S.D.N.Y. 2007) (discussing “international public policy”).

15. See *id.*, 242 F.R.D. at 106–07 (discussing class certification issues, remedies abroad, and interests in finality); see also FED. R. CIV. P. 23(b)(3)(C); 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1780 (2009) (noting that Rule 23(b)(3)(C) allows a court to “evaluate whether allowing

diction would be reasonable,¹⁶ efficient,¹⁷ or in the interests of public policy.¹⁸ The lack of any clear mandate with regard to the extraterritorial application of securities laws coupled with an emphasis on policy analysis thus further obfuscates the jurisdictional inquiry.

B. *The Problems of Class*

Current class action law in the United States provides a useful analog for analyzing some of the problems posed by f-cubed securities class actions. At heart, class actions in general, and securities class actions in particular, present a tension between two imperatives. The current law, specifically Rule 23 of the Federal Rules of Civil Procedure, on the one hand encourages the aggregation, and thus vindication, of smaller claims.¹⁹ On the other hand, some courts have attempted to temper the ease with which claims are aggregated in order to guard against unwarranted settlement pressure and potential abuses by overzealous litigants and lawyers.²⁰

The core justification for American-style permissive aggregation is to enable individuals to bring negative value claims, in which “the costs of enforcement in an individual action would exceed the expected individual recovery.”²¹ Securities fraud presents the classic case for the reasonable justification of the class action mecha-

a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results”).

16. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 403, 416 (1986).

17. See Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997) (arguing that regulatory expertise and corresponding efficiency is the critical factor in determining authority to regulate securities laws).

18. See, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972). The f-cubed action also implicates such issues as *forum non conveniens*, see *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 502 (1947), and lead plaintiff selection, see *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343, 351–53 (D. Md. 2003), which are beyond the scope of this paper.

19. See FED. R. CIV. P. 23.

20. See, e.g., *In re Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (“We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.”).

21. *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 348 (N.D. Ohio 2001); see *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (“The most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit.”)

nism. In virtually every individual case, the stakes are incredibly low and simply would not merit the time, energy, or expense of an attorney. As a result of the negative value of the claim, the myriad individuals harmed by real corporate malfeasance would go uncompensated, and the corporation itself would have little or perhaps no incentive to abandon illegitimate practices.

However, the very mechanism that enables negative value claims to exist for social and individual good can also potentially be used as a means to extort unwarranted settlements from wary defendants.²² Aggregation can exert serious pressure on defendants to settle in two major ways. First, certification of a class itself often times leads to an increase in the absolute number of claims.²³ Since the very purpose of a class action is to enable negative value claims, unmarketable claims will be potentially roped into the class, raising the stakes, and increasing the probability that defendants will settle.²⁴ Given the large size of securities fraud classes—necessarily large in order to counter the negative value of their individual claims—truly meritless claims may never be separated from credible claims. Second, certification of a class results in a variance of outcomes.²⁵ With an increase in variance, risk-averse defendants

22. Predictably, the debate as to whether “settlement pressure”—improper or not—actually exists splits largely along the plaintiff/defendant division. See generally Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1872–73 nn.1–2 (2006); see also Lance P. McMillan, *The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 222–23 (2007) (noting that definitional and empirical challenges make it difficult to determine whether so-called strike suits and blackmail settlements pose an actual problem for the legal system). Some scholars, arguing on behalf of plaintiffs, note that “blackmail settlements” are empirically unsubstantiated. See, e.g., Charles Silver, *“We’re Scared to Death”: Does Class Certification Subject Defendants to Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (criticizing theory that class action certification results in massive settlement pressure and that defendants are coerced into settlements). On the other hand, proponents of the defendant’s view note that certification of a class greatly increases the chance of settlement irrespective of the merits and should thus be curtailed or controlled. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285–86 n.129 (2002) (citing sources).

23. See *Rhone-Poulenc*, 51 F.3d at 1299; see also Nagareda, *supra* note 22, at 1880–81 (2006) (noting the “addition” effect of class certification).

24. See *Rhone-Poulenc*, 51 F.3d at 1298 (“[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”).

25. Nagareda, *supra* note 22, at 1882. Variance essentially refers to the range of possibility and presence of risk, which increases more or less alongside the number of class members.

will pay more money in settlement to avoid a potentially destructive judgment, even given a low probability of plaintiffs' success.²⁶

The class action game has increasingly reoriented itself toward settlement rather than trial, though many of the procedural mechanisms governing the class action are based on actually bringing a case to trial.²⁷ As a result, surviving the minimal standards associated with the motion to dismiss (or even summary judgment) can result in a large, sometimes undeserved, settlement—the “*in terrorem*” increment of the settlement value.”²⁸

As a result, the Supreme Court has addressed the problems engendered by a low pleading standard for fraud, rendering that standard more stringent.²⁹ Moreover, the addition of subsection (f) to Rule 23 of the Federal Rules of Civil Procedure in 1998³⁰ also constituted an attempt to respond to serious concerns about improper settlement pressure. With the introduction of Rule 23(f), class certification was determined to be final enough to warrant interlocutory review by an appellate court.³¹ By allowing appeal at this stage, rather than waiting for immense costs to accrue and only subse-

26. *See id.*

27. For example, manageability at trial is considered in the 23(b)(2) class action certification, though most cases settle and never make it to trial. *See* FED. R. CIV. P. 23; *see, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 462 (2004) (showing that the number of suits filed in federal courts increased exponentially in the last four decades of the twentieth century, yet the number of bench trials and jury trials declined); Michael Moffit, *Pleadings in an Age of Settlement*, 80 IND. L.J. 727, 728 (“Most legal disputes end with a settlement.”) (2005).

28. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

29. *See Ashcroft v. Iqbal*, 129 S. Ct 1937, 1954 (2009) (imposing stricter pleading standards in civil cases); *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (holding that a securities fraud complaint must allege facts adequate to establish an inference of fraudulent intent that is “cogent and at least as compelling as any opposing inference of nonfraudulent intent.”); *Twombly*, 550 U.S. at 558; *see also* text accompanying note 40 *infra* (discussing *Twombly*).

30. *See* FED. R. CIV. P. 23(f). Subsequently restyled in 2007, Rule 23(f) provides that:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Id.

31. *See id.*

quently allowing appeal, improper settlement pressure could be somewhat ameliorated.³²

C. Congressional Intent and the PSLRA

Securities class actions brought in federal courts were deeply affected by the enactment of the Private Securities Litigation Reform Act (PSLRA) in 1995.³³ Primary among the aims of the PSLRA was a desire to diminish the frequency of non-meritorious securities class actions—those filed “whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action.”³⁴

One of the central concerns prompting the passage of the PSLRA was that securities class actions were driven by entrepreneurial attorneys, rather than by injured plaintiffs.³⁵ The PSLRA attempted to remedy this problem by imposing heightened pleading requirements and eliminating some forms of derivative liability.³⁶ More important to the f-cubed problem, however, the PSLRA reformed the procedures governing securities class actions.

32. See, e.g., 28 U.S.C. § 1292(a)(1) (2006) (enacted by Congress enabling appellate review over certain interlocutory orders via a certification procedure); 28 U.S.C. § 2072(c) (2006) (authorizing the Supreme Court to announce rules to “define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title”).

33. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in sections of 15 U.S.C. and 18 U.S.C.) (1995).

34. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) (discussing “abusive practices committed in private securities litigation”).

35. Indeed, Congress explicitly endorsed this view in the legislative history accompanying the PSLRA, stating that the PSLRA was intended to terminate the “routine filing of lawsuits against issuers of securities and others” without respect to the merits of the claim. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.); see James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979 (1996) (“Empirical results show that most securities-fraud class actions are, in fact, frivolous.”); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1469 (2004) (reviewing studies suggesting that many securities class actions have been frivolous). This is still hotly debated. Some commentators have argued that the premises of the PSLRA were inadequate or faulty, see, e.g., Joel Seligman, *Commentary, The Merits Do Matter: A Comment on Professor Grundfest’s “Disimpifying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority,”* 108 HARV. L. REV. 438, 439 (1994), and some have noted its possible chilling effect on meritorious claims, see, e.g., Lynn A. Stout, *Commentary, Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 714–15 (1996).

36. See 15 U.S.C. § 78u-4(b)(1) (2006); see also § 78u-4(b)(2) (imposing heightened scienter requirement); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318–22 (2007).

For example, while leaving intact Rule 23 of the Federal Rules of Civil Procedure, the requirements for selecting lead plaintiffs in securities class actions changed substantially.³⁷ Thus, the perception of increased filing of frivolous securities class action lawsuits is clearly a matter of public policy important enough to be addressed by Congress.

D. *The Supreme Court*

The Supreme Court has of late largely agreed with Congress, noting that “[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”³⁸ This is due to the fact that pleading standards, governed in the past by notice pleading, have traditionally been quite lenient.³⁹

The seminal 2007 case, *Bell Atlantic Corp. v. Twombly*, although not a securities fraud case, addressed the nature of pleading fraud, which is easy to allege, but quite difficult to prove.⁴⁰ This relationship is exacerbated by “blackmail settlements” or “strike suits,”⁴¹ where the “threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [trial].”⁴² In establishing more rigorous standards in the class action context, the Court has echoed Congress in acknowledging the problem of frivo-

37. See FED. R. CIV. P. 23(a). Plaintiffs must establish numerosity, commonality, typicality, and superiority. They must also fall within one of the categories determined by FED. R. CIV. P. 23(b). The passage of the PSLRA eliminated the first-to-file rule, ending the “race to the courthouse” that existed before the PSLRA’s enactment, and requires the court instead to appoint whomever adequately represents the interests of the class—presumptively, whomever has the largest financial interest in the litigation.

38. *Tellabs*, 551 U.S. at 313.

39. See *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *overruled by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

40. *Twombly*, 550 U.S. at 559. The vast discrepancy between ease of allegation and ease of proof in the context of pleading fraud is exacerbated by the fact that most judges deny interlocutory review. See 28 U.S.C. § 1292(b) (2006).

41. “Strike suits” are “meritless suits brought by class action plaintiffs’ lawyers to extort settlement and attorneys’ fees.” Amanda M. Rose, *Life After SLUSA: What Is the Fate of Holding Claims?*, 69 DEF. COUNS. J. 455, 455 (2002).

42. *Twombly*, 550 U.S. at 559. Indeed, *Blue Chip Stamps v. Manor Drug Stores, Inc.*, 421 U.S. 723 (1975), a decision by the Supreme Court holding that non-purchasers and non-sellers of securities lack standing, was explicitly motivated by a concern about so-called “strike suits.” *Blue Chip Stamps*, 421 U.S. at 740; see also Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1320 (2008).

lous lawsuits and their potentially detrimental effects on the American economy.

E. Economic Policy Fears—The Bloomberg-Schumer Report

The potential for massive and devastating awards is embedded in the psyche of foreign investors, many of whom perceive the American legal system as arbitrary, punitive, and jurisdictionally expansionist.⁴³ Indeed, the settlement sums yielded from class actions can be staggeringly large. In 2005, class action settlements yielded a record \$9.6 billion, excluding the partial settlement of \$7.1 billion in Enron litigation.⁴⁴ Moreover, three of the top ten securities class action settlements as of December 2006 involved foreign companies and all for over \$1 billion.⁴⁵

Confirming these fears, a report authored by McKinsey & Co. and the New York City Economic Development Corporation, sponsored by New York City Mayor Michael Bloomberg and New York Senator Charles Schumer, discussed the negative effects of frivolous litigation on investment in the United States. The report noted that “the prevalence of meritless securities lawsuits and settlements in the United States has driven up the apparent and actual cost of business and driven away potential investors.”⁴⁶ Further, the report noted that “[t]he propensity toward litigation, a significant issue for society as a whole, is of particular importance to the securities industry, which in recent years has borne a disproportionate share of the overall cost.”⁴⁷ This share of the cost measures in the billions of dollars and has been growing steadily in recent years.⁴⁸

Not only is America perceived as a place where enormous sums may be spent on litigation, it is also disfavored in the estimation of corporate executives due to the wide breadth of personal and entity

43. See MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP ii (2007) [hereinafter BLOOMBERG-SCHUMER REPORT].

44. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 n.7 (2006).

45. Two settlements involved Nortel Networks (Canada), and one involved Royal Ahold, N.V. (the Netherlands). See Todd Foster et al., NERA ECON. CONSULTING, RECENT TRENDS IN SHAREHOLDER CLASS ACTION LITIGATION: FILINGS PLUMMET, SETTLEMENTS SOAR 5 (2007), available at http://www.nera.com/image/BRO_Recent%20Trends_%201288_FINAL_online.pdf.

46. BLOOMBERG-SCHUMER REPORT, *supra* note 43, at ii.

47. *Id.* at 74.

48. *Id.* (“The total bill for securities settlements in 2005 was 3.5 billion (omitting WorldCom-related settlements of approximately 6.2 Billion), up more than 15 percent over 2004 and nearly 70 percent over 2003.”).

liability engendering serious civil and criminal penalties.⁴⁹ America's legal system is perceived as punitive and unpredictable, and its reach is seen as dramatic and expansive.⁵⁰ A recent capital markets regulatory report, for example, noted that “[f]oreign companies commonly cite the US class action enforcement mechanism as the most important reason why they do not want to list on the US market.”⁵¹

II. THE POLICY PERSPECTIVE

The circuit split with regard to f-cubed class actions, discussed *infra*, indicates that there is, at a fundamental level, a lack of a standard metric to analyze truly global class actions. This means that the dual problems engendered by jurisdictional unpredictability—comity concerns and the problem of crafting uniform national economic policy—will persist. Thus, in a real sense, uniformity itself is the most critical aim of any policy governing jurisdiction over f-cubed actions and will hopefully be resolved by the Supreme Court's ruling on the issue in 2010, or by congressional action. However, the myriad policy implications of dealing with comity as well as economic concerns suggest several different alternatives available to Congress or the Supreme Court, some much more palatable than others.

A. *The Function and Aims of Securities Regulation*

The securities laws address the “core policy of protecting U.S. investors and markets.”⁵² Indeed, the Supreme Court has articu-

49. America is seen as being at a competitive disadvantage with respect to London in particular. *See id.* at 75–77 (“The recent extraterritorial application of other US statutes has made even clearer the personal threat that US laws can present.”).

50. *Id.* at ii (describing perception that the “highly complex and fragmented nature of our [American] legal system has led to a perception that penalties are arbitrary and unfair”).

51. LUIGI ZINGALES ET AL., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 11 (2006), available at www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

52. Buxbaum, *supra* note 3, at 24; *see also* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (“We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.”); H.R. REP. NO. 73-1383, at 1 (1934) (stating that the purpose of legislation was to protect investors); Jill E. Fisch, *Imprudent Power: Reconsidering United States Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 547–48 (1993) (not-

lated the central importance of the 1934 Act as protecting the American markets, noting:

The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated. In response to the sudden and disastrous collapse in prices of listed stocks in 1929, and the Great Depression that followed, Congress enacted the Securities Act of 1933, and the Securities Exchange Act of 1934. Since their enactment, these two statutes have anchored federal regulation of vital elements of our economy.⁵³

Protecting American investors is also critical. For example, the Second Circuit has noted that the federal courts may exercise jurisdiction pursuant to Section 10(b) of the 1934 Act given injury to an American citizen, even if that injury occurred in the purchase or sale of a security abroad.⁵⁴ Indeed, one federal court noted that “[t]he New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada.”⁵⁵ Yet there must be an actual American interest involved: “What little guidance we can glean from the securities statutes indicates that they are designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States.”⁵⁶

However, the centrality of domestic markets and investors to securities law must also be balanced with a second concern: “the subsidiary policy of preventing the United States from becoming a ‘launching pad’ for fraudulent behavior directed elsewhere.”⁵⁷ The United States has a legitimate interest in encouraging reciprocity in policing fraud abroad.⁵⁸ Just as the United States would not want an independent sovereign to countenance the manufacture of securities fraud on its soil, so it should not allow its own territory to be

ing that Congress was primarily concerned with domestic markets when drafting the federal securities laws).

53. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) (internal citations omitted).

54. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336 (2d Cir. 1972).

55. *Id.*

56. *Robinson v. TCI/US W. Cable Commc’n Inc.*, 117 F.3d 900, 906 (5th Cir. 1997).

57. *Buxbaum*, *supra* note 3, at 24; *see also IIT v. Vencap Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (noting that Congress would not have wanted the United States to be used as a “base” for securities fraud).

58. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (noting reciprocity possibility in exercising extraterritorial jurisdiction).

used as a locus for the creation of fraud which would be difficult to litigate in virtually any jurisdiction—a “Barbary coast” for securities fraud, in the Third Circuit’s imagination.⁵⁹

B. Transnational Concerns Underlying the “Presumption Against Extraterritoriality”: The Principle of Comity

There is a thin line between offering litigants meaningful access to remedies in the United States and the imposition of legal hegemony. Concerns of comity and international policy are thus inherent in determining the scope of the extraterritorial application of American laws.⁶⁰

The principle of comity is essential to defining the proper boundaries of United States law. Comity in the legal context is understood as:

[N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁶¹

One commentator has described comity as “an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.”⁶² The “fuzziness” of comity is complicated by the ire raised when it is ignored: “[M]any foreign states view any effort to apply American laws beyond its borders as a violation of the foreign state’s sovereignty and as an improper attempt to export American economic, social and judicial values.”⁶³ It is especially worrisome when decisions relating to global economic policy are made by judges, a practice which raises legitimate concerns regarding the relative institutional competence of the judiciary.⁶⁴

59. *Id.*

60. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

61. BLACK’S LAW DICTIONARY 303–04 (9th ed. 2009) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)).

62. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 281 (1982).

63. Philip R. Wolf, *International Securities Fraud: Extraterritorial Subject Matter Jurisdiction*, 8 N.Y. INT’L L. REV. 1, 13 (1995) (quoting F. Russell Du Puy, III, *International Cooperation in Securities Enforcement*, 46 WASH. & LEE L. REV. 713, 720 (1989)).

64. One commentator has noted that “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function

These concerns are quite stark in the context of extraterritorial application of the securities laws. This is largely due to the fact that the American regime of securities enforcement is generally aggressive as compared to other nations.⁶⁵ It favors a robust amalgam of private and public enforcement mechanisms, which features a particularly expansive private right of action.⁶⁶ By contrast, many nations severely limit the ability of litigants to bring private rights of action.⁶⁷ Others proscribe public enforcement and limit redress to private litigants entirely.⁶⁸ These systems reflect deliberate policy decisions made by the authorities of each nation.⁶⁹

that should not be committed to courts in a democracy.” Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT’L L. 1, 1 n.153 (2001) (citing BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183 (1963)). This idea to some extent mirrors the concerns of the Supreme Court in articulating the “political question doctrine.” As the Supreme Court held in *Baker v. Carr*:

There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. *Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.*

369 U.S. 186, 211 (1962) (footnotes omitted, emphasis added). *But see* *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 115–16 (1987) (noting that asserting personal jurisdiction in the United States over a foreign defendant could disrupt foreign relations).

65. *See* Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT’L L. 369, 372 (2001) (“[C]lass actions do not exist in Germany, Switzerland, and most other countries of the civil law system.”). For an analysis of developments in Europe, see Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 18 PRAC. LITIGATOR 23 (2007) (describing European trends in aggregation).

66. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2005) (noting that the Supreme Court has “long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)”); *see also* *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (noting that private securities fraud actions provide “a most effective weapon in the enforcement” of securities laws and are “a necessary supplement to Commission action”).

67. *See* Debra Lyn Bassett, *Implied “Consent” to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 624–25 (2004).

68. *See* *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008) (“For instance, in Switzerland, no comprehensive federal legislation governs securities fraud, and private remedies are the only ones available.”)

69. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 256 (2007) (describing three models of securities regulation: (1) the “Government-Led Model” of France, Germany, and Japan; (2) a “Flexibility

The choice to permit private securities actions in the first instance implicates a host of secondary considerations and policy choices. For example, the American class action itself is a relatively exceptional procedural mechanism.⁷⁰ The question of whether aggregation should be permitted at all is an increasingly pervasive issue abroad.⁷¹ Of great concern to American courts is the possibility that foreign courts will refuse to recognize United States judgments made via findings of expansive jurisdiction.⁷² This would seriously threaten the central concepts of United States class action procedure: finality and fairness.⁷³

The very features of the American system that have proven to be so attractive for plaintiffs world-wide are the same procedural elements of the American class action that bring it into conflict with

Model,” utilized by the United Kingdom, Hong Kong, and Australia; and (3) a “Cooperation Model,” used by the United States and Canada).

70. See Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002) (“The class action is a uniquely American procedural device.”). While Australia, Canada, and England have some form of aggregation, most group action abroad is in the incipient stage. *Id.* at 422–32 (describing the Australian, Canadian and English systems). Richard Nagareda has noted that “the legal regime for civil litigation in this country is exceptional by comparison to European systems.” Richard Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009). However, Nagareda also points to the nascent aggregation movement in Europe:

Dutch collective settlement actions, English group litigation orders, German model cases in securities litigation, and Italian class actions, among other procedures. Additional moves in the offing suggest a similar openness to possible reforms in the direction of more rather than less aggregate litigation. These include major studies by the European Commission of new measures for aggregate redress in antitrust and consumer litigation and by the Civil Justice Council of England and Wales on reform of collective redress.

Id. at 4–5 (internal citations omitted).

71. See, e.g., Harbour & Shelley, *supra* note 65 (describing historical paucity of group action in Europe and its current expansion); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregation Come to Europe?*, 62 VAND. L. REV. 179 (2009) (discussing whether group actions are feasible in Europe on a large scale); Richard Nagareda, *supra* note 70.

72. See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996–97 (2d Cir. 1975) (noting the significance of the submission of affidavits on behalf of England, Germany, Switzerland, Italy, and France to the effect that they would not recognize a United States judgment).

73. See *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 106–07 (S.D.N.Y. 2007) (“The likelihood of nonrecognition in Germany and Austria raise weightier issues of fairness and lessen, albeit in limited realistic situations, the promise of economy, consistency, and finality made possible when class members are bound to a final judgment or settlement.”).

the policies of other nations.⁷⁴ The opt-out feature⁷⁵ of the 23(b)(3) “damages” class action, for example, is both critical and virtually unique to the American class action; it is eschewed even in those European nations where collective actions exist.⁷⁶ The contingency fee, “one of the defining characteristics of civil litigation in the United States,” is completely proscribed by other nations.⁷⁷ Intensive pre-trial discovery and motion practice, prominent features of American securities class action litigation, are rejected and even vilified by foreign attorneys.⁷⁸ The extensive use of civil juries, and the attendant potential for massive rewards, is nearly exclusive to the American system, especially in complex securities fraud cases.⁷⁹ As Lord Denning, English Master of the Rolls, recounted:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will

74. See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 473 (2001) (“US courts are a magnet for international litigation, given the country’s high damage awards, liberal personal jurisdiction rules, broad discovery standards, and allowance of class actions and contingency fee arrangements.”).

75. Class membership is presumed for individual members under Rule 23(b)(3), absent actual opting out by individual members. Instead of asking to join, class members must ask to be excluded, at least in the case of “damages” class actions. See Fed. R. Civ. P. 23(c)(3).

76. See FED. R. CIV. P. 23(c)(2)(A) (mandatory opt-out procedure in class actions); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1531 (2004) (describing the opt-out as “a fundamental part of class action practice”); see also Issacharoff & Miller, *supra* note 71, at 202–08 (discussing the near impossibility of reconciling opt-in and opt-out systems).

77. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 & n.1 (1998) (“While a number of countries have some form of contingency fee, the American contingency fee is relatively unique, both in its form and its dominance as a means of funding litigation. What sets the American contingency fee apart from contingency arrangements in most other countries is that it is based on a percentage of recovery.”). But see Issacharoff & Miller, *supra* note 71, at 198 (discussing the rise of contingency fee use in Germany, England, and Wales).

78. See Gerald Walpin, *America’s Failing Civil Justice System: Can We Learn From Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 649 (1997) (“The United States is unique in allowing broad pre-trial discovery that includes not only document production but also extensive interrogatories and pre-trial depositions, practices which are, for the most part, not permitted in civil law countries and are rather restricted in other common-law systems.”).

79. See *id.* at 652–53 (noting that, even in common law countries, the civil jury trial is virtually never used outside of America).

conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent. of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 per cent. before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.⁸⁰

Beyond general procedural difficulties, the substantive law of securities fraud poses additional challenges to the notion of transnational enforcement. Central to the litigation of securities fraud is the determination of such basic concepts as scienter, materiality, and causation.⁸¹ Concepts such as fraud on the market, central to American securities class actions, are not accepted in all countries.⁸² This variation being the case, the potential for massive international forum shopping—which may arise given the assertion of expansive subject matter jurisdiction by the federal courts—is especially troubling.⁸³ Such a practice could engender a great deal of direct controversy with the approaches to securities regulation of distinct nations. This, in turn, could constitute an affront to principles of comity and have extremely negative economic consequences.⁸⁴

80. *Smith Kline & French Labs, Ltd. v Bloch*, (1983) 1 W.L.R. 730, 733–34 (Eng. Ct. App.).

81. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 & n.12 (noting that to establish liability under § 10(b) and Rule 10b-5, a plaintiff must prove that the defendant acted with scienter, “a mental state embracing intent to deceive, manipulate, or defraud.”).

82. *See Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008) (“In Canada, securities class actions are recognized, but most provinces do not recognize the fraud on the market doctrine.”). The Supreme Court has defined the fraud on the market theory in the following terms:

An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

83. *See Buxbaum, supra* note 3, at 67.

84. For example, the burdens to the court system could be potentially massive.

The reticence of the Supreme Court and Congress has meant that it is largely up to the lower federal courts to make decisions with the potential to affect international relations and trade. International actors therefore find it difficult, if not impossible, to structure their dealings in reliance on such a variable and unclear area of the securities laws.⁸⁵ It also means that lower federal judges will be forced to make decisions more properly made by Congress or the Supreme Court, which would at least have the benefit of uniformity. With a decision by either actor looking increasingly imminent,⁸⁶ limited access to the courts in the case of true f-cubed class actions in the name of comity and economic interests seems the best course of action.

C. *The Presumption Against Extraterritoriality*

The “presumption against extraterritoriality” essentially holds that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁸⁷ The Supreme Court has consistently held that congressional law is “primarily concerned with domestic conditions.”⁸⁸

85. Indeed, the Supreme Court has recognized this concern in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), noting that “[t]he expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.” Chief Justice Burger thus recognized that international business requires stability and predictability in order to function effectively.

86. See Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009); *Morrison*, 547 F.3d at 174, cert. granted, 130 S. Ct. 783 (2009).

87. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

88. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros.*, 336 U.S. at 285). The definition of domestic conditions has generally been informed by historical reliance on the concept of territoriality. Indeed, the modern conduct test is still, essentially, a territorial rule of jurisdiction. See, e.g., Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 *FORDHAM L. REV.* 1855, 1885 (1997) (describing modern conduct test as a territorial rule). This emphasis on territoriality implied a reluctance to legislate outside of American territory—a hesitancy that led directly to the statutory canon of construction declared by John Marshall in the 1804 case *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). That canon embodied a presumption that Congress would not casually intend to violate the “law of nations.” *Id.* By the twentieth century, the *Charming Betsy* canon had come to stand for the proposition that, absent clear proof of congressional intent, American legislation should not apply abroad. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (agreeing with the government’s argument that “[f]oreign conduct is generally the domain

This presumption has been used extensively in a variety of legal contexts,⁸⁹ including such varied fields as admiralty,⁹⁰ labor law,⁹¹ civil rights,⁹² sovereign immunity,⁹³ torts,⁹⁴ and criminal law.⁹⁵ Most recently, the presumption has been reiterated in the fields of antitrust⁹⁶ and patent law.⁹⁷

Though never addressed explicitly by the Supreme Court, securities law arguably offers greater justification for the application of the presumption against extraterritoriality than other legal fields.⁹⁸ Section 10(b) is silent even on the availability of the pri-

of foreign law, . . . law may embody different policy judgments about the relative rights of inventors, competitors, and the public.”).

89. However, some have argued that this presumption has outlived its usefulness and should be reassessed. “[T]erritorial sovereignty has been eroded by” the development of the United Nations, the importance of international law domestically, international criminal law imperatives, “technological advances” that mandate international cooperation to prevent international calamity, the rise of the global media, and the increasingly global world economy. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 10, 61–63 (1992).

90. See *Murray*, 6 U.S. (2 Cranch) at 118.

91. See *Foley Bros.*, 336 U.S. at 285.

92. See *Arabian*, 499 U.S. at 248.

93. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440–41 (1989).

94. See *Smith v. United States*, 507 U.S. 197, 204 (1993).

95. See *United States v. Bowman*, 260 U.S. 94, 98 (1922) (noting that certain criminal laws should be applied extraterritorially when the nature of the offense is not dependent on their “locality” regardless of where the conduct took place).

96. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). However, the Supreme Court approved the exercise of jurisdiction in the antitrust context in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). In that case, the Court relied on the Restatement (Third) of Foreign Relations Law requirement of reasonableness and found that a finding of significant effects in the United States was warranted. *Id.* at 796.

97. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

98. It is possible that the distinction between antitrust, criminal, patent, tort, and other areas of law on the one hand, and securities regulation on the other, necessitates substantially different jurisdictional tests. See, e.g., *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 356 n.10 (2004) (noting the distinction between securities laws and antitrust laws). One argument, of course, is that securities law in general is too amorphous to be susceptible to the presumption against extraterritorial application. Globalization has only made the character of the securities markets more international, interconnected, and has rendered harms more indivisible than ever before. Moreover, the at times subconscious American commitment to our permissive, expansive model of civil litigation is difficult to quash even when injustice is relatively foreign to national interests. Indeed, the analogy of the Third Circuit to piracy allowed to occur blatantly on American soil without the dispensing of old-fashioned, *American* justice—jury trial and all—is particularly compelling.

vate right of action for *domestic* conduct, to say nothing of *foreign* conduct. Rather than being created by Congress, the private right of action under Section 10(b) has been inferred by the courts.⁹⁹ Indeed, the private right of action under Section 10(b) has been famously called “a judicial oak which has grown from little more than a legislative acorn.”¹⁰⁰ Since the growth of that “judicial oak,” the Court has refused to extend implied rights further.¹⁰¹ The fact that the private right of action for domestic conduct is itself so tenuously rooted in congressional intent provides further evidence that Congress did not intend to bring foreign conduct within the ambit of United States securities law.¹⁰²

As a matter of fact, two recent cases in which the Supreme Court declined to assert jurisdiction both featured plaintiffs who based their arguments on statutes explicitly sanctioning the extraterritorial application of the substantive law in question—the Sherman Act¹⁰³ and patent laws,¹⁰⁴ respectively. The absolute silence of

99. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

100. *Id.* at 737 (discussing the lack of congressional intent regarding private actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78ll (2009)).

101. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772 (2008) (noting that to extend implied rights “runs contrary to the established principle that “[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction”) (internal citations omitted); see also *Blue Chip Stamps*, 421 U.S. at 737.

102. Since the writing of this paper, the House of Representatives has passed a bill that in part addresses the extraterritorial application of the antifraud provisions of the securities laws, providing for jurisdiction when there is either “conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors” or when there is “conduct occurring outside the United States that has a foreseeable substantial effect within the United States.” Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009). However, a companion bill remains stalled in Senate committee, and omits completely any jurisdictional prescription. Thus this Note does not consider the bills to be any substantial step toward discerning congressional intent. Indeed, that the Supreme Court was willing to grant certiorari is testimony to the inconclusive nature of this bill.

103. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004). The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) covers conduct with “a direct, substantial, and reasonably foreseeable effect” on United States commerce and “such effect gives rise to a [Sherman Act] claim.” 15 U.S.C. § 6a(1)–(2) (2006).

104. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). Under consideration was the specific question of whether a Windows “master disc”—solely used to make copies of software for later installation in computers abroad—should be

Section 10(b) of the 1934 Act, on the other hand, buttresses the presumption against extraterritoriality in securities fraud cases.¹⁰⁵

Justice Breyer, writing for the Court in declining to apply the Sherman Act extraterritorially, noted a potentially useful distinction between domestic and foreign injury. He found that domestic injury calls for the extraterritorial application of American law, despite possible “interfere[nce] with a foreign nation’s ability independently to regulate its own commercial affairs.”¹⁰⁶ In the case of foreign injury, however, it was simply not reasonable “to apply [American] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim.”¹⁰⁷ Ultimately, he concluded, greater uniformity¹⁰⁸ will itself help ensure that the lower courts will not disrupt the balance between rights and remedies as constructed by independent nations, or the decisions made by Congress, in determining the permissible extent of American interference in the affairs of sovereign nations.¹⁰⁹

considered a “component” for purposes of patent infringement liability. *See id.* at 442. The Supreme Court unanimously rejected the plaintiffs’ argument for extraterritorial application of United States antitrust laws in a class action featuring a putative class comprised of foreign and domestic plaintiffs. *See id.* The provision at issue in *Microsoft* expressly provided for extraterritorial application. It stated that anyone who “supplied in or from the United States all or a substantial portion of the components of a patented invention,” and “actively induce[d] the combination of such components outside of the United States,” would be “liable as an infringer” if the combination would have “infringe[d] the patent [had it] occurred within the United States.” *Id.* at 445 (quoting 35 U.S.C. § 271(f)(1) (2003)).

105. *See* Margaret Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT’L L. 677, 681–82 (1990). Sachs makes a case for the position that the legislative history argues against the extraterritorial application of the securities laws.

106. *F. Hoffman-La Roche*, 542 U.S. at 169.

107. *Id.* at 165–66.

108. The idea that courts should weigh “comity considerations case by case” was “too complex to prove workable.” *Id.* 168. “The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.” *Id.* at 169.

109. *Id.* at 167.

III. JUDGE FRIENDLY'S FORMULATION AND THE CIRCUIT SPLIT

In the earliest case to use the conduct test, *Leasco Data Processing Equipment Corp. v. Maxwell*,¹¹⁰ Judge Henry Friendly developed the concept of an “essential link” between the domestic conduct and the harm in question to describe whether jurisdiction would be consistent with foreign relations, United States policy, and accepted jurisprudence.¹¹¹ Yet, as this Note explores below, what exactly constitutes an “essential link” has been variably interpreted by the courts.¹¹²

A. *Testing Jurisdiction*

The “effects” test¹¹³ measures the total domestic effect of the alleged fraud, allowing a court to exercise jurisdiction solely over foreign conduct exerting a “substantial effect” on United States investors or markets.¹¹⁴ In practice, it is nearly impossible for a United States court to assert jurisdiction over an f-cubed case via the effects test. The putative class of investors involved in an f-cubed securities class action is made up, at least in substantial part, of foreign defendants. Even when American investors suffer losses the effects test will seldom be satisfied, as foreign litigants are prohibited from “bootstrap[ing] their losses to . . . independent American losses.”¹¹⁵ Moreover, injury must be alleged with sufficient specificity, which generally precludes the use of the effects test as it

110. 468 F.2d 1326 (2d Cir. 1972).

111. In *Leasco*, an American corporation engaged in misrepresentations made in the United States. The case featured an American plaintiff. The Court’s inquiry centered on whether “if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purpose which its words can fairly be held to embrace.” *Id.* at 1337. Since an American was harmed in the transaction, the court exercised jurisdiction.

112. See e.g., *Robinson v. TCI/US W. Cable Commc’ns Inc.*, 117 F.3d 900, 909 (5th Cir. 1997) (“The circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test.”).

113. The effects test was borrowed from the field of antitrust. See *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964) (proscribing mergers with “a probable anticompetitive effect”).

114. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (“A federal court also has jurisdiction under the ‘effects’ test where illegal activity abroad causes a ‘substantial effect’ within the United States.”) (quoting *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989)).

115. *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002).

pertains to American markets. For example, fraud affecting the prices on the New York Stock Exchange, with an attendant effect on an investor's "faith in the market," is insufficient to merit the attention of United States courts—"an adverse effect on this country's general economic interests or on American security prices" does not merit jurisdiction in the federal system.¹¹⁶

As a result of these difficulties, the conduct test generally controls subject matter jurisdiction over f-cubed cases.¹¹⁷ It is usually satisfied if a defendant's domestic conduct was more than "merely preparatory" to the fraud,¹¹⁸ and "directly caused" foreign losses.¹¹⁹ Yet courts have not uniformly defined many of the key terms, including what constitutes an "essential link."¹²⁰

Even a recent bill passed by the House of Representatives on the subject is simply too equivocal to provide meaningful guidance.¹²¹ On December 11, 2009, the House of Representatives passed a bill which would provide some degree of extraterritorial application of the antifraud provisions of the securities laws. The bill contemplates jurisdiction when there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."¹²²

Thus, the first jurisdictional aspect of the bill, essentially a conduct test, simply calls for "significant steps in furtherance of the

116. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987–89 (2d Cir. 1975).

117. Courts allow either conjunctive or disjunctive use of the tests in determining the breadth of the antifraud provisions of the 1934 Act; for example, the Second Circuit has allowed disjunctive use of the conduct and effects tests while explicitly noting that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba Ltd. v. Lep Group*, 54 F.3d 118, 122 (2d Cir. 1995).

118. *Bersch*, 519 F.2d at 992.

119. *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003).

120. *See e.g.*, *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 909 (5th Cir. 1997) (noting that the conduct test's requirements vary among the circuit courts and describing the circuit split that exists).

121. Indeed, as a result of this bill, Solicitor General Kagan argued that it would be improper for the Supreme Court to grant the petition for certiorari. *See* Brief for the U.S. as Amicus Curiae, *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008), *cert. granted*, 2009 U.S.L.W. 8694 (U.S. Nov. 30, 2009).

122. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009).

violation.”¹²³ Yet the problems with regard to unpredictability would remain even if this bill were passed as written. As will be shown below, just how “significant” the steps would have to be for jurisdiction to be properly asserted is precisely the problem with which the courts have struggled for decades.

B. Friendly’s Formulation: Intellectual Antecedents of the Conduct Test

As a consequence of New York City’s significance in the world of global commerce, the Second Circuit has traditionally played an important role in adjudicating complex cases at the junction of law and finance.¹²⁴ The jurisdictional analysis pioneered by the Second Circuit continues to provide the framework for determining the jurisdictional parameters of complex transnational litigation.

*Bersch v. Drexel Firestone, Inc.*¹²⁵ was the first case to deal with the question of exercising subject matter jurisdiction over foreign plaintiffs in the context of a class action.¹²⁶ The case involved fraud allegedly perpetrated by a company headquartered in Europe and incorporated in Canada.¹²⁷ The plaintiff class was almost exclusively comprised of foreign individuals who had purchased shares issued and, for the most part, traded abroad.¹²⁸ The plaintiffs argued that, because the offering documents were substantially prepared by professional firms in New York, their claims merited adjudication under Section 10(b) of the 1934 Act and under the antifraud provisions of the 1933 Securities Act.¹²⁹

The district court found that the combined assistance of New York-based law firms, investment banks, and accounting firms in preparing the offering documents constituted a legitimate basis for asserting subject matter jurisdiction over the defendants.¹³⁰ Juris-

123. *Id.*

124. *See* Coffee, *supra* note 44, at 1541 n.18 (2006) (“The Second Circuit and the Ninth Circuit have long been the principal circuits in which securities class actions are filed. In 2005, when the number of securities class actions fell to 176, forty-four were filed in the Second Circuit, thirty-eight in the Ninth Circuit, and only eighteen in the Third Circuit, which had the next highest number.”).

125. 519 F.2d 974 (2d Cir. 1975).

126. *See id.*

127. *See id.* at 978.

128. *See id.* at 977–78.

129. *See* *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 457 (S.D.N.Y. 1974), *aff’d in part, rev’d in part*, 519 F.2d 974 (2d Cir. 1975).

130. *See id.* at 453 (“It is clear that the provisions of the American securities laws may cover transactions in the securities of foreign issuers Ultimately, the concern is that domestic law be applied only to transactions with which the United States has a significant connection or interest.”).

diction was not defeated by the fact that a large portion of the plaintiff class was made up of foreign investors or by the fact that many of the plaintiff class members had purchased the securities on foreign exchanges.¹³¹ In essence, the district court found that absent the preparatory activity in the United States the fraud would not have been perpetrated and considered this causal link sufficient to support jurisdiction.¹³²

The Second Circuit Court of Appeals reversed, rejecting the potentially expansive “but for” causation test in favor of the “conduct” test.¹³³ Instead, by focusing on the nexus between the fraudulent activity, which actually took place in the United States, and the alleged fraud, the court found that the domestic activity could not support jurisdiction.¹³⁴ Writing for the court, Judge Friendly noted:

[W]e do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.¹³⁵

Thus, while an American plaintiff must show that a defendant’s conduct “significantly contributed” to his loss in order to support jurisdiction by United States courts, a foreign plaintiff must show that the defendant’s conduct “directly caused” the loss.¹³⁶ Significantly, Judge Friendly found that jurisdiction existed as to the twenty-two American citizens in the class, but dismissed the claims brought by the foreigners.¹³⁷

However, Judge Friendly did not completely reject the extraterritorial application of the United States securities laws, which might have created a simple, bright-line rule for the courts to apply.¹³⁸ Indeed, in the same year as *Bersch*, Judge Friendly also authored *IIT*

131. *See id.* at 457–58.

132. *See id.* at 458 (“Finally, the domestic conduct was, although less direct than that in *Leasco*, an ‘essential link’ in inducing the ultimate purchases.”).

133. *See Bersch*, 519 F.2d at 987.

134. *See id.*

135. *Id.*

136. *Id.* at 993.

137. *See id.* at 987, 991, 1001.

138. Though, at least one commentator has argued that correct application of the *Bersch* test would lead to the dismissal of most f-cubed or related claims. *See* George T. Conway, III, *The Rise and (Coming) Fall of “F-Cubed” Securities Litigation*, 9 ENGAGE 1, 34 (2008) (noting that the *Bersch* conduct test is a “clean, bright-line rule”).

v. Vencap,¹³⁹ which provided an oft-cited analysis for allowing prescriptive jurisdiction over transnational securities fraud.¹⁴⁰ In that case, the court held that a foreign corporation was entitled to sue another foreign corporation because the planning of the fraud and the preparation of legal documents took place within the United States.¹⁴¹

Conceding the lack of any textual or historical mandate regarding the extraterritorial application of the 1934 Act, Judge Friendly in *Bersch* argued that the court should use its “best judgment as to what Congress would have wished if these problems occurred to it.”¹⁴² In his view, Congress could not have wanted the “United States to be used as a base for manufacturing fraudulent securities devices for export, even when these are peddled only to foreigners.”¹⁴³ This approach has been labeled as the “good neighbor” approach; it holds that the United States should enforce antifraud laws when they are breached to any degree within its borders.¹⁴⁴ Otherwise, some American defendants might be beyond the reach of any jurisdiction, and some American plaintiffs might not be able to vindicate their claims.

The burdens imposed by extraterritorial application of securities laws also proved to be of concern to Judge Friendly, especially in the class action context. He observed that the “United States courts have no reason to become involved, and compelling reason not to become involved, in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail.”¹⁴⁵ Indeed, he noted that the class action mechanism itself posed “tremendous burdens” on American courts, and that class actions in general demanded special considerations relating to international policy, comity, and duplicative recovery.¹⁴⁶ To that end, the case for exer-

139. 519 F.2d 1001 (2d Cir. 1975).

140. See, e.g., *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

141. See *Vencap*, 519 F.2d at 1018. That case involved a suit alleging fraud against a Bahamian corporation, established by a New York citizen residing in the Bahamas. The plaintiff was an international investment trust organized under the laws of Luxembourg.

142. *Bersch*, 519 F.2d at 993.

143. *Vencap*, 519 F.2d at 1017.

144. See, e.g., John C. Coffee, Jr., *Foreign Issuers Fear Global Class Actions*, NAT'L L.J. (June 14, 2007) (criticizing Friendly's notion of being a “good neighbor” as overly invasive and arguing for a limited extraterritorial application of securities laws).

145. *Bersch*, 519 F.2d at 993–98.

146. *Id.*

cising prescriptive jurisdiction in the class action context should present especially persuasive justification.¹⁴⁷

C. A “Friendly” Disagreement: The Circuit Split

Neither Judge Friendly’s analysis in *Bersch* or *Vencap*, nor any other decision, has produced agreement among the circuit courts on the issue of the extraterritorial application of securities laws.¹⁴⁸ Though the Supreme Court recently granted certiorari on the issue, it is exceedingly unclear how they will interpret congressional silence as to the scope of the 1934 Act’s antifraud provisions.

It is reasonably probable, however, that the Supreme Court will adopt some version of Judge Friendly’s conduct test. Indeed, Judge Friendly’s general description of the conduct test and his analysis of the jurisdictional problems posed by foreign aspects of lawsuits in the federal court system have been adopted by virtually every circuit court. However, even given this agreement at a general level,

[t]he circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test, although all agree that it is based on the idea that Congress did not want “the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.”¹⁴⁹

Thus, the Supreme Court will have to resolve precisely what sort of conduct will satisfy the requirements of the classic test. It is also quite notable at the outset that the House of Representatives bill, even if passed in its current incarnation, is flexible and vague enough to encompass any of the analyses utilized by the various circuit courts.

The D.C. Circuit hews closest, and most rigorously, to Friendly’s analysis in *Bersch*. The analysis employed by that circuit requires that the domestic conduct, standing alone, must constitute a violation of the antifraud provisions of the securities laws.¹⁵⁰ This means that fraudulent statements or misrepresentations must originate in the U.S., must be made with the requisite scienter, must be made in connection with the sale or purchase of securities, and

147. *See id.* at 993 (“If what was before us was a single action with only named plaintiffs of the three sorts above described or three separate actions on behalf of the respective classes, we could promptly proceed to decision. Unhappily that is not the case.”).

148. *See, e.g.,* *Robinson v. TCI/US W. Cable Commc’ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997).

149. *Id.* at 905 (citations omitted).

150. *See Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987).

must cause injury to the claimants.¹⁵¹ Nearly determinative value is assigned to the actual location from which the misrepresentation or fraud originated.¹⁵²

Contrary to the D.C. Circuit's narrow test, the approaches adopted by the Third, Eighth, and Ninth Circuits focus on a rather more expansive baseline requirement: that "at least some activity designed to further a fraudulent scheme occurs within [the United States]."¹⁵³ The Third Circuit, for example, eschews the *Bersch* analysis and cleaves more closely to Friendly's "good neighbor" analogy, though perhaps in more colorful terms. That court reasons that congressional intent could not have included turning the United States into "a Barbary Coast, as it were, harboring international securities pirates" ¹⁵⁴ This analysis merely requires "at least some" domestic conduct in furtherance of the fraud.¹⁵⁵ It legitimizes subject matter jurisdiction based on "the acts [which] helped to make the gun" rather than the place from "whence the bullet was fired,"¹⁵⁶ concentrating on causation rather than on the territorial aspect of analysis. The analyses employed by the Eighth and Ninth Circuits, marginally more stringent than the Third Circuit, require some relevant, significant conduct to occur within the U.S.¹⁵⁷

More stringent still are the approaches of the Fifth and Seventh Circuits, which require a "higher quantum of domestic conduct."¹⁵⁸ The Fifth Circuit has explicitly allied itself with the Second Circuit's approach, noting that "the presumption against extraterritorial application informs our choice between the Second Circuit's restrictive test and the more expansive standard applied by

151. *See id.*

152. *See Conway, supra* note 138, at 34.

153. *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977); *see also Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983) (adopting the *Continental Grain* test); *Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) (holding that jurisdiction is proper when the defendant's "conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment").

154. *Kasser*, 548 F.2d at 116.

155. *Id.* at 114.

156. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975).

157. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *Cont'l Grain*, 592 F.2d at 421 (holding that jurisdiction applies when defendant's "conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment").

158. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997).

the Third, Eighth, and Ninth Circuits.”¹⁵⁹ Though the Fifth Circuit states that its test should be interpreted identically to that of the Second Circuit, the two do not neatly converge.¹⁶⁰ In fact, the Fifth Circuit has erroneously equated the Second and D.C. Circuit approaches. As this Note will demonstrate in the next section, however, the D.C. Circuit approach virtually eliminates the f-cubed action from the federal courts, while the Second Circuit would explicitly allow the f-cubed action in some circumstances. Yet, as discussed below, the Second Circuit itself was, until recently, plagued by extreme uncertainty regarding the proper extraterritorial application of the antifraud provisions of the securities laws.¹⁶¹

D. *The Second Circuit Approach*

In the case of *In re Alstom SA Securities Litigation*,¹⁶² a New York federal district court noted the serious problem with the jurisprudence concerning the extraterritorial application of securities laws:

[A]ny notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe. Even on a surface reading, the variegated standards . . . coupled with the latitude accorded by Second Circuit guidance that no particular consideration may be decisive, rather than offering a explicit counsel and a clear path towards the resolution of a jurisdictional challenge in a complex case . . . serve only to confirm that the determination is by no means an easy task.¹⁶³

Recently though, the Second Circuit decided *Morrison v. National Australia Bank*,¹⁶⁴ its first true f-cubed case. That circuit has

159. *Robinson*, 117 F.3d at 906.

160. *See id.* at 905 n.10 (noting, incorrectly, that the Second and D.C. Circuit approaches were the same).

161. *Compare, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008) (declining to exercise subject matter jurisdiction), *cert. granted*, 130 S. Ct. 783 (2009), *with In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346 (S.D.N.Y. 2005) (finding subject matter jurisdiction in matter featuring a class of foreign plaintiffs alleging accounting fraud at the United States subsidiary of a French corporation, when the alleged misstatements were distributed abroad), *and In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 74–76 (S.D.N.Y. 1999) (finding subject matter jurisdiction proper in a case featuring a foreign plaintiff class, a Canadian defendant, and a United States subsidiary).

162. 406 F. Supp. 2d 346 (S.D.N.Y. 2005).

163. *Id.* at 375.

164. 547 F.3d 167 (2d Cir. 2008).

again proved to be a leader in formulating the optimal approach to the exercise of jurisdiction in cases of transnational securities fraud. In *Morrison*, National Australia Bank (NAB) allegedly made false statements in periodic reports, which were filed with Australian securities regulators and distributed to its shareholders.¹⁶⁵ The false statements related to the accounting and reporting activities of NAB's wholly-owned American mortgage service company, Home-Side.¹⁶⁶ The question in the case was whether this conduct could be properly categorized as "substantial" rather than "merely preparatory."¹⁶⁷

Morrison elucidates how fact-dependent jurisdictional determinations can be in f-cubed cases. The fraudulent data in question had been prepared by an American mortgage subsidiary, which sent reports to NAB in Australia.¹⁶⁸ NAB then incorporated those numbers into statements provided to NAB shareholders.¹⁶⁹ The NAB shareholders were nearly universally located outside the United States, though an extremely small percent of the plaintiff class was made up of American investors who had purchased American Depository Receipts (ADRs) on the New York Stock Exchange.¹⁷⁰ The vast majority of the class was made up of foreign investors whose shares were purchased on foreign exchanges.¹⁷¹

The district court opinion relied on both the conduct test and the effects test to dismiss the complaint for lack of subject matter jurisdiction.¹⁷² Judge Jones noted that the domestic conduct in this case was only a very weak "link in the chain" of foreign securities fraud.¹⁷³ The Second Circuit affirmed, holding that the domestic conduct must be "more than merely preparatory to the fraud" and that such acts must have "directly caused losses to foreign investors abroad."¹⁷⁴

As to the central question—what constitutes "direct" causation—the Second Circuit found that such a determination depends "on what and how much was done in the United States and on what

165. *Id.* at 169.

166. *Id.*

167. *Id.* at 171.

168. *Id.* at 169.

169. *Id.*

170. *See In re Nat'l Austl. Bank Sec. Litig.*, 2006 WL 3844465, at *15 (S.D.N.Y. 2006) ("[T]he aggregate value of the ADRs represented a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares . . .").

171. *See id.*

172. *See id.* at *4–5.

173. *Id.* at *8.

174. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008).

and how much was done abroad.”¹⁷⁵ In applying this analysis to the alleged fraud at issue, the court found that, compared to the conduct in the U.S., the Australian conduct was “significantly more central to the fraud and more directly responsible for the harm to investors.”¹⁷⁶ Moreover, the Australian parent company, not the Florida subsidiary, was responsible for ensuring the accuracy of releases and statements.¹⁷⁷ Thus the locus of the fraud—the heart of the fraud—was determined to be Australia, and jurisdiction would not lie in the United States.¹⁷⁸

IV. POSSIBLE SOLUTIONS

A. *The D.C. Circuit’s Bright-Line Approach*

The D.C. Circuit’s approach is unique in the demanding test it sets forth for determining jurisdiction. Following a literal reading of *Bersch*, it endorses a version of the conduct test that turns on the location of the fraud.¹⁷⁹ The domestic conduct in question must constitute in itself a violation of the antifraud provisions of the securities laws to merit the application of subject matter jurisdiction.¹⁸⁰ Every other circuit eschews this analysis in favor of something much more similar to a direct causation test.¹⁸¹

This clear rejection of expansive prescriptive jurisdiction in federal securities class actions defers to the need for judicial restraint in matters of international policy. Indeed, the D.C. Circuit’s decision in *Zoelsch* reads like a critique of the relationship between being a “good neighbor” and the extraterritorial policing of securities fraud. It rejects the notion that courts must interpret congressional intent had it considered the contemporary issue. Judge Bork

175. *Id.*

176. *Id.* at 176.

177. *Id.*

178. *See id.*

179. *See Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987). Fraudulent statements or misrepresentations must originate in the United States, must be made with scienter, must be made in connection with the sale or purchase of securities, and must cause injury to the claimants. *Id.* at 33.

180. *See Zoelsch*, 824 F.2d at 31.

181. The Second Circuit in *Morrison* noted that its test did not require “the domestic conduct to comprise all the elements necessary to establish a violation of Rule 10b-5.” *Morrison*, 547 F.3d at 172 n.6 (2d. Cir. 2008). Indeed, one commentator—the attorney who argued on behalf of NAB—has argued that the D.C. Circuit’s approach is the correct approach. Read correctly, the *Bersch* conduct test should be properly understood as a “clean, bright-line rule.” Conway, *supra* note 138, at 34.

insists: “[I]t is somewhat odd to say . . . that courts must determine their jurisdiction by divining what Congress would have wished if it had addressed the problem. A more material inquiry might be what jurisdiction Congress in fact thought about and conferred.”¹⁸² Thus Judge Bork highlights a serious problem with this type of dynamic interpretation: If Congress had wanted, at any time or contemporaneously, to expand the antifraud provisions of the securities laws to extraterritorial conduct, it could have done so with relative ease. According to Bork’s analysis, the 1934 legislature’s silence could be easily surmounted, and it follows that implying intent where it is perfectly clear that none existed is unnecessary and normatively improper.¹⁸³

Judge Bork’s analysis also points to the fundamental problem with balancing tests. He argues in *Zoelsch* that such approaches are by definition “difficult to apply and are inherently unpredictable.”¹⁸⁴ Further, their very unpredictability “present powerful incentives for increased litigation.”¹⁸⁵

The D.C. Circuit approach avoids the unpredictability of the more flexible approaches used by other circuits by adhering to a bright-line rule that essentially rejects virtually any extraterritorial application of the antifraud provisions of the 1934 Act. It also recognizes the relative inability of the judiciary to formulate transnational securities policy and the specter of American legal imperialism.

Along these lines, Professor Coffee has noted that:

[T]he obligation to be a “good neighbor” sometimes requires prudence and restraint, not hyperactive zeal. Although a good neighbor may properly be concerned that its borders not be used to shelter a fraud against its neighbor’s citizens, it should also be cautious in not interfering unduly or obtrusively in a domestic dispute that is simply none of its business.¹⁸⁶

Professor Coffee has distinguished the Second Circuit’s decision in *Vencap* as abandoning jurisdictional restraint out of concern that the SEC be able to pursue an f-squared case in the United States (since the primary defendant was American) where other jurisdictions would be powerless to do so.¹⁸⁷ In his view, subsequent decisions have co-opted and essentially corrupted the originally lim-

182. *Zoelsch*, 824 F.2d at 32.

183. *See id.* at 33.

184. *Id.* at 32 n.2.

185. *Id.* at 32; *see also* Conway, *supra* note 138, at 34.

186. Coffee, *supra* note 144.

187. *Id.*

ited “good neighbor” and “base for fraud” approaches, expanding them beyond all recognition.¹⁸⁸ This has been, in his opinion, detrimental to sound legal and political policy.¹⁸⁹

Judicial restraint can be taken too far. The problem with the D.C. Circuit’s approach is that it starts from the premise that extraterritorial application of United States law should be avoided at absolutely all costs. Indeed, the court conceded that “[w]ere it not for the Second Circuit’s preeminence in the field of securities law and our desire to avoid a multiplicity of jurisdictional tests, we might be inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors.”¹⁹⁰

However, there are times when American law does and should apply extraterritorially. This is especially true when United States plaintiffs are involved. The United States has a legitimate concern in protecting its own investors and markets.¹⁹¹ The D.C. Circuit approach does not address the traditional concerns with restricting the extraterritorial application of the antifraud provisions of the securities laws, namely that the United States securities markets will become a “base” for foreign, fraudulent securities transactions.¹⁹² Neither does it address, even to dismiss, the legitimate desire of the United States to encourage reciprocity with foreign nations regarding vigorous and just enforcement of the securities laws.¹⁹³ Yet American investors’ reliance upon the protections offered by foreign nations must be dependent to some extent on the protections American law offers to foreign investors.

The D.C. Circuit approach also puts the cart before the horse in terms of pleading requirements. Essentially, to prove that subject matter jurisdiction can be legitimately exercised, plaintiffs must prove that all the elements of the securities fraud claim occurred

188. *Id.*

189. *See id.*

190. *Zoelsch*, 824 F.2d at 32.

191. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (“We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.”); Fisch, *supra* note 52, at 547–48 (noting that Congress was primarily concerned with domestic markets when drafting the federal securities laws).

192. *See IIT v. Vencap Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (noting that Congress would not have wanted the United States to be used as a “base” for securities fraud).

193. *See Buxbaum*, *supra* note 3, at 24.

domestically.¹⁹⁴ Proper analysis should divorce the two examinations. The jurisdictional analysis should precede the analysis of the merits of the fraud claim. Moreover, the jurisdictional analysis should be relatively less rigorous in order to allow non-frivolous claims to proceed to the merits without requiring plaintiffs to plead so extensively at the jurisdictional stage.

B. *Balancing Tests: Measuring the Immeasurable?*

Absent a usable, objective metric by which to weigh the relative merits of arguments, it is difficult for judges to make principled, predictable decisions. The relative freedom of the federal judge, in turn, runs the risk of undermining the interests of international relations and international commerce.¹⁹⁵ The need for a usable metric for lower federal courts to employ is imperative to avoid inter-circuit as well as intra-circuit discord.

1. *Morrison's* Balancing Approach

The discretion left to federal judges via the Second Circuit's *Morrison* balancing approach cannot truly alleviate the unpredictability that currently plagues f-cubed cases. After all, on closer scrutiny it is quite possible that, a different judge presiding, the *Morrison* case itself might have come out the other way.¹⁹⁶ The reality of intra-circuit splits in addition to inter-circuit splits thus seems to demand a more forceful approach.

It may be that *Morrison* will be interpreted by the Supreme Court as standing for the proposition that foreign plaintiffs will have a difficult time satisfying the "conduct" test against foreign corporations if the challenged statements were made outside of the United States based on information that was evaluated (though not produced) abroad. Notably absent from the plaintiff's complaint, for example, were allegations of negative effects on United States investors. Thus, in a way, *Morrison* returns to a territorial-like approach to subject matter jurisdiction.

194. See *Zoelsch*, 824 F.2d at 31.

195. Transnational disputes generally feature assessments that are foreign and challenging. See Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589–90 (1983).

196. Compare *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008) (ruling against jurisdiction), with *In re Alstom SA Sec. Litig.*, 406 F.Supp. 2d 346 (S.D.N.Y. 2005), both dealing with foreign class actions alleging that accounting errors perpetrated by a United States subsidiary were incorporated into financial statements distributed outside America by a foreign defendant corporation.

If the Supreme Court were to take up the Second Circuit's test, it could promulgate more precise definitions regarding the specific elements: How close must the nexus be for "direct action" and how substantial must an act be to overcome the presumption that it is "merely preparatory"? With the continued changes wrought by globalization, it is likely that litigation over definitional aspects of Friendly's formula will persist and possibly intensify. Thus, it is important for Congress, as well as the Supreme Court, to assess the arguments for and against f-cubed jurisdiction and fashion standards that take into account the policy implications, which the courts now balance in an ad hoc fashion.

2. The SEC's Modified Conduct Test

The SEC, in an amicus brief submitted in *Morrison*, proposed an alternative formulation of the conduct test for determining the reach of the United States securities laws. The proposed test was rejected by the court in *Morrison*, but it merits consideration as a possible alternative approach for the Supreme Court or Congress to espouse.

Noting the diversity of approaches among the circuits, the SEC proposed that courts exercise jurisdiction over transnational securities fraud in the f-cubed context when the domestic conduct "is material to the fraud's success and forms a substantial component of the fraudulent scheme."¹⁹⁷ The jurisprudence in this area, however, is fundamentally complicated by the question as to what exactly constitutes materiality and substantiality. Regarding the former, the SEC insisted that the conduct should constitute "an integral—not incidental or ancillary—link in the chain of events in the transnational fraud."¹⁹⁸ Substantiality would depend on the "quantum of conduct" in the United States or whether conduct was "highly significant" to the fraudulent enterprise.¹⁹⁹ The SEC also noted with approval the Second Circuit's concern that prescriptive jurisdiction over class actions should be exercised only with extra justification, given the onerous burdens imposed by the mechanism on the district courts.²⁰⁰

197. Brief of the Securities and Exchange Commission as Amicus Curiae at 2, *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.2d 167 (2d Cir. 2008) [hereinafter SEC Amicus Brief], available at <http://www.sec.gov/litigation/briefs/2008/nationalaustralianbank.pdf>.

198. *Id.* at 23.

199. *Id.* at 24.

200. *Id.* at 4 & n.1.

Though *Morrison* featured a foreign entity making alleged misstatements to largely foreign investors, the SEC amicus brief argued in favor of exercising jurisdiction.²⁰¹ Applying its own formulation of the conduct test, the SEC argued that the domestic conduct of the Florida subsidiary was a “substantial” part of the alleged fraud and “material” to the fraud’s success.²⁰² The Second Circuit rejected the SEC’s argument because of its potential to lead to a more expansive assertion of jurisdiction over cases more properly litigated elsewhere.

The SEC’s proposed test comes closer than the current conduct test to guaranteeing a predictable way of determining jurisdiction in f-cubed cases. Were the Supreme Court to adopt the SEC recommendation, however, they would have to be quite explicit about the necessary requirements of the test, in order to avoid running afoul of comity or economic concerns. What constitutes an adequate “quantum” of domestic conduct, if not properly defined, would otherwise be decided by federal judges on a case-by-case basis, which would provide no predictability and raise concerns about comity and international economic policy. This approach also runs into the potential problem of institutional competence, which cannot be altogether overcome even by a pronouncement of sufficient specificity by the Supreme Court.

3. Reasonability and the Restatement Approach

Sections 402 and 403 of the Restatement (Third) of Foreign Relations Law promulgate principles of international law dealing specifically with legislative jurisdiction. Section 403 allows prescriptive jurisdiction with respect to: (a) conduct that takes place within the nation’s territory (at least “in substantial part”),²⁰³ (b) conduct outside its territory “that has or is intended to have substantial effect within its territory,”²⁰⁴ (c) the activities and interests of its citizens,²⁰⁵ and (d) activities implicating national security.²⁰⁶

Even when these requirements are satisfied, Section 403 imposes an overarching requirement of reasonableness.²⁰⁷ Essentially

201. *See id.* at 32.

202. *Id.* at 35.

203. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(a) (1986).

204. *Id.* § 402(1)(c).

205. *Id.* § 402(2).

206. *Id.* § 402(3).

207. *See id.* § 403(1). One commentator has compared the reasonableness requirement to the imposition of “minimum contacts” and “reasonableness” by the Due Process Clause on judicial jurisdiction. *See* Born, *supra* note 89, at 38 & n.173

a balancing test, the inquiry considers several different, non-exclusive factors. These include the “location of the challenged conduct, the effects within the regulating state, the nationalities of the parties, the ‘importance of the regulation’ to the regulating state, the likelihood of conflict with another state’s laws, and the extent to which the regulation is consistent with, and important to, the ‘international system.’”²⁰⁸

Thus the “reasonableness” test of the Restatement could be used either with the litany of requirements laid out by the Restatement itself or in conjunction with the “conduct” test currently used by the circuit courts in defining the scope of extraterritorial application of the securities laws. For example, the Second Circuit has noted that the focus of the inquiry in determining the scope of extraterritorial application of the securities laws often considers and turns on the concept of “reasonableness:”

As more fully detailed below, insofar as the Second Circuit’s subject matter jurisdiction doctrine viewed as a whole suggests an overlying principle to which the court’s articulated considerations and precedents point, it is one that, in the final analysis, is grounded on congressional policy as bounded by a standard of reasonableness. As expressed in *Bersch*, the ultimate question is whether Congress contemplated that American resources would be allocated to adjudicate predominantly foreign disputes and whether the United States has a relevant interest in the litigation.²⁰⁹

The flexibility of a Restatement-based approach could be sensitive and responsive to the myriad interests presented by f-cubed cases: comity, economic policy and the welfare of the United States, fairness, and the compatibility of foreign legal systems with that of the United States. Yet the very strength of the test—its flexibility—is also its greatest weakness. Functionally, it will be remarkably difficult for the Supreme Court to promulgate a test specific enough to take into account the different problems posed by f-cubed class actions while also maintaining the flexibility that is the hallmark of the Restatement approach. The problems of judicial discretion and

(citing *Asahi Metal Indus. v. Super. Court*, 480 U.S. 102 (1987)); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

208. Born, *supra* note 89, at 38 & n.173 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403(2) (1986)).

209. *In re Alstom SA*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005) (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975)); see also *Eur. and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998); *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975).

predictability in judgments would still remain. Thus, though the “reasonableness” inquiry might be incorporated into the analysis at some point, it likely cannot adequately serve the need for uniformity even given a Supreme Court ruling.

C. Exchange and Listing Requirements: The Waiver Paradigm

Some have argued that a jurisdictional rule based predominantly on the exchange on which the transaction takes place would ensure greater predictability while maintaining the welfare of United States investors and the integrity of United States markets.²¹⁰ Professors Choi and Silberman, in a recent article,²¹¹ argue that an exchange-based rule would address the dominant concerns of critics of the current approach to the question of extraterritorial application of the securities laws.²¹²

An exchange-based law could be achieved in several ways. For example, judges could apply a rebuttable presumption against jurisdiction for transactions based on foreign exchanges.²¹³ Or, corporate charters could contain forum selection clauses describing the intent of the corporation to abide by the jurisdictional demands set forth in the listing requirements of national exchanges.

Buttressing the concept of an exchange-based rule is the fact that investors can reasonably expect that securities purchased on a national exchange would be regulated by that country’s regulatory agency and its laws. For example, by listing on the New York Stock Exchange, corporations have signaled that they have submitted to the protections afforded consumers by United States laws. This alternative has the benefit of practicality and common sense, and requires no formal agreement to insert jurisdictional consent into corporate charters or listing requirements. Despite the international membership of modern exchanges, each is regulated by a specific nation, which has a particular right to exert control over these mechanisms.

The exchange-based rule suffers from some infirmities as well. First, by basing jurisdiction largely on exchanges, it cannot effectively deal with fraud perpetrated by private companies trading in private securities offerings. Second, its utility rests in large part on the ability of the SEC to fashion a precise enough listing test against which courts could predictably gauge whether the jurisdictional

210. See Stephen Choi & Linda Silberman, *Transnational Litigation and Global Securities Class Actions*, 2009 WIS. L. REV. 465, 502 (2009).

211. See *id.*

212. See *id.* at 493.

213. See *id.* at 503.

presumption has been rebutted. As the SEC amicus brief in *Morrison* shows, this test would likely be fairly expansive and vague. Third, the exchange-based rule might discourage litigation-averse companies from listing on United States exchanges, further undermining the vitality of the United States as a world financial center.

The key element of this proposal is that it effectively turns an f-cubed class action into an “f-squared” class action. Instead of a foreign class, foreign defendant, and foreign exchange, the f-cubed action would feature a foreign class, foreign defendant, and, most likely, a domestic exchange. For the true f-cubed cases, however, which would be forced to rebut a presumption against territoriality, this test takes us back to the Second Circuit balancing test. Thus, though the proposal goes much further than the other extant tests, it might not fully resolve the problem.

D. Alleviating Settlement Pressure Via Intra- and Inter-Circuit Reforms

To fully resolve intra- and inter-circuit discrepancies, heighten predictability and uniformity, and get to the real heart of the f-cubed problem—respect for the rule of law in other nations and economic concerns engendered by settlement pressure—this Note proposes two reforms. First, the courts should distinguish between classes comprised solely of foreign plaintiffs and those comprised of both domestic and foreign plaintiffs. Second, f-cubed actions that pass jurisdictional muster at the trial level should be subject to interlocutory, de novo review upon the motion of the defendant.

The first proposal is to distinguish between classes comprised of solely foreign plaintiffs, subject to extremely rigorous analysis, and those comprised of both foreign and domestic plaintiffs, subject to slightly lesser scrutiny. This proposed distinction is rooted in the notion that, by using the traditional conduct test to determine jurisdiction regarding securities fraud, the real concern is with catching frauds planned to some or to a great extent in the United States that would elude the possibility of litigation elsewhere. Fundamentally, it is based on Judge Friendly’s key distinction between domestic and foreign plaintiffs, fashioning different tests for each group in deciding whether United States jurisdiction would apply. In *Bersch*, the test for the American plaintiffs was whether the defendant’s conduct “significantly contributed” to the plaintiffs’ loss.²¹⁴ However, the test for foreign plaintiffs was stricter: whether the defendant’s conduct “directly caused” the injury at issue.²¹⁵ Signifi-

214. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975).

215. *Id.*

cantly, in *Bersch* the domestic plaintiffs' claims of jurisdiction were accepted, while the foreign plaintiffs' were not.²¹⁶

The jurisdictional inquiry should thus separate class members by nationality, as is done later in the class certification process, in order to determine whether subject matter jurisdiction should be properly exercised.²¹⁷ The aim is to balance the significant interests in the ability of United States citizens to vindicate their claims in United States courts against the need for relatively narrow jurisdictional breadth over truly foreign claims, in the interests of comity and economic policy. This test would follow both *Bersch* and *Empagran*'s distinction between the strong interest in allowing vindication of American injuries and the lesser interest in allowing plaintiffs to vindicate harms functionally alien to the United States in any meaningful sense.²¹⁸

With respect to a putative class comprised of both domestic and foreign plaintiffs, the courts should perform a distinct and separate jurisdictional analysis to domestic and foreign plaintiffs. This analysis would not involve the creation of subclasses. Rather, if either or both groups meet their respective jurisdictional tests, they can be re-aggregated back together into the putative class for class certification consideration.

Courts should apply a strong presumption in favor of jurisdiction to domestic plaintiffs. Using the traditional jurisdictional inquiry used in civil cases in general, corporations should be able to reasonably expect that their "products" be released into the "stream of commerce" of the American securities markets.²¹⁹ As a result, American plaintiffs would be able to take advantage of the expansive antifraud laws without any real surprise to corporations—who have full awareness of their stockholders' nationalities. In this case, the effects test, and not the conduct test, could govern.

On the other hand, the federal courts should apply a strong presumption against extraterritoriality when a putative class is comprised solely of foreign plaintiffs. In such a case, plaintiffs cannot reasonably expect to avail themselves of United States remedies unless a truly significant amount of conduct occurred domestically.²²⁰

216. *Id.* at 1001.

217. *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004). *But cf. In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 169–70 (S.D.N.Y. 2003) (dividing plaintiff class by nation).

218. *See Bersch*, 519 F.2d at 993.

219. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

220. Moreover, when jurisdiction seems unclear at the trial level, as the jurisdictional inquiry is liable to be confused with the merits, or when jurisdiction is

Second, interlocutory, de novo appellate review should be available upon the motion of a defendant in an f-cubed action. Such review could be combined with either a general presumption against finding for jurisdiction in true all-foreign-class f-cubed cases, or with the listing requirement paradigm previously described. Not only would this promote a higher level of uniformity, but it would also quash any potential international forum shopping which would almost inevitably occur given a weaker presumption against jurisdiction. Interlocutory review has been exceptionally successful in combating domestic forum shopping and should perform similarly in an international context.

This Note has already shown, *infra*, that all three branches of government have recognized the problem of “strike suits” and their concomitant negative effects on the economic posture of the United States in the world.²²¹ Thus a major problem with the current case law governing f-cubed cases is that it simply does not recognize that the core problem presented by such suits is the potential, in the eyes of foreign nations and corporations, of seriously exaggerated settlement values stemming from relatively meritless suits that manipulate jurisdictional requirements. By allowing, or even mandating, interlocutory, de novo review of any favorable jurisdictional ruling in an f-cubed case, the uncertainty surrounding this issue can be reduced and settlement pressure greatly ameliorated through the timely conclusion of needless litigation.

Though the private remedy has been inferred by the courts in interpreting the antifraud provisions of Section 10(b) of the 1934 Act, the international relations and economic policy concerns raised by extraterritorial application merits caution by the courts. Congress should consider these issues and render a decision offering a normative concept of the international reach of the United States securities laws; indeed, to some extent it has already started to take up this enterprise.

found to exist over f-cubed claims, the courts should utilize the expertise of the SEC by asking it to submit an opinion as to whether the “heart of the fraud” occurred in the United States. This would not only allow the question to be resolved by a true expert in the field, resolving issues of institutional competence, but it would also increase uniformity. In turn, the economic interests of the United States in protecting the courts from seeming arbitrary and overly punitive would be preserved.

221. See *infra* Part I.C–D.

CONCLUSION

The law's unpredictability in the f-cubed context has the potential to seriously undermine foreign investment in the United States and threaten the principle of comity. Both Congress and the Supreme Court have begun to recognize the reality of the problem and have taken steps to ameliorate the problems engendered by the current jurisprudence. The most important goal in this determination is the creation of a more predictable jurisdictional regime that will promote sound economic policy and respect foreign imperatives.

Distinguishing between generally permissible plaintiff classes of American citizens and generally impermissible classes of foreign citizens uniquely accommodates both the specific Second Circuit approach cautioning against too narrow a jurisdictional test and counseling courts to act as a "good neighbor" to other countries in policing international securities fraud. It also respects the more general "presumption against extraterritoriality" espoused by the Supreme Court in virtually every other legal context. A rule modeled after Rule 23(f) would diminish unwarranted settlement pressure and its attendant effects on investment in the United States.

With these reforms, f-cubed securities class actions can be properly addressed by the courts. Jurisdiction can be exercised when there exists a legitimate American interest in the case—for example, when there are a significant number of American plaintiffs involved in the suit—or when no other jurisdiction could be properly asserted. However, when American interests are lacking, jurisdiction should not be exercised, and restraint should be exercised in the name of economic uniformity, international policy, and comity.

