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NOT QUITE HIGH NOON FOR GUNMAKERS, BUT
IT'S COMING: WHY *HAMILTON* STILL MEANS
NEGLIGENCE LIABILITY IN THEIR FUTURE*

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INTRODUCTION

With very few exceptions, American courts have not endorsed mass tort claims against handgun manufacturers. Questions of cause-in-fact and whether third parties have a duty of care to strangers have posed significant obstacles. Likewise, plaintiffs' defeat before the Second Circuit in *Hamilton v. Beretta U.S.A. Corp.*¹ gave credence to the defendant gun manufacturers' protests throughout the lawsuit that the law

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¹ 264 F.3d 21 (2d Cir. 2001) [hereinafter *Beretta III*]. The Second Circuit relied here on answers to the questions it had certified to the New York Court of Appeals, so the New York court produced the legal reasoning at the heart of the matter.

was “settled”: victims of handgun violence cannot successfully sue handgun manufacturers for negligence. If, as the gun industry had maintained for many years, the vast bulk of guns used to commit crime were stolen, then negligent distribution and marketing had little affect on the availability of guns to criminals.

But plaintiffs’ defeat was not premised upon the old factual understandings and prior theories of liability. In certifying key questions, the Second Circuit gave the New York Court of Appeals (“Court of Appeals”) the opportunity to break new ground by questioning supposedly “settled” law, an opportunity the Court of Appeals embraced: “This case challenges us to rethink traditional notions of duty, liability, and causation.”² And indeed, the Court of Appeals did break new ground, although it could not justify recognition of a gun manufacturer’s duty of care to victims of gun violence on the basis of the facts presented.³

In *Hamilton*, the Court of Appeals, for the first time in the United States,⁴ issued an opinion that in effect took judicial notice of the changed factual context. Instead of rejecting outright the possibility that negligence could apply, as had so many other courts,⁵ it noted explicitly that plaintiffs might

² *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 242, 750 N.E.2d 1055, 1068, 727 N.Y.S.2d 7, 20 (2001) [hereinafter *Beretta III*].

³ *Id.*

⁴ The court described its decision as “in accord with most jurisdictions that have considered this issue,” with a long string of citations, *id.* at 238 n.6, 750 N.E.2d at 1064-65 n.6, 727 N.Y.S.2d at 16-17 n.6, and properly distinguished “two notable exceptions” both of which involved “different factual contexts and different theories of negligent marketing not relevant here.” *Id.* In the more prominent case, the California Supreme Court subsequently reversed, ruling that the gun manufacturer could not be held liable. The California Court held that plaintiffs’ negligence claim was a disguised products liability/design defect claim, and as such was precluded by a California statute, CAL. CIV. CODE 1714.4(a) (Deering 1999). *Merrill v. Navegar*, 28 P.3d 116, 122 (Cal. 2001).

⁵ *See, e.g., Cincinnati v. Beretta U.S.A. Corp.*, 1999 OHIO MISC. LEXIS 27, at *8 (*Hamilton Cnty. C.P. Ohio*, Sept. 27, 1999) *aff’d*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000). The court held:

[U]nder Ohio law, in order to hold a defendant liable in negligence for the criminal conduct of a third party, the defendant must owe a duty arising out of a special relationship between the defendant and the third party giving rise to an ability to control the conduct of that third party, or there must be a special relationship which requires the defendant to protect the plaintiff.

Id. *See also Penelas v. Arms Technology*, 1999 WL 1204353, at *3 (Fla. Cir. Ct., 11th Dist. Dec. 13, 1999), *aff’d*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (“Florida law does

succeed in a negligence cause of action if they can show that manufacturers knowingly supply wholesalers who regularly distribute guns into the criminal market.⁶

The trial court had permitted the jury to assess damages against several gun manufacturers on the basis of injuries inflicted with the use of only one gun which was never recovered and could not be linked to any manufacturer.⁷ The Court of Appeals rejected the trial court's application of the "preponderance of the evidence" standard and of market-share liability to the facts of *Hamilton*. But when other plaintiffs, as in *Camden County Bd. of Chosen Freeholders v. Beretta*,⁸ are able to come forward with computer print-outs of thousands of guns traced to crime, each identified by serial number and manufacturer, the outcome may well be different. The Court of Appeals has removed the conceptual barrier, a sufficiently important breakthrough to compel attention here, leaving only an evidentiary obstacle to a negligence-based cause of action.

The Court of Appeals has cast a long shadow over the future of gun manufacturers by raising the specter of an alternative to market-share liability, one based on proportional causation instead, that may also be imposed without linking a particular manufacturer to a particular weapon and to a particular injury.⁹

Now that the Court of Appeals has established the logic for doing so, states should eventually impose liability on handgun manufacturers for damages caused by negligent distribution of their product either through entities they control, or by virtue of non-delegable duties of care to the public through their independent contractors. As the Court of Appeals suggested, a successful liability theory in the handgun manufac-

not impose a duty on a defendant to protect others from the criminal and reckless behavior of a third person unless there is a special relationship between the defendant and the plaintiff, or the defendant and the third person"); *Bubalo v. Navegar*, No. 96C3664, 1997 WL 337218 (N.D. Ill. June 13, 1997).

⁶ *Beretta II*, 96 N.Y.2d at 237, 750 N.E.2d at 1064, 727 N.Y.S.2d at 16; *see also Beretta III*, 264 F.3d at 28.

⁷ *See, e.g., Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 829 (E.D.N.Y. 1999) [hereinafter *Accu-Tek*], *inter alia* (that is why the jury assessed damages against three different gun manufacturers).

⁸ 123 F. Supp. 2d 245 (D.N.J. 2000) (dismissing public nuisance, negligent entrustment, and negligence claims), *aff'd*, 273 F.3d 536 (3d Cir. 2001).

⁹ *Beretta II*, 96 N.Y.2d at 235, 241 n.11, 750 N.E.2d at 1062-63, 1067 n.11, 727 N.Y.S.2d at 14-15, 19 n.11.

turer negligent distribution context must rest on proportional causation, abandoning the traditional “preponderance of the evidence” test.

Part I of this Article suggests that the cultural context of American jurisprudence has been significantly responsible for most courts’ reluctance, thus far, to recognize the facts that should drive handgun manufacturer liability. Part II sets forth the district court’s handling of the duty question in *Hamilton v. Accu-Tek* and explains how the Court of Appeals found that, although the plaintiffs in *Hamilton* did not satisfy the requirements of the elements of negligence, there is a proper way for future litigants to do so. Part II continues with an alternative theory of handgun manufacturers’ liability for negligence: even if they do not control the chain of distribution, they remain liable under one or two exceptions to the rule that exempts principals from the torts of their independent contractors. The first excepts principals who contract out inherently dangerous undertakings. The second excepts principals who negligently select their independent contractors. Part III explains the availability of the theory of proportional causation, and why the courts may allow findings of liability on that theory but preclude liability on older theories.

I. THE CULTURAL CONTEXT OF AMERICAN HANDGUN MANUFACTURERS’ LIABILITY JURISPRUDENCE

Our society subjects other comparably dangerous instrumentalities to regulatory schemes that safeguard or compensate the public far more adequately than they can with respect to handguns, in the absence of tort liability. Cigarette manufacturers have incurred tort liability, albeit initially de facto by way of settlements, for a product which also harms substantial numbers of people. Dram shop acts have imposed third-party liability on purveyors of alcohol by the drink, but common-law tort liability was beginning to emerge before legislatures took action.¹⁰ We can regulate automobiles, which kill

¹⁰ At common law, and apart from statute, no redress existed against persons selling, giving, or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. This rule was

comparable numbers of people as handguns do, through a reasonably effective scheme of licensing, registration, and insurance. However, no comparable scheme can be applied to handguns: criminals will not buy liability insurance to compensate their victims, even if society enacts legislation requiring them to do so.

Why has it taken the United States so long to develop the law and facts in the handgun context? In Great Britain, where such events are relatively rare, sixteen children and their teacher were massacred with a handgun in March 1996.¹¹ Within seven months, a groundswell of support for gun control moved the government to ban large caliber handguns, and the subsequent Labor Government extended the ban to virtually all such handguns a few months later.¹²

Guns have a special place in American jurisprudence because guns have a special place in American society, and jurisprudence reflects culture. For Americans brought up on cowboy movies, and almost all of us were, the good guy outdraws the bad guy and shoots him dead. From John Wayne to Roy Rogers to Clint Eastwood to Charles Bronson to Bruce Willis, good guys shooting bad guys overwhelmingly dominated American cinema.¹³ This cowboy image has not faded over the

based on the theory that the proximate cause of the injury was the act of the purchaser in drinking the liquor and not the vendor in selling it. . . . In recent years, many states have retreated from or have abrogated the strict common-law rule. Fourteen states now have dram shop statutes which give, generally, a right of action to persons injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor which caused the intoxication in whole or in part. . . . Courts in 29 jurisdictions, including the District of Columbia, have judicially abrogated the common-law doctrine of no liability. . . . Many of the jurisdictions which now recognize a common-law right of action do so on the premise that the serving of liquor to a minor or an inebriated person initiates a foreseeable chain of events for which the tavern owner may be held liable.

Ling v. Jan's Liquor's, 703 P.2d 731, 735-36 (Kan. 1985).

¹¹ Erlend Clouston & Sarah Boseley, *Dunblane Massacre*, GUARDIAN CENTURY, Mar. 14, 1996, at <http://www.guardiancentury.co.uk/1990-1999/story/0,6051,112749,00.html> (last visited Nov. 14, 2001).

¹² PETER SQUIRES, GUN CULTURE OR GUN CONTROL? FIREARMS, VIOLENCE AND SOCIETY 5 (2000).

¹³ In the 1950s,

[t]he *Shane* [a 1953 movie starring Alan Ladd] plot-formula of a gun-fighter from outside aiding a helpless community was perhaps the most frequently raised. *Representative* [emphasis added] titles include

decades—merely morphed into a different type of “cowboy.” As an historian of America’s gun culture wrote, “A generation of Hollywood’s maverick cowboys slipped effortlessly from their western landscapes into identical roles as tough city cops in a later film genre.”¹⁴

Before there was such a thing as American cinema, American myth, folklore, history, and literature encouraged the same themes; the Revolution, the Alamo, Daniel Boone, Davy Crockett, James Fenimore Cooper’s Natty Bumppo,¹⁵ and Wyatt Earp, all featured heroic Americans shooting guns at bad guys.¹⁶ No matter how sophisticated citizens may be, somewhere in the back of their minds lurks the fantasy that someday, they will do likewise against an armed criminal.

Perhaps even more important, guns have a special place in the American value system as a guarantor of the ability to resist oppression. Notwithstanding our generally positive experience with government, a strong skepticism toward government runs through American history, from Thomas Paine, most radically, and from Thomas Jefferson, whose vision of agrarian democracy included substantial distrust of big and centralized government. Even George Washington said: “A free people ought not only to be armed, but disciplined”¹⁷

Man Without a Star (1955); *Tall T* (1957); *Proud Rebel* (1958); *At Gunpoint* (1955); *Johnny Concho* (1956); *Man From Del Rio* (1956); *Fury from Showdown*, *Gun for a Coward*, *Gun Glory* (1957); and *Last of the Fast Guns* (1958).

RICHARD SLOTKIN, *GUNFIGHTER NATION* 402 (1992).

Then there was the 1952 Stanley Kramer movie *High Noon*, and some of the “recastings of the OK Corral story . . . *Law and Order* (1953), *A Man Alone* (1955), *Top Gun* (1955), *Wichita* (1955), *Gunfight at the OK Corral* (1957), *The Tin Star* (1958), *Rio Bravo* (1959), and *Warlock* (1959).” *Id.* at 403. One might consider the trajectory of progress in the 1960s from *The Magnificent Seven* (1960) to *The Green Berets* (1968), when John Wayne was sixty. *Id.* at 520.

¹⁴ SQUIRES, *supra* note 12, at 57.

¹⁵ “The frontier romances of James Fenimore Cooper, published between 1823 and 1850, codified and systematized the representation of the frontier that had developed haphazardly since 1700 in such diverse narratives as the personal narrative, the history, the sermon, the newspaper item, the street ballad, and the ‘penny dreadful.’” SLOTKIN, *supra* note 13, at 15.

¹⁶ The list could be vastly longer: “[f]rom the 1840s through the Reconstruction period, most cheap frontier stories followed the formula of Cooper’s historical romances, using Indian warfare and captivities (actual or threatened) and a colonial or Revolutionary War setting to provide a ‘historical’ context for the action of the plot.” SLOTKIN, *supra* note 13, at 127.

¹⁷ 1 ANNALS OF CONG. 969 (1970) (quoted in Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. OF AM. HISTORY 599, 611 (1982)).

Forty-three years later, Joseph Story expressed a similar view: “The right of a citizen to keep and bear arms has justly been considered, as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers”¹⁸

The same skepticism of government informs Sanford Levinson’s view that the framers intended the Second Amendment to guarantee citizens more than the right to participate in state-regulated militias; rather, that they intended to arm citizens as a check against the overbearing use of force by government itself.¹⁹ Whether or not his view prevails as a legal interpretation, certainly the popular understanding of the Second Amendment included the notion that an armed citizenry can resist oppression. A.E. Van Vogt’s science fiction story, *The Weapon Shop*, provides a vivid cultural illustration of this attitude.²⁰ First published in 1942, the story portrays a distant future in which effective resistance to a tyrannical galactic empire can only emerge from a chain of weapon shops. Each weapon shop has a sign out front that reads “The Right to Buy Weapons is the Right to Be Free.” Twenty-five years after its original publication, the members of Science Fiction Writers of America, hardly a right-wing conservative organization, voted *The Weapon Shop* one of the twenty-five best science fiction short stories of the pre-1965 period.²¹ This notion of gun ownership as a bedrock of freedom pervades the story. It could only

¹⁸ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (1833) (quoted in Shalhope, *supra* note 17, at 612).

¹⁹ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Levinson quotes approvingly the view of an early twentieth-century libertarian defender of both the First and Second Amendments, that “the obvious import [of the constitutional guarantee to carry arms] is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement.” *Id.* at 650 (quoting THEODORE SCHROEDER, *FREE SPEECH FOR RADICALS* 104 (reprint ed. 1969) (alteration in the original)). Against the view that has now been conventional for decades, see e.g. Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 107 (1991) (“[T]he Second Amendment . . . has been devoid of importance as a constitutional barrier to gun control laws.”), Levinson thinks the Second Amendment might provide the basis for challenging some gun control laws. Levinson, *supra* at 650. The Fifth Circuit has now provided Levinson’s views with strong support in dicta in *United States v. Emerson*, 270 F.3d 203 (2001).

²⁰ A.E. Van Vogt, *The Weapon Shop*, in *THE SCIENCE FICTION HALL OF FAME* 183 (Robert Silverberg ed., 1970).

²¹ *Id.* at ix-x. See also *Van Vogt’s obituary*, N.Y. TIMES, Feb. 2, 2000, at A27 (reporting the initial publication date of “The Weapon Shops of Isher” as 1951).

have commanded such respect among its author's peers because it struck a chord in a culture at large with a strong attachment to that same notion.

Jurisprudence has stymied efforts to hold even the most egregious producers of "Saturday night specials" liable for the harm done by the weapons they manufacture. But that jurisprudence has had more than legal theory behind it. An enormously powerful strain of American cultural tradition underpins the "policy" decisions that the law explicitly allows judges to make in the context of determining duties to third parties in tort liability.

The National Rifle Association ("NRA") has been the most prominent organization giving voice to that cultural tradition, and has exercised the political power to block important aspects of gun control. Although the NRA has long complained that the Federal Bureau of Alcohol, Tobacco & Firearms ("BATF") "harasses honest gun owners and dealers," until the 1990s, at least in terms of their role at the national policy level, the opposite criticism was more accurate: "that the ATF [was] a weak and ineffective agency that has been buffeted by the prevailing political winds, especially those stirred up by the NRA."²²

For a long time, the gun lobby prevented collection of the data necessary to show the origin of most crime guns. In 1978, the Carter administration attempted to overcome the gun lobby by supporting a \$4.2 million appropriation for BATF to computerize their mandated task of crime gun tracing. The NRA furiously and successfully lobbied against the new appropriation. When the NRA learned that BATF thought it could fund the program from elsewhere in its budget, the NRA was able to get Congress to cut the agency's regular appropriation by the same amount.²³

But, the tide turned. The 1999 Columbine High School massacre may forever symbolize the turning point, but the bloody history of handgun violence in America, as publicized by more pervasive media than the world had ever seen, had already crystallized American public opinion.²⁴ Public opinion

²² ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 127-28 (1998).

²³ *Id.* at 129.

²⁴ See, e.g., Michael Janofsky, *Concerns About Guns Put New Pressure on State Legislatures*, N.Y. TIMES, Jan. 5, 2000, at A12 ("In the wake of the killings at Colum-

had supported the 1993 enactment of the Brady Law,²⁵ well before Columbine, and finally emboldened the Clinton White House, in the late 1990s, to have BATF analyze crime gun trace data effectively with computers to determine where crime guns come from.

The conventional view, long promulgated by the NRA, held that most criminals steal the guns they use from the enormous existing stock of guns—more than two hundred million, by most accounts—already in the homes of American citizens.²⁶ So long as no one knew any better, it seemed to make little difference, therefore, how manufacturers marketed and distributed their new handguns. In 1998, however, a Northeastern University study based on records maintained by BATF²⁷ demonstrated that the conventional wisdom was wrong: more criminals buy their guns new than steal them.²⁸ Based on firearms trafficking investigations performed between July 1996 and December 1998 throughout the United States, BATF determined that while over 11,000 of the weapons traced were stolen from Federal Firearms Licensees (“FFLs,” or licensed gun dealers), residences, or from common carriers transporting the guns, almost four times as many, or

over 40,000, were trafficked by licensed dealers.²⁹ Of guns trafficked to youth and juveniles, BATF found that only about fourteen percent “involved firearms stolen from a residence,” while half “involved firearms trafficked by straw purchasers,” and a fifth involved firearms “stolen from a federally licensed firearms dealer.”³⁰ In mid-1999, the public first learned that a

bine High School and elsewhere, polls show that a growing number of Americans want their state representatives to do something to relieve gun violence.”)

²⁵ SPITZER, *supra* note 22, at 119.

²⁶ Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES, July 1, 1999, at A14.

²⁷ GLENN L. PIERCE, ET AL., NATIONAL REPORT ON FIREARM TRACE ANALYSIS FOR 1996-1997, (1998). Federal law requires gun manufacturers, distributors, and dealers to respond to requests from BATF for crime gun trace data. See 18 U.S.C. § 923(g)(7) (2001) and 27 C.F.R. § 178.25a (2002).

²⁸ PIERCE ET AL., *supra* note 27, at 11, tbl. 5; see also Butterfield, *supra* note 26, at 8 (“[M]ore than a fifth of all guns recovered in crimes in those two years had been purchased from a licensed dealer less than a year earlier, and . . . almost half had been bought from dealers within three years.”).

²⁹ BATF, U.S. DEPT OF TREASURY, FOLLOWING THE GUN: ENFORCING FEDERAL LAW AGAINST FIREARMS TRAFFICKERS 13, tbl.3 (2000).

³⁰ BATF, U.S. DEPT OF TREASURY, YOUTH CRIME GUN INTERDICTION INITIATIVE

small and identifiable percentage of those engaged by manufacturers to sell their products wholesale and retail were responsible for the overwhelming bulk of sales to criminals.³¹

Litigants can now analyze BATF trace data to show that over several years, Manufacturer A received, for example, approximately thirty telephone calls a month from BATF inquiring about the purchaser of particular weapons that had been traced to crimes. Manufacturer A's records show that it sold twelve weapons a month to Distributor B, five weapons a month to Distributor C, and so forth. In turn, the distributors receive similar follow-up calls from BATF with respect to their retailers: the distributors' records show which retailers received the guns that later were used in crime. Since, as it turns out, a small and identifiable group of retailers are responsible for the vast bulk of the sales into the criminal market, distributors know precisely which retailers' sales foreseeably resulted in criminal use, and manufacturers know which distributors sold disproportionately to such retailers. Litigants will have access to this information,³² and therefore will be able to identify precisely the manufacturers and distributors who knew that sales to particular business customers resulted in criminal use, but nonetheless continued to supply those customers.

If most crime guns are bought, not stolen, sellers of

REPORT 5-6 (1999) [hereinafter YOUTH CRIME REPORT]. "Since firearms may be trafficked along multiple channels, an investigation may be included in more than one category," PIERCE ET AL., *supra* note 27, at 13 tbl. 4.

³¹ The results of the Pierce study, *supra* note 27, at 16 tbl. 9, were first reported in the Butterfield article, *supra* note 26, at 8: "[A] mere 389 federally licensed dealers, of 104,855 such dealers around the country, sold half the guns used in 1996 and 1997 that could be traced by law enforcement to their initial sale. . . ." See also BATF, U.S. DEPT OF TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 2, tbl. D3, A-25 (2000) ("Just 1.2 percent of dealers—1,020 of the approximately 83,200 licensed retail dealers and pawnbrokers—accounted for over 57 percent of the crime guns traced to current dealers in 1998. And just over 450 licensed dealers in 1998 had 10 or more crime guns with a time-to-crime of three years or less traced to them."). The latter number appears to add up to 491 dealers. A few weeks earlier, Senator Charles Schumer had released the results of his study, also based on BATF data, concluding that one percent of FFLs supplied forty-five percent of guns traced to crime. Shannon McCarthy, *Small Number of Dealers Supply Most Guns Used in Crimes*, ASSOCIATED PRESS STATE & LOCAL WIRE, June 8, 1999, a.m. cycle.

³² See, e.g., Second Amended Complaint and Jury Demand at 17-24, Camden County Bd. of Chosen Freeholders v. Beretta, 123 F. Supp. 2d 345 (D.N.J. 2000) (No. 99CV-2518), *aff'd*, 273 F.3d 536 (3d Cir. 2001). The complaint was dismissed for lack of standing, preemption, and lack of duty. 123 F. Supp. 2d 345, 255-64 (D.N.J. 2000).

guns can greatly influence the degree to which guns flow to the crime market. Through their records of responses to BATF, manufacturers can, if they wish, stop dealing with distributors who then deal with retailers leaking inventory into the hands of criminals.

But prospective plaintiffs still lack one important element of a successful negligence claim. They may show that a “disproportionately” small number of retailers leak a large number of guns into the crime market. Thus far, however, plaintiffs have been unable to obtain total handgun sales figures by retailer to compare them with crime gun traces. Therefore, they cannot show that particular dealers leak guns to the criminal market in numbers that are a disproportionately large part of their total sales. In theory, “leaks” could be a constant proportion: few guns from dealers with small total sales volume, many guns from dealers with large total sales volume. This pattern would not suggest negligence. With enough volume, the most careful dealer can sell some guns that end up in criminal hands. Based on anecdotal evidence, the *Hamilton* plaintiffs, jury, trial judge, and others believed that negligence, not volume, accounted for the leaks.³³ But without dealer-by-dealer sales figures to match against crime gun traces, plaintiffs had no proof that the negligence of dealers, or of the distributors and manufacturers who continued to supply them, caused their harm or enhanced their risk of harm.

If future plaintiffs can show that leakage is not simply a function of volume, however, courts will find it difficult to continue to reject claims of negligence. The vast majority of retailers have managed for years to avoid selling guns into the criminal market, arguably by techniques that are not secret. They attempt to avoid selling to “straw purchasers,” persons who buy illegally on behalf of felons or underage purchasers. Straw purchasers tend to purchase multiple firearms in a single transaction.³⁴ Retailers who refuse to avoid sales to straw purchasers may be enhancing the public risk resulting from criminal use. Criminal activity by the ultimate purchaser may not constitute intervening cause under these circumstances.³⁵

³³ *Accu-Tek*, 62 F. Supp. 2d at 826-33.

³⁴ See Douglas S. Weil, & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. OF AM. MED. ASS'N 1759 (1996).

³⁵ *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 729, 462 N.Y.S.2d

Retailers are Federal Firearms Licensees (“FFLs”). No one may sell handguns, except at gun shows, without applying for and obtaining a license to do so from the federal government. This requirement helps to assure that most gun dealers adhere to some standards of respectability. However, many do not fit the image normally associated with gun shops. Some do not operate out of retail establishments, but are “kitchen table” or “back of the truck” dealers.³⁶ Some distributors continue to supply inventory to gun shows, which are not even subject to the legal restrictions governing FFLs. The Court of Appeals found insufficient evidence that manufacturers and distributors know or have reason to know that sales to these kinds of outlets result in disproportionate leakage of guns to the criminal market because plaintiffs presented only anecdotal evidence connecting such outlets to crime gun leakage.³⁷

With the best of efforts and intentions by gun dealers, some criminals will buy guns. Even if manufacturers insist that distributors only sell to legitimate storefront retailers, some people will buy guns to commit crimes. Danger to the public inheres, then, in the sale of guns. But future plaintiffs must prove that it makes a great deal of difference how guns are sold: without the best of efforts and intentions by sellers, far more criminals will buy guns.

II. DUTY TO THIRD PARTIES IN NEGLIGENCE

A. Hamilton’s *Frontal Assault on McCarthy*

The 1996 *Forni v. Ferguson*³⁸ decision appeared at the time to be the New York courts’ last word on the question of handgun manufacturers’ liability for negligence when their

831, 835 (1983) (“When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs.”).

³⁶ BATF, DEPT OF TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 16 (Feb. 2000). A random sample inspected in 1998 found that fifty-six percent of FFLs operated out of residential rather than commercial premises.

³⁷ See *Beretta II*, 96 N.Y.2d at 234, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14.

³⁸ 232 A.D.2d 176, 648 N.Y.S.2d 73 (1st Dep’t 1996).

products were used criminally to kill and injure. The *Ferguson* court held: “New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product. The manufacturer in this case certainly had no control over the criminal conduct of a third party.”³⁹

The Second Circuit the following year, in *McCarthy v. Olin Corp.*, said: “New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition.”⁴⁰

McCarthy (now U.S. Representative Carolyn McCarthy, D-N.Y.) had sued the Olin Corporation for negligence and strict liability for their design, manufacture, marketing, and sale of Black Talon ammunition, which has exceptionally ferocious wounding power. In the context of Olin’s motion to dismiss McCarthy’s claim, the court accepted McCarthy’s allegation that criminal use of Black Talon bullets to injure innocent victims was foreseeable. But, said the trial court, the New York Court of Appeals separates issues of duty and foreseeability in the negligence context, unlike the Michigan court upon whose ruling McCarthy had attempted to rely.⁴¹

In the widely-publicized *Hamilton v. Accu-Tek* decision,⁴² relatives of deceased handgun crime victims and one surviving victim sued twenty-five handgun manufacturers, supplying most of the U.S. market, for negligent marketing and distribution. After the trial court awarded damages, defendants appealed to the Second Circuit. Citing *Forni* and *McCarthy* as controlling precedent, defendants protested trial court Judge Jack Weinstein’s recommendation that the Second Circuit certify the question of duty to the New York Court of Appeals.⁴³ Judge Cabranes, in dissent, agreed, concluding that “there are sufficient precedents—from New York courts, from this Court, and from other jurisdictions—for us to make a determination of how New York’s highest court would rule.”⁴⁴

³⁹ *Id.* at 176, 648 N.Y.S.2d at 74 (citation omitted).

⁴⁰ 119 F.3d 148, 157 (2d Cir. 1997).

⁴¹ *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) [hereinafter *Sturm, Ruger, & Co.*] (distinguishing New York law from the law applicable in *Moning v. Alfonso*, 254 N.W.2d 759 (Mich. 1977)).

⁴² 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

⁴³ *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 42 (2d Cir. 2000) [hereinafter *Beretta I*].

⁴⁴ *Id.* at 47 (Cabranes, J., dissenting).

Nevertheless, on August 16, 2000, the Second Circuit certified the question of the existence of such a duty to the New York Court of Appeals.⁴⁵ Had the Second Circuit a less profound understanding of New York law, they would have reversed the decision of trial court Judge Jack Weinstein on the straightforward basis of the *McCarthy* holding.

The holdings in *Forni* and *McCarthy* appear to directly contradict the *Hamilton* trial court's assertion that "the method of sale and distribution [of weapons] by producers may be" tortious.⁴⁶ It is significant, therefore that in responding to the certified question of the Second Circuit, the Court of Appeals refrained from citing either *Forni* or *McCarthy* for the holding that New York law does not impose on weapons manufacturers a duty of care to third parties.⁴⁷ In applying the Court of Appeals' answers to the certified questions, the Second Circuit, likewise, ignored the *Forni* and *McCarthy* holdings.⁴⁸

The Second Circuit *McCarthy* decision occurred in a context in which the conventional wisdom about crime guns—that most of them were stolen from the public's existing stock of weapons—continued to prevail. Not surprisingly, in that context, courts concluded that manufacturers of new weapons could do nothing that would sufficiently affect criminal behavior.⁴⁹ The *Forni* court thought the manufacturer "certainly had no control over the criminal conduct of a third party."⁵⁰ But the *Hamilton* trial court ruled on the basis of testimony strongly suggesting that the *Forni* court was wrong, at least from the point of view of probability and statistics.⁵¹

The *Hamilton* trial court had the benefit of then-new statistical information, based on a review of gun trafficking investigations in twenty-seven cities, showing that far more crime guns used by persons under the age of twenty-five were purchased from FFLs and by straw purchasers than were sto-

⁴⁵ *Id.* at 46-47 (choosing to do so, interestingly, despite opposition to certification by "all parties to this appeal [emphasis added]").

⁴⁶ *Accu-Tek*, 62 F. Supp. 2d at 825.

⁴⁷ *Beretta II*, 96 N.Y.2d at 222, 750 N.E.2d at 1055, 727 N.Y.S.2d at 7.

⁴⁸ *Beretta III*, 264 F.3d 21 (2d Cir. 2001).

⁴⁹ *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) [hereinafter *Olin Corp.*] (quoting *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976)).

⁵⁰ *Forni v. Ferguson*, 232 A.D.2d 176, 176, 648 N.Y.S.2d 73, 74 (1st Dep't 1996).

⁵¹ *Accu-Tek*, 62 F. Supp. 2d at 820.

len.⁵² Thus, the trial court noted that handgun manufacturers could “reduc[e] the flow of illegal guns. . . [by] declining to do business with careless or unscrupulous FFLs, limiting sales at unregulated gun shows, and requiring that first sales of handguns to the public take place only in fully stocked, responsibly operated stores.”⁵³

The trial court also took note of expert testimony by a former executive at Smith & Wesson that the manufacturers could—but do not—force distributors to stop doing business with retailers who generate unusually large numbers of trace requests (inquiries from BATF to gun manufacturers, distributors, and retailers as to the purchasers of their weapons, identified by serial numbers, used in crimes). Since a manufacturer must tell BATF which distributor purchased crime guns the manufacturer supplied, the manufacturer can demand that the distributor stop doing business with the retailers responsible for the leakage, on pain of losing the manufacturer as a supplier.⁵⁴

However, although the Smith & Wesson executive had testified at trial that some retailers disproportionately leaked guns to the criminal market, he provided no evidence.⁵⁵ It remained theoretically possible for guns to leak to the criminal market fairly evenly across the spectrum of retailers, varying only with sales volume, notwithstanding the apparent differences in their degree of care in marketing. If that were indeed the case, it might not be possible for gun manufacturers to control their liability. If they had no way of establishing a rational policy to control sales at the retail level, they still could not significantly lessen the danger and harm to third parties ex-

⁵² YOUTH CRIME REPORT, *supra* note 30, at 13 (cited in *Accu-Tek*, 62 F. Supp. 2d at 825-26). The trial court also cited Fox Butterfield, *New Data Point Blame at Gun Makers: Fewer Criminals Stole Their Weapons Than Thought, Analysts Say*, N.Y. TIMES, Nov. 28, 1998, at A8. In addition, the trial court noted the testimony of Joseph Vince, former chief of the Crime Gun Analysis Branch of the Bureau of Alcohol, Tobacco & Firearms, who said that “[I]n the research that we have done, we have not seen stolen firearms being employed by criminals. The majority of the time we are seeing them getting them from retail sources.” *Accu-Tek*, 62 F. Supp. 2d at 830 (quoting Tr. at 1044). Also, New York City Police Lieutenant Kenneth McCann, former director of the joint NYPD/BATF task force on illegal gun trafficking, testified that of the guns seized, “a very, very small percentage was reported stolen.” *Id.* at 838 (quoting Tr. at 488).

⁵³ *Accu-Tek*, 62 F. Supp. 2d at 826.

⁵⁴ *Id.* at 831.

⁵⁵ See *infra* note 83 and accompanying text.

cept by refusing to sell their products altogether.

The *Hamilton* trial court described practical steps manufacturers could have taken to reduce the flow of guns to the criminal market. For instance, manufacturers could have required distributors to sell only to retailers who had actual stores, instead of selling out of the backs of trucks or off kitchen tables. Moreover, manufacturers could have refused to sell to distributors who insist on supplying retailers who sell at gun shows.⁵⁶ The trial court also relied to some extent on testimony that the manufacturers “oversupplied” southeastern “weak law” states, from which less expensive handguns flowed illegally to New York, where they could be sold at a profit.⁵⁷

The first question certified by the Second Circuit to the Court of Appeals was whether firearms manufacturers had a duty of care to third parties.⁵⁸ In *McCarthy*, the Second Circuit had held that since the Olin Corporation had no special relationship with Ferguson, the shooter, it had no authority over him, no ability to control his behavior, and therefore no duty to do so under New York law.⁵⁹ There, the Second Circuit had based its “special relationship” requirement primarily on *Pulka v. Edelman*.⁶⁰ The bane of New York plaintiff lawyers seeking damages for breaches of duty to third parties in tort, *Pulka v. Edelman* stands as shorthand for the proposition that courts will not find such a duty without “authority and ability to exercise control.”⁶¹

In *Pulka*, a pedestrian passing by was injured by a customer driving his car out of the defendant’s parking garage. The Court of Appeals said:

[I]n no sense, can it be said that there was, in fact, a reasonable opportunity to stop drivers from disregarding these precautions in the same way that such drivers disregard their own sense of the danger to pedestrians caused by not stopping or by proceeding recklessly. Accordingly, to say that a duty to use care arose from the relation-

⁵⁶ *Accu-Tek*, 62 F. Supp. 2d at 831.

⁵⁷ *Id.* at 830-31.

⁵⁸ *Beretta I*, 222 F.3d at 46.

⁵⁹ *Sturm, Ruger and Co.*, 916 F. Supp. at 369; see also *Olin Corp.*, 119 F.3d at 156-57.

⁶⁰ *Olin Corp.*, 119 F.3d at 156-57 (citing *Pulka v. Edelman*, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976)).

⁶¹ Although a summary of *Pulka*, the quoted phrase actually appears in *Purdy v. Pub. Admin.*, 72 N.Y.2d 1, 9, 526, N.E.2d 4, 7, 530 N.Y.S.2d 513, 516 (1988).

ship of the garage to its patrons when there was no opportunity to fulfill that duty, places an unreasonable burden on the garage, indeed.⁶²

Pulka's progeny, emanating from the Court of Appeals as well as the Second Circuit, occasionally included language that suggested a more robust and personal kind of pre-existing relationship requirement between a defendant and an immediate tortfeasor than the Court of Appeals' decisions, at least, actually imply. In one such decision, for example, the court said, "[W]hatever else may be required, however, at the minimum such a duty requires an existing relationship between the defendant and the third person over whom 'charge' is asserted."⁶³ But there, the defendant had had no authority or ability whatsoever to control the tortfeasor's drunk driving after defendant fired him. A wide range of possible relationships could have fallen within the Court of Appeals' definitional boundaries.

The Court of Appeals' actual requirements with respect to the relationship have been far more subtle and nuanced. The relationship requirement of *Pulka* itself was based primarily on a very thoughtful law review article,⁶⁴ which counseled: "[t]he social policies which determine what relationships require such special assurance [of safety to person and property on the part of the parties thereto] and what ones are sufficiently unimportant not to require them are so incredibly complicated as almost to defy analysis."⁶⁵

In *Pulka*, the New York Court of Appeals noted that Cardozo's rule that "risk imports relation,"⁶⁶ has been applied "to determine the scope of duty—only after it has been determined that there is a duty."⁶⁷ But various kinds of "special relationships" appear to suffice for a duty to exist. In *Purdy*, the Court of Appeals found for the defendant because neither of the

⁶² *Pulka*, 40 N.Y.2d at 784, 358 N.E.2d at 1021, 390 N.Y.S.2d at 395.

⁶³ *D'Amico v. Christie*, 71 N.Y.2d 76, 89, 518 N.E.2d 896, 902, 524 N.Y.S.2d 1, 7 (1987).

⁶⁴ Fowler V. Harper & Posey M. Kime, *Duty to Control the Conduct of Another*, 43 YALE L. J. 886 (1934) (cited in *Pulka*, 40 N.Y.2d at 783, 385 N.E.2d at 1021, 390 N.Y.S.2d at 395).

⁶⁵ Harper & Kime, *supra* note 64, at 904.

⁶⁶ *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 344, 162 N.E. 99, 100, 1928 N.Y. LEXIS 1269, *9 (1928).

⁶⁷ *Pulka*, 40 N.Y.2d at 785, 358 N.E.2d at 1022, 390 N.Y.S.2d at 396.

defendants had the “necessary authority” or “ability to exercise control” over the plaintiff’s conduct so as to give rise to a duty on the defendants’ part to protect plaintiff, a member of the general public.”⁶⁸ In the *Purdy* context, the relationship the Court of Appeals would appear to have required—“authority” over the plaintiff—seems to be no more than the legal right to have stopped her from driving the car with which she accidentally caused the injury in question. If the Court of Appeals believes that handgun manufacturers can effectively exercise power over sales practices of retailers through distributors, then such manufacturers have the “authority” and “ability” to withhold guns from criminals to a significant degree.

In *Strauss v. Belle Realty Co.*,⁶⁹ the Court of Appeals in dicta noted that in appropriate circumstances, it could find a duty where there was neither privity nor foreseeability: “Duty in negligence cases is defined neither by foreseeability of injury (*Pulka v Edelman*, supra, at p. 785) nor by privity of contract.”⁷⁰ This statement strongly suggested that the kind of relationship the defendants argued was needed, a privity-based relationship, was more than the Court of Appeals would require.

The *Hamilton* defendants had argued at trial⁷¹ and on appeal⁷² that the *Pulka-Purdy* requirement of “authority and responsibility” required plaintiffs to prove a “special relationship” either between the defendant and the immediate tortfeasor, or between the defendant and the victim. Defendant manufacturers denied any relationship with the shooter or the victim in the instant case, or ability or authority to control criminals

⁶⁸ *Purdy*, 72 N.Y.2d at 8, 526 N.E.2d at 7, 530 N.Y.S.2d at 516.

⁶⁹ 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

⁷⁰ *Strauss*, 65 N.Y.2d at 402, 482 N.E.2d at 36, 492 N.Y.S.2d at 557.

[A]n obligation rooted in contract may engender a duty owed to those not in privity. . . [W]hile the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, ‘to limit the legal consequences of wrongs to a controllable degree’ and to protect against crushing exposure to liability. “In fixing the bounds of that duty, not only logic and science, but policy play an important role.”

Id. (citations omitted).

⁷¹ *Accu-Tek*, 62 F. Supp. 2d at 821.

⁷² Reply Brief of Defendants-Appellants Beretta U.S.A. Corp. and American Arms, Inc. at 12, *Beretta II*, 96 N.Y.2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001) (No. 03401) [hereinafter *Reply Brief Beretta II*].

generally.⁷³ Other than with regard to the sufficiency of the evidence, the defendants failed in this line of their argument.

Two Court of Appeals cases illustrate the issue. In the first case, *Nallan v. Helmsley-Spear Inc.*,⁷⁴ the Court of Appeals held that the owner of an office building in a high-crime location had a duty to safeguard the lobby for business “invitees.” The *Hamilton* defendants sought to distinguish these facts deeming the defendant’s ownership and control of the building sufficient to create a “relationship” with the plaintiff, who was nominally an “invitee.”⁷⁵ But *Nallan* illuminates the artificiality of defendants’ “special relationship” construct, a construct that would infuse a kind of personalization into the relationship that the law does not in fact require. The “special relationship” between the owner and the victim in *Nallan* can only have emerged from the fact that the shooting victim attended a union meeting in the owner’s building, because there was no indication that the owner had ever met the victim, or even heard of him prior to the claim.

The court would not extend a building owner’s duty to a stranger who was in no sense an invitee. In the second case, *Waters v. New York City Housing Authority*,⁷⁶ the Court of Appeals held that the owner of a housing project owed no duty to a passerby who was dragged off the street and assaulted.⁷⁷ Owners could not in fact safeguard such passers-by, so liability could devastate them financially without improving public safety.⁷⁸

The “relationship requirement,” then, must enable the defendant to limit and control liability to potential plaintiffs by exercising due care, and need not involve an actual interpersonal encounter. The landlord in *Nallan* could only “control” the actions of an immediate tortfeasor or criminal on his property by creating safety conditions that would affect the statistical likelihood of criminal behavior to a third party. Obviously, he had no relationship with any individual criminal, but he had a duty to third parties nonetheless.

⁷³ *Id.* at 12-13.

⁷⁴ 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980).

⁷⁵ *Reply Brief Beretta II*, *supra* note 72, at 13.

⁷⁶ 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987).

⁷⁷ *Id.* at 228-31, 505 N.E.2d at 923, 513 N.Y.S.2d at 357.

⁷⁸ *Id.* at 230-31, 505 N.E.2d at 923, 513 N.Y.S.2d at 357.

Handgun manufacturers may similarly exercise enough economic power over business entities further down the stream of distribution to distributors and retailers, to dictate at least to some extent the conditions under which they perform their function. That is, the manufacturer can enforce their adoption of certain sales policies, like not selling to straw purchasers, or not selling at gun shows, or otherwise, in the words used in the proceeding paragraph to describe the nature of the landlord's "control" of the criminal in *Nallan*, "creating safety conditions that would affect the statistical likelihood of criminal behavior damaging to a third party,"⁷⁹ which is precisely our description of the basis for the *Nallan* landlord's duty to third parties. That the manufacturers' control in this context is abstract and statistical, rather than personal, does not distinguish them from other defendants whose negligence resulted in harm to third parties in violation of their duty of care. Whether the final links in the distribution chain—the retailer who sells to the straw purchaser, the straw purchaser who sells to the actual shooting criminal—are deemed to exercise authority and control does not really matter, since the foreseeability of criminal behavior invalidates any attempt to use criminal action as an "intervening cause" shielding the earlier links in the chain from liability.⁸⁰

The trial court in *Hamilton* heard testimony that some manufacturers can and do require distributors to enforce contractual provisions against retailers that publish off-pricing or even publish certain wholesale prices.⁸¹ If a gun manufacturer stands in that kind of relationship to the downstream entities with which it does business, then, assuming plaintiffs could show that particular practices by retailers disproportionately leaked guns to the criminal market, manufacturers who "control" retailers, in effect "control" the actions of criminals.

The Court of Appeals concluded that the *Hamilton*

⁷⁹ *Id.*

⁸⁰ "When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs." *Kush*, 59 N.Y.2d at 33, 449 N.E.2d at 729, 462 N.Y.S.2d at 835 (quoted in *Accu-Tek*, 62 F. Supp. 2d at 834).

⁸¹ *Accu-Tek*, 62 F. Supp. 2d at 832 (quoting the testimony of Robert Hass, a former executive at Smith & Wesson: " 'These retailers could be cut off,' he noted, '[j]ust in the same way a retailer would be cut off who broke price and published ads and God knows we did that enough.' Tr[anscript] 2330.").

plaintiffs did not demonstrate that the defendants could have done anything significant to have prevented harm to the plaintiffs.⁸² Although witnesses at the *Hamilton* trial suggested steps manufacturers could take to reduce the flow of guns to the criminal market, they had “presented no evidence . . . showing any statistically significant relationship between *particular classes* of dealers [such as those who fail to take the proposed precautions] and crime guns.”⁸³ The Court of Appeals decided, therefore, that plaintiffs in *Hamilton* were analogous to the plaintiff in *Waters*, not to the plaintiff in *Nallan*. But once a plaintiff shows that the actual behavior of gun dealers meaningfully increased his or her risk of harm, the results will be different, for manufacturers who know the results of such negligence are positioned in the chain of commerce to control it. The New York Court of Appeals in *Hamilton* has suggested the strong possibility that any objections to the nature of the relationship between gun manufacturer and criminal or victim would be cured as soon as plaintiffs show that actual negligence increased their risk of harm.

B. *Alternative Theories of Handgun Manufacturer Liability to Third Parties in Negligence*

Defendant gun manufacturers have argued that to find a duty to third parties in tort the law requires relationships of a concrete and somewhat personal nature. Although the New York courts have sometimes used language in the past that encouraged that view, the Court of Appeals in *Hamilton* implicitly rejected it. If plaintiffs can rely on that implication, their new course is clear enough. If not, plaintiffs may utilize two alternative theories, especially if gun manufacturers successfully allege that they do not control the manner in which downstream sellers market the product.

Legal theory does not always concede that public policy is a primary consideration. But courts are expected to apply public policy considerations when they decide whether or not to find a duty to third parties in tort.⁸⁴ New York jurisprudence,

⁸² *Beretta II*, 96 N.Y.2d at 236, 750 N.E.2d at 1063, 727 N.Y.S.2d at 15.

⁸³ *Id.*

⁸⁴ PROSSER & KEETON ON TORTS ch. 9, § 53, 358 (5th ed., 1984). *See also* Palka v. Servicemaster Mgmt. Serv. Corp., 83 N.Y.2d 579, 587, 634 N.E.2d 189, 193, 611

as that of other states, has been less expansive in this regard, generally requiring a pre-existing relationship between the defendant and the tortfeasor or between the defendant and the victim before conceding that the defendant had a duty to the victim.⁸⁵ The New York Court of Appeals has often explained that if it did not require such relationships, it might be imposing “limitless” and “crushing” liability on defendants who could neither control what tortfeasors do with their products and services, nor protect victims from tortfeasors.⁸⁶ In view of this aspect of New York law, an unscrupulous proprietor could hire an independent contractor to undertake such tasks as would involve direct encounters with customers, when such encounters might increase the likelihood that the customers would become tortfeasors or victims.

The notion of an “independent contractor” derives from the likelihood that when an entity engages another under contract to perform a service, the one for whom the service is to be performed does not control the manner of performance. Rather, in contrast with an employee, the independent contractor only warrants to produce the result required, not to produce it in any particular manner.⁸⁷

N.Y.S.2d 817, 820 (1994) (stating that relevant public policy factors should include “reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability”); *Waters*, 69 N.Y.2d at 229, 505 N.E.2d at 923-24, 513 N.Y.S.2d at 358; *DeAngelis v. Lutheran Medical Center*, 58 N.Y.2d 1053, 1055, 449 N.E.2d 406, 407, 462 N.Y.S.2d 626, 627 (1983).

⁸⁵ See, e.g., for New York, *Pulka v. Edelman*, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976); *Purdy v. Pub. Admin.*, 72 N.Y.2d 1, 526 N.E.2d 4, 530 N.Y.S.2d 513 (1988); *McCarthy v. Sturm, Ruger, Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996), *aff’d sub nom*; *McCarthy v. Olin*, 119 F.3d 148 (2d Cir. 1997); for Florida, *Peneas v. Arms Tech.*, 738 So. 2d 1042 (Fla. Dist. Ct. App. 2001), *Lighthouse Mission of Orlando, Inc. v. Estate of McGovern*, 683 So. 2d 1086 (Fla. Dist. Ct. App. 1996), *Austin v. Mylander*, 717 So. 2d 1073 (Fla. Dist. Ct. App. 1998); for Ohio, *Gelbman v. Second Nat’l Bank*, 458 N.E.2d 1262 (Ohio 1984), *Simpson v. Big Bear Stores Co.*, 652 N.E.2d 702 (Ohio 1995). Compare *Moning v. Alfonso*, 254 N.W.2d 759 (Mich. 1977) (discussing how Michigan does not treat separately the questions of foreseeability and the existence of a duty).

⁸⁶ See, e.g., *Pulka*, 40 N.Y.2d at 786, 358 N.E.2d at 1023, 390 N.Y.S.2d at 397; *Strauss*, 65 N.Y.2d at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

⁸⁷ If the court finds that the manufacturers did not have a relationship with their distributors that gave them the ability to exercise authority over the manner in which the distributors performed the task for which they were under written or oral contract to perform for the manufacturers, then they were independent contractors. An independent contractor is not subject to the control of the employer as to how he or she

Potential tortfeasors, thus, could strategically interpose barriers to privity between themselves and victims to preclude liability. The obvious strategic defense was to employ independent contractors to perform those aspects of one's business that included dangerous activities. The manufacturer would have had no relationship with the contractor's own independent subcontractor, and surely none with the random victim of the latter's negligence. Thus, the manufacturer could export those risks and costs of doing the dangerous part of his or her business onto the end subcontractor, or, as is often the case, onto the random victims if the subcontractor had "shallow pockets." Similarly, but under a slightly different theory, the manufacturer may deal through some legitimate and careful independent contractors, and through other illegitimate and careless independent contractors who would do business with a riskier and more profitable end of the market, for example, the gun trafficker who purchases in quantity for resale to criminals.

Therefore, one of the presumptions under which manufacturers traditionally escaped liability even when they produced the guns used to inflict injury, is that they do not exercise control over the manner in which their guns are sold. Rather, they enter into arms-length sales contracts with their distributors, who enter into arms-length contracts with their retailers, who engage in arms-length sales to purchasers, who engage in arms-length sales to criminals. At each stage of the process, everyone is an independent contractor.

Principals ordinarily cannot be held liable for the negligence of their independent contractors for the same reason that principals cannot control the manner in which those contractors meet their contractual obligations.⁸⁸ The law, however, has developed exceptions to this rule. Employers have a duty to third parties for the negligence of their independent contractors when the independent contractor negligently performs an assignment the employer knows or should know is inherently

performs the work but only for the results of the contracted-for work. *See e.g.* G.D. Searle & Co. v. Medico Communications, Inc., 843 F. Supp. 895, 904-05 (S.D.N.Y. 1994); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 142-43 (S.D.N.Y. 1991); Beach v. Belzy, 238 N.Y. 100, 143 N.E. 805, 1924 N.Y. LEXIS 653 (1924); Uppington v. City of New York, 165 N.Y. 222, 59 N.E. 91, 1901 N.Y. LEXIS 1409 (1901); Tytell v. Battery Beer Distrib., Inc., 608 N.Y.S.2d 225, 226, 202 A.D.2d 226 (1st Dept. 1994).

⁸⁸ *See* authority cited *supra*, note 86.

or foreseeably dangerous.⁸⁹ The employer also has a duty to third parties for negligent work performed by an incompetent independent contractor the employer hired negligently.⁹⁰ These legal doctrines could stand ready for use against handgun manufacturers if plaintiffs can link the negligence of “independent contractors,” or gun dealers, to an increased risk of harm to plaintiffs.⁹¹

In addition, the courts have not required extreme danger, only “inherent” danger. Juries have found such “inherent” danger in cleaning mats with soap and water on a New York City sidewalk,⁹² painting billboards up on a scaffold over the street,⁹³ or replacing elevator doors while keeping the elevator running.⁹⁴ Likewise, the sale of lethal weapons is an inherently dangerous activity. Even with the exercise of reasonable care, weapons may get into the wrong hands. Without the exercise of such care, far more weapons leak to the criminal market. When most people believed that most criminals stole their guns, one could have argued that a sale was not particularly dangerous. The revelation that more criminals buy their guns, however, has made manifest the danger inherent in the sale of guns. Under these circumstances, if defendant handgun manufacturers cannot control their distributors, then each defendant has a duty that is “non-delegable and, though blameless, it is liable

⁸⁹ *Rosenberg v. Equitable Life Assur. Soc. of U.S.*, 79 N.Y.2d 663, 664, 584 N.Y.S.2d 765, 767-78, 595 N.E.2d 840, 842 (1992).

⁹⁰ *Hesch v. Seavey*, 188 A.D.2d 808, 809, 591 N.Y.S.2d 546, 547 (3d Dept. 1992). See also *Maristany v. Patient Support Servs., Inc.*, 264 A.D.2d 302, 303, 693 N.Y.S.2d 143, 144 (1st Dep’t 1999).

⁹¹ In analogous product liability cases, the delegation of responsibilities to dealers to assemble, adjust, or inspect parts or all of a vehicle did not relieve the manufacturers of their non-delegable duties toward ultimate purchasers. *Sabloff v. Yamaha Motor Co.*, 273 A.2d 606, 612 (N.J. Super. Ct. App. Div.), *aff’d*, 283 A.2d 321 (1971); *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. Ct. App. 1964). However, the independent contractor context of “dangerous activity” makes for a different analytical outcome, and therefore should not be confused with the treatment recommended for “ultrahazardous activity” in the product liability context in James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1321 (1991).

⁹² *Wright v. Tudor City Twelfth Unit, Inc.*, 276 N.Y. 303, 307, 12 N.E.2d 307, 308, 1938 N.Y. LEXIS 1189, *9 (1938).

⁹³ *Rohlf v. Weil*, 271 N.Y. 444, 3 N.E.2d 588, 1936 N.Y. LEXIS 1221 (1936).

⁹⁴ *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 577, 1921 N.Y. LEXIS 844 (1921).

for the independent contractor's negligence."⁹⁵ Thus, defendants cannot escape liability by interposing an independent contractor between themselves and victims of negligence in their dangerous endeavors. The defendant can delegate the dangerous task, but not the legal duty. The duty of care, and liability for its breach, remains with the defendant.⁹⁶

Without explicit reference to any such theory, the U.S. Supreme Court found that a manufacturer of a legal but controlled pharmaceutical had a sufficient duty to the public to exercise care that it imposed *criminal* liability for its breach of that duty.⁹⁷ The company had filled large orders for the drug from a physician in a small town. The quantities that were ordered and sent exceeded the amount likely to be used for legitimate and lawful purposes.⁹⁸ The defendants in *Hamilton* attempted to distinguish this case, noting that the Federal Bureau of Narcotics (the precursor of today's Drug Enforcement Agency) had previously warned the company that the morphine had leaked into the criminal market.⁹⁹ However, through crime gun trace request telephone calls from BATF, gun manufacturers likewise receive warnings, whether or not they were intended as such, that their products leak into the criminal market.

The knowing or careless selection of distributors who take no precautions against leakage to the criminal market would bring handgun manufacturers under the second exception to the immunizing principals for the torts of their independent contractors. When BATF seeks daily crime gun purchaser information from a gun manufacturer, and the manufacturer finds, ten or thirty or a hundred times a year, that a particular distributor leaked those guns to the criminal market, then that manufacturer has reason to know of the "incompetence," or worse, of that particular independent contractor. (This again assumes that manufacturers or others eventually establish that leakage levels do not just vary with volume, but correlate to negligence or corruption.) The same analysis applies to the distributor whose records show that particular re-

⁹⁵ *Rosenberg*, 79 N.Y.2d at 666, 595 N.E.2d at 842, 584 N.Y.S.2d at 767.

⁹⁶ *Id.* at 668, 595 N.E.2d at 843, 584 N.Y.S.2d at 768.

⁹⁷ *Direct Sales Co. v. United States*, 319 U.S. 703 (1943).

⁹⁸ *Id.*

⁹⁹ *Reply Brief Beretta II*, *supra* note 77, at 22.

tailers constitute vastly disproportionate leaks of handguns to the criminal market.

Thus, either gun manufacturers exercise economic control over distributors and retailers to the extent that they can enforce their wishes as to the manner in which handguns are sold, or they do not. If the former, manufacturers may exercise authority and responsibility sufficient to make distributors and retailers liable to victims for the negligence of their agents. If the latter, manufacturers cannot delegate to their contractors a duty to those victims but must retain it themselves. The danger in the sale of handguns renders nondelegable the duty to assure public safety; the negligent selection of incompetent independent contractors likewise prevents delegation of the duty to those contractors.

III. PROPORTIONAL CAUSATION

A. *Why the Preponderance Standard in Hamilton Did Not Prevail*

Questions of collective liability as well as proximate cause occupied a great deal of the *Hamilton* trial court's attention. The only plaintiff to win damages for his gunshot injuries was unable to identify the manufacturer of the particular handgun that was used to cause the injury. With no one manufacturer linked to the weapon, plaintiff had no choice but to argue that the range of possible manufacturers bore collective liability, an argument that virtually begged the question of cause-in-fact. With respect to proximate cause, the trial court summarized the testimony of the plaintiff's expert as follows: Gun manufacturers' negligent marketing and distribution resulted in widespread and easy availability of .25 caliber handguns to criminals and to underage purchasers and in consequent injuries to shooting victims. In particular and for example, Alfred Adkins illegally purchased and used such a gun to shoot and cripple his friend and fellow teenager Stephen Fox, a plaintiff in the instant case.¹⁰⁰

¹⁰⁰ *Accu-Tek*, 62 F. Supp. 2d at 835.

With respect to collective liability, the court agreed with plaintiffs' analogy of "illegal handguns to deadly pathogens[.]" and therefore applied a liability theory used in mass toxic tort cases when "circumstances . . . made it impossible for plaintiffs to determine which one of a number of manufacturers made the particular unit of the product which caused the injury. . . ." ¹⁰¹

However, most of the argument in *Hamilton* centered on causation.¹⁰² The court permitted the jury to determine whether a preponderance of the evidence established defendants' market share liability,¹⁰³ and concluded:

Proof of the sales history of the specific gun used in the Fox shooting is not required. Plaintiff need only produce evidence from which a fair-minded jury could conclude that the Fox defendants failed to market and distribute their product—a .25 caliber handgun—reasonably in light of all the circumstances. They have met that burden.¹⁰⁴

At oral argument before the Second Circuit,¹⁰⁵ the panel asked the plaintiffs' attorney how she could link a defendant to the gun that was used to shoot the injured plaintiff since the gun was never recovered. She referred to the testimony that the shooter bought the gun from a trafficker who sold it out of the back of his truck, and who had himself purchased it down South, in a pattern that usually includes a straw purchase from an FFL. The defendant's failure to impose requirements through its distributors to its FFL retailers, she suggested, typified the kind of behavior that made possible the rest of the process: sale by FFL to straw purchaser, subsequent sale to criminal, and shooting of victim.

However, the Court of Appeals noted that plaintiffs had not met the "but for" test: had gunmaker defendants taken all the actions plaintiffs alleged constituted the exercise of their

¹⁰¹ *Id.* at 834, 836 (citing *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989) for market share liability, which the *Hamilton* trial court applied).

¹⁰² See generally Trial Transcript, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (1999) (on file with author).

¹⁰³ *Accu-Tek*, 62 F. Supp. 2d at 835.

¹⁰⁴ *Id.* at 829.

¹⁰⁵ Oral argument for *Hamilton v. Beretta*, No. 99-7753(L), attended March 13, 2000.

duty of care, Stephen Fox, the injured plaintiff, might well still have been shot. The gun in question might have been obtained by the trafficker through a non-negligent retail sale, or from a group of weapons stolen from non-negligent retailers, or even from citizens, although most are not. Had the trafficker not supplied the weapon, the shooter might have borrowed one from a friend, or stolen one himself. It might not have made any difference had the defendant gun manufacturers forced their distributors to cut off retailers who engaged in multiple sales, repeatedly had crime guns traced to them, sold at gun shows, or were not well-stocked storefront establishments.¹⁰⁶

Thus, had defendants not engaged in any of the behavior that the plaintiffs claimed constituted negligent marketing, the man who shot Fox might still have obtained the gun he used. In rejecting plaintiffs' effort to show that defendants could have prevented their injuries, the Court of Appeals recognized that this possibility made it difficult for plaintiffs. In adopting a "preponderance of the evidence" standard, plaintiffs undertook to show that defendants did more than merely increase plaintiffs' risk of harm. They had to show, instead, that defendants were more than fifty percent likely to have "caused" the harm, and that defendants' behavior supplied the "specific causal link" to the plaintiffs' injuries.¹⁰⁷

When a plaintiff cannot identify which manufacturer produced the particular "unit of the product" that caused the injury (the "indeterminate defendant" problem), New York has used market share liability to apportion liability among defendants. But the plaintiff must still establish, by a preponderance of the evidence, that the *product* caused the injury.¹⁰⁸ For the appropriate analogy to hold in *Hamilton*, plaintiffs were required to establish by a preponderance of the evidence that the defendants' *behavior* caused the injury. The Court of Appeals concluded that the plaintiffs had not done so.¹⁰⁹

Ironically, one of the trial judge's prior opinions offers a causation theory, proportional causation, that fits the facts of

14.

¹⁰⁶ *Beretta II*, 96 N.Y. 2d at 232-33, 750 N.E.2d at 1060-61, 727 N.Y.S.2d at 12-

¹⁰⁷ *Accu-Tek*, 62 F. Supp. 2d at 834; *see generally id.*

¹⁰⁸ *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 1078, n.2.

¹⁰⁹ *Accu-Tek*, 96 N.Y.2d at 236, 750 N.E.2d at 1063, 727 N.Y.S.2d at 15.

Hamilton.¹¹⁰ In *Hamilton*, Judge Weinstein found that plaintiffs need not settle for the substantially smaller awards likely to be available under the proportional causation theory because the evidence they had presented satisfied the requirements of the preponderance standard, under which they could win larger awards.¹¹¹ But the Court of Appeals, in rejecting Judge Weinstein's application of the preponderance standard and market share liability,¹¹² suggested that a successful plaintiff might well pursue damages under the proportional causation theory.¹¹³

B. *Why "Indeterminate Plaintiff"/"Indeterminate Defendant" Settings Make a Better Fit With Proportional Causation*

Until the advent of proportional causation theory, courts responded to problems analogous to the problem in *Hamilton* in an inconsistent manner. That is, when the defendant's behavior increased the risk to the plaintiff, but there was no way to tell whether the particular plaintiff would have suffered injury in the absence of the defendant's behavior, courts sometimes let the causation question go to the jury and sometimes they did not. The defendant's apparent moral culpability and social status were among the factors that influenced the courts' distinctions.

A seminal 1956 *Stanford Law Review* article by Wes Malone¹¹⁴ provided several illustrations. When two fires, one caused by a railroad's negligence and one of unknown origin, merged to damage plaintiff's property,¹¹⁵ or when two motorcy-

¹¹⁰ *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), where Judge Weinstein utilized proportional causation to distribute the proceeds of a settlement. In that administrative context, such utilization did not of course constitute precedent as a matter of tort law. See John C. P. Goldberg & Benjamin Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1415, n.13 (2000).

¹¹¹ *Accu-Tek*, 62 F. Supp. 2d at 835.

¹¹² *Beretta II*, 96 N.Y.2d at 234-42, 750 N.E.2d at 1062-68, 727 N.Y.S.2d at 14-20.

¹¹³ *Id.* at 241, 750 N.E.2d at 1067, 727 N.Y.S.2d at 19, n.11.

¹¹⁴ Wes S. Malone, *Ruminations on Cause-in-Fact*, 9 STANFORD L. REV. 60 (1956).

¹¹⁵ *Anderson v. Minneapolis, St. P. & S. Ste. M. Ry.*, 179 N.W. 45 (Minn. 1920),

cles simultaneously made noise near a horse which, frightened, ran off, injuring the plaintiff,¹¹⁶ the courts did not simply reject plaintiffs' claims for failure to establish causation. Instead, in "combined force" cases of this kind, they permitted juries to assess damages equally against defendants whose identical behavior created equal risk of harm, regardless

of the fact that only one and not the other must have "caused" the harm.¹¹⁷

At the time in other cases, such as medical malpractice cases, the fact that better treatment would have increased a patient's chance from twenty percent to forty percent was not enough for the court to allow a finding of causation.¹¹⁸ Courts permitted juries to assess damages against defendants in some cases when no determination of actual cause-in-fact was possible, generally when the juries saw the defendants, one of whom must truly have caused the injury, all as wrongdoers.¹¹⁹ The social status of the defendant class at the time influenced such perceptions.¹²⁰ But after Congress enacted legislation extending provisions of the Federal Employers' Liability Act to sailors, the courts found that employers had a duty to take precautions against danger to sailors. Subsequently, the courts began to find causation against ship owners who didn't provide life preservers.¹²¹

Professors Twerski and Sebok¹²² extend Malone's life preserver discussion with this scenario: Say we know that life preservers would have prevented one out of three sailors from drowning, but we do not know which one. Decedents of a sailor who really drowned because defendants neglected to provide a lifesaver might not recover, because no one would ever know or

cited in Malone, *supra* note 114, at 89, n.72.

¹¹⁶ *Corey v. Havener*, 65 N.E. 69 (Mass. 1902), *cited in* Malone, *supra* note 114, at 89, n.71.

¹¹⁷ Malone, *supra* note 114, at 89.

¹¹⁸ See *Kuhn v. Banker*, 13 N.E.2d 242 (Ohio 1938); *Connellan v. Coffey*, 187 A. 901 (Conn. 1936), *cited in* Malone, *supra* note 114, at 87, n.66 ("This would throw the physician open to more claims that it is felt would be proper" at the time).

¹¹⁹ Malone, *supra* note 114, at 84.

¹²⁰ *Id.* at 86.

¹²¹ *Id.* at 76-77.

¹²² Aaron Twerski & Anthony Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1380-81 (2000).

could ever prove that he would have lived. Decedents of a sailor who would have drowned anyway might recover.¹²³

When the evidence supported less than a fifty percent likelihood of causation, courts could not allow findings of causation under a strict preponderance theory. So victims of some defendants whose behavior had indeed caused harm would never recover damages.¹²⁴ When the evidence supported more than a fifty percent likelihood, but of course not certitude, a preponderance of the evidence sufficed to show causation. Therefore, in some such cases, defendants would be held liable for harms they had not inflicted; and the use of such decisions as precedent, for the same class of defendants, would multiply damages against that class for the cost of harms they had not inflicted.¹²⁵

Under proportional causation, defendants are held liable only for the excess risk their behavior contributed to the plaintiff's situation. Thus, in the drowning sailor illustration, decedents of the drowned sailor could recover one-third of the damages his death imposed, because he might or might not have been the one sailor in three whose life would have been saved by the life preserver. Defendants are held liable for destroying his one-third *chance* of surviving.

In the context of multiple defendants, one defendant's behavior may have increased risk more than another's, so the calculation of damages becomes more complicated than apportioning the risk equally over the defendants. In an earlier decision,¹²⁶ Judge Weinstein suggested an illustration in which 1,100 people developed cancer after exposure to a toxic carcinogen, one hundred more than without exposure. Damages average one million dollars per cancer victim, but no victim knew

¹²³ *Id.* at 1387.

¹²⁴ Under the "strong" version of preponderance theory, even with a greater than fifty percent probability of causation, courts do not impose liability without some "particularistic" proof that an individual defendant's behavior caused the particular victim's injury. With strict application of that version of the theory, then, virtually no mass tort plaintiff would ever recover damages. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 857 (1984).

¹²⁵ This would be an improper result: "[t]o the extent that a risk is attributable to unknown or nonculpable sources or to the victim's own recklessness, the victim should bear the loss unless society has decided to absorb it collectively.[Citations omitted.]" *Id.* at 880.

¹²⁶ *In re Agent Orange Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984).

which of the ten product manufacturers were responsible for that particular victim's cancer, and obviously no victim out of the 1,100 knew which victims were the one hundred who would not have developed cancer but for the defendant's product. Under these circumstances, Judge Weinstein suggested that with equal toxicity, the ten manufacturers together would have been liable for the cost of the "extra" cancers (one hundred times one million dollars = one hundred million dollars), so each manufacturer would have had to pay each of the 1,100 victims 1/1100th of one hundred million dollars, or about \$90,000 each. While this gives each victim far less than his or her full damages for the illness, it gives each victim the damages proportionate to the manufacturers' behavior in increasing the likelihood that the victim would incur the illness.¹²⁷

In some medical malpractice cases, negligent failure to diagnose cancer at an earlier stage of the cancer could increase a patient's mortality risk from sixty-one percent to seventy-five percent.¹²⁸ The patient's subsequent death could not, then, be attributed to the negligence of the physician by a preponderance of the evidence: it "merely" increased the risk fourteen percent. But some courts have awarded damages as follows: the percentage risk times what damages would have been for full liability for the death.¹²⁹ As one such court explained, "A patient with cancer . . . would pay to have a choice between three unmarked doors—behind two of which were death, with life the third option. A physician who deprived the patient of this opportunity, even though only a one-third chance, would have caused her real harm."¹³⁰

In a different context, Professors Twerski and Cohen discuss a form of negligence which increases a patient's risk of \$100,000 worth of harm from seventeen percent to twenty percent. Out of one hundred patients, twenty will suffer the ad-

¹²⁷ *Id.* at 837-38.

¹²⁸ *Herskovits v. Group Health Cooperative of Puget Sound*, 664 P.2d 474, 476-79 (Wash. 1983).

¹²⁹ See Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 N.W. U. L. REV. 1, 20-21, n.48 (citing nine medical malpractice cases). See also *Herskovits*, 664 P.2d at 479, 486-487 (Pearson, J., concurring).

¹³⁰ Twerski & Cohen, *supra* note 129, at 16 (quoting *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 684 (Mo. 1992)).

verse consequences, but only three will suffer as a result of the physician's negligence. That negligence will have imposed \$300,000 of harm, but under the preponderance rule, no patient would recover any damages. Under the proportional causation rule, each of the twenty patients will recover \$15,000, the proportion of the harm equal to the degree by which the doctor increased the patients' risk of suffering that harm. The physician will pay a total of \$300,000: precisely the total damage attributable to his negligence.¹³¹ Physician A pays the damage amount he should pay. Since none of his twenty patients knows or can prove which actually suffered because of A's negligence, each gets a pro rata share.

C. *Why Proportional Causation Should Succeed For Handgun Injury Plaintiffs*

Applying proportional causation to the *Hamilton* case poses practical challenges, but not theoretical ones. In *Hamilton*, the jury translated behavioral differences among defendants into findings of liability or non-liability for negligence, and then applied market share to apportion damages. In a new case brought against handgun manufacturers utilizing data made available subsequent to the *Hamilton* trial, a jury would have to translate behavioral differences more finely into percentage degrees of risk enhancement. Testimony could be brought to bear on that task. Plaintiffs may eventually be able to show that permitting sales at gun shows, and permitting multiple sales to the same purchaser by retailers, increases the risk of gun violence to third party victims among the public. BATF found there were five times as many crime guns leaked through FFLs to New York City during one nine-month period as handgun permits were issued by the city in that same period.¹³² Plaintiffs would still have to demonstrate that distribution and sales methods alleged to be negligent did in fact disproportionately cause guns to enter the criminal market, but it seems likely that such behavior increases risk. Studies covering 1986 through 1992 quantified "excess murders" during that

¹³¹ *Id.* at 30.

¹³² YOUTH CRIME REPORT, *supra* note 30, at 1; "New Licenses Issued by the License Division," Police Department, City of New York, under cover letter of 6/22/99 from Inspector John J. Hudson, Commanding Officer, License Division.

period for all age groups at about twelve percent,¹³³ and concluded that “the lethality of the ubiquitous guns contributed in a major way to the doubling of the homicide rate by (and of) those 18 and under.”¹³⁴ These studies were not offered into evidence for the *Hamilton* trial.

BATF data suggested to the *Hamilton* trial court that defendants had increased the risk to plaintiffs by thirty-three percent. If so, proof of causation by a preponderance of the evidence would seem arithmetically impossible. Citing Professors Twerski and Sebok’s analysis¹³⁵ the Court of Appeals noted that even if plaintiffs had persuaded it to recognize a duty of care owed by defendants, the appropriate measure of damages would have reflected the thirty-three percent risk enhancement, not the full damage assessment associated with the preponderance rule.¹³⁶ In any case, none of the plaintiffs’ evidence persuaded the court that the defendants’ alleged negligent marketing and distribution had increased the risk to plaintiffs in any way that could be quantified or separated out from the overall risk posed by guns in the United States generally.¹³⁷

But with the proper factual foundation, proportional causation, as the court suggested, makes a far better logical “fit” in an indeterminate plaintiff/indeterminate defendant combination case, like *Hamilton*, where plaintiffs at best will only be able to show risk enhancements by defendants at a level below fifty percent.

CONCLUSION

Future plaintiffs may be expected to seek proof that handgun manufacturers exercise control over the degree to

¹³³ Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 19-20 (1995). The twelve percent represents the likely increase over the baseline murder rate of earlier (and most likely, later) periods, but the quantity of homicides potentially attributable to easy access to guns by criminals and youth may include some of the ongoing baseline as well, bringing the total well above twelve percent.

¹³⁴ Alfred Blumstein, *The Context of Recent Changes in Crime Rates*, Panel Paper, National Institute of Justice and Executive Office for Weed and Seed, Washington, D.C., Jan. 5-7, 1998.

¹³⁵ See *supra* notes 110-112.

¹³⁶ 96 N.Y.2d 222, 241, 750 N.E.2d 1055, 1067, 727 N.Y.S.2d 7, 19 (2001).

¹³⁷ *Id.* at 234, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14.

which their product will be used to generate injury and destruction. Courts need no longer believe that they must defer to legislatures to impose liability, and may utilize available and well-established theories of liability to impose responsibility where it truly belongs.

Although neither the *Hamilton* plaintiffs nor anyone else to date has yet come forward with dispositive evidence of a causal relationship between the negligent marketing and distribution of handguns on the one hand and increased risk to victims on the other, only the capture of that evidence—and not, any longer, an apparent barrier of legal theory—stands between handgun manufacturers and liability on a negligence claim. New York jurisprudence is now open for change with far-reaching potential consequences for both handgun manufacturers, and gunshot victims.

What seemed to be settled law after *McCarthy*, “New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition,”¹³⁸ now is not.

¹³⁸ *Olin Corp.*, 119 F.3d at 157.

MAKING A FEDERAL CASE OUT OF IT: SECTION 1981 AND AT-WILL EMPLOYMENT*

Joanna L. Grossman†

Employment at will is not a state of nature but a continuing contractual relation.¹

INTRODUCTION

Most Americans work at will—they can quit in a huff, but be fired on a whim. That is the double-edged sword of at-will employment.² What these workers gain in freedom, they sometimes lose in rights. One of the rights at-will employees have tried to claim, with moderate success, is the right not to be fired or otherwise treated adversely on the basis of race. For many of them, Title VII of the Civil Rights Act of 1964³ (“Title VII”) provides that protection, prohibiting employers from taking any racially motivated adverse employment action.

But millions of these workers are not able to make use of Title VII’s protections, either because the employers they work for are too small, and therefore exempt, or because they have failed to comply with its procedural prerequisites like

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¹ *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (Posner, J.).

² “‘Employment at will’ is a term long used to mean that an employer may discharge an employee without restriction, that is, for any reason or for no reason, without incurring any liability to the employee.” 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2000).

³ See 42 U.S.C. § 2000e -§ 2000e -17 (1994 & Supp. V 1999).

administrative exhaustion and a relatively short statute of limitations. For this group of workers, another federal civil rights statute provides some relief.

Section 1981,⁴ the modern iteration of a reconstruction-era civil rights act, prohibits race discrimination in contracting. For the last three decades, the predicate for most § 1981 cases has been an employment contract. At-will employees, however, do not have a piece of paper labeled “contract” nor a standard oral agreement that clearly brings them within the purview of the statute. Federal courts across the country have thus been grappling for the past few years with the question whether such employees have a contractual relationship with their employers, such that § 1981 may be invoked to challenge discrimination against them on the basis of race. The Second Circuit weighed in last term in *Lauture v. IBM*.⁵

At-will employees have racked up considerable successes, convincing four federal courts of appeals—including, most recently, the Second Circuit—to apply § 1981 to them, while losing in only one circuit. While these decisions have quite assuredly reached the right outcome, their reasoning makes them precarious. Most have relied on contract law in the state where the suit was brought to determine whether the employee-employer relationship is contractual. In most states, that approach will ensure that § 1981 applies to at-will employees. But not in all. Some states, although recognizing at-will employment, do not view the relationships as contractual.⁶ If state law supplies the definition of contract for § 1981 purposes, at-will employees in those states lose the protection provided by the statute. This approach is wrong. The benefits of an important federal civil rights law should not be hamstrung by the idiosyncrasies of a particular state’s rules of contract law. What these decisions should turn on instead is federal common law—a uniform, federal interpretation of § 1981 that protects all at-will employees, even those in states with stricter definitions of contractual relationships.

⁴ 42 U.S.C. § 1981 (1994).

⁵ 216 F.3d 258 (2d Cir. 2000).

⁶ See, e.g., *Jones v. Becker Group*, 38 F. Supp. 2d 793, 796-97 (E.D. Mo. 1999) (noting that, under Missouri law, at-will employers do not have a contractual relationship with their employers). See *infra* note 133.

This Article is divided into four parts. Part I describes the history and origins of § 1981, its bloodletting by the Supreme Court, and its ultimate restoration and reinvigoration by Congress. Part II first describes the federal appellate opinions addressing the applicability of § 1981 to at-will employment. It then examines the source of law question: whether state law, federal law, or some combination ought to dictate the definition of “contract” in § 1981. It concludes that federal common law, which may draw on well-established state law principles, should control. Part III examines the possible interpretations of “contract” as used in § 1981, looking at both state and federal law, ultimately concluding that at-will employees should be protected from race discrimination on the same terms as other employees. Part IV explores why § 1981 continues to be important, in light of the substantial protections provided by Title VII. This section looks at the doctrinal differences between the two statutes and examines some empirical evidence about § 1981’s continuing use. It concludes that § 1981 remains an important tool in the fight for racial equality.

I. SECTION 1981’S BIRTH AND REBIRTHS

A. *Enactment and Early History*

Immediately following the Civil War and ratification of the Thirteenth Amendment to the federal Constitution, Congress enacted the Civil Rights Act of 1866, a wide-ranging ban on race discrimination. Part of this Act, eventually codified as 42 U.S.C. § 1981,⁷ addressed the problem of race discrimination in contracting. As originally enacted, § 1 of the Civil Rights Act provided, in relevant part:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties,

⁷ See Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. This provision of the Civil Rights Acts of 1866 and 1870 was first codified as Revised Statutes § 1977, then recodified as 8 U.S.C. § 41, then finally recodified as 42 U.S.C. § 1981. When § 1981 was amended by the Civil Rights Act of 1991, the original § 1981 was renumbered “1981(a).” Sections 1981(b) and 1981(c), discussed below, were added in 1991.

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens⁸

To remove any doubt about its authority to pass this act pursuant to the Thirteenth Amendment (which, narrowly construed, did nothing more than abolish slavery),⁹ Congress re-enacted this provision as § 16 of the Civil Rights Act of 1870 after ratification of the Fourteenth Amendment.¹⁰

As first enacted, § 1981 was used to challenge the Black Codes used by southern states to limit the rights and opportunities of newly freed slaves.¹¹ But after the 1870s, the statute went largely unused for nearly a century.¹²

The modern use of § 1981 came about through a series of cases in the 1970s and 1980s, in which the Supreme Court both breathed new life into the statute and hammered out its contours more precisely.¹³ Section 1981 was resurrected by the Supreme Court's decision in *Johnson v. Railway Express Agency*,¹⁴ which held that the statute applied not only to government-sponsored discrimination, but to private discrimination as well.¹⁵ Section 1981's breadth had been in question for

⁸ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1994)).

⁹ The competing view of the Thirteenth Amendment gave Congress the right to federalize and enforce civil rights more generally, rather than simply the power to make sure "slavery per se did not return." Sanford V. Levinson, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 481 (1974).

¹⁰ See Act of May 31, 1870, ch. 114 §§ 16, 18, 16 Stat. 144. The re-enactment made only two minor changes. See generally Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 385-86 (1982) (discussing legislative history of § 1981).

¹¹ See, e.g., Hart v. Hoss, 26 La. Ann. 90, 93 (La. 1874) (interpreting the Civil Rights Act of 1866 to annul all existing state laws creating legal disabilities on the basis of race).

¹² See generally HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 325 (2001).

¹³ Section 1983, arguably the most important federal civil rights statute, lay similarly dormant for nearly a century, before being resurrected in 1961 by *Monroe v. Pape*, 365 U.S. 167 (1961), as a "broad cause of action to remedy constitutional violations." Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 53 (1986).

¹⁴ 421 U.S. 454 (1975).

¹⁵ *Id.* at 459-60. The Court established the groundwork for this ruling seven years earlier in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in which it held that § 1982, a companion provision dealing with race discrimination affecting property rights, applied to purely private conduct. The rationale for that decision was equally applicable to § 1981. See Levinson, *supra* note 9 at 482, for the critique of this reading of Congressional intent because "it would have been a stunning repudiation of an al-

nearly a century, since the Court's ruling in the *Civil Rights Cases*.¹⁶ In those cases, the Court invalidated significant portions of another reconstruction-era civil rights act, the Civil Rights Act of 1875,¹⁷ which prohibited race discrimination in public accommodations like inns, restaurants, and the like.¹⁸

In those cases, the Supreme Court took an extremely narrow view of Congress' power under the Thirteenth and Fourteenth Amendments to legislate against race discrimination.¹⁹ The Court's rebuke arguably stood for the proposition that neither the Thirteenth nor Fourteenth Amendment was broad enough to enable Congress to regulate or prohibit private acts of race discrimination.²⁰ Although not directly considering the validity of the Civil Rights Acts of 1866 or 1870, the Supreme Court obliquely suggested that they should also be construed, because of limits on Congress' power, to apply only to "state action."²¹ It would, the Court cautioned, be "running the slavery argument into the ground" to characterize acts of private discrimination as inflicting "badges

of slavery."²² Thus, § 1981 stood on shaky ground until the

most omnipresent racism for Congress to have committed itself in 1866 to such equality for blacks." *Id.* See also Gerhard Casper, *Jones v. Myer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 (discussing the legislative history of the Civil Rights Act of 1866).

¹⁶ 109 U.S. 3 (1883).

¹⁷ *Id.* at 26.

¹⁸ See Civil Rights Act of 1875, 18 Stat. 335.

¹⁹ See generally Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (discussing the gradual restriction of federal civil rights laws and constitutional amendments by strict constructionist judges who were hostile to the idea of nationalized civil rights); Levinson, *supra* note 9, at 468, 470 (noting the Supreme Court's "potential antagonism to Reconstruction," which "did nothing to discourage the [South's] policy of noncooperation").

²⁰ The prohibition against race discrimination in public accommodations was resurrected nearly a century later by the Civil Rights Act of 1964, this time pursuant to the Constitution's Commerce Clause. See Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) (prohibiting race discrimination in public accommodations); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Title II against challenge that Congress did not have sufficient authority under the Commerce Clause to enact it); cf. *EEOC v. Ratcliff*, 906 F.2d 1314, 1315 (1990) (noting that Title VII was enacted pursuant to the Commerce Clause).

²¹ *The Civil Rights Cases*, 109 U.S. at 6.

²² *Id.* at 24, 25; see also Casper, *supra* note 15, at 126 (noting that the *Civil Rights Cases* left the applicability of § 1981 to private discrimination in question for nearly a century).

Court's ruling in *Railway Express*.²³

B. Section 1981 and Employment

The Court's ruling in *Railway Express*, later reaffirmed in *Runyon v. McCrary*²⁴ and *Patterson v. McLean Credit Union*,²⁵ and eventually codified by Congress,²⁶ transformed § 1981 into an effective and frequently used weapon in the arsenal of employment discrimination lawyers. In addition to its holding that § 1981 was broad enough to reach private discrimination generally, the Court in *Railway Express* directly held that § 1981 was applicable to claims of employment discrimination,²⁷ a conclusion that had already been reached by several federal courts of appeals.²⁸ The Court applied § 1981 to employment contracts despite the fact that it overlapped to a significant extent with Title VII.²⁹ Although the justifications for permitting both statutes to stand side-by-side have lessened somewhat in the quarter-century since *Railway Express* was

decided,³⁰ it remains possible today for aggrieved employees to pursue claims of race discrimination under both statutes simultaneously.

²³ 421 U.S. 454 (1975).

²⁴ 427 U.S. 160, 168, 173-75 (1976).

²⁵ 491 U.S. 164, 171-72 (1989). The Supreme Court in *Patterson* expressly requested that the parties submit briefs on whether its decision in *Runyon* (and, by implication, *Railway Express*) ought to be overruled or affirmed. *See infra* note 38.

²⁶ *See* 42 U.S.C. § 1981(c); *see infra* notes 51-52 and accompanying text; *see also* H.R. REP. No. 102-40(I), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630 ("[t]his subsection also confirms section 1981's coverage of both public and private sector employment").

²⁷ 421 U.S. at 459-60.

²⁸ *Id.* at 460 (discussing cases); *see also* Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 993-94 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 622 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1385 (4th Cir. 1972); Caldwell v. Nat'l Brewing Co., 443 F.2d 1044, 1045 (5th Cir. 1971); Young v. ITT, 438 F.2d 757, 759-60 (3d Cir. 1971); Waters v. Wis. Steel Works, 427 F.2d 476, 481-84 (7th Cir. 1970).

²⁹ *Railway Express*, 421 U.S. at 461 (concluding that while Title VII and § 1981 are not entirely co-extensive in their coverage, they are not mutually exclusive and the remedies that are available, therefore, "although related, and . . . directed to most of the same ends, are separate, distinct, and independent").

³⁰ *See infra* text accompanying notes 222-36.

1. The Supreme Court Limits § 1981

Although Congress expressly declined an opportunity to eliminate the overlap between Title VII and § 1981 in the employment context,³¹ the Supreme Court in the 1980s dealt § 1981 two major blows. First, the Court in *General Building Contractors Ass'n v. Pennsylvania* held that § 1981 could not be used to attack unintentional, or disparate impact, discrimination.³² The District Court in that case had, contrary to most other courts, interpreted § 1981 to be roughly co-extensive with Title VII.³³ Title VII had been interpreted early on, and later expressly amended, to permit employees to attack facially neutral employment practices with a disproportionately adverse impact on a protected group.³⁴ The Supreme Court, however, declined to interpret § 1981 as broadly as Title VII, given the different contexts in which each statute was enacted. The “principal object of the legislation was to eradicate the Black Codes,” the Court explained, laws that embodied “express ra-

³¹ In *Runyon v. McCrary*, the Supreme Court noted that Congress, “in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in [*Railway Express*], insofar as it affords private-sector employees a right of action based on racial discrimination in employment.” 427 U.S. at 174. The principle of enhanced stare decisis—applicable to court interpretations that have been ratified implicitly by Congress—is ultimately what saved the ruling in *Railway Express* and *Runyon* against later attacks.

³² See 458 U.S. 375, 391 (1982). The Court had failed to reach this question in at least three prior cases involving § 1981 claims that were premised on a disparate impact theory of discrimination. See *County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979) (dismissing case on ground of mootness); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (declining to reach question whether § 1981 applies to unintentional discrimination); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977) (vacating class certification in case brought under disparate impact theory).

³³ See *Pennsylvania v. Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 401 (E.D. Pa. 1978). *But see* *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 267 (2d Cir. 1980) (refusing to apply § 1981 to disparate impact claims because “the language, structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination”), *aff'd*, 463 U.S. 582 (1983); *Mescal v. Burrus*, 603 F.2d 1266, 1270 (7th Cir. 1979) (interpreting § 1981 more narrowly than Title VII because of the former’s strong ties to the Fourteenth Amendment).

³⁴ The Supreme Court first sanctioned this use of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress ultimately amended Title VII to make clear that it protected against disparate impact discrimination. See 42 U.S.C. § 2000e-2(k) (1994). Proof of disparate impact discrimination only entitles its victims to equitable relief, however, rather than the full panoply of remedies available to plaintiffs able to prove intentional discrimination. See Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1994).

cial classifications” and imposed a “range of civil disabilities on freedmen.”³⁵ Although some of the Black Codes were in fact facially neutral, such as those penalizing vagrancy, the Court concluded that § 1981 was created to target the facially discriminatory aspects of these laws.³⁶

Then, six years later, the Court drastically limited the scope of § 1981 in *Patterson v. McLean Credit Union*.³⁷ In *Patterson*, the Court was asked to interpret the “make and enforce” language in § 1981, specifically to decide whether it permitted plaintiffs to challenge post-hiring conduct.³⁸

Brenda Patterson, an African-American bank teller, brought suit against McLean Credit Union, alleging that her supervisor harassed her, failed to promote her, and ultimately laid her off, all on the basis of race.³⁹ In response, the defendant argued that § 1981 did not provide a cause of action for racial harassment.⁴⁰

The Supreme Court agreed, holding that § 1981 did not regulate all aspects of the relationship between two contracting parties, but instead merely prohibited race discrimination in the “making” and “enforcement” of contracts.⁴¹ Sharply

deviating from lower court precedent,⁴² the Court held that the right to *make* contracts applied only to contract formation. In other words, an employer could not refuse to enter into an employment contract with an applicant because of race without

³⁵ *Gen. Bldg. Contractors*, 458 U.S. at 386-87.

³⁶ *Id.* at 387-88 (Congress “acted to protect the freedmen from intentional discrimination by those whose object was ‘to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.’”) (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1839 (1866) (Rep. Clarke)).

³⁷ 491 U.S. 164 (1989).

³⁸ The Court also requested briefing and argument on whether to overrule *Runyon v. McCrary* and thereby limit § 1981 to protect only against discrimination by state actors. See *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (ordering briefing and reargument). The Court ultimately decided to adhere to precedent and continue to apply § 1981 to purely private conduct. See *Patterson*, 491 U.S. at 175.

³⁹ *Patterson*, 491 U.S. at 169.

⁴⁰ *Id.* at 170.

⁴¹ *Id.* at 176-77.

⁴² Prior to *Patterson*, every federal court to consider the issue had held that § 1981 applied to both pre- and post-formation conduct. See Harry Hutchison, *The Collision of Employment-At-Will, Section 1981 & Gonzalez: Discharge, Consent and Contract Sufficiency*, 3 U. PA. J. LAB. & EMP. L. 207, 226 (2001).

running afoul of § 1981. But that protection against discrimination did not extend to conduct by an employer after the contractual relationship has been established.⁴³ Thus, for § 1981 purposes,⁴⁴ an employer could—under *Patterson*—harass, transfer, or demote an employee on the basis of race with impunity. The right to *enforce* contracts, according to the Court in *Patterson*, applied only to conduct of an employer designed to impair an employee’s ability to avail herself of the legal process.⁴⁵

Despite its tolerance of overlap between Title VII and § 1981 in *Railway Express*, the Court in *Patterson* expressly tried to limit it.⁴⁶ Applying § 1981 to post-formation conduct, the Court reasoned, would undermine Title VII’s elaborate administrative scheme designed to promote conciliation rather than litigation.⁴⁷

For the plaintiff in *Patterson*, the Court’s narrowing of § 1981 left her harassment and layoff claims unremediable.⁴⁸ But her failure-to-promote claim was perhaps viable. Whether such a claim would be actionable under § 1981, the Court held, “depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer.”⁴⁹ If the sought-after promotion would create a “new and distinct relation” between the parties, the right to make contracts on race-neutral terms might be implicated.⁵⁰

⁴³ *Patterson*, 491 U.S. at 177.

⁴⁴ As discussed below, there is considerable overlap between § 1981 and Title VII in the employment context. Thus, although *Patterson* seemingly permitted employers to discriminate in a variety of ways, Title VII would, for some employees, provide an alternative remedy. See *infra* text accompanying notes 203-47.

⁴⁵ *Patterson*, 491 U.S. at 177-78.

⁴⁶ See *id.* at 181 (despite accepting some “necessary overlap,” the Court was “reluctant” to impose a “tortuous construction” or use a “twist[ed] interpretation” to read § 1981 and Title VII to cover the same post-formation discriminatory conduct).

⁴⁷ *Id.* at 180-81 (“By reading section 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII’s procedures without sacrificing any significant coverage of the civil rights laws.”).

⁴⁸ *Id.* at 179.

⁴⁹ *Id.* at 185.

⁵⁰ *Patterson*, 491 U.S. at 185. Whether Brenda Patterson’s promotion met this test was never reached by the Supreme Court because the defendant had not challenged the applicability of § 1981 to that claim.

2. Congress Breathes New Life Into § 1981

Patterson's life was short. Congress overruled the Court's restrictive interpretation of § 1981 by statute as part of the Civil Rights Act of 1991. Renumerating the original provision as § 1981(a), Congress added the following subsections:

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.⁵¹

The express purpose of subsection (b) was to undo the damage wrought by *Patterson* and restore § 1981's fuller scope.⁵² Subsection (c) served to validate the Court's decision to apply § 1981 to private conduct.

3. The Immediate Aftermath of *Patterson*

In the first few years after the Civil Rights Act of 1991 was passed, *Patterson* continued to wield some power. To resolve a developing circuit split, the Supreme Court granted certiorari in a case questioning the retroactivity of the 1991 amendments to § 1981. In that case, the Court held that the amendments were not retroactive and thus did not apply to claims that arose before November 1991.⁵³ Thus, for some time, courts were busy interpreting *Patterson* as it applied to those cases, even though the case itself had been overruled by statute.⁵⁴

⁵¹ 42 U.S.C. § 1981 (1994).

⁵² See, e.g., H.R. REP. NO. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 ("there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination").

⁵³ See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

⁵⁴ A decade later, the non-retroactivity ceases to have much meaning, but for several years after *Patterson* was decided, new cases based on past conduct were affected. According to one commentator, the Court's decision in *Patterson* caused 825 of 961 then pending cases to be dismissed on the merits. See George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 262 (1995); see also H.R. REP. NO. 102-40(I), at 90 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 629 (statement of Julius LeVonne Cham-

In *Patterson's* wake, lower courts agreed that claims of racially motivated discharge were no longer cognizable under § 1981.⁵⁵ Most courts gave even broader effect to the Court's intent to narrow § 1981, finding it inapplicable to claims of wrongful transfer as well.⁵⁶

With respect to claims other than discharge, some courts tried to determine whether the allegedly discriminatory action created a "new and distinct relation," the touchstone identified by the Court in *Patterson*. The results were mixed. Some courts that undertook this inquiry rejected transfer claims, for example, on the theory that a transfer is "simply a continuation of a previous contractual relationship."⁵⁷ Others treated significant transfers as effecting a change in contractual status, thereby falling within § 1981's rubric.⁵⁸

The hardest category of cases involved failure-to-promote claims because the Supreme Court in *Patterson* had specifically suggested that such claims might remain cognizable under § 1981. Determining whether a particular wrongfully denied promotion would have created a "new and distinct relation," as the Court seemed to require under § 1981, was an endeavor described by courts and commentators alike as "hair-splitting."⁵⁹ In the end, courts looked for some substantial change in compensation, level of responsibility, and status before treating a sought-after promotion as protected by § 1981.⁶⁰ Indeed, Brenda Patterson herself was unable to sustain this burden, and thus her failure-to-promote claim was ultimately dismissed, despite the Supreme Court's encouraging words about her prospects for success.⁶¹ For all practical purposes, § 1981 was relegated to refusal-to-hire claims, the most difficult

bers, Director-Counsel, NAACP Legal Defense & Education Fund, Inc.) (noting that hundreds of race discrimination claims had been dismissed in the year following the Court's decision in *Patterson*).

⁵⁵ See, e.g., *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 493 (6th Cir. 1992); *Hayes v. Cmty. Gen. Osteopathic Hosp.*, 940 F.2d 54, 56 (3d Cir. 1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257 (6th Cir. 1990). See also *Taylor*, *supra* note 54, at 299 n.181 (collecting cases). Ultimately, every circuit to consider the issue ruled that discriminatory discharge cases were not cognizable under § 1981. *Id.* at 299 n.182.

⁵⁶ See *Taylor*, *supra* note 54, at 294 n.155 (collecting cases).

⁵⁷ See *id.* at 294.

⁵⁸ See *id.* at 294-95.

⁵⁹ See *id.* at 283 (collecting citations).

⁶⁰ See *id.* at 289.

⁶¹ See *Patterson v. McLean Credit Union*, 39 F.3d 515, 519 (4th Cir. 1994).

cases in which to prove discrimination.⁶²

II. SECTION 1981, AT-WILL EMPLOYMENT, AND THE SOURCE OF LAW

As courts began to hear cases involving post-1991 conduct, the emphasis shifted from understanding *Patterson* to understanding the effect of its reversal. One obvious consequence of Congress' overruling *Patterson* was that employees working pursuant to a contract could use § 1981 to challenge discriminatory conduct of their employers at any stage—including, of course, a discriminatory discharge. One of the issues repeatedly raised in litigation was whether § 1981 could also be used by *at-will* employees to challenge discriminatory discharges.⁶³ At the heart of these cases is the determination whether at-will employees have a sufficiently contractual relationship with their employers to bring them within the purview of § 1981, which applies only to discrimination in contracting.⁶⁴ The sticking point in contract terms, discussed in detail in Part III below,⁶⁵ is that at-will employment is terminable by either party without notice or cause—a feature that sets it apart from arrangements conventionally recognized as contracts.

In the course of considering this question, courts have paid little or no attention to the source of law, assuming for the most part that the answer can—and should—be found in state decisional reporters. This Part first describes the analysis undertaken by each of the five appellate courts that have considered the applicability of § 1981 to at-will employees, noting both the outcome reached and the source of law. It then raises the question whether courts should look to state or federal

⁶² See, e.g., *Wright v. Southland Corp.*, 187 F.3d 1287, 1297 n.12 (11th Cir. 1999) (noting refusal-to-hire claims still cognizable after *Patterson*); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 795 (1997) (stating that compared to discharge cases, “refusal-to-hire cases are much more difficult to prove where the number of applicants outnumbered positions available and where many factors unknown to the potential litigant could have been taken into consideration”).

⁶³ Prior to *Patterson*, courts routinely applied § 1981 to at-will employees without considering the propriety of doing so. See *Hutchison*, *supra* note 42, at 226.

⁶⁴ The original provision of § 1981 refers to the making and enforcement of “contracts”; one of the provisions added in 1991 refers to incidents of a “contractual relationship.” See 42 U.S.C. § 1981(a), (b) (1994).

⁶⁵ See *infra* notes 167-68, 176 and accompanying text.

common law to define “contract” under § 1981. The touchstone of this inquiry is an analysis of 42 U.S.C. § 1988, a statute which governs the role of state law in construing federal civil rights acts.

A. *Federal Appellate Cases*

In the past three years, five federal appellate courts have considered whether at-will employees may invoke § 1981 to challenge racially motivated discharges. Four of these courts addressed the issue head-on, each holding that § 1981 protects at-will employees just as it protects employees working pursuant to a formal employment contract.⁶⁶ The fifth court considered, but did not decide the issue. However, in the course of its discussion, that court strongly suggested that at-will employees *would not* find protection against wrongful discharge under § 1981.⁶⁷ All five courts relied on state law to characterize the at-will employment relationship for § 1981 purposes.

1. The First Round of Decisions

The Fifth Circuit was the first to rule on whether § 1981 covers at-will employees. In *Fadeyi v. Planned Parenthood Ass'n*,⁶⁸ the plaintiff complained of racially discriminatory scheduling, allocation of office resources, and, ultimately, termination.⁶⁹ She also objected when she and another black employee facetiously were given applications for membership in the Ku Klux Klan. Important to the court's decision was Texas law, which clearly treats at-will employment as contractual in

⁶⁶ See *Lauture v. IBM*, 216 F.3d 258, 264 (2d Cir. 2000); *Perry v. Woodward*, 199 F.3d 1126, 1133-34 (10th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n*, 160 F.3d 1048, 1051-52 (5th Cir. 1998).

⁶⁷ See *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1034-35 (7th Cir. 1998).

⁶⁸ 160 F.3d at 1048.

⁶⁹ *Id.*

nature.⁷⁰ Just as voidable contracts, which are enforceable at one-party's option, are contracts nonetheless, so are contracts that either party may terminate at will.⁷¹ The court thus concluded that, under § 1981, "even though an at-will employee can be fired for good cause, bad cause, or no cause at all, he or she cannot be fired for an illicit cause."⁷² The court made clear that its decision relied on state law, noting in a footnote that it was not bound to follow any "federal case law interpreting at-will employment relationships in other states."⁷³

The Tenth Circuit followed suit in *Perry v. Woodward*,⁷⁴ a case in which the plaintiff filed a racial harassment suit under § 1981 because, among other things, she had been repeatedly chastised for hiring "hot blooded" Hispanics.⁷⁵ The court of appeals relied on New Mexico law, which characterizes at-will employment as a contract of indefinite duration. The contract consists of the employee's provision of services in exchange for the employer's payment of wages.⁷⁶ And although duration is not one of the terms of the contract, the contractual nature of the arrangement is sufficient to bring it within § 1981. The otherwise unfettered right of termination becomes therefore limited by that statute.⁷⁷ As with the Fifth Circuit, the court here made some casual references to Congressional intent and general principles of statutory interpretation, but, in the end, made its decision based on state contract law.

Third in line, the Fourth Circuit decided *Spriggs v. Diamond Auto Glass*.⁷⁸ James Spriggs filed a § 1981 claim for racial harassment when his supervisor called him "dumb monkey" and "nigger," leading him eventually to quit his job.⁷⁹ Like its sister circuits, the court relied on state law (Maryland) to characterize the relationship as contractual, despite the indefinite duration of the employment relationship. The contract consisted of a promise to pay in exchange for a promise to pro-

⁷⁰ *Id.* at 1050-51.

⁷¹ *Id.*

⁷² *Id.* at 1051-52.

⁷³ *Fadeyi*, 160 F.3d at 1049 n.11.

⁷⁴ 199 F.3d 1126 (10th Cir. 1999).

⁷⁵ *Id.* at 1130-31.

⁷⁶ *Id.* at 1133.

⁷⁷ *Id.*

⁷⁸ 165 F.3d 1015 (4th Cir. 1999).

⁷⁹ *Id.* at 1017 n.2.

vide services.⁸⁰ The court thus found § 1981 to be broad enough to encompass at-will employment relationships because Maryland has defined them as contractual.

2. The Latest Decision

Recently, the Second Circuit joined these three federal appellate courts by concluding in *Lauture v. IBM*⁸¹ that at-will employees are protected by § 1981 from race discrimination in employment, resolving a long brewing split among district courts within that circuit.⁸² Plaintiff Jackie Lauture, an at-will employee, sued her employer, alleging a racially discriminatory discharge. The court of appeals ostensibly drew on the “ordinary meaning” of the word “contract,” garnered primarily from the *Second Restatement of Contracts*, to evaluate the at-will relationship between the plaintiff and her employer.⁸³ But the court also drew on New York’s treatment of at-will employment as a contractual relationship in other contexts.⁸⁴ Although the court suggested that § 1981 plaintiffs need not prove that their employment relationships conformed to state contract law, “as opposed to the ordinary common-law definition,”⁸⁵ it nonetheless proceeded to distinguish a case from another circuit because it was interpreting Washington rather than New York law.⁸⁶ And in the course of reviewing the decisions of its three sister circuits, the court referred to the “state law at issue” in each case⁸⁷—an odd statement given that the task of each court was to interpret a federal statute. In the end the court joined the growing consensus with the following explanation: “We do not see how the law of the state of New York requires a differ-

⁸⁰ *Id.* at 1018.

⁸¹ 216 F.3d 258 (2d Cir. 2000).

⁸² Compare, e.g., *Moorer v. Grumman Aerospace Corp.*, 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997) (at-will employees not covered by § 1981), *aff’d*, 162 F.3d 1148 (2d Cir. 1998) with *Hartzog v. Reebok Int’l Ltd.*, 77 F. Supp. 2d 478, 479-80 (S.D.N.Y. 1999) (at-will employees are protected by § 1981). See also *Hutchison*, *supra* note 42, at 214 (noting the “distinct split of opinion” within the Second Circuit).

⁸³ *Lauture*, 216 F.3d at 261.

⁸⁴ *Id.* at 262-63 (noting that an at-will employee may have a cause of action under New York law for tortious interference with employment relationships).

⁸⁵ *Id.* at 261.

⁸⁶ *Id.* at 261 n.4.

⁸⁷ *Id.* at 263.

ent result.”⁸⁸ Applying this vague amalgamation of general common law and New York law, the court found Lauture’s relationship with her employer to be sufficiently contractual for § 1981 purposes.

3. The Lone Dissenting Voice

Among federal appellate courts, only the Seventh Circuit has hesitated to find that § 1981 protects at-will employees from race discrimination. Although the court in *Gonzalez v. Ingersoll Milling Machine Company*⁸⁹ purportedly refused to consider plaintiff Juana Gonzalez’ § 1981 claim because it was not properly before them,⁹⁰ it nonetheless addressed it in dicta. Because she was an at-will employee and “did not have any contractual rights regarding the term of her employment,”⁹¹ the court suggested, she could not claim protection under § 1981.⁹²

Thus, the Seventh Circuit diverged not only in its ultimate conclusion about the applicability of § 1981 to at-will employees, but also in its approach to the problem. The four other circuits each embarked on a search for an underlying contractual relationship. Once found, the courts then superimposed § 1981—and its prohibition on racial discrimination—on the relationship. With that approach, an at-will employment relationship remains terminable at-will, provided the termination does not violate § 1981’s strictures. Thus the Fifth Circuit’s mantra that an at-will employee can be fired for *no* cause, but not for an *illicit* cause.

But the Seventh Circuit apparently did not find Gonzalez’ § 1981 claim invalid because the underlying employment

⁸⁸ *Lauture*, 216 F.3d at 263.

⁸⁹ 133 F.3d 1025 (7th Cir. 1998).

⁹⁰ *Id.* at 1033 (holding that Gonzalez was barred from raising claims regarding her termination on appeal because she had failed to raise them in the court below).

⁹¹ *Id.* at 1035.

⁹² Later in the opinion, the court clarifies that its words are dicta: “However, we need not determine whether Gonzalez’s at-will status provided adequate support for her § 1981 claim because even if we were to allow Gonzalez’ § 1981 claim to stand, based on finding Gonzalez had a contractual relationship with Ingersoll, it would fail [because she could not prove intentional discrimination.]” *Id.* at 1035.

relationship was not sufficiently contractual.⁹³ Instead, it concluded that § 1981 did not operate to prevent a racially motivated discharge because the employment relationship did not include a provision regarding the term of employment.⁹⁴ In other words, the court suggested that to challenge a racially motivated discharge under § 1981, an employee must be able to show that—as a matter of contract rather than statute—she had some protection against termination. Without a durational term for § 1981 to modify, it had no effect. Without contractual rights “regarding the term of her employment,” she could be laid off (and not recalled) on the basis of race, as she could for any other reason.⁹⁵

B. *Federal Common Law, § 1988, and the Role of State Law*

The sole question in these cases is whether an at-will employment relationship constitutes a “contract” for purposes of § 1981.⁹⁶ Because § 1981 contains no precise definition of contract, courts have scrambled to come up with one. They have looked primarily to state law to supply the needed definition, without considering whether that is the appropriate choice of law.⁹⁷

⁹³ In fact, the court seemed to concede that prior Seventh Circuit precedent treating at-will employment as contractual was correct. *Id.* at 1035 (discussing *McKnight v. Gen. Motors Corp.*, 908 F.2d 104 (7th Cir. 1990)).

⁹⁴ *Id.* at 1035.

⁹⁵ *Id.* There is some division among the district courts in the Seventh Circuit about whether to follow *Gonzalez*' dicta, but the majority have deviated from it, holding that at-will employees are covered by § 1981. Compare *Stone v. Am. Fed'n of Gov't Employees*, 135 F. Supp. 2d 873, 875-76 (N.D. Ill. 2001) (declining to follow *Gonzalez*' dicta and holding that at-will employees are protected by § 1981) and *Riad v. 520 S. Mich. Ave. Assocs.*, 78 F. Supp. 2d 748, 756-57 (N.D. Ill. 1999) (same) with *Payne v. Abbott Labs.*, No. 97-C-3822, 1999 U.S. Dist. LEXIS 2443, at *10-11 (N.D. Ill. Mar. 2, 1999) (declining to find at-will employees covered by § 1981 without additional evidence of an employment contract). The Seventh Circuit itself has not had occasion to revisit the question.

⁹⁶ *Gonzalez* takes a bifurcated approach, discussed *supra*, which asks first whether there is an employment contract and second whether there is a durational term that can be modified by § 1981. See *Gonzalez*, 133 F.3d at 1034. One commentator advocates this approach. See *Hutchison, supra* note 42, at 240-44.

⁹⁷ See *supra* Part II.A.

1. Federal Common Law

How should courts determine whether the term “contract,” as used in § 1981, is broad enough to encompass at-will employment relationships? One possibility is federal common law. Although modern law students are taught early on that there is no such thing as *general* federal common law under the doctrine of *Erie v. Tompkins*,⁹⁸ there is still an important role for federal common law.⁹⁹ It is presumptively the source of law to be used, for example, in defining the rights and obligations of the federal government under nationwide federal programs.¹⁰⁰

Federal common law is also presumptively the source of law to determine the meaning of a federal statutory term.¹⁰¹ As the Supreme Court explained in *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁰² “[W]e start, however, with the general assumption that ‘in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.’”¹⁰³

The preference for relying on federal rather than state law to interpret federal statutes reflects the view that “federal statutes are generally intended to have uniform nationwide application.”¹⁰⁴ Relying on federal common law, the Supreme

⁹⁸ 304 U.S. 64 (1938). *Erie* and its progeny established the principle that federal courts hearing cases premised on diversity jurisdiction must apply state substantive law and federal procedural law. *Id.* at 78.

⁹⁹ See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 307-09 (1947) (noting distinction between the specifics of federal common law eradicated by *Erie* and those still alive and well afterward); see also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964).

¹⁰⁰ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (“The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.”); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (stating that when Congress has not spoken about an issue relating to a federal program, “*Clearfield* directs federal courts to fill the interstices of federal legislation according to their own standards” (citing *Clearfield*, 318 U.S. at 367)).

¹⁰¹ See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); see also generally RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 762-70 (4th ed. 1996).

¹⁰² 490 U.S. 30.

¹⁰³ *Id.* at 43 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

¹⁰⁴ *Id.*

Court has many times over interpreted a federal statutory term in a way that is inconsistent with the law of the particular state in which the case was brought.

For example, the Supreme Court in *Holyfield* interpreted the word “domicile” in the Indian Child Welfare Act (“ICWA”), by reference to a uniform federal law, rather than the law of the state where a protected child is located.¹⁰⁵ The Court in that case was motivated by concerns about the lack of uniformity that would result from reliance on state law definitions of “domicile.”¹⁰⁶ It would mean not only that different Indian children were governed by different rules, but that different rules might apply to the same child over time if he was transported across state lines.¹⁰⁷

The Court in *Holyfield* also took into account its concern about the relations between Indian families and state authorities, noting that one of the primary purposes of the ICWA was to prevent states from exercising jurisdiction over some custody cases involving Indian children.¹⁰⁸ Allowing state law to control the interpretation of a Congressional enactment would potentially subvert the purpose behind it.

There are other examples as well. The Supreme Court in *Dickerson v. New Banner Institute*¹⁰⁹ held that the term “convicted,” as used in the Gun Control Act of 1968, had to be interpreted according to federal law even though the predicate offense and punishment were defined by state law. Again, uniformity was cited as the motivating force behind the preference for federal over state law.¹¹⁰ Likewise the Court in *NLRB v. Hearst*¹¹¹ rejected an argument that the term “employee,” as used in the Wagner Act, should be defined by state law. As the Court explained, in the course of holding that “employee” included independent contractors,

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork

¹⁰⁵ *Id.* at 47.

¹⁰⁶ *Id.* at 43.

¹⁰⁷ *Holyfield*, 490 U.S. at 44.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ 460 U.S. 103 (1983).

¹¹⁰ *Id.* at 111-12.

¹¹¹ 322 U.S. 111 (1944).

plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is . . . intended to solve a national problem on a national scale Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.¹¹²

A decision that federal law is controlling does not, however, render state law irrelevant.¹¹³ Courts interpreting federal statutory terms look first for their "ordinary meaning," in light of the "object and policy" of the statutory scheme.¹¹⁴ State law may be important in determining the "ordinary meaning" of the words used.¹¹⁵ It may also be adopted as the federal rule if necessary to preserve intrastate rule uniformity,¹¹⁶ to accommodate the interests of states more generally, or if nationwide uniformity is not important.¹¹⁷

Thus, in *Reconstruction Finance Corp. v. Beaver County*,¹¹⁸ the court defined "real property" as used in a federal statute under state law. Because the law permitted local taxation of the covered property, which guaranteed different approaches in different places, the presumption that Congress intended nationwide uniformity was not warranted.¹¹⁹ And adopting state law as the federal rule of decision did not

¹¹² *Id.* at 123. The Court's definition of "employee" was trumped three years later when Congress, in the Taft-Hartley Act, expressly excluded independent contractors from the definition. See Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. § 152(3) (1994 & Supp. IV 1998)).

¹¹³ See *Kimbell Foods*, 440 U.S. at 728 (explaining that although federal law controls, the Court must still decide "whether to adopt state law or to fashion a nationwide federal rule").

¹¹⁴ *Holyfield*, 490 U.S. at 46 (1989).

¹¹⁵ *Id.* at 47 ("That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine 'the ordinary meaning of the words used.'").

¹¹⁶ See, e.g., *Kimbell Foods*, 440 U.S. at 739 (resorting to state law regarding the priority of liens arising from federal programs to avoid disrupting expectations about priority from competing creditors).

¹¹⁷ See Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 412 (1997) (noting view of some commentators that "the interests of the states ordinarily deserve at least some consideration in the decision whether to fashion federal common law").

¹¹⁸ 328 U.S. 204 (1946).

¹¹⁹ *Id.* at 209.

threaten to frustrate any federal program.¹²⁰

The application of this body of law to our § 1981 question would point almost certainly to federal common law as the source from which the definition of contract should be drawn. Considerations of statutory purpose, the need for uniformity, and Supreme Court precedent all confirm this result.

A powerful case can be made that § 1981 is indeed a statute that requires a controlling, uniform federal interpretation. There is a strong tradition of federal involvement in anti-discrimination law, particularly in the context of employment, where § 1981 is most frequently invoked.¹²¹ In fact, § 1981 was specifically enacted as an antidote to the Black Codes of the southern states, designed to prevent recently freed black men from realizing their rights.¹²² Thus, the concerns present in *Holyfield* about states mistreating the protected group may operate here as well. Permitting the rights of at-will employees to be determined by

state law may undermine Congress' clear intent to provide full and robust protection against race discrimination in employment and elsewhere.¹²³

The Supreme Court has interpreted other statutory terms in federal civil rights acts by reference to federal common law. For example, in *Burlington Industries v. Ellerth*, the Court relied on federal law to determine whether the term "employer" encompassed supervisory employees.¹²⁴ In so doing, the Court found state law and treatises, like the *Second Restatement of Agency*, instructive but not dispositive.¹²⁵

The Supreme Court's recent decisions in two cases involving reconstruction-era civil rights acts also rely primarily

¹²⁰ *Id.* at 210.

¹²¹ *See, e.g.*, *NLRB v. Hearst*, 322 U.S. at 123.

¹²² *See supra* text accompanying notes 7-11.

¹²³ *See Burnett v. Grattan*, 468 U.S. 42, 55 (1984) (noting the "central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief").

¹²⁴ *See* 524 U.S. 742, 754-55 (1998); *see also* *NLRB v. Hearst*, 322 U.S. at 123 (refusing to define "employee" as used in the Wagner Act according to state law because it was designed to "solve a national problem on a national scale").

¹²⁵ *Burlington Indus.*, 524 U.S. at 754.

on federal law in defining statutory terms. First, in *Patterson*, the case in which the Court limited § 1981 to pre-formation conduct, the Supreme Court declined the Solicitor General's invitation to interpret the "make and enforce" language of § 1981 according to state contract law. The Court rejected the view that § 1981 "has no actual substantive content, but instead mirrors only the specific protections that are afforded under the law of contracts of each state."¹²⁶ The Court looked instead to the plain meaning of the statute to ultimately conclude that, as a matter of federal law, the "make and enforce" language limited § 1981 to pre-formation conduct.¹²⁷

Second, and more recently, the Court in *Haddle v. Garrison*¹²⁸ took a similar approach to interpreting § 1985, another civil rights act of the same era, which prohibits certain conspiracies to deprive individuals of rights.¹²⁹ In *Haddle*, the Court was asked to determine whether a retaliatory firing of an at-will employee inflicted an injury to "person or property" as required by § 1985. Although the meaning of "property" is certainly something usually relegated to state law, the Court looked at a variety of general sources, including treatises and past federal decisions, to determine that an at-will employee did possess a sufficient property interest to come within § 1985.¹³⁰ The Court did refer to Georgia law, the state where the case was brought, but did so only by way of example.¹³¹ Thus, although it did so without discussion, the Court made use of federal common law and general principles of property law to define the relevant term. Concerns about uniformity and the relationship between states and their black citizens operate with equal strength under § 1985 and § 1981.

¹²⁶ *Patterson*, 491 U.S. at 164. Specifically, the Solicitor General argued that racial harassment should be actionable under § 1981 only if it amounted to a breach of contract under state law. *Id.*

¹²⁷ See *supra* text accompanying notes 41-45.

¹²⁸ 525 U.S. 121 (1998).

¹²⁹ See 42 U.S.C. § 1985(2) (1994). Section 1985 was originally enacted as the Civil Rights Act of 1871 to make the Ku Klux Klan vulnerable to suit for its racially motivated hostile acts. See *Monroe v. Pape*, 365 U.S. 167, 200 (1961).

¹³⁰ *Haddle*, 525 U.S. at 126.

¹³¹ *Id.* at 127.

2. The Relevance of 42 U.S.C. § 1988

The automatic resort to federal common law to interpret § 1981 is complicated, however, by another federal statute, which directs courts interpreting the federal civil rights statutes to look at state law in some circumstances. Section 3 of the Civil Rights Act of 1866 stated that district court jurisdiction to hear claims under § 1981

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, *or are deficient in the provisions necessary to furnish suitable remedies* and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States. . . .¹³²

Later codified as § 1988, and applied to all federal civil rights acts, this provision has come to be used as a source of law provision guiding enforcement of § 1981. Section 1981, like other civil rights statutes of its era, is meagerly drafted. Even as amended by the Civil Rights Act of 1991, it has no statute of limitations. It has no express provision for damages. It says nothing about whether claims survive a plaintiff's death. And, relevant to our purposes here, it gives no definition of contract.

The question, then, is whether § 1988 authorizes or requires that the definition of "contract" in § 1981 be gleaned from state law. That requires a determination that § 1988 applies in the first instance and that it mandates the importation of state contract law into § 1981. At stake in this issue is whether at-will employees in every state will be protected against racially discriminatory discharges by § 1981, or only in those states that treat at-will employment as a contractual relationship. There are states that have refused to view at-will

¹³² 42 U.S.C. § 1988(a) (1994) (emphasis added). It is not just the existence of § 1988 that complicates matters, but also the utter clumsiness of the drafting. As Justice Clifford once noted, § 1988 is "a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which . . . amounts to no more than a direction to a judge [to conduct proceedings] as well as he can." *Tennessee v. Davis*, 100 U.S. 257, 299 (1880) (Clifford, J., dissenting), *quoted in* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 501 (1980).

employment relationships as contractual outside of the § 1981 context.¹³³ And those federal courts that have refused to apply § 1981 to at-will employees have done so precisely because state law does not permit it.¹³⁴

The Supreme Court has been agnostic on the appropriate breadth of § 1988, and academics have divergent views on its meaning.¹³⁵ It is clear that § 1988 neither creates an independent cause of action,¹³⁶ nor authorizes the “wholesale importation” of state causes of action into federal law.¹³⁷ But how far it does extend is unclear. The Court has, on the one hand, interpreted it to leave almost no room for principles of state law. In *Sullivan v. Little Hunting Park*,¹³⁸ for example, the Court construed § 1988 to mean that when a federal civil rights statute is “deficient,” the court has the discretion to draw on either federal or state sources, “whichever better serves the policies expressed in the federal statutes.”¹³⁹ Courts after *Sullivan* were barely nudged in the direction of state law. But a decade later, the Court decided *Robertson v. Wegmann*,¹⁴⁰ in which it read § 1988 as a mandatory directive to courts to fill in

¹³³ See, e.g., *Thompson v. Bridgeport Hosp.*, No. CV 98352686, 2001 Conn. Super. LEXIS 1755, at *17 (Conn. Super. Ct. June 18, 2001) (denying at-will employee’s breach of contract claim because under Connecticut law she was part of an at-will employment relationship, but “not part of a contract”); *McManus v. MCI Communications Corp.*, 748 A.2d 949 (D.C. 2000) (denying at-will employee’s claim for tortious interference with contract because she did not have a “contractual” relationship).

¹³⁴ See, e.g., *Gatson v. Home Depot USA, Inc.*, 129 F. Supp. 2d 1355 (S.D. Fla. 2001) (noting uncertainty under Florida law whether at-will employees have a sufficiently contractual relationship to warrant protection under § 1981); *Tucker v. Cassiday*, No. 99C4001, 2000 U.S. Dist. LEXIS 9864, at *11-12 (N.D. Ill. July 12, 2000) (refusing to apply § 1981 to at-will employee because she was not working pursuant to a contract under Illinois law); *Jones v. Becker Group*, 38 F. Supp. 2d 793, 796 (E.D. Mo. 1999) (refusing to apply § 1981 to an at-will employee because Missouri law requires a statement of duration as an “essential element to an employment contract”), *aff’d*, No. 99-1827, 1999 U.S. App. LEXIS 38377 (8th Cir., Nov. 15, 1999).

¹³⁵ See generally Jack M. Beerman, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665 (1986); Eisenberg, *supra* note 132; Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985); Wells, *supra* note 13.

¹³⁶ See *Moor v. County of Alameda*, 411 U.S. 693, 704 n.17 (1973).

¹³⁷ See *id.* at 703-04.

¹³⁸ 396 U.S. 229 (1969).

¹³⁹ *Id.* at 240.

¹⁴⁰ 436 U.S. 584 (1978).

all statutory gaps with rules borrowed from state law.¹⁴¹ *Robertson* set the stage for a more inclusive approach to state law.¹⁴²

The Supreme Court has applied § 1988 to a § 1981 claim only a handful of times.¹⁴³ In *Runyon v. McCrary*, the Court refused to allow it to be used to authorize borrowing a state rule that would have allowed fee-shifting in a § 1981 case.¹⁴⁴ The Court next considered § 1988's relevance to § 1981 in *Burnett v. Grattan*.¹⁴⁵ In that case, the Court established a three-step process to determine when and whether to borrow a particular state rule under § 1988 and apply it to § 1981.¹⁴⁶

First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."¹⁴⁷

In short, this test asks: whether to resort to state law in the first instance (deficiency); which rule of state law might be applicable (relevancy); and, if there is a relevant rule, whether it is consistent with federal law and policy (consistency).

In *Burnett*, the Court was considering whether to borrow and apply an administrative statute of limitations from Maryland law to an employee's § 1981 discrimination claim.¹⁴⁸ Prior to *Burnett*, the Court had already sanctioned borrowing

¹⁴¹ *Id.* at 588.

¹⁴² See generally Eisenberg, *supra* note 132, at 502-07 (discussing tension between *Roberston* and *Sullivan*).

¹⁴³ See generally *Runyon v. McCrary*, 427 U.S. 160 (1976); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 712-23 (1989).

¹⁴⁴ 427 U.S. at 184-85. Ironically, § 1988 was itself amended to add a provision authorizing fee-shifting to prevailing plaintiffs under § 1981 and other civil rights statutes. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (1994 & Supp. V 1999)).

¹⁴⁵ 468 U.S. 42 (1984).

¹⁴⁶ *Id.* at 47.

¹⁴⁷ *Id.* at 47-48 (alteration in original) (citations omitted) (quoting 42 U.S.C. § 1988 (1982)).

¹⁴⁸ *Id.* at 46.

state statutes of limitations because § 1981 does not contain its own.¹⁴⁹ Section 1981 is arguably “deficient” with respect to a limitations period, and, the Supreme Court held, § 1988 authorizes the use of state law to remedy such a deficiency.

Thus, the real issue in *Burnett* was whether this was the appropriate state rule to govern claims under § 1981—a question of relevancy. The Court rejected the administrative statute of limitations because, under the second step of the Court’s test, there were more closely analogous rules. The Court found the three-year personal injury statute of limitations in Maryland law more appropriate.¹⁵⁰ The result of the Court’s approach in *Burnett* is that § 1981 plaintiffs in different states may be governed by different statutes of limitations.¹⁵¹ The cases on at-will employment under § 1981 do not seem to implicate the relevancy question because in most states there are not competing rules about whether to treat at-will employment as contractual. But the deficiency and consistency prongs of the *Burnett* test are both raised.

a. Does § 1988 Apply?

Before reaching the other prongs of the *Burnett* test, it must initially be determined that the federal statute is “deficient.” Without a deficiency, § 1988 does not authorize the incorporation of state law and a consideration of other factors becomes superfluous.¹⁵²

Whether an at-will employee is protected by § 1981 turns on the meaning of the federal statutory term “contract.” Is § 1981 “deficient” in failing to precisely define contract? If

¹⁴⁹ *Id.* at 49.

¹⁵⁰ *Burnett*, 468 U.S. at 46 n.8.

¹⁵¹ The potentially great state variation was limited by later cases holding that courts must apply the state’s general personal injury statute of limitations to federal civil rights acts claims, “whether or not the state itself would characterize the . . . action as a personal injury claim.” Beerman, *supra* note 135, at 58; *see also* Wilson v. Garcia, 471 U.S. 261, 275-76 (1985) (federal interest in uniformity requires that courts rely on general personal injury limitations period for federal civil rights claims); Okure v. Owens, 488 U.S. 235, 249 (1989) (rejecting argument that court should apply state’s shorter intentional tort limitations period because doing so would be inconsistent with § 1983’s “broad scope”).

¹⁵² *See, e.g.*, Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965) (refusing to resort to state law on question of availability of punitive damages because federal civil rights act was not “deficient”).

not, § 1988 does not apply and the conventional rules governing federal statutory interpretation apply instead.

There are some strong arguments that § 1988 does not apply to the question raised by *Lauture*—whether at-will employees are protected by § 1981 from race discrimination in employment—or to related questions. Section 1988 itself refers to the inability of federal law to “furnish suitable remedies.”¹⁵³ Commentators have noted that § 1988 has in fact, whether by design or inadvertence, only been applied to remedial and enforcement provisions of the federal civil rights acts.¹⁵⁴ While the Supreme Court has never expressly said § 1988 should be so limited, it has only been applied, in the § 1981 context, to fill gaps relating to damages,¹⁵⁵ survival of actions,¹⁵⁶ and statutes of limitations.¹⁵⁷ These deficiencies all arguably relate to remedies and enforcement, whereas the definition of “contract” clearly relates to a substantive provision of § 1981.

If § 1988 applies, it is also curious that it was not mentioned in either *Haddle* or *Patterson*. In *Haddle*, the Court was grappling with an almost identical problem under § 1985—whether at-will employees had a sufficient property interest to be hurt by a conspiratorial firing within the meaning of the statute.¹⁵⁸ Section 1988 clearly applies generally to § 1985,¹⁵⁹ which used terms it failed to define. Yet the Supreme Court made no reference to a § 1988 deficiency in analyzing the plaintiff’s claim. It instead assumed that general principles of tort law—without dependence upon the law of any particular state—could guide their analysis.

The Court was similarly undeterred by § 1988 in *Pat-*

¹⁵³ See 42 U.S.C. § 1988 (1994).

¹⁵⁴ Beerman, *supra* note 135, at 58. One commentator, Theodore Eisenberg, argued that § 1988 should only be applied in cases that have been removed from state court pursuant to the civil rights removal provisions. See Eisenberg, *supra* note 132. That approach has not carried the day.

¹⁵⁵ See, e.g., *Sullivan*, 396 U.S. at 239-40 (suggesting that § 1988 authorizes the use of federal and state law to determine what damages are available under § 1982).

¹⁵⁶ See, e.g., *Robertson v. Wegmann*, 436 U.S. 584 (1978) (applying Louisiana survivorship law to § 1983 claim pursuant to § 1988).

¹⁵⁷ See, e.g., *Burnett*, 468 U.S. 42 (applying state statute of limitations to § 1981 claim pursuant to § 1988).

¹⁵⁸ See *Haddle v. Garrison*, 525 U.S. 121 (1998).

¹⁵⁹ See *Moor*, 411 U.S. at 702 (section 1988 is “intended to complement the various acts which do create federal causes of action for the violation of federal civil rights,” including § 1985).

tersen. In interpreting the “make and enforce” language of § 1981, it paid attention to congressional intent, statutory structure, and general principles, which led to the narrow interpretation discussed above. Again, the Court made no mention of § 1988 or a statutory deficiency, completely ignoring § 1988.¹⁶⁰ These are only two examples of times the Supreme Court has ignored “the potential application of § 1988 to other aspects of civil rights actions that are not directly addressed by federal law.”¹⁶¹

The meaning of the term “contract” in § 1981 is a very similar issue to those raised in *Haddle* and *Patterson*. Thus one might expect § 1988 to be similarly inapplicable.

Finally, a review of § 1988 cases reveals that it is only used when the court finds abject silence on a seemingly important or necessary issue. Section 1981’s failure to contain any statute of limitations is one example.¹⁶² It is virtually inconceivable that the Court would allow a cause of action that allowed significant money damages to exist without a limitations period. Thus § 1988 was necessary as a gap-filler. The failure to state whether “contract” includes at-will employment relationships does not create such a deafening silence; thus, the role for § 1988 is not as obvious.

b. Does § 1988 Authorize the Adoption of State Contract Law?

Even if § 1988 does apply to the at-will question because § 1981 is deficient in failing to define “contract,” there is still an additional step before state law may be used to supply the definition. Each state rule that is borrowed pursuant to the authority of § 1988 must also be tested for consistency with

¹⁶⁰ *Patterson*, 491 U.S. at 183. There are other examples as well. In defining “person” for purposes of § 1983, the Supreme Court made no reference to § 1988 on state law at all. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

¹⁶¹ D. Bruce LaPierre, *Enforcement of Judgments Against States & Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299, 404 n.639 (1993) (noting other examples, such as the doctrine of official immunity under § 1983, where § 1988 was not invoked despite an apparent statutory deficiency).

¹⁶² See *Burnett*, 468 U.S. at 42.

overarching federal law and policy. Courts in many circumstances have refused to apply particular state rules because, under the *Burnett* test, they are inconsistent with federal law.¹⁶³

There are two potential inconsistencies in this context. First, if the law of a particular state refused to treat an at-will employment relationship as contractual,¹⁶⁴ thereby depriving such employees of the protection of § 1981, it would be inconsistent with federal law because, as explained in Part III below, federal common law principles support the treatment of at-will employment as contractual.

Second, because incorporation of state law creates the possibility that § 1981 will mean different things for different people, it may be inconsistent with the federal policy of strong, uniform enforcement of § 1981 and other statutes prohibiting employment discrimination.¹⁶⁵ If nationwide uniformity in interpretation is important to make the statute meaningful, state law should be looked to in fashioning a federal rule of decision rather than expressly incorporated.¹⁶⁶ That way, federal law can give effect to well-established state law principles accepted by a majority of states without giving unnecessarily subversive power to rogue states with different ideas.

In the end, the back-and-forth between federal and state law should operate under § 1988 much as it does outside it. That is, even where state law is not expressly adopted, it

¹⁶³ See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966) (refusing to consider state law where it would be inconsistent with the federal policy underlying the cause of action); *Hardin v. CNA Ins. Cos.*, 103 F. Supp. 2d 1091, 1097 (S.D. Ind. 1999) (applying federal common law to determine the date on which the statute of limitations for a § 1981 claim begins to run); *Williams v. City of Oakland*, 915 F. Supp. 1074, 1079 (N.D. Cal. 1996) (refusing to apply California's survivorship law to a § 1983 claim because it was inconsistent with the broad, compensatory purposes of the federal civil rights laws).

¹⁶⁴ See *supra* note 133.

¹⁶⁵ See *supra* notes 111-12, 123-24 and accompanying text.

¹⁶⁶ *Holyfield*, 490 U.S. at 43-45 (“[T]he cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended.”); *Kimbell Foods*, 440 U.S. at 728 (“federal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules” (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966))); *Basista*, 340 F.2d at 86 (“Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.”).

may be persuasive in fashioning the federal rule. Arguably the only relevance of making the threshold determination whether § 1988 applies is to gauge whether the presumption is in favor of federal law or state law. If § 1988 does not apply, federal law is presumptively controlling unless special circumstances make state law more appropriate. If § 1988 does apply, state law is presumptively operative unless it is inconsistent with federal law. With respect to the question of § 1981's applicability to at-will employment, the better approach is to leave § 1988 out of it.

III. WHY § 1981 SHOULD APPLY TO AT-WILL EMPLOYEES: A CONTRACTUAL ANALYSIS

Both state and federal common law ultimately provide the same conclusion to the question whether at-will employees should be protected by § 1981. An examination of state contract law and commentary, as well as federal decisions, reveals that the four circuits who agreed that at-will employees deserve protection were correct. This Part explains why.

A. *Basic Contract Law Principles*

There are two potential doctrines implicated in the effort to describe an at-will employment relationship as contractual: mutuality of obligation and definiteness.

1. Mutuality of Obligation

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹⁶⁷ Promises are enforceable (i.e., the law gives a remedy for their breach) when they are supported by legally sufficient consideration.

Under traditional consideration theory, a promise that is illusory—one that takes the form of a promise, but does not in fact oblige the promisor to do anything—is not sufficient

¹⁶⁷ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

consideration for a return promise or performance.¹⁶⁸ An agreement premised on *one* illusory promise is said to lack mutuality of obligation—a fancy way of saying one party's promise is not supported by consideration—and is therefore unenforceable. An agreement premised on *two* illusory promises simply lacks consideration and is also unenforceable. At-will employment is vulnerable to this characterization if one views the employer's promise as a promise to pay for services unless he chooses not to (and terminates the employee), and the employee's promise as a promise to work unless he chooses not to (and quits).

Modern courts, however, are slow to invalidate contracts based on a lack of mutuality, resorting instead to legal fictions to save agreements that are, in practice, useful. For example, a requirements contract, pursuant to which a buyer agrees to buy all the widgets he needs from a single seller, lacks mutuality in the traditional sense because if he does not need any, he need not buy any. The buyer, then, has not obligated himself to do anything in exchange for the seller's promise to make adequate supplies available.

The needs of the modern economy have forced courts to relax the requirement of mutuality. Many businesses are unable to forecast their precise needs or output and, therefore, depend on requirements and outputs contracts. Accommodating this need, courts today uniformly agree that these are valid, enforceable contracts.¹⁶⁹ How do they justify this result?

One way to validate requirements and outputs contracts is to look harder for consideration. Courts might ask whether there is anything the buyer could do to breach the contract—a backwards way of assessing whether he has obligated himself to do anything. The answer for a requirements contract is that

¹⁶⁸ See generally JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.17 (rev. ed. 1993) (describing illusory promises) [hereinafter CORBIN ON CONTRACTS]; RESTATEMENT, *supra* note 167, at § 77, cmt. a (“Where the apparent assurance of performance is illusory, it is not consideration for a return promise.”).

¹⁶⁹ See, e.g., *McMichael v. Price*, 58 P.2d 549 (Okla. 1936) (finding a promise to purchase all the sand he needed for his business non-illusory, despite the fact that the buyer could go out of business and evade his promise without penalty). See also U.C.C. § 2-306 cmt. 2 (1988) (“Under this Article, a contract for output or requirements [does not] lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.”).

the buyer can breach the contract by buying some of his requirements from a second seller. He has, therefore, made a non-illusory promise, which can serve as consideration for the seller's promise. Courts will look hard to find express or implied limits on the promisor's putative free-way-out of the contract,¹⁷⁰ and almost any limit is sufficient to render a promise non-illusory.¹⁷¹

Apply the same analysis to at-will employment agreements. The employer can breach the agreement by refusing to pay for services already rendered. His promise is, then, not entirely illusory. But the same cannot be said about the employee. There is nothing the employee could do that would enable the employer to sue to enforce the contract. Thus, the use of implied limitations to remedy the lack of mutuality does not work in this context.

But the late Arthur Corbin, one of the preeminent contracts scholars, characterized the at-will employment arrangement differently. The employer is the offeror to a unilateral contract (promise exchanged for performance rather than a return promise).¹⁷² And although he can withdraw the offer at any time, the terms of the employer's offer obligate him to pay for any service rendered by the employee.¹⁷³

The employee, for his part, has not obligated himself to do anything, since he can perform or not perform under the terms of the offer.¹⁷⁴ But unilateral contracts do not, by definition, require mutuality of obligation.¹⁷⁵ The offeree is always

¹⁷⁰ See, e.g., *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (finding an implied promise of best efforts on the part of the marketer to save an exclusive dealing contract); see also RESTATEMENT, *supra* note 167, at § 77 cmt. d ("A limitation on the promisor's freedom of choice need not be stated in words. It may be an implicit term of the promise, or it may be supplied by law."); see U.C.C. § 2-306 (2) (1988) ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.").

¹⁷¹ See RESTATEMENT *supra* note 167, at § 77, cmt. b, illus. 5 (right of termination conditioned upon thirty-days notice makes promise non-illusory because promisor is bound to terms of the contract for at least thirty days).

¹⁷² See CORBIN ON CONTRACTS, *supra* note 168, at 213.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ The requirement of mutuality is, even outside of this context, losing its hold on contract law. The *Restatement* ostensibly denounces it, though it mimics the requirement in other ways. RESTATEMENT, *supra* note 167, at § 79; see, e.g., *id.* at § 7;

free to make the choice between performance and non-performance. Corbin's analysis thus supports the conclusion that an at-will employment arrangement is indeed contractual.

2. Definiteness

Another stumbling block for at-will employment is the doctrine of definiteness, which states that the material terms of a contract must be specified with certainty in order for the agreement to be valid.¹⁷⁶ The argument is that an at-will employment relationship cannot be a valid contract because it does not specify a term of duration. The counterargument is that the relationship can be characterized as a contract of indefinite duration, which is valid despite the lack of a specific term regarding length.

Several courts have relied on the *Second Restatement of Contracts* ("*Second Restatement*") to support their conclusion that at-will employment is contractual. Although the illustration cited does not obviously support that proposition,¹⁷⁷ the *Second Restatement* may be read more generally to support the characterization of at-will employment as a contract of indefinite duration. Section 33 of the *Second Restatement*, which addresses contracts with uncertain terms, uses an illustration of A's promise to serve as B's chauffeur in exchange for \$100 per month. The contract is silent as to duration. According to the *Second Restatement*, this agreement is presumed to be a contract for one month, and, absent revocation, renewed at the end of each month. This characterization saves the indefinite contract unless, the illustration states, circumstances "show that such an agreement merely specifies the rate of compensation for an employment at will."¹⁷⁸ The question is whether the

see also CORBIN ON CONTRACTS, *supra* note 168, at 224 (agreeing with a recent case advocating for the "interment" of the principle of mutuality and all the rules that flow from it).

¹⁷⁶ See RESTATEMENT, *supra* note 167, at § 33(1) (1979) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

¹⁷⁷ See, e.g., *Lauture*, 216 F.3d at 262 (citing RESTATEMENT, *supra* note 167, at § 33 cmt. d, illus. 6 for the proposition that an at-will employment agreement is enforceable as a contract of indefinite duration); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999) (same).

¹⁷⁸ RESTATEMENT, *supra* note 167, at § 33 cmt. d, illus. 6 .

carve-out for at-will employment means it is not an enforceable contract, or that it is valid but the parties are not bound to continue performance a month at a time. Ultimately, this illustration does little to advance the analysis of whether the at-will employment relationship qualifies as a contract.

Comment (d) to § 33 of the *Second Restatement* does, however, seem to suggest that a truly at-will arrangement qualifies as a contract. “Valid contracts are often made which do not specify the time for performance. . . . When the contract calls for successive performances but is indefinite in duration, it is commonly terminable by either party, with or without a requirement of reasonable notice.”¹⁷⁹ This provision, of course,

suggests that an at-will employment relationship, which fits this description, is a valid contract.

But in other instances, the *Second Restatement* wavers in its commitment to the notion that at-will employment is contractual by refusing to apply general rules of contract. For example, in § 188, which deals with the validity of non-compete clauses, comment (g) off-handedly describes “the case of employment at will,” as one where “no contract of employment is involved.”¹⁸⁰

The *Uniform Commercial Code*, though not applicable to employment contracts, recognizes an arrangement akin to at-will employment as a valid contract. Section 2-309 provides that “[w]here the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.”¹⁸¹

Taken together, most general commentary seems to accept the notion that an at-will employment arrangement can be a valid contract, even though it sometimes has to stretch basic principles of contract law to reach that conclusion.

¹⁷⁹ *Id.* § 33 cmt. d.

¹⁸⁰ *Id.* § 188 cmt. g.

¹⁸¹ UNIFORM COMMERCIAL CODE § 2-309(2) (2001).

B. *State Contract Law*

State courts are not, of course, always restrained by basic principles of contract law. In a variety of contexts, without much discussion of contract doctrine, courts have assumed that at-will employment relationships are contractual in nature.

There has been considerable litigation about whether employee manuals and handbooks devolve rights on employees. With respect to at-will employees, this issue arises when a handbook outlines disciplinary procedures that include, for example, hearings and other incidents of due process. The at-will employee, in receipt of such a document, tries to argue that the employer's right of termination—a central incident of the at-will relationship—is now limited. For an employee who is terminable at-will, courts take one of two approaches to determining whether the employer is bound to follow the procedures—or, in the alternative, is free to fire at will. Some courts ask whether the handbook *creates* an employment contract that limits the employer's ability to terminate the employee without adhering to the process outlined in the handbook.¹⁸² With this approach, the nature of the underlying at-will relationship without the benefit of the handbook is irrelevant.

But other courts ask, instead, whether the handbook adds a term to an existing contractual, albeit terminable-at-will relationship. The effect of a handbook, then, may be to modify or change the existing contractual relationship.¹⁸³ Implicit in this approach is an acknowledgment that an at-will employment relationship is contractual, despite the fact that the right not to be terminated is not one of the contract's terms.¹⁸⁴

¹⁸² See, e.g., *Jackson v. Georgia-Pacific Corp.*, 685 A.2d 1329, 1334 (N.J. Super. Ct. App. Div. 1996) (stating that an employee handbook can, depending on certain criteria, create an implied contract of employment that protects an at-will employee).

¹⁸³ One of the niceties of contract law ignored by most of these cases is that a handbook given *after* employment has begun is not supported by consideration because the employee has given nothing in return. Thus, a pure contract analysis would never enforce promises made therein. The unilateral contract analysis, discussed *supra*, might save such promises, however. See, e.g., CORBIN ON CONTRACTS, *supra* note 168, at § 6.2 (“where the employer promise[s] job security through restrictions on the power to terminate the employment, the employee’s services provide consideration for a unilateral contract”).

¹⁸⁴ See, e.g., *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1006 (M.D. Tenn. 1993) (recognizing that “an employee handbook may, under certain circum-

Courts have also broached the issue of how to characterize the contractual status of at-will employment for tort law purposes. Specifically, they have considered whether an at-will employee can bring a suit alleging tortious interference with a contract, which includes, as an element of proof, that a valid contract exists. Several courts have permitted at-will employees to maintain a tortious interference claim,¹⁸⁵ though some apply a higher standard to such claims.¹⁸⁶ Implicit in these cases again is recognition of the underlying relationship as being contractual in nature.

At-will employees have also been permitted to sue their employers for breach of contract. Termination without cause is not, of course, a breach of an at-will employment agreement, but the failure to pay wages or promised benefits may be.¹⁸⁷ This approach is consistent with the *Second Restatement*, which defines a contract as “a set of promises for the breach of which the law gives a remedy.”¹⁸⁸ By allowing an employee to bring a breach-of-contract action, courts are recognizing that the relationship is contractual, despite the lack of guarantees about duration. In miscellaneous other contexts as well, courts have treated at-will employment as a contract or made pronouncements about the contractual nature of the relationship.¹⁸⁹

stances, become a part of the contract” for an at-will employee).

¹⁸⁵ See, e.g., *Albert v. Loksen*, 239 F.3d 256, 276 (2d Cir. 2001) (finding an at-will employee’s claim for tortious interference actionable); *Terhune v. Frank*, 1993 WL 316006 (W.D. Mich. Apr. 23, 1993) (same); *Nelson v. Fleet Nat’l Bank*, 949 F. Supp. 254, 261 (D. Del. 1996) (predicting that Delaware would recognize a tortious interference claim brought by an at-will employee); *Keith v. Mendus*, 661 N.E.2d 26, 32-33 (Ind. Ct. App. 1996) (same); *GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs.*, 99 Cal. Rptr. 2d 665, 676 (Cal. Ct. App. 2000) (“It is well established that the at-will nature of a contract does not preclude a tortious interference claim.”). *But see* *Kadco Contract Design Corp. v. Kelly Servs., Inc.*, 38 F. Supp. 2d 489, 494 (S.D. Tex. 1998) (refusing to recognize a claim of tortious interference by an at-will employee); *Felhauer v. City of Geneva*, 568 N.E.2d 870, 878-79 (Ill. 1991) (recognizing an at-will employee’s claim for tortious interference with a “legitimate expectancy of continued employment,” but not with a contract).

¹⁸⁶ See, e.g., *Water Dev. Co. v. Bd. of Water Works*, 488 N.W.2d 158, 162 (Iowa 1992) (requiring a showing of “substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons”).

¹⁸⁷ See, e.g., *Lane v. Ogden Entm’t, Inc.*, 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998) (permitting the plaintiff to bring a § 1981 claim for failure to receive a promotion).

¹⁸⁸ RESTATEMENT, *supra* note 167, at § 1.

¹⁸⁹ See, e.g., *McKnight*, 908 F.2d at 109 (“Employment at will is not a state of

C. *The Supreme Court on Contracts*

The Supreme Court has implicitly resolved the question whether § 1981 applies to at-will employees on two separate occasions. First, in *Patterson* itself, the plaintiff was an at-will employee.¹⁹⁰ Although the Court used her case as an opportunity to limit § 1981's applicability to contract formation, it implicitly recognized that the underlying employment relationship was contractual in nature. Recall that in *Patterson* the Court hinted that the plaintiff's failure-to-promote claim might fall within the newly constricted § 1981 if it involved formation of a "new and distinct relation,"¹⁹¹ or, in other words, if the employer's action could be fairly described as a "refusal to enter the new contract."¹⁹² Implicitly, the Court was treating the underlying at-will relationship as a contract, and the putative promotion as a new contract.

Then, in 1998, the Court decided *Haddle v. Garrison*,¹⁹³ a case involving the scope of another federal civil rights statute, § 1985.¹⁹⁴ Section 1985 protects against conspiracies to deprive individuals of their civil rights. The question presented in *Haddle* was whether it could be used by an at-will employee to challenge a conspiratorial firing.¹⁹⁵ At issue was the requirement of § 1985 that the plaintiff suffer "actual injury" to

nature but a continuing contractual relation."); *EEOC v. Chestnut Hill Hosp.*, 874 F. Supp. 92, 96 (E.D. Pa. 1995) (finding an implied duty of good faith inherent in every contract, including those for at-will employment); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 614 A.2d 1021, 1030 (Md. Ct. Spec. App. 1992) ("In Maryland, at-will employment is a contract of indefinite duration that can be terminated at the pleasure of either party at any time."); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (same). Many courts have permitted at-will employees to bring a claim for fraudulent inducement—typically a contract formation defense—when the employer led them to accept the position through misrepresentations. Implicit in the recognition of this defense, again, is the contractual nature of the at-will employment arrangement. *See, e.g.*, *Franz v. Iolab, Inc.*, 801 F. Supp. 1537, 1542 (E.D. La. 1992). Under the Texas Whistleblower Act, at-will employees have been held to work under contract. *See Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1181 (5th Cir. 1992).

¹⁹⁰ *Patterson*, 491 U.S. at 221 (Stevens, J., concurring in part and dissenting in part).

¹⁹¹ *Id.* at 185.

¹⁹² *Id.*

¹⁹³ 525 U.S. 121, 126 (1998).

¹⁹⁴ *See supra* notes 128-31, 158-59 and accompanying text.

¹⁹⁵ Specifically, the plaintiff alleged that his employer conspired to have him fired from his job in retaliation for obeying a grand jury subpoena. *Haddle*, 525 U.S. at 122.

“person or property.” The employer argued (and the district and appellate courts agreed) that because an at-will employee has no right against termination, he suffers no such injury when he is fired, regardless of whether it was induced by a prohibited conspiracy.¹⁹⁶

The Court looked to tort law to determine whether an at-will employee deprived of employment suffers actual harm. Relying primarily on a treatise, it concluded that malicious or other wrongful discharge by an employer could be actionable, regardless of “whether the employment was for a fixed term not yet expired or is terminable at the will of the employer.”¹⁹⁷ But the Court stopped short of holding, as a matter of federal law, that an at-will employment relationship is strictly contractual. Instead, it described Haddle’s claim as “a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations.”¹⁹⁸

It is true that at-will employees might be able to maintain a tort claim in some states for third-party interference without showing that the underlying relationship qualifies as a contract. The cause of action in many states includes interference with a prospective business relation as well as a contract per se. And for purposes of § 1985, the Court needed only to find that the plaintiff had *some* interest that could be tortiously interfered with, not necessarily that the interest was contractual in nature. But the case the Court primarily relied on to illustrate this point in fact recognized that an at-will employee has a “valuable contract right.”¹⁹⁹ The Court’s analysis thus provides some additional support for the conclusion that at-will employment relationships are contractual.

The bulk of the authority supports the same conclusion: at-will employees function in a contractual relationship with their employers that is sufficient to render them protected by § 1981.

¹⁹⁶ *Id.* at 123-24.

¹⁹⁷ *Id.* at 126 (quoting 2 THOMAS COOLEY, LAW OF TORTS 589-591 (3d ed. 1906)).

¹⁹⁸ *Id.* at 126.

¹⁹⁹ *Id.* at 127 (quoting *Ga. Power Co. v. Busbin*, 250 S.E.2d 442, 444 (1978)).

IV. WHY § 1981 MATTERS

Whether § 1981 applies to at-will employees is a matter of some significance. A majority of American employees work at-will.²⁰⁰ Forty states recognize at-will employment,²⁰¹ and most of those indulge a presumption of at-will employment in the absence of clear evidence that the parties agreed to a specific term of employment.²⁰² Section 1981's applicability to those workers is not, then, something to be ignored. But given the often parallel protection provided by Title VII, the need for § 1981 is worth further consideration. This Part looks first at doctrinal similarities and differences between the two statutes, and then at some empirical evidence about how § 1981 is actually used in practice.

A. *A Statutory Comparison*

1. Coverage

For some at-will employees, § 1981 provides the only available protection against race discrimination in employment. Title VII applies only to employers that have at least fifteen full-time employees.²⁰³ Based on extrapolation from census data, nineteen percent of the American workforce is not covered by Title VII.²⁰⁴ But even where employees have protec-

²⁰⁰ See John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J. L. & PUB. POL'Y 555, 556 (1997) ("Since the start of the twentieth century, the majority of employment relationships in the United States have been governed by the common law employment-at-will presumption.").

²⁰¹ See Gary Minda, *Employment At Will in the Second Circuit*, 52 BROOK. L. REV. 913, 915 (1986); see also Hutchison, *supra* note 42, at 208.

²⁰² See, e.g., *Gonzalez*, 133 F.3d at 1034 ("Under Illinois law, an employer-employee relationship without an explicit durational term is presumed to be an at-will relationship.").

²⁰³ See 42 U.S.C. § 2000e(b) (1994). Title VII is of course broader than § 1981 in that it protects against discrimination on bases other than race. See *id.* at 42 U.S.C. § 2000e-2(a)(1).

²⁰⁴ This method for determining the number of employees without Title VII protection is borrowed from Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602, n.42 (1988). The authors of that article conducted a comprehensive study of § 1981 litigation, discussed *supra*. Their method,

tion under both § 1981 and Title VII, there are other meaningful differences that make § 1981 important.

2. Administrative Exhaustion

Section 1981 claims are not subject to any administrative exhaustion requirements, unlike those brought under Title VII. Title VII plaintiffs must first file complaints with the Equal Employment Opportunity Commission (“EEOC”) or a state work-sharing organization, give the EEOC the opportunity to investigate and urge conciliation of the claims, and then wait for EEOC permission to sue. Only then can a Title VII plaintiff turn to a court for relief.²⁰⁵ Claims under § 1981, in contrast, can be brought directly to court. The ability of plaintiffs alleging race discrimination to bypass the EEOC’s conciliation scheme simply by bringing their complaints under § 1981 prompted the Supreme Court to take a serious look at whether § 1981 ought to apply to employment discrimination. But, in *Railway Express*, the Court acknowledged the overlap and its potential to undermine Title VII’s administrative scheme, but nonetheless permitted plaintiffs to continue pursuing either or both avenues of relief.²⁰⁶

which in 1988 led them to estimate that fourteen percent of the workforce and eighty-six percent of employers are covered by § 1981 but not Title VII, is based on census data. County business patterns data lists the number of employees who work for different size employers as well as the number of employers who have different numbers of employees. Because a single category includes employers with ten to nineteen employees, they added the number of employers with fewer than ten employees and half of the employers from the category “ten to nineteen employees” to estimate the number of Title VII-covered employers. Using that same approach, I estimate that in 1999, nineteen percent of employees (21 million workers) and eighty percent of employers are not covered by Title VII. See U.S. Census Bureau, U.S. Dep’t of Commerce, County Business Patterns 1999, at 3 (2001), available at <http://www.census.gov/prod/2001pubs/cbp99/cbp99-1.pdf>. (last visited Jan. 21, 2002).

²⁰⁵ See 42 U.S.C. § 2000e-5 (1994).

²⁰⁶ 421 U.S. at 461. Although § 102 of the Civil Rights Act of 1991 states that damages under Title VII can be recovered only if the complainant “cannot recover” under § 1981, 42 U.S.C. § 1981A(a)(1) (1994), the EEOC has taken the position that it bars double recovery for the same injury, but not the simultaneous pursuit of claims under both statutes. See ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991 (July 14, 1992) (interpreting “cannot recover” language of § 1981A).

3. Statutes of Limitations

Title VII requires that plaintiffs file complaints with the EEOC within either 180 or 300 days, depending on whether the complaint goes to the EEOC directly or to a state work-sharing organization, respectively.²⁰⁷ Section 1981, in contrast, does not impose a particular statute of limitations. The Supreme Court has held that § 1981 claims should be governed by state law,²⁰⁸ and that the most analogous limitations period is the one that governs residual or general personal injury rather than intentional torts.²⁰⁹ In many states, this approach means that the statute of limitations under § 1981 is considerably longer than that under Title VII.²¹⁰ In *Patterson*, for example, the plaintiff pursued her claim under § 1981 precisely because she filed too late to bring it under Title VII.²¹¹

4. Proof Structure

Under Title VII, there are two proof structures plaintiffs use to show disparate treatment discrimination. The first is a pretext model, which requires the plaintiff to make out a prima facie case of discrimination. To support a claim of a racially motivated failure-to-hire, the plaintiff must prove: (i) he belongs to a racial minority; (ii) he applied for and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected for the position; and (iv) thereafter, the employer continued to seek applicants with complainant's qualifi-

²⁰⁷ 42 U.S.C. § 2000e-5(e) (1994).

²⁰⁸ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987) (holding that § 1981 claims are governed by the limitations period prescribed for personal injury under state law); see also *supra* notes 148-51 and accompanying text.

²⁰⁹ See *Owens v. Okure*, 488 U.S. 235 (1989); see *supra* notes 150-51 and accompanying text.

²¹⁰ See, e.g., *Morse v. Univ. of Vt.*, 973 F.2d 122, 126 (2d Cir. 1992) (noting that § 1981 claims in New York are governed by the three-year personal injury statute of limitations); *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 131 (2d Cir. 1996) (applying Connecticut's three-year personal injury statute of limitations to § 1981 claim). The statute of limitations under § 1981 is not, however, tolled by filing an administrative claim with the EEOC under Title VII. See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975).

²¹¹ See 805 F.2d at 1144 n.* (“presumably for statute of limitations reasons, *Patterson* did not assert a claim under Title VII of the Civil Rights Act of 1964”).

cations.²¹² The employer then bears a burden of production—which requires it to come forth with legitimate non-discriminatory reasons for its actions. The plaintiff, who has at all times retained the burden of proof, can win the case either by disproving the reason proffered by the employer or introducing other evidence of discrimination.²¹³ The jury then has the opportunity to decide whether or not the employer violated Title VII.²¹⁴ Following the Supreme Court's lead in *Patterson*,²¹⁵ most courts have applied this proof structure to § 1981 claims as well.²¹⁶

Title VII also allows a plaintiff with some direct evidence of discrimination to proceed under an alternative proof structure, labeled “mixed-motive.” Faced with the plaintiff's evidence that race was “a motivating factor” in the adverse employment decision, the employer must prove (not just produce evidence) that it would have made the same decision even if race had not been a factor.²¹⁷ Initially, this showing by the employer was sufficient to avoid liability entirely.²¹⁸ But Congress amended Title VII in 1991 to provide that an employer who succeeds in that endeavor is still liable for committing discrimination, but can avoid paying money damages for its violation.²¹⁹ The plaintiff can still seek declaratory and injunctive relief, as well as attorneys' fees as the “prevailing party.”

Although it seems clear that § 1981 plaintiffs may rely on a mixed-motive theory to prove discrimination,²²⁰ it is not clear whether the pre- or post-1991 rules regarding liability and available remedies will be applied. The Civil Rights Act of 1991, which changed the mixed-motive proof structure, did not

²¹² See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²¹³ *Id.* at 802-03.

²¹⁴ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 140 (2000).

²¹⁵ See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (applying the pretext proof structure to an employment discrimination claim brought under § 1981).

²¹⁶ See, e.g., *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001); *Bass v. Bd. of County Comm'rs*, 242 F.3d 996 (11th Cir. 2001).

²¹⁷ See 42 U.S.C. § 2000e(2)(m) (1994).

²¹⁸ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).

²¹⁹ See 42 U.S.C. § 2000e-2(m) (1994).

²²⁰ This assumption comes from *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), a decision which permits § 1983 defendants to prove that a challenged employment action would have been taken for legitimate reasons separate and apart from any discriminatory motive.

explicitly amend § 1981. Most circuits, therefore, continue to hold that a defendant who makes the appropriate showing will be excused from both liability and damages.²²¹ Such an

interpretation makes § 1981 a less desirable cause of action for mixed-motive plaintiffs.

5. Remedies

Plaintiffs who prevail under § 1981 are entitled to equitable relief and monetary damages.²²² Although Title VII plaintiffs are now entitled to these same types of remedies,²²³ some meaningful differences remain. Damages under Title VII, for example, are capped according to the size of the defendant employer.²²⁴ Damages under § 1981 are not similarly limited,²²⁵ and awards of backpay are not limited under § 1981 to two years, as they are under Title VII.²²⁶

There may also remain some differences in the availability of punitive damages under the two statutes. Under § 1981a, the statutory provision making monetary damages available for violations of Title VII, punitive damages may be awarded when plaintiff shows “that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”²²⁷ In 1999, the Supreme Court interpreted § 1981a to provide an additional limitation on punitive damages. In *Kolstad v. American Dental Ass’n*,²²⁸ the Court held that punitive

²²¹ See, e.g., Pulliam v. Tallapoosa County Jail, 185 F.3d 1182, 1184 (11th Cir. 1999). But see Lewis v. American Foreign Serv. Ass’n, 846 F. Supp. 77 (D.D.C. 1993) (holding that CRA 1991 provisions regarding remedies in mixed-motive cases are applicable to § 1981 claims).

²²² *Johnson*, 421 U.S. at 460 (section 1981 plaintiffs are “entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages”).

²²³ See 42 U.S.C. § 1981a(b) (1994).

²²⁴ 42 U.S.C. § 1981a(b)(3) (1994). Title VII plaintiffs won a recent victory in *Pollard v. E.I. DuPont de Nemours*, 532 U.S. 843 (2001), in which the Supreme Court held that awards of front pay were not subject to the statutory cap on damages.

²²⁵ 42 U.S.C. § 1981a(b)(4) (1994).

²²⁶ *Johnson*, 421 U.S. at 460.

²²⁷ See 42 U.S.C. § 1981a(b)(1) (1994).

²²⁸ 527 U.S. 526 (1999).

damages may not be imposed where liability is vicarious based on the acts of a supervisor or agent whose discriminatory or harassing conduct is contrary to the employer's efforts to comply with Title VII.²²⁹

Section 1981a does not expressly amend § 1981. Prior to 1991, courts were deeply divided about the proper standard for punitive damages under § 1981, a statute with no separate provision governing punitive damages. Some courts required evidence of some egregious misconduct, beyond mere intentional discrimination, to justify an award of punitive damages.²³⁰ Others found that simple proof of intentional discrimination, a mere violation of the statute, is sufficient to put the request for punitive damages to the jury.²³¹ But at least one of the latter cases was overruled in light of *Kolstad*.²³² Whether *Kolstad* will universally be understood to limit claims for punitive damages under § 1981, too, is unclear.

6. Jury Trials

The jury trial right for § 1981 plaintiffs is rooted in the Seventh Amendment, which preserves the right to trial by jury in "suits at common law."²³³ Claims brought under § 1981 fall within that category.²³⁴ Prior to 1991, Title VII plaintiffs were not entitled to a jury trial because the relief available to them

²²⁹ *Id.* at 540-46.

²³⁰ *See, e.g., Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1115 (10th Cir. 2001) ("the standard for punitive damages for discrimination [under § 1981] is that the discrimination must have been malicious, willful, and in gross disregard of plaintiff's rights") (quoting *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir. 1989)); *Stephens v. S. Atlantic Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (requiring discrimination that "constitutes reprehensible and abhorrent conduct"); *Beauford v. Sisters of Mercy-Province*, 816 F.2d 1104, 1109 (6th Cir. 1987) (punitive damages are generally "limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant").

²³¹ *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (requiring only proof of "intentional wrongdoing"), *overruled in part*, *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

²³² *See Iacobucci*, 193 F.3d at 27 (overruling *Rowlett* to the extent it made punitive damages available under § 1981 based solely on intentional wrongdoing).

²³³ U.S. CONST. amend. VII; *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990).

²³⁴ *Id.* at 550 (assuming that claims brought under § 1981 are legal in nature and, therefore, deserving of a right to jury trial).

was exclusively equitable.²³⁵ But the Civil Rights Act of 1991 made it possible for victims of intentional discrimination to seek monetary damages—legal relief—and concomitantly granted them a right to jury trial.²³⁶ Thus, today, there is no meaningful difference in the jury trial right under either statute.

7. Potential Plaintiffs and Defendants

Although in most respects Title VII is considerably broader than § 1981—as it protects against discrimination on the basis of sex, religion, color, and national origin, as well as race²³⁷—independent contractors are protected by the latter but not the former.²³⁸

Section 1981 allows for more potential defendants than Title VII.²³⁹ Supervisors who commit discriminatory acts in violation of § 1981 can be held individually liable.²⁴⁰ This is in stark contrast to court interpretations of Title VII, which have uniformly held that the statute does not permit individual liability.²⁴¹

²³⁵ See, e.g., *Lehman v. Nakshian*, 453 U.S. 156 (1981).

²³⁶ 42 U.S.C. § 1981a(c) (1994).

²³⁷ Section 1981 protects individuals of any race from discrimination on the basis of race or ancestry, but not national origin or alienage status directly. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (whites as well as blacks can assert rights under § 1981, even though the statute secures to all the same contracting rights as “white citizens”); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

²³⁸ See, e.g., *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999).

²³⁹ One exception to this is with respect to federal employees, who may sue under § 1981 only when they are not covered by Title VII. See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976). Title VII, as amended in 1991, applies to most federal employees. See 42 U.S.C. § 2000e-16 (1991).

²⁴⁰ See, e.g., *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997) (permitting individual liability against employees who have the authority to act on behalf of an employer with respect to making and enforcing contracts); *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (permitting individual liability under § 1981); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985); *Hicks v. IBM*, 44 F. Supp. 2d 593, 597 (S.D.N.Y. 1999) (permitting supervisors involved in the discriminatory activity to be held individually liable under § 1981); see also *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (permitting, without discussion, individual liability under § 1981).

²⁴¹ See *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998) (no individual liability under Title VII); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996) (same); *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) (same); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995) (same); *Greenlaw v. Garrett*, 59 F.3d 994,

Except with respect to state and local governments, entity liability under § 1981 is roughly coextensive with Title VII. Under Title VII, “employer” is defined to include both the employer and its agents. The employer is automatically liable for any tangible discriminatory act taken by a supervisor

against an employee.²⁴² This is so because, under traditional agency principles, an employer is held responsible for the acts of its agents undertaken within the scope of employment or when aided by the agency relation. When a supervisor refuses to hire, demotes, or fires an employee on the basis of race, he is acting as the employer’s agent and therefore rendering him liable. The same approach is generally taken under § 1981.

One difference between Title VII and § 1981 may relate to the liability of state and local governments for racially discriminatory employment actions. The Civil Rights Act of 1991 has muddied this area somewhat. Prior to 1991, the Supreme Court had severely limited the liability of state and local governments under § 1981. In *Jett v. Dallas Independent School District*,²⁴³ the Court held, drawing on its prior interpretation of § 1983, that a plaintiff must show that a § 1981 violation was undertaken pursuant to an official custom or policy of the governmental entity being sued.²⁴⁴ This heightened show-

1001 (9th Cir. 1995) (same); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995) (same).

²⁴² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-71 (1986) (“courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor’s actions”); *Burlington Indus.*, 524 U.S. at 760 (holding employer automatically liable for tangible employment actions). This holding almost certainly applies to race. See, e.g., EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* at 4 (Jun. 21, 1999), available at <http://www.eeoc.gov/docs/harassment.html> (last visited Nov. 9, 2001) (noting that employer liability rules set forth in *Burlington Indus.* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), apply to discrimination on all protected bases); *Richardson v. N.Y. State Dep’t of Corr. Servs.*, 180 F.3d 426 (2d Cir. 1999) (holding that rules of liability apply to racial harassment); *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405 (6th Cir. 1999) (same). A different rule of liability applies to harassment (racial or otherwise) that does not result in a tangible employment action. There, the employer’s liability is subject to an affirmative defense based on efforts to prevent and correct harm and based on the victim’s use of available grievance procedures. See *Faragher*, 524 U.S. 775 (1998).

²⁴³ 491 U.S. 701 (1989).

²⁴⁴ Arguably, this case also meant that states could not be sued directly, since that is the case under § 1983. This contention comes from the Supreme Court’s sugges-

ing made governmental liability more elusive. But in 1991, Congress added a provision to § 1981, making

clear that it prohibited both “nongovernmental discrimination and impairment under color of state law.”²⁴⁵

Court interpretations of the Civil Rights Act’s effect on *Jett* have been varied. Some have held that all of *Jett*’s limitations on liability survived the 1991 Act.²⁴⁶ Others have held that while states can be sued directly under § 1981, plaintiffs must still prove the existence of an official policy or custom of discrimination.²⁴⁷

B. *Some Empirical Evidence about the Use of § 1981*

There is only one systematic study comparing the use of § 1981 with Title VII.²⁴⁸ In that study, which was conducted before Congress authorized damage awards under Title VII and before *Patterson* desiccated and Congress restored the statute’s power, § 1981 played a significant role in challenging employment discrimination.²⁴⁹ The study evaluated every § 1981 case filed in fiscal year 1980-81 in three federal districts²⁵⁰ and found that § 1981 was invoked the third most often, behind Title VII and § 1983,²⁵¹ in civil rights cases. Other federal civil rights statutes, like Title VI, which prohibits race discrimination in federally assisted programs, and Title IX, which prohibits sex discrimination in education, were far behind § 1981.²⁵² The study, however, found no significant differences in outcome or procedural progress between § 1981 and

tion that a § 1981 plaintiff must meet all § 1983 procedural requirements in order to maintain a suit against a state or local governmental actor. Under § 1983, the state is not itself an actor that can be sued. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989); *see also* LEWIS & NORMAN, *supra* note 12, at 337-39.

²⁴⁵ *See* 42 U.S.C. § 1981(c) (1994).

²⁴⁶ *See, e.g.*, *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000).

²⁴⁷ *See, e.g.*, *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1205 (9th Cir. 1996); *see also* LEWIS & NORMAN, *supra* note 12, at 340-41.

²⁴⁸ *See* Eisenberg & Schwab, *supra* note 204, at 596.

²⁴⁹ *Id.* at 603.

²⁵⁰ *Id.* at 598.

²⁵¹ 42 U.S.C. § 1983 is a federal statute that permits plaintiffs to seek money damages for violations of federal constitutional and some statutory rights.

²⁵² Eisenberg & Schwab, *supra* note 204, at 599.

Title VII. Success rates, litigation burden, and settlement rate were roughly comparable under both statutes.²⁵³ The study also showed that nearly half of the plaintiffs filing race-based Title VII claims also made a § 1981 claim.²⁵⁴ The authors had trouble specifically explaining the nine percent of the race discrimination cases that raised a § 1981 claim but not a Title VII claim, although the size of employer may have been relevant.

The study also showed that, despite published opinions suggesting a widespread use in general contracting cases, § 1981 was used primarily in the employment context.²⁵⁵ Nearly eighty percent of cases filed raised claims of employment discrimination.²⁵⁶

But now that Title VII has been strengthened by the availability of compensatory and punitive damages, and § 1981 has been restored to its pre-*Patterson* vitality, does § 1981 continue to be important? My own brief examination of recent § 1981 cases suggests that it does.

Based on a review of all district court decisions within the Second Circuit in 1999 and 2000, in which a § 1981 claim is raised, I conclude that § 1981 continues to be actively invoked by plaintiffs complaining of race discrimination.²⁵⁷ It appears to be most important in the employment context. More than eighty-five percent of the cases involved claims of workplace discrimination, most often discriminatory discharge (31%), racial harassment (12%), and discriminatory failure to hire or promote (11%).²⁵⁸ The remaining § 1981 claims were raised in the context of education or government contracting.²⁵⁹ Section

²⁵³ *Id.* at 600.

²⁵⁴ *Id.* at 603.

²⁵⁵ Published opinions suggest that § 1981 was used to challenge school segregation, racially exclusive private clubs, and discrimination in general contracting. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160 (1976) (schools); *Sullivan*, 396 U.S. 229 (private clubs); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973) (private clubs).

²⁵⁶ Eisenberg & Schwab, *supra* note 204, at 601.

²⁵⁷ *See* Grossman Study (data on file with author). The usefulness of a study based solely on published opinions is often questionable because such a significant proportion of cases filed never reach that stage. But the purpose of this study is only to attain a profile of § 1981 plaintiffs and cases, as a basis for drawing some preliminary conclusions about its continuing importance in an age when civil rights plaintiffs have other avenues of relief. In this context, the deficiencies normally attributable to this type of study are not particularly relevant.

²⁵⁸ *See id.*

²⁵⁹ *See id.*

1981 plaintiffs tend to be African-American (52%), Hispanic (9%), and Asian-American (7%), in that order.²⁶⁰ Sixty per cent

of these plaintiffs work for private employers, twenty-nine per cent for public ones.²⁶¹

Section 1981 appears to be used concurrently with rather than to the exclusion of other federal civil rights remedies.²⁶² Sixty-nine percent of the cases including a § 1981 claim also included a Title VII claim. Section 1981 claims were also coupled with § 1983 claims (31%), § 1985 claims (18%), and related state law claims (29%).²⁶³ Although very few cases provide information about the size of the defendant-employer, the cases in which Title VII claims are also brought (69%) presumptively involve employers with at least the statutory minimum number of employees—fifteen.

Where plaintiffs are protected by both Title VII and § 1981, the latter may be used to hold the individual discriminator liable. At least a third of the § 1981 claims included a claim against the individual supervisor responsible for the alleged discrimination.

This data also proves the importance of the primary question addressed in this article: whether § 1981 should apply to at-will employees. Although very few cases explicitly characterize the relationship between the plaintiff and the employer as at-will or otherwise, most claims appear to be brought by at-will employees.

CONCLUSION

The real story of § 1981 and at-will employment is that four federal appellate courts have reached the right conclusion—that at-will employees benefit from the same protection against racial discrimination as employees working for a contractual term of employment—for the wrong reasons. Jackie Lauture does not have a viable case under § 1981 just because

²⁶⁰ *See id.* The race of the plaintiff cannot be determined in twenty-five per cent of these cases.

²⁶¹ *See id.*

²⁶² *See* Grossman Study, *supra* note 257.

²⁶³ *See id.*

New York law defines her relationship with her employer as contractual in nature. She has a viable claim because under basic common law principles, both state and federal, at-will employment is treated as a contract.

Each of the five appellate courts that addressed the applicability of § 1981 to at-will employment rested its decision expressly on the law of the state in which the suit was brought. The one court to break ranks with the majority did so because Illinois law dictated that result. What is interesting about these cases is that not one court considered whether state law is the appropriate source of law for answering the question posed.

The question of whether federal or state law should be used to define the term “contract” in § 1981 is not uncomplicated. One approach is to look to a long line of cases that say federal statutes must be interpreted according to federal standards, to be drawn from federal common law. With this approach, Congress is presumed to have intended a nationwide, uniform rule, a goal that would be subverted by allowing the rule to differ state-by-state based solely on the origin of the lawsuit. State law may be used, however, as the rule of decision where uniformity is not paramount, or where other considerations make it appropriate. In any event, it may be looked to in fashioning a uniform, federal rule. Under this approach, § 1981 should be interpreted to require a uniform federal rule that recognizes at-will employment as contractual.

A second approach is to incorporate § 1988 into the analysis. Although there is an argument that § 1988 does not apply because an undefined substantive term is not clearly “deficient,” within the meaning of the statute, even if it does apply, it may also dictate the use of federal rather than state law. Although with § 1988 there appears to be a presumption that state law should be used to fill in gaps in federal civil rights legislation, that presumption can be rebutted where the use of state law would jeopardize the need for nationwide uniformity or would be otherwise inconsistent with federal law or policy. The application of § 1981 to at-will employees may present a case where that presumption can be rebutted.

Under either approach, federal common law appears to be the appropriate source of law to define “contract” as used in

§ 1981. Section 1981, enacted to stem rampant discrimination against black Americans by states themselves as well as their citizens, presents a perfect case for the application of a uniform, federal law. But state law, as well as treatises and general principles, all inform the substantive analysis of the questions whether at-will employment is sufficiently contractual to come under § 1981. Whether one looks at the relationship as a unilateral contract, where the employer offers to pay in exchange for the employee's completed services, or as a bilateral contract of indefinite duration, under conventional principles of contract law, the relationship is a valid contract. That is sufficient to make § 1981, and its protections against race discrimination, applicable.

Resolution of this issue is important, as § 1981 continues to be invoked today. It is used primarily to redress employment discrimination, and, despite some overlap, provides some advantages over Title VII, including a longer statute of limitations, uncapped money damages, and a larger pool of defendants. But perhaps the most important advantage of § 1981 is that twenty percent of the American workforce does not benefit from Title VII's protections because they work for small businesses. For them, many of whom work at-will, § 1981 provides the only federal statutory protection against race discrimination. The conclusion reached by the four circuits in the majority is thus important—and correct.

TAKING SUBROGATION SERIOUSLY:
THE BLUE CROSS-BLUE SHIELD TOBACCO
LITIGATION RECONSIDERED*

Mark C. Weber[†]

INTRODUCTION

On June 4, 2001, a jury in the Eastern District of New York awarded Empire Blue Cross-Blue Shield \$17.8 million against six tobacco company defendants for violating New York consumer protection laws and committing unfair and deceptive business practices.¹ Although state governments achieved a

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[†] Professor of Law, DePaul University. B.A. Columbia; J.D. Yale. I thank Jeffrey W. Stempel, Stephan Landsman, and Joseph Borders for their comments on the manuscript. Special thanks to Catherine Tetzlaff for her research assistance. By way of disclosure, let me note that I am insured under a Blue Cross-Blue Shield plan, and do not smoke.

¹ Alan Feuer, *Tobacco Jury Awards Insurer*, N.Y. TIMES, June 5, 2001, at A22; see *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, No. 98 CV 3287 (JBW), 2001 WL 1304370 (E.D.N.Y. Oct. 19, 2001) [hereinafter *Empire*]. Though noteworthy, the award was lower than might have been anticipated in light of the finding of liability. The jury rejected the conclusion that the tobacco companies had engaged in fraud or racketeering, and so did not award punitive damages. The absence of a racketeering finding foreclosed a treble damages award under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994). Empire prevailed on the claims that the companies violated New York consumer protection laws and engaged in unfair and deceptive business practices. *Media Backgrounder: Brooklyn Jury Shatters Big Tobacco's Winning Streak*, Tobacco Products Liability Project, at <http://www.tobacco.neu.edu/PR/Backgrounders/empire-.htm> (last visited June 4, 2001). The relatively modest amount awarded, especially on the subrogation claim, supports the conclusion that even successful individual claims by smokers are not necessarily big money cases, and may need to be pooled in some fashion in order to justify the high litigation expenses they entail. See Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation Over Tobacco Injuries*, 33 GA. L. REV. 979, 1009-10 (1999) (discussing need to pool expenses in light of reductions to recovery due

\$246 billion settlement against tobacco producers in 1998 for tobacco-related Medicaid expenditures,² the *Empire* case represented the first time a third party medical expense payor case actually went to verdict.³ The result was thus very big news for the federal courts of the Second Circuit and for the judicial system of the United States.

In the Eastern District action, twenty-one Blue Cross-Blue Shield plans asserted both direct injury and subrogation claims against the tobacco companies. Empire, whose case came to trial first, received alternative awards of \$17.8 million for direct injury and \$11.8 million as subrogee of the injury claims that could be brought by its members.⁴

The direct injury and subrogation claims merit separate treatment. Direct injury claims have fared poorly on appeal. So far, the United States courts of appeals, including the Second Circuit, have uniformly rejected direct injury claims of third party payors.⁵ Judge Jack Weinstein, who presided over the *Empire* trial and entered judgment, allowed the case to proceed on the direct injury theory, noting distinctions from the Second Circuit case that had failed.⁶ While the third party payors' claims of direct injury have some persuasive power, anyone playing the odds would conclude that the \$17.8 million verdict based on that injury will have rough sailing in the Second Circuit. Still more doubtful would be the fate of any similar verdict based on a violation of RICO,⁷ the specific cause of action that the courts of appeals have most frequently rejected, and

to comparative fault); *see also infra* text accompanying notes 96-99 (discussing pooling effect of insurer lawsuits).

² National Association of Attorneys General Tobacco Documents Master Settlement Agreement, (Nov. 23, 1998), *available at* <http://www.naag.org/tobacco-public.html> (last visited Oct. 18, 2001).

³ *See* Christopher Mumma, *Tobacco Companies Ordered to Pay \$17.8 Mln to Insurer*, Bloomberg News Archive, *at* http://www.bloomberg.com/fgc...arkets-quote99_news.ht&s (last visited June 4, 2001) ("The decision is the first instance in which an insurer—a so-called third party—has succeeded in a court case seeking reimbursement from the tobacco industry.").

⁴ *See id.*

⁵ *See* United Food & Commercial Workers Union, Employers Health & Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271, 1273-74 (11th Cir. 2000) (rejecting state law claims); *see also* cases cited *infra* note 9 (rejecting direct injury claims brought under federal statutory causes of action).

⁶ Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 371-72 (E.D.N.Y. 2000). *See also infra* notes 31-32 and accompanying text.

⁷ 18 U.S.C. §§ 1961-1968 (1994).

one that Empire had hoped to prevail upon at trial.⁸ The courts of appeals that have ruled on the question have all found third party payors' claims of direct injury from tobacco too remote to satisfy the test for RICO liability.⁹

The courts of appeals have said nothing about the subrogation claims,¹⁰ however, and for that reason their merits remain very much an open question. Although they were evidently the second choice of the insurer litigants, the modest success of the *Empire* action, contrasted with the abject failure of most direct injury cases, suggests that they will become the favorite approach in the future.

⁸ See Mumma, *supra* note 3 (reporting interview with lawyer for Empire).

⁹ *Regence Blue Shield v. Philip Morris, Inc.*, No. 99-35203, 2001 WL 205996, at *1 (9th Cir. Feb. 28, 2001) (unpublished op.; citation disfavored); *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1076 (D.C. Cir. 2001); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 703 (9th Cir. 2001); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 444 (3d Cir. 2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 789 (5th Cir. 2000); *Int'l Bd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 823 (7th Cir. 1999) [hereinafter *Int'l Bd. of Teamsters*]; *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999) [hereinafter *Laborers Local 17*]; *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964 (9th Cir. 1999) [hereinafter *Oregon Laborers*], *cert. denied*, 528 U.S. 1075 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) [hereinafter *Steamfitters Local Union*].

The courts have rejected treble damages antitrust law claims on similar grounds. *Regence Blue Shield, Inc.*, 2001 WL 205996, at *1; *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 703; *Service Employees Int'l Union*, 249 F.3d at 1076; *Allegheny Gen. Hosp.*, 228 F.3d at 443; *Tex. Carpenters*, 199 F.3d at 443; *Int'l Bd. of Teamsters*, 196 F.3d at 823; *Oregon Laborers*, 185 F.3d at 966; *Steamfitters Local Union No. 420*, 171 F.3d at 933. Some of the cases also included state law claims, which the courts rejected. *See, e.g., Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 706; *see also Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, No. W 1999-01061-COA-R9-CV, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000) (rejecting various state law claims). *But see Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) (answering certified questions regarding state claims so as to permit claims to proceed).

¹⁰ *See* authority cited *supra* note 9. One court of appeals has found the claims of a multi-employer benefits trust preempted by the Employee Retirement Income Security Act ("ERISA"). *Lyons v. Philip Morris, Inc.*, 225 F.3d 909, 912-14 (8th Cir. 2000). This holding did not dispose of the merits of any subrogation claim that might be brought pursuant to ERISA or some mixture of ERISA and other federal law (such as RICO), and is in any instance not relevant to the claims of the Blue Cross plans. *See infra* text accompanying notes 76-80 (discussing *Lyons*).

On a societal, rather than a tactical level, the important fact about the subrogation claims is that individual litigation has only occasionally been able to achieve compensation for smoking injuries.¹¹ Individual litigants encounter difficulties establishing liability or they run out of money to support litigation long before the case reaches a decision on the merits. Aggregate tobacco litigation of one form or another is far more likely to have a social impact than individual litigation, at least in the near future.¹² Subrogation actions are an important means for challenging tobacco on an aggregate basis. The aggregate harm is clear: Smoking kills 400,000 Americans a year, the equivalent of three jumbo jet crashes a day.¹³ Documents from the tobacco companies themselves provide strong evidence of careless—and worse—conduct in the manufacture and marketing of tobacco.¹⁴ There has been no adequate legislative response to compensate for and deter the losses from smoking, or to achieve corrective justice for wrongs inflicted. It remains to be seen if the tort system will provide a means to rebalance the scales and relieve the victims and the public of some of the costs. Subrogation actions could be the way in which that relief occurs.

Although much has been written about the state attorney generals' third party Medicaid payor actions against the tobacco companies,¹⁵ so far there has been little scholarship concerning the private third party payors and their notable lack of success in asserting direct injury claims.¹⁶ This Article does not address that issue as such, but instead seeks to answer the question of "what if." Assuming the direct injury actions fail, what if the plaintiffs proceed on a subrogation claim? Insurance subrogation in general has been the subject of sporadic academic inquiry,¹⁷ but scholars have not yet had to focus

¹¹ See *infra* text accompanying notes 98-99.

¹² See *infra* text accompanying notes 97-99 (describing tobacco industry's fear of aggregate litigation rather than individual cases).

¹³ See Weber, *supra* note 1, at 980 (collecting sources).

¹⁴ See *infra* note 68 and accompanying text (listing documentary sources).

¹⁵ See *infra* note 24 and accompanying text (listing illustrative sources).

¹⁶ A noteworthy student contribution on the topic is Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000).

¹⁷ See, e.g., KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 153-55 (1986) (discussing economic principles regarding subrogation); RONALD C. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE

on the issue as it relates to third party payors' claims for the costs of tobacco injuries.

This Article addresses that issue by discussing, in Part I, the prospects for a tobacco subrogation claim for treble damages relief under RICO. Part II explores the analogous action under state law. Finally, Part III discusses questions regarding the presentation of the subrogation claim to the trial court and adjudication of thorny issues such as contributory fault and reliance. The Article concludes that insurer subrogation actions are a viable—perhaps the most viable—means of achieving aggregated liability for the harms caused by smoking.

I. INSURERS' RICO SUBROGATION CLAIMS FOR TOBACCO INJURIES

Subrogation claims differ from the claims of direct injury that the Blue Cross plans have pursued most aggressively in their actions against the tobacco companies, but like those claims, the subrogation actions are being asserted under RICO as treble-damages cases. An analysis of the leading RICO precedent demonstrates, perhaps somewhat surprisingly, that the subrogation claims of the insurers fit comfortably within the proximate cause standards established by the statute. Other issues may still limit the applicability and operation of the RICO treble-damages provision, however.

A. *Subrogation Versus Direct Injury*

“[S]ubrogation is an equitable right whereby a nonvolunteer who has made a payment to another of a debt for which he or she is only secondarily liable succeeds to that party's rights against the third party who is primarily responsible for the debt.”¹⁸ In the context of Blue Cross-Blue Shield insurance claims against Big Tobacco, the insurance companies paid the

(1964); JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES §§ 11.01-05 (2d ed. 1999 and Supp. 2001); June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 N.C. L. REV. 893 (1990); Jeffrey W. Stempel, *Recent Case Developments*, 6 CONN. INS. L.J. 207, 233-37 (1999-2000) (discussing subrogation dispute).

¹⁸ ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 96(b), at 603 (2d ed. 1996).

smokers' medical bills. Thus the insurers succeed to the smokers' rights against the tobacco companies, whose wrongful conduct supposedly caused the losses. Since nearly all health insurance policies contain subrogation clauses,¹⁹ the claim is one of conventional, rather than equitable, subrogation.²⁰

A subrogation claim differs from the direct injury claims asserted by the Blue Cross plans and other insurers against Big Tobacco. In claiming direct injury to themselves, the insurers allege that they expended their funds to treat tobacco victims, and would not have done so but for the wrongful conduct of the tobacco companies in manufacturing and marketing their harmful products. The loss is thus to the surplus (or other competing expenditures) of the nonprofit plans.²¹ The insurers have argued further that if they themselves had not been the target of fraudulent misrepresentations, they would have done more to diminish smoking among their insureds, and thus would not have suffered losses as great as they did.²² These claims are not the same as the claim that the tobacco companies injured consumers by selling them cigarettes that caused cancer, and that the consumers contractually or equitably assigned (i.e., subrogated) their causes of action for their losses to the entities that paid for treatment.²³ The attraction of direct

¹⁹ *Id.* § 96(c), at 605 (“[I]nsurers now routinely include subrogation clauses in health insurance contracts.”).

²⁰ *See id.* at 602 (“‘Conventional subrogation’ arises out of the contractual relationship of the parties.”); STEMPPEL, *supra* note 17, at § 11.02 (suggesting use of “contracted” rather than “conventional” for subrogation by contract); *see also* Health Care Serv. Corp. v. Brown & Williamson Tobacco Corp., 208 F.3d 579, 581 (7th Cir. 2000) (“Doubtless the Blues are subrogated to their insureds’ tort claims.”).

²¹ *See* Blue Cross & Blue Shield of N.J. v. Phillip Morris, Inc., 36 F. Supp. 2d 560, 569-70 (E.D.N.Y. 1999) (describing direct injury claim).

²² *See, e.g., Oregon Laborers*, 185 F.3d at 962; *see also Laborers Local 17*, 191 F.3d at 233 (describing claimed losses “due to the Funds’ inability to control costs, to promote the use of safer alternative products, and to establish programs to educate their participants not to use tobacco products”).

²³As the Third Circuit explained:

In plaintiffs’ submission, notwithstanding defendants’ argument that all of the Funds’ claims are essentially subrogation claims, their “direct” claim is a fundamentally different legal claim from the typical insurer-against-wrongdoer claim that falls under the principle of subrogation. This direct claim is said to arise not only out of a tortfeasor’s actions toward an insured, but also from its actions toward the insurance company (here the Funds) itself. The traditional subrogation principle holds that an “insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured’s right of action against any

injury theories is their ability to avoid the obstacles facing the smokers' causes of action for negligence, product liability, and fraud.²⁴ Smokers' negligence and product liability actions present, at minimum, difficulties with comparative fault and, to the extent they are based on failure to warn, preemption by federal law.²⁵ Fraud actions typically require a showing of reliance.²⁶

Subrogation claims brought by insurers derive from the smokers' rights to sue, and face the same impediments—comparative fault, preemption, reliance—that the smokers' actions do. Although the conventional subrogation that originates in a contractual term of the insurance policy avoids equitable defenses such as unclean hands,²⁷ it remains subject to legal

other person responsible for the loss." *Great Am. Ins. Co.*, 575 F.2d at 1034 (quoting W. VANCE, VANCE ON INSURANCE 787 n.2 (3d ed. 1951)). Here, the Funds are essentially claiming that they paid for more than "the property insured" (i.e., the health of fund participants) because the defendants caused the Funds to expend additional costs that would have been paid by the tobacco companies (through reduced revenues and tort damages) if they had not defrauded the Funds and conspired to cover up their wrongdoing.

Steamfitters Local Union, 171 F.3d at 920.

²⁴ See Richard A. Epstein, *Subrogation and Insurance, with Especial Reference to the Tobacco Litigation*, 41 N.Y.L. SCH. L. REV. 493, 499 (1997) (discussing state government litigation over Medicaid expenditures and assumption of risk defense). The efforts of the states to recover the Medicaid costs free of the defenses sparked considerable controversy. See, e.g., *id.*; Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (1998); Michael Moore, *Tobacco Litigation: A Problem that Needs a Solution*, 41 N.Y.L. SCH. L. REV. 487 (1997); Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935 (1999). See generally *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239 (Fla. 1996) (ruling that creation of new cause of action free of traditional defenses did not on its face violate due process). This Article sidesteps that debate and assumes that whatever the law may be with regard to state Medicaid costs, Blue Cross subrogation claims will remain subject to defenses applicable to the smokers' own claims.

²⁵ Federal law preempts claims based on the inadequacy of warnings on cigarette packages for periods of time after the passage of federal warning requirements. *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 524 (1992). Failure-to-warn claims based on inadequacy of communications other than the package labels may remain viable. See Michael D. Green, *Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L. REV. 1257 (1997) (noting that *Cipollone* requires preemption only of claims based on inadequacy of package warnings).

²⁶ See, e.g., *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) (noting that reliance must be proven in statutory sales misrepresentation action, but permitting use of circumstantial evidence).

²⁷ See JERRY, *supra* note 18, at § 96(b), 603.

defenses such as comparative fault.²⁸ If an insurer can show a direct injury to itself, the relevant question would be whether it was guilty of comparative fault, and the insurers are far more confident of a negative answer on that question than smokers would be.

Nevertheless, the appeals courts have rejected insurers' direct injury claims altogether, something they have not done with the subrogated causes of action. For example, in *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*,²⁹ the Second Circuit ruled that all the harms that the insurers suffered on account of the tobacco companies' conduct were "entirely derivative of" and "purely contingent on" the harms worked on the smokers themselves.³⁰ Thus the insurers' direct harms, however real, were not proximate enough to support a claim under RICO and other theories of liability.³¹

Judge Weinstein distinguished *Laborers Local 17*, which arose out of a Southern District of New York multi-employer benefits trust action, primarily on the ground that the Blue Cross plans have such a huge role in the health care industry that they are a different class of victim than an individual union local benefits trust.³² Although the Seventh Cir-

²⁸ See *Allstate Ins. Co. v. Town of Ville Platte*, 269 So. 2d 298, 304 (La. Ct. App. 1972) (barring subrogation claim on account of insured's contributory negligence); *Prudential Prop. & Cas. Co. v. Dow Chevrolet-Olds, Inc.*, 10 S.W.3d 97, 100 (Tex. Ct. App. 1999) ("Since the Joneses are subject to the defense of contributory negligence, so is Prudential.").

²⁹ 191 F.3d 229 (2d Cir. 1999).

³⁰ *Id.* at 239.

³¹ See *id.* at 244. Other courts have questioned whether such losses are even real, noting that the insurers had the capacity to pass them through to ratepayers. See *Int'l Bd. of Teamsters*, 196 F.3d at 824. For Judge Weinstein's response to this argument, see *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 36 F. Supp. 2d at 569-70 (noting that many businesses have the ability to shift losses to consumers but may recover for wrongful conduct anyway).

³² *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 213, 216-217 (E.D.N.Y. 1999); accord *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 113 F. Supp. 2d at 371-72. Presumably, the argument is that this prominent role removes the Blue Cross plans from the "unexpected victim" limit on proximate causation. See, e.g., MARC A. FRANKLIN & ROBERT RABIN, *TORT LAW AND ALTERNATIVES* 419 (7th ed. 2001) (describing limits on proximate cause pertaining to "unexpected victim"); see also *Nat'l Asbestos Workers v. Philip Morris*, 74 F. Supp. 2d 221, 227 (E.D.N.Y. 1999) ("Injury to the Blues was allegedly more foreseeable, and allegedly more calculated as part of the defendants' racketeering scheme, because of the Blues' dominant and highly visible role as health care providers throughout the nation."). This argument has some persuasive power, given the strong relevance of foreseeability to proximate cause, and the likely congressional knowledge of that fact when it passed RICO. See *Holmes v.*

cuit was guilty of rhetorical overkill in describing Judge Weinstein's opinion as "a thinly disguised refusal to accept and follow the second circuit's holding,"³³ the distinction has obviously failed to persuade the other circuits that have passed on Blue Shield plans' direct injury causes of action. If Empire's direct injury claim fails on appeal, as the other direct injury claims have, the subrogation claim is all that remains. Despite its problems, it is the insurers' surest hope, and it may well succeed.

B. *Subrogation Under RICO*

There is no barrier to a subrogee filing suit for treble damages under RICO's general principles, and the leading case from the Supreme Court assumes *arguendo* that an insurer whose subrogor has received an injury actionable under RICO may sue for the relief.³⁴ A further analysis of the case shows that although remoteness bars a treble-damages claim, subrogation does not bear on the remoteness question.

1. RICO Principles

RICO establishes a claim for treble damages for "[a]ny person injured in his business or property by reason of a violation of"³⁵ any of a list of prohibited activities,³⁶ including engag-

Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) (applying traditional proximate cause analysis to interpret causation requirement in RICO)

³³ *Int'l Bd. of Teamsters*, 196 F.3d at 827.

³⁴ *Holmes*, 503 U.S. at 271; *see also* *Ramos v. Patrician Equities Corp.*, No. 89CIV5370 (TPG), 1993 WL 58428 (S.D.N.Y. Mar. 3, 1993) (allowing surety to assert RICO claims of investors); *Fed. Ins. Co. v. Ayers*, 760 F. Supp. 1118, 1119-20 (E.D. Pa. 1990) (allowing subrogated surety to assert RICO for treble damages); *Sec. Inv. Prot. Corp. v. Poirier*, 653 F. Supp. 63, 65-66 (D. Or. 1986) (finding insurer to have standing under RICO); *Gen. Accident Ins. Co. of Am. v. Fidelity & Deposit Co. of Md.*, 598 F. Supp. 1223, 1246 (E.D. Pa. 1984) (holding that blanket bond issuer's third-party complaint sufficiently pled RICO counts).

³⁵ 18 U.S.C.A § 1964(c) (West 2000).

³⁶ *See* 18 U.S.C. § 1962.

ing in a pattern of mail fraud or wire fraud,³⁷ threatening and intimidating witnesses,³⁸ and interstate and foreign travel in aid of racketeering.³⁹ The Blue Cross plans allege that the tobacco companies have committed those crimes in the course of making and selling cigarettes and other products.⁴⁰

RICO's cause of action extends to all specified violations of the law; there is no need for the activity to rise to the level of organized crime. As the Supreme Court has commented:

The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime. In [the statute], Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with "organized crime."⁴¹

If the tobacco companies' alleged misrepresentations and fraudulent concealment with regard to the dangers of smoking and the addictive character of nicotine constitute a pattern of violation of the underlying criminal code provisions, anyone injured in his or her business or property may assert the treble damages claim under RICO.

Or perhaps not quite anyone. As developed more fully below, the Supreme Court has interpreted the causation idea in "injured" to mean proximate causation, rather than cause in fact.⁴² Therefore, the treble-damages plaintiff must show that the relationship between the injurious conduct and the injury is sufficiently direct.⁴³ A similar test applies in antitrust

³⁷ 18 U.S.C. §§ 1341, 1343 (1994).

³⁸ 18 U.S.C. §§ 1512, 1513 (1994).

³⁹ 18 U.S.C. § 1952 (1994).

⁴⁰ See *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 36 F. Supp. 2d 560, 565-66 (E.D.N.Y. 1999).

⁴¹ *H.J., Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 248 (1989); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("[There is] no distinct 'racketeering injury' requirement . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).").

⁴² *Holmes*, 503 U.S. at 268.

⁴³ See *id.* (discussing requirement of "some direct relation between the injury

cases.⁴⁴ Indeed, the Court adopted the proximate-cause interpretation of the RICO claim on the strength of the analogy to previous interpretations of comparable language in the treble damages provision of the federal antitrust laws.⁴⁵

2. *Holmes v. SIPC*

Apart from the problem of the defenses applicable to the subrogated claims of the insured, a likely reason that the Blue Cross plans have shied away from the subrogation cause of action is the subrogee's defeat in the Supreme Court's one seemingly analogous RICO subrogation case. In *Holmes v. Securities Investor Protection Corp.*,⁴⁶ defendant Holmes allegedly engaged in fraudulent manipulation of stock prices that kept two broker-dealers from meeting obligations to customers, forcing the liquidation of the brokerages and the payout of insurance funds to their customers by the plaintiff, the federally created corporation that protects customers in the event of brokerage liquidations.⁴⁷ The Securities Investment Protection Corporation ("SIPC") asserted that Holmes was liable to it for treble damages under RICO because the stock manipulation entailed a pattern of violation of the securities fraud laws that bankrupted the brokerages and thus harmed the customers, even though the customers had not invested in the manipulated stock.⁴⁸ Since the SIPC paid out to the customers, it stood as subrogee for their claims.⁴⁹

The Court rejected the corporation's claim. It held that the RICO treble damages provision requires not just that the defendant's pattern of racketeering activity be the cause in fact of the plaintiff's losses; the conduct must also be the proximate cause of the plaintiff's losses.⁵⁰ The injury was insufficiently direct to constitute proximate cause. The causal chain depended on the stock manipulator causing harm to the brokers,

asserted and the injurious conduct alleged.").

⁴⁴ *Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983).

⁴⁵ *Holmes*, 503 U.S. at 267-68.

⁴⁶ 503 U.S. 258 (1992).

⁴⁷ *Id.* at 262-63.

⁴⁸ *Id.* at 263-64.

⁴⁹ *Id.* at 270-71.

⁵⁰ *Id.* at 268.

and, as a result, the brokers becoming insolvent. As the Court stated, “[O]nly that intervening insolvency connects the conspirators’ acts to the losses suffered by the nonpurchasing customers and general creditors.”⁵¹ The Court quoted the principle that “[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step,”⁵² and advanced policy reasons for not doing so in *Holmes*. First, it would be difficult to sort out the role of the stock manipulation, as opposed to poor business practices or other causes, for the brokerages’ insolvencies. Second, the broker-dealers and the customers would have conflicting claims for treble damages that would somehow need to be apportioned. Third, the broker-dealers’ own treble-damages suit would fully vindicate the underlying law’s purposes.⁵³

C. *Insurers’ Subrogation Claims for Tobacco Injuries Under RICO*

Once one plots out the nature of the relationship of the parties and intermediaries in *Holmes*, it becomes obvious that it is not analogous to the Blue Cross subrogation cases. In contrast to the *Holmes* causal chain:

Defendant Racketeer (Holmes) -> Brokerages -> Customers -> SIPC,

the tobacco causal chain is:

Defendant Racketeer (Tobacco Co.) -> Smokers -> Blue Cross.

The intermediate step, the one that gave the Court pause in *Holmes*, is missing in tobacco. That distinction is crucial. The Court in *Holmes* declared that “the link is too remote between the stock manipulation alleged and the *customers’* harm,”⁵⁴ not the insurer’s harm. Instead, it was willing to assume, *arguendo*, that the insurer had the perfect right to stand in the shoes of nonpurchasing customers.⁵⁵ Those customers, how-

⁵¹ *Holmes*, 503 U.S. at 271.

⁵² *Id.* (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)).

⁵³ *Id.* at 272-73.

⁵⁴ *Id.* at 271 (emphasis added).

⁵⁵ *Id.*

ever, had no claim under the statute. There is no obstacle to a subrogee suing under RICO, but its subrogor must actually have a cause of action under the law. The Court held “not that RICO cannot serve to right the conspirators’ wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs.”⁵⁶ Just as the dealers, who were directly harmed, had a claim under RICO,⁵⁷ so too the smokers in the tobacco case will have a claim if they can show the underlying violations of the law. And if they do, their subrogees, the Blue Cross plans, can assert the claim under ordinary subrogation doctrine.

D. *Additional Issues Regarding the Treble Damages Provision*

One additional limit on statutory reach must be noted in discussing RICO subrogation claims for tobacco injuries. Personal injuries are not within the treble damages provision.⁵⁸ Rather, the damages are available only for injuries to “business or property.”⁵⁹ Therefore, the damages to be trebled in the RICO subrogation action are the non-personal injury losses of

⁵⁶ *Holmes*, 503 U.S. at 274. A district court case also involving subrogated claims asserted under RICO reinforces the irrelevance of the subrogation to the directness of the injury. *Kaiser v. Stewart*, 965 F. Supp. 684 (E.D. Pa. 1997). As in *Holmes*, the plaintiff failed because the subrogors, in this instance, creditors of bankrupt insurance companies, lacked a sufficiently direct injury to sustain a cause of action under RICO. *Kaiser*, 965 F. Supp. at 689.

⁵⁷ *Holmes*, 503 U.S. at 273-74 (“[T]he broker-dealers have in fact sued in this case, in the persons of their SIPA [Securities Investor Protection Act] trustees appointed on account of their insolvency. Indeed, the insolvency of the victim directly injured adds a further concern to those already expressed, since a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim’s liquidation proceedings.”).

⁵⁸ See, e.g., *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1300 (6th Cir. 1989) (holding that neither personal injury nor mental suffering are injury to business or property as defined by RICO); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 509 (1985) (Marshall, J., dissenting) (stating that RICO does not provide treble damages for personal injury claims); cf. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (finding personal injury claims to be outside scope of antitrust treble damages provision). For Judge Weinstein’s effort to distinguish some of these cases and explain his disagreement with others, see *Nat’l Asbestos Workers v. Philip Morris*, 74 F. Supp. 2d 221, 229-38 (E.D.N.Y. 1999) and *Nat’l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 213, 218-20 (E.D.N.Y. 1999).

⁵⁹ 18 U.S.C.A § 1964(c) (West 2000).

the smokers. Whether the hospitalization and medical costs, particularly those traceable to fraud or misrepresentation, constitute property losses rather than personal injuries is a RICO-interpretation issue that is beyond the scope of this Article.⁶⁰

The disposition of the remedy is a final issue to be considered. Although the general rule is that a subrogee may sue only for the amount that it has paid out to the insured, when a statute confers the right to punitive remedies, the subrogee may assert the claim the statute provides.⁶¹ The amount in excess of the actual expenditures may need to be held in trust for the person actually injured, however.⁶² It is a matter of RICO interpretation whether the goals of the statute are best served by allocation of the amount of damages in excess of the actual insurer losses to the victims of tobacco-related illnesses.

II. INSURERS' SUBROGATION CLAIMS FOR TOBACCO INJURIES UNDER STATE LAW

If the RICO subrogation claim fails on account of the personal injury exclusion or some other basis, a claim still remains under state law, under either consumer fraud statutes or common law fraud, negligence, or product liability. State law grounded the \$11.8 million alternative verdict in the *Empire* case. Matters of remedies and of federal jurisdiction come into play in discussing state law subrogation claims for tobacco injuries.

⁶⁰ In one analogous case, a court permitted a claim under civil RICO for the costs of defective cardiac pacemakers and the charges for implanting and removing them, though not for personal injuries as such. *In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, No. MDL850, 1992 WL 754061, at *3 (S.D. Ohio Dec. 23, 1992); *see also Int'l Bd. of Teamsters*, 196 F.3d at 823 (“[G]etting a product that causes deferred injury and medical expenses, causes a loss of one’s money, which is ‘property.’”).

⁶¹ *See Cincinnati Ins. Co. v. Brookwood Med. Ctr.*, 689 So. 2d 47, 50 (Ala. 1997) (permitting action pursuant to statute by employer’s workers’ compensation carrier for punitive award for worker’s death). *But see Fidelity & Deposit Co. of Md. v. Bradley*, No. CV 940544726, 1997 WL 804898, at *6 (Conn. Super. Ct. Dec. 22, 1997) (rejecting subrogee’s claim for double and treble damages pursuant to statute).

⁶² *See Cincinnati Ins. Co.*, 689 So. 2d at 50 (quoting statute). Determining whether the same result would obtain under RICO requires an analysis of RICO’s statutory purposes that is beyond the scope of this article.

A. *Remedies in Common Law Tobacco Subrogation Actions*

Unless the state has the equivalent of RICO remedies under its own statutes,⁶³ the insurer must forgo treble damages and attorneys' fees. Punitive damages may also be beyond reach, for the general rule is that a subrogee may recover only its actual expenditures on behalf of the subrogor, not a punitive award that exceeds the outlays.⁶⁴ Nevertheless, state supreme courts may determine that the policies of their states justify departure from the rule, just as a statutory right to recovery in a given jurisdiction might support punitive awards.⁶⁵

If punitive damages are available to the subrogee, apportionment problems arise. Should the insurer have to give the punitive award to the insured? The traditional rule is that if a subrogee somehow receives damages greater than the amount it paid, the amount goes to the subrogor (minus reasonable litigation expenses, if applicable).⁶⁶ If a state chooses to depart from that rule and allows the insurer to keep some of the punitive damages, how much should the insurer keep? A Blue Cross plan typically pays the doctor and hospital bills only in part, leaving a deductible and co-payment that the insured must absorb, and it pays nothing for pain and suffering or lost wages or other costs of the injury. The subrogation action is one in which the insurer steps into the shoes of the insured, but in the Blue Cross-tobacco situation, it occupies only part of the figurative footwear.

Denying punitive awards altogether solves the apportionment problem by eliminating the need for any division of the money, but that draconian measure is not the most just solution. In smokers' individual cases, some juries have con-

⁶³ A number of states have their own versions of RICO. See, e.g., ARIZ. REV. STAT. ANN. § 13-2314.04 (West Supp. 2000); N.D. CENT. CODE § 12.1-06.1-05 (1997).

⁶⁴ *Wasko v. Manella*, No. CV 930308152S, 2000 WL 1683417, at *2 (Conn. Super. Ct. Oct. 13, 2000); *S. Ry. Co. v. Malone Freight Lines, Inc.*, 330 S.E.2d 371, 408-09 (Ga. App. 1985); *Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360, 1371 (Ind. App. 1982); *Colonial Penn Ins. Co. v. Ford*, 411 A.2d 736, 737 (N.J. Super. 1979); *Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 133 (Tex. Ct. App. 1997).

⁶⁵ See *Cincinnati Ins. Co.*, 689 So. 2d at 50.

⁶⁶ See JERRY, *supra* note 18, § 96(d), at 609 (collecting cases); see also ROBERT E. KEETON, *INSURANCE LAW* 160-61 (1971) (supporting approach). See generally Jay S. Bybee, Comment, *Profit in Subrogation: An Insurer's Claim to Be More than Indemnified*, 1979 BYU L. REV. 145 (discussing apportionment of overage).

cluded that the tobacco companies' conduct reached the standards for outrageousness that would support an award of punitive damages;⁶⁷ the documentary record from the companies themselves demonstrates appalling misconduct.⁶⁸ The cost of matching the tobacco defendants' scorched-earth litigation tactics means that few tobacco victims with meritorious claims are likely to bring them.⁶⁹ Class action litigation is one way of vindicating the rights of the victims. However, the federal courts have rejected that avenue of relief,⁷⁰ and the state courts remain split, so relief of that kind

will be sporadic.⁷¹ The policy underlying punitive damages supports the availability of some procedural mechanism for obtaining the relief in a case where the facts justify it.⁷² If insurer litigation is the best—or perhaps the only—mechanism for obtaining punitive recoveries, the problems with apportionment should not be permitted to stand in the way. The

⁶⁷ The primary example is the Florida class action judgment, but some individual suits have also yielded punitive awards. See James Sterngold, *A Jury Awards A Smoker With Lung Cancer \$3 Billion From Philip Morris*, N.Y. TIMES, June 7, 2001, at A14.

⁶⁸ See STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996). Additional documents of interest are found at http://www.tobacco.neu.edu/mn_trial/index.html (last visited Feb. 9, 2002) and <http://www.tobacco.org/Documents/documents.html> (last visited Feb. 9, 2002). The deposition of Jeffrey S. Wigand, which was dramatized in the 1999 movie *The Insider*, may be viewed at http://www.tobacco.neu.edu/Extra/hotdocs/wigand_depo.htm (last visited Feb. 9, 2002).

⁶⁹ See Weber, *supra* note 1, at 1009 (discussing high costs of tobacco litigation and their implications).

⁷⁰ See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing certification of a nationwide class of nicotine-dependent persons, their estates, and family members); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998) (affirming decertification of class action for medical monitoring of tobacco victims); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469 (E.D. Pa. 1997).

⁷¹ Compare *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (permitting state-wide class action of smokers to go forward) with *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892 (1999) (rejecting smokers' consumer fraud class action). The Florida case resulted in a \$144.8 billion punitive damages award that is now under appeal. See *Engle v. Am. Tobacco Co.*, No. 94-08273 CA-3 (Fla. Cir. Ct., Dade County Nov. 6, 2000) (Final Judgment and Amended Omnibus Order), at Tobacco Control Resource Center & The Tobacco Products Liability Project, http://tobacco.neu.edu/Extra/Engle/kaye_11-6-00.PDF (last visited Feb. 9, 2002).

⁷² The policies behind punitive damages include punishment and retribution, deterrence, and encouragement to potential plaintiffs to uncover wrongdoing by providing additional funds to finance litigation. See DAN B. DOBBS, LAW OF REMEDIES § 3.11(2)-(3) (2d ed. 1993).

courts should allow the claims and adopt either a rule compelling remittance to the victims (minus an appropriate deduction for reasonable costs of recovery)⁷³ or a rule calling for proportional distribution based on the proportion of the costs of the injury borne by the victim and the insurer.

B. *Jurisdiction in Common Law Tobacco Subrogation Actions*

Whether for punitive damages or compensatory relief, insurer claims that are not appended to a RICO or other federal claim fall outside federal jurisdiction, in the absence of complete diversity.⁷⁴ Diversity may exist in some Blue Cross cases, though the plaintiffs could fairly easily defeat it by naming a nondiverse defendant such as a distributor, who would be liable under product liability and negligence theories, or an advertiser, who might have entered into a conspiracy to defraud or violate state consumer protection laws.⁷⁵

One court has found that the Employee Retirement Income Security Act⁷⁶ ("ERISA") preempts the third party claims of a multi-employer benefits trust that provided insurance to tobacco victims, and that therefore any such claims fall within federal jurisdiction and must be decided under the interpretations of that statute.⁷⁷ The court's reasoning was breathtakingly broad: It would sweep every subrogation claim by a multi-employer trust against a tortfeasor into federal court, no matter how small the case or localized the occurrence. Any auto accident in which the injuries have been paid for by the plan and the plan sues the negligent driver becomes a federal case.⁷⁸ The court's conclusion rests on a comparison between

⁷³ A litigant whose actions confer benefits on another is traditionally granted a reasonable fee out of the benefits conferred. *See, e.g.,* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 163-67 (1939) (explaining basis for fee award).

⁷⁴ *See generally* 28 U.S.C. § 1332 (1994) (establishing diversity jurisdiction).

⁷⁵ *See* Scott v. Am. Tobacco Co., No. Civ.A.97-1178, 1997 WL 749415 (E.D. La. Dec. 2, 1997) (remanding case to state court in light of tobacco distributor defendants' co-citizen status with plaintiffs). *See generally* Weber, *supra* note 1, at 1001-05 (discussing federal jurisdiction in tobacco class action suits).

⁷⁶ 29 U.S.C. §§ 1001-1461 (1994).

⁷⁷ Lyons, 225 F.3d at 912-14.

⁷⁸ The court attempts to avoid this conclusion by distinguishing subrogation cases brought in the name of the beneficiary. *Id.* at 913. How a subrogation case is captioned is a matter of state law, *see* JERRY, *supra* note 18, § 96(h), at 620-21, that

actions by the trust against the employee-beneficiary (clearly covered by ERISA and subject to federal jurisdiction) to actions by the trust against a third party,⁷⁹ in which the trust merely assumes the role the beneficiary would otherwise occupy in the state's tort liability system.

However dubious this comparison is, it does not affect the Blue Cross plans, which are not multi-employer trusts. Though the insurance is typically provided as a benefit of employment, it is not subject to the web of pervasive ERISA regulation that covers multi-employer trusts. Hence, in the absence of a RICO claim there is no ground, apart from diversity, for federal jurisdiction, and if the RICO claims fail, the state courts should be able to develop the subrogation, underlying tort, and procedural principles that will apply to the Blue Cross cases.⁸⁰

III. PRESENTING THE SUBROGATION CLAIM

The conditions on recovery that the subrogation borrows from its underlying claims bring to the fore the very practical problems of trying the combined subrogated claims of thousands (or even millions) of tobacco victims. The *Empire* case reached verdict in a reasonable period of time, but the issues

does not affect the impact that the litigation has on core ERISA relationships. *But see Lyons*, 225 F.3d at 913 (relying on distinction). Scholarly commentary supports a much more conservative view of ERISA preemption than that espoused by Lyons. *E.g.*, Jeffrey W. Stempel & Nadia von Magdenko, *Doctors, HMOs, ERISA, and the Public Interest After Pegram v. Herdrich*, 36 TORT & INS. L.J. 687, 690 (2001); accord James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term*, 16 LAB. LAW. 151, 195 (2000); Thomas R. McLean & Edward P. Richards, *Managed Care Liability for Breach of Fiduciary Duty After Pegram v. Herdrich: The End of ERISA Preemption for State Law Liability for Medical Care Decision Making*, 53 FLA. L. REV. 1 (2001).

⁷⁹ See *Lyons*, 225 F.3d at 913. The opinion does not discuss whether the benefits trust may maintain an action for subrogation under the federal common law of ERISA. Although the opinion is somewhat obscure, the plaintiffs apparently did not pursue that claim. See *id.* at 911-12.

⁸⁰ I have argued elsewhere that state courts are the forum of choice for the development of underlying tort law in mass product exposures and similar dispersed injury cases. See Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POLY REV. ___ (forthcoming 2002); Weber, *supra* note 1, at 1014-20; Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).

relating to the trial will likely be the source of years of appeals. Any underlying tobacco case comprises issues of exposure, reliance on tobacco company representations (and the subsidiary issues relating to tobacco companies' willful misconduct and congressional preemption of some warning claims), the dangers of tobacco products, when those dangers were known, damages, possible comparative fault, and additional questions relevant to punitive remedies.

Individual subrogation litigation would be possible in theory, with the insurance companies presenting smokers' damages cases seriatim. However, a more attractive proposition to the plaintiffs, the court system, and perhaps even the defendants would be a combined trial on the relevant elements and defenses of the smokers' subrogated claims, with the nature and amount of the losses proven primarily through expert opinion and statistical evidence. Moreover, given the reality of litigation costs and finite judicial time, combined proceedings conducted in that fashion might be the only cost-effective way to adjudicate the case at all. Combined proceedings present the opportunity for litigation against the tobacco companies by an opponent whose resources and sophistication present something of an even match.

A. *Relevant Elements of Claims and Defenses*

Getting past the long list of potential issues of fact in a tobacco case premised on product liability, negligence, and statutory or nonstatutory fraud and misrepresentation, the question is whether some of these issues may be amenable to legal approaches that facilitate their proof or disproof in an aggregate proceeding. Plainly, some matters, such as those that pertain to tobacco company conduct, are the same or nearly the same for all the underlying claims.⁸¹ Other questions of fact, such as reliance by smokers on misleading information, or a particular smoker's comparative fault with regard

⁸¹ Some underlying claims of smokers with brand loyalties pertain only to particular defendants. Nevertheless, proof of civil conspiracy, *see* *Adcock v. Brakagate, Ltd.*, 645 N.E.2d 888 (Ill. 1994), which the insurers have alleged, or various market share liability approaches, *see* *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1077-78, 73 N.Y.2d 487, 511-13 (1989), would make the proof of the conduct of every manufacturer relevant to each claim.

to negligence or product liability,⁸² would appear to be less so.

Although the elements of these underlying claims and defenses may need to be taken as a given in establishing subrogation liability, the decision of which party has the obligation to bring forward evidence on them or assume the risk of non-persuasion is much more fluid. In many cases, from *Summers v. Tice*⁸³ to broad applications of *res ipsa loquitur*,⁸⁴ courts have shifted the burden of production or persuasion from a plaintiff with an apparently just cause but an evidentiary difficulty to a probable wrongdoer. At times, as with *Summers*, the court has shifted the burden when the defendant cannot establish its defense any more effectively

than the plaintiff would have been able to establish the claim had the burden remained where it was.⁸⁵

With regard to comparative negligence, shifting the burden to the tobacco defendants is not a shift at all. Before the widespread adoption of comparative negligence, the vast majority of jurisdictions allocated the burdens of pleading, production, and persuasion on the topic of contributory negligence to the defendant. Those states that have dealt with the issue of burdens on comparative negligence have assigned them to the defendant, and scholarly opinion supports that view.⁸⁶ Therefore, if the trier of fact cannot make up its mind or must engage in estimation to determine how much the subrogation damages should be reduced for the comparative negligence of the smokers, it seems perfectly appropriate that the tobacco companies should bear that risk, if indeed they have marketed a defective product or engaged in negligent, reckless, or intentionally

⁸² Most states now assimilate assumption of risk into comparative negligence in product liability cases. See RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 17 cmt. d (1998) (describing majority view).

⁸³ 199 P.2d 1 (Cal. 1948) (leading U.S. case on alternative causation involving two independent tortfeasors who were each held liable for the whole damage caused to the plaintiff, despite the fact that only one tortfeasor could have caused the harm).

⁸⁴ See, e.g., *Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1 (Alaska 1978) (permitting jury to find that operator of plane liable in airplane crash in absence of explanation of cause of crash); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (permitting liability in case in which bottle exploded in plaintiff's hand); *Anderson v. Serv. Merch. Co.*, 485 N.W.2d 170 (Nev. 1992) (permitting finding of liability in case in which light fixture fell from ceiling).

⁸⁵ *Summers*, 199 P.2d at 4 (acknowledging effect of shifting burden of proof).

⁸⁶ VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 17-2, at 356 nn.17-20 (3d ed. 1994).

wrongful activity.⁸⁷ Even those states that would otherwise allocate the burden to the plaintiff would do well to shift it to the wrongdoer in a mass subrogation action of the kind being brought by the Blue Cross plans.

The issue of reliance in fraud and misrepresentation claims (either common law or RICO) may also be amenable to judicial burden shifting. Courts have frequently accepted conclusive or rebuttable presumptions of reliance in consumer fraud cases.⁸⁸ In securities fraud class actions, the Supreme Court has permitted the use of a "fraud-on-the-market" theory that dispenses with the need for individual proof of reliance on the assumption that false information affects the prices of the security whether the individual investor relies on it or not.⁸⁹ The analogy between smoking and the consumer class actions is closer than that for the securities law, but even the securities situation demonstrates the flexibility of the assignment of burdens, the need to respond to the fact of what realistically can be proved, and the urgency of vindicating social policies against fraud and deceit.⁹⁰

⁸⁷ This description does not fully capture the problem in a modified comparative negligence state, for if the responsibility assigned to the victim equals (or in other states is greater than) 50%, the reduction is 100%. Nevertheless, establishing the percentages that pertain to the smokers and applying the appropriate rule is no easier for the plaintiff than for the defendant. Moreover, the temptation to assign the smoker a percentage of fault equal or greater than 50% diminishes if the trier of fact considers the reality that most smokers become addicted at about age fourteen and that nicotine is an extremely difficult drug to quit. See Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 485, 499-506 (1998) (providing information about nicotine addiction and discussing its impact on assignment of fault to smokers). As indicated below, expert opinion and statistical support would be the most sensible way to approach the issue whether the burdens fall on the plaintiff or the defendant.

⁸⁸ See, e.g., *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998) (allowing inference of reliance by entire class regarding marketing of insurance policies); *Stellema v. Vantage Press, Inc.*, 109 A.D.2d 423, 425-26, 492 N.Y.S.2d 390, 393 (1st Dep't 1985) (noting that reliance could be presumed in class action regarding publication contracts). Reliance is not necessarily an element in state consumer fraud statutory actions, see *Group Health Plan*, 621 N.W.2d at 13; *Stutman v. Chemical Bank*, 731 N.E.2d 608, 612 (N.Y. 2000), though something akin to it may need to be shown to establish causation, see *Group Health Plan, Inc.*, 621 N.W.2d at 13-14.

⁸⁹ *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

⁹⁰ See generally Hal S. Scott, Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 348-71 (1971) (discussing relationship between nature and use of class action device and development of fraud-on-the-market reasoning in lower courts).

B. *Use of Statistical Evidence*

At the outset, the *Empire* plaintiffs announced their intention to rely on statistical evidence and expert opinion in proving their direct injury and subrogation claims, and Judge Weinstein commented at length on his belief that use of that approach satisfies due process and jury trial entitlements.⁹¹ I have discussed elsewhere the due process and related issues in the conduct of mass tort trials,⁹² and would merely emphasize here that a subrogation action of the Blue Cross type is a far more appropriate candidate for mass trial techniques, such as statistical inference, than is a class action product liability case. The participation concerns of the individual claimants either are nonexistent, may be deemed satisfied by the contractual subrogation provision, or may be met by limited intervention in the trial proceedings.⁹³ The concern of defendants for an accurate determination is more clearly met in a mass determination made with sophisticated statistical tools than even in individual litigation.⁹⁴ Discussing the tobacco companies' proportional responsibility for the cost of treating conditions such as lung cancer, heart disease, and other maladies, the Seventh Circuit Court of Appeals commented that "[s]tatistical methods could provide a decent answer—likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit."⁹⁵

⁹¹ *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 113 F. Supp. 2d at 372-76. The court extended the analysis to state law objections to proof of the state law claims by the same means. *Id.* at 379-80. The *Empire* opinion makes the same points about due process and jury trial, though it focuses on state law consumer fraud claims supporting the \$17 million verdict. *Empire*, 2001 WL 1304370, at *46-*52.

⁹² See Weber, *supra* note 1, at 1011-14; Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DEPAUL L. REV. 463, 473 (1998); cf. Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 LOY. U. CHI. L.J. 959, 973-74 (1996) (discussing procedural mechanisms used in Illinois).

⁹³ See generally Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74-76, 82-86 (explaining participation concerns of claimants in mass tort proceedings).

⁹⁴ See Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 825-26 (1992) (discussing benefits of use of statistical inference in mass tort cases); cf. *Hilao v. Estate of Marcos*, 103 F.3d 767, 787 (9th Cir. 1996) (approving use of statistical methods of proof in class action over human rights violations).

⁹⁵ *Int'l Bd. of Teamsters*, 196 F.3d at 823. A subrogation action, which relies on this measure of damages, is thus a much easier action to sustain than the direct injury

C. *Economies of Scale and Magnitude of Recovery*

A power imbalance affects smokers' actions against the tobacco companies because the tobacco defendants can mass resources against individual plaintiffs. Of course, the tobacco industry has a legal right to defend itself as vigorously as it can afford to do, which is very vigorously indeed. But a party that takes advantage of its litigation power can hardly complain when a new opponent adopts its own tactics. That is what the insurers have done. The Blue Cross plans are large enterprises with the ability to finance protracted litigation, even if their resources still do not quite match those of the tobacco defendants. The Blue Cross plans have combined their purses and taken advantage of economies of scale in litigating the cases. Empire's success on its subrogation claim shows what sophisticated legal advocacy can accomplish. If the *Empire* subrogation verdict withstands appeal (even if the direct injury claim fails) and other Blue Cross companies succeed, perhaps with still larger awards, the aggregated recoveries may even threaten the profitability of Big Tobacco.⁹⁶

The tobacco companies' reaction to the rare victories of individual smokers is revealing. After the award of \$3 billion in an individual smoker's suit this June,⁹⁷ a stock analyst downplayed the significance of the verdict, predicting it would be overturned on appeal.⁹⁸ The analyst noted, however, that the industry is worried about aggregate cases, such as those filed as class actions or by third parties. "Tobacco companies won seven cases in a row before this one," the *New York Times* quoted the analyst. "The real challenge, in our opinion, are the aggregate suits."⁹⁹ Aggregated subrogation actions provide the opportunity for a fair fight between a powerful representative

action that the court rejected on the ground that the ultimate gain or loss to the insurer itself is nonexistent or impossible to measure. *Cf. id.* at 824-27 (asserting that gain or loss from smoking diseases to medical intermediaries is indeterminate or does not occur).

⁹⁶ See Weber, *supra* note 1, at 1009-14 (describing effect of aggregate tobacco litigation in balancing plaintiff and defendant resources and bringing all claims to the head of the trial queue).

⁹⁷ See Sterngold, *supra* note 67, at A14; see also <http://www.foxnews.com/story/0,2933,26611,00.html>; <http://www.usatoday.com/news/nation/june01,2001-06-06-smoke.htm>.

⁹⁸ See Sterngold, *supra* note 67.

⁹⁹ *Id.*

of those injured by tobacco and powerful companies that claim that the responsibility is not theirs.

CONCLUSION

Subrogation claims by health care insurers against Big Tobacco deserve the serious attention of the litigants, the courts, and those of us who comment from the sidelines. The claims are the logical outgrowth of the effort to recover for the losses inflicted by tobacco, and may be squared, though not without some challenges, with RICO and state law principles. If they prove successful, subrogation claims will present still more questions for courts and scholars about the measure of recovery and allocation of proceeds.

EDWARD V. SPARER PUBLIC INTEREST
LAW FELLOWSHIP SYMPOSIUM:
ROAD BLOCKS TO JUSTICE:
CONGRESSIONAL STRIPPING OF
FEDERAL COURT JURISDICTION

INTRODUCTION*

Eve Cary†

Brooklyn Law School's annual Edward V. Sparer Public Interest Law Fellowship Symposium held on April 5, 2001 was entitled "Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction." The topic was three pieces of federal legislation passed in 1996 and signed into law by President Clinton. These were the Anti-terrorism and Effective Death Penalty Act ("AEDPA"),¹ the Prison Litigation Reform Act ("PLRA"),² and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").³ Essays on this legislation by the Symposium panelists, James Liebman, John Boston, and Lee Gelernt follow this introduction.

AEDPA was designed to place often insurmountable procedural barriers before prisoners seeking federal court review of the constitutionality of their imprisonment or death sentences. It places a one-year time limit from final judgment in state court on filing a petition for a writ of habeas corpus,⁴

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¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

² Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

³ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

⁴ Pub. L. No. 104-132, § 101, 110 Stat. 1214 (1996).

limits the number of successive petitions that a prisoner may file,⁵ and restricts the circumstances under which a judgment of conviction may be overturned.⁶ AEDPA also eliminates judicial review of deportation and exclusion orders and expands the definition of “aggravated felonies” to permit the deportation of legal resident aliens who have committed minor crimes long in the past.⁷

PLRA’s purpose was to make it more difficult (some would say impossible) for prisoners to obtain redress in federal court for constitutionally impermissible conditions of confinement. The Act, among other provisions, effectively bars from court indigent prisoners who have previously filed “frivolous” law suits by imposing prohibitive filing fees;⁸ dictates the explicit findings that courts must make to remedy unconstitutional prison conditions;⁹ prohibits money damages for “psychological” harm;¹⁰ and automatically terminates orders granting relief in prison conditions cases.

Finally, IIRIRA eliminates judicial review of deportation orders in any court, and removes jurisdiction from all courts to hear any claim by any noncitizen arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any noncitizen.¹¹

This trio of Acts shares two common features. The most obvious feature is their applicability only to two vulnerable and politically powerless groups of people: prisoners and immigrants. The second is their interference with the historic role of the federal courts to provide remedies to those whose constitutional rights have been violated by acts of the other branches of government. The personal suffering caused by the inability to obtain an impartial hearing of a claim of injustice is incalculable. One can only imagine the despair of a death row inmate who realizes that his right to obtain federal review of his conviction or sentence has been forfeited by his inexperienced (or

⁵ Pub. L. No. 104-132, § 106, 110 Stat. 1214 (1996).

⁶ Pub. L. No. 104-132, § 104, 110 Stat. 1214 (1996).

⁷ Pub. L. No. 104-132, § 440, 110 Stat. 1214 (1996).

⁸ 28 U.S.C. § 1915 (2001).

⁹ 18 U.S.C. § 3626 (2001).

¹⁰ 42 U.S.C. § 1997e(e) (2001).

¹¹ 8 U.S.C. § 1252 (2001).

lazy or drunk or sleeping) lawyer's failure to meet the abbreviated deadlines or to take the complicated procedural steps required by AEDPA. Nearly as tragic is the plight of the immigrant who, after living legally in the United States since infancy, finds that, as a result of a minor crime committed decades ago, he or she must, by the unreviewable order of the Attorney General, be separated from family and friends and deported to a distant, unfamiliar, and probably poverty-stricken country where they speak a strange tongue.

Even worse than these individual costs, however, is the lasting damage that AEDPA, PLRA, and IIRIRA do to the system of separation of powers that has for centuries served so well to protect the rights of the individual against governmental overreaching. When so many other countries, from England to Eastern Europe to South Africa, are realizing the crucial role that an independent judiciary plays in the creation and maintenance of a constitutional democracy that respects human rights, it is ironic that our own Congress is manipulating federal jurisdiction to cut back on those rights.

Questions that arises naturally are: what purpose was this legislation designed to serve? What evil was it supposed to prevent? One answer has been that the federal courts are flooded with frivolous lawsuits by prisoners and that this tide must be stemmed. As James Liebman and John Boston discuss, however, this is simply not the case. Moreover, the complicated and incomprehensible procedures mandated by both AEDPA and PLRA have, in fact, increased litigation and lengthened the time that inmates convicted of capital crimes remain on death row.

New York Times columnist Anthony Lewis, who has written frequently about jurisdiction-stripping, told of a German-born woman who immigrated to the United States when she was one-year old and faced deportation because she had, two decades earlier, pled guilty to pulling another woman's hair in a squabble over a boyfriend. "What's the point?" Lewis asked rhetorically. "Who would want to bother prosecuting someone because twenty years before she pled

guilty on the advice of counsel to a misdemeanor?”¹² There does not appear to be a satisfying answer.

Massachusetts District Court Judge Nancy Gertner, speaking at a recent ACLU conference, suggested that the purpose of jurisdiction-stripping legislation is to curb an “activist” judiciary. She went on to criticize this suggestion by pointing out that in the areas of immigrants’ and prisoners’ rights, the federal courts had not been at all “activist” for decades. Indeed, she said, “when you look at these areas, the courts had stripped themselves long before President Clinton did it and long before Congress did it.”¹³

Judge Gertner’s explanation for why Congress has passed such unnecessary and harmful legislation is dispiriting. She said,

What’s happened here is the politics of demonology. This is the demonizing of the most vulnerable among us and . . . this happened when nobody was looking. It wasn’t necessary for the workload of judges, it wasn’t necessary to enact this legislation for the fanaticism of the federal courts. It was pure symbolism. And it is symbolism which unfortunately has real and substantial consequences to the human beings who pass in front of us.¹⁴

A 1998 survey indicates that the members of Congress who voted to pass AEDPA, PLRA, and IIRIRA may not in fact have understood their constituents’ views. The great majority of Americans—some 67%—believe that it is more important to protect the rights of individuals than to follow what the community as a whole wants.¹⁵ They also believe, however, that individual rights are adequately protected.¹⁶ Moreover, the same survey showed that the American public knows very little

¹² Anthony Lewis, Remarks at Blocking the Courthouse Doors: Contemporary Congressional Limits on Federal Jurisdiction, Harvard Law School (Mar. 10, 2001).

¹³ Hon. Nancy Gertner, Remarks at Blocking the Courthouse Doors: Contemporary Congressional Limits on Federal Jurisdiction, Harvard Law School (Mar. 10, 2001).

¹⁴ *Id.*

¹⁵ American Civil Liberties Union, Defending the Integrity and Restoring the Jurisdiction of Federal Courts: A Proposal from the Public Education Department of the American Civil Liberties Union Foundation (Mar. 10 2001) (presented at conference entitled “Blocking the Courthouse Doors: Contemporary Congressional Limits on Federal Jurisdiction,” co-sponsored by Harvard Law School and the ACLU).

¹⁶ *Id.*

about the federal courts.¹⁷ Thus, it is not surprising that this legislation was passed “when no one was looking.” But as DNA evidence has revealed the legal system’s unreliability, the shift in public opinion on the fairness of the death penalty over the last year has shown that public education can be effective. Thus, there may be reason to hope that the trend in Congress may be reversed through the hard work of lawyers like the Sparer panelists to challenge jurisdiction-stripping legislation and to increase public awareness that such laws exist and pose a danger to all of us.

An optimistic note: At the time that the Sparer forum took place, panelist Lee Gelernt was busy working on the ACLU’s Supreme Court briefs in *Calcano-Martinez v. Immigration and Naturalization Service*¹⁸ and *Immigration and Naturalization Service v. St. Cyr*,¹⁹ which challenged provisions of IIRIRA and AEDPA. Both cases were decided on June 25, 2001. In *Calcano-Martinez*, the Court held that while the federal courts lack the power of direct review over deportation decisions by the INS, the jurisdiction-stripping provisions of IIRIRA do not apply to habeas corpus petitions.²⁰ In *St. Cyr* the Court held that neither AEDPA nor IIRIRA deprived the federal courts of jurisdiction to review the habeas corpus petitions of immigrants challenging orders for their deportation.²¹ The Court also held that the statutory provisions mandating the automatic deportation of immigrants who had been convicted of particular crimes were not retroactive.²²

¹⁷ *Id.*

¹⁸ 121 S. Ct. 2268 (2001).

¹⁹ 121 S. Ct. 2271 (2001).

²⁰ *Calcano-Martinez*, 121 S. Ct. at 2270.

²¹ *St. Cyr*, 121 S. Ct. at 2278-80, 2283-87.

²² *Id.* at 2275-78, 2283-84.

AN “EFFECTIVE DEATH PENALTY”? AEDPA AND ERROR DETECTION IN CAPITAL CASES*

James S. Liebman†

INTRODUCTION

On June 11, 2001, the United States of America executed Timothy McVeigh.¹ Dwarfed among the many unspeak-

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¹ See *Execution Was “Justice,”* USA TODAY, June 12, 2001, at D7 (reprinting President George Bush’s statement on Timothy McVeigh’s execution).

This Article is a revised version of a lecture delivered at the Brooklyn Law School Edward V. Sparer Public Interest Law Fellowship Symposium on April 5, 2001. At that point, McVeigh was forty days away from his scheduled execution on May 16, 2001. Five days before that execution, however, the FBI revealed that it had discovered thousands of pages of documents that the Government improperly had failed to turn over to McVeigh and his lawyers before trial. This “monumental foul-up,” to quote Tom Brokaw on the evening news the night the FBI announced its discovery, led McVeigh’s execution, which had been the subject of a monumental build-up by the media, to be postponed for close to a month. See *NBC News: Nightly News, Newscast: Justice Department Postpones Timothy McVeigh Execution* (NBC television broadcast, May 11, 2001), available at 2001 WL 24022866:

TOM BROKAW, anchor: In Terre Haute, Indiana tonight, Timothy McVeigh, the man who described the dead children of Oklahoma City as, quote, “collateral damage,” that Timothy McVeigh has had his life extended. His execution as the Oklahoma City bomber has been postponed until June 11th as a result of a monumental foul-up by the FBI. McVeigh’s defense lawyers failed to get thousands of pages of evidence from the FBI. And so Attorney General John Ashcroft ordered the postponement. McVeigh’s lawyers also say their client might now fight execution.

Although up to that point, McVeigh had asked to waive all legal proceedings and be executed, the disclosure of the FBI documents led him to request a further stay of execution to give him time to litigate issues he claimed were presented by the documents. After a federal judge refused the request and a court of appeals panel affirmed the decision, McVeigh again decided to forgo all further legal challenges to his execution, see Jo Thomas, *McVeigh Prepares for Death and Awaits Move from Cell*, N.Y.

able evils that Mr. McVeigh wrought is a speakable one I will address here, namely, the so-called Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).²

Abbreviated, AEDPA’s political history is as follows: In November 1994, the “Gingrich Congress” was elected on its *Contract with America* platform. One of the planks of that platform—one of the few that actually ended up passing Congress—was the so-called “Effective Death Penalty Act.” That proposal had little to do with the death penalty and, originally, nothing to do with terrorism. What it instead proposed were drastic cuts in federal habeas corpus review of capital and non-capital criminal convictions.

First introduced in January 1995, the bill was moving through Congress no more quickly than any other part of the *Contract* when, on April 19, 1995, Timothy McVeigh’s bomb exploded in front of the Murrah Federal Building in Oklahoma City. The blast killed 168 people, including nineteen children in a day care center at ground zero. Within hours, McVeigh was spotted careening down an Oklahoma interstate highway without license plates, and arrested. Within days, the President (quite publicly and explicitly) and most other Americans (rather more quietly) had resolved that McVeigh’s punishment must be death, and hunkered down to await the imposition and execution of that verdict. And within weeks, Republicans in both Houses of Congress had attached the Effective Death Penalty Act to a version of a Clinton administration proposal for an Antiterrorism Act, and renamed the resulting proposal the Antiterrorism and Effective Death Penalty Act.³ I discuss below the cynicism of that particular

shotgun political marriage, but its effect was to set the legisla-

TIMES, June 9, 2001, at A7, which was carried out according to his wishes on June 11, 2001. See Rick Bragg, *McVeigh Dies for Oklahoma City Blast*, N.Y. TIMES, June 12, 2001, at A1.

² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in amendments to 28 U.S.C. §§ 2244-2267 (1996)) [hereinafter AEDPA].

³ For a useful discussion of this and other aspects of AEDPA’s legislative history, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422-42 (1996). See also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4-22 (1997) (providing additional discussion of AEDPA’s legislative history).

tive sled careening down the hill.

AEDPA's death penalty provisions were radical, and the bill quickly encountered opposition. The Senate scheduled the key vote on a bipartisan amendment to strike the worst aspects of the death penalty provisions for June 7, 1995. Those amendments were strongly supported by William Cohen, the Republican Senator from Maine, and they had enough Republican support to pass, if the Senate Democrats held firm.⁴ On the evening of June 6, 1995, however, President Clinton went on CNN talk show *Larry King Live* and announced that he was satisfied with the *un*-amended bill.⁵ The next day, five Democratic Senators defected, and the amendments were defeated by a four vote margin.⁶

When the bill encountered similar resistance in the House in the spring of 1996, President Clinton again came to its rescue, demanding its passage by the April 19 anniversary of McVeigh's bombing.⁷ Again, wavering Democrats obliged the President, though they missed his deadline by a week.

AEDPA, thus, was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh's twisted patriotism and disdain for "collateral damage," the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.

I. THE ACT

A. *An Irony*

Timothy McVeigh was, of course, a *federal* prisoner exe-

⁴ See, e.g., 141 CONG. REC. S7838-S7839 (daily ed. June 7, 1995) (statement of Sen. Cohen).

⁵ See 141 CONG. REC. S7877 (daily ed. June 7, 1995) (statement of Sen. Bob Dole) (commending President Clinton, based on his statements on *Larry King Live*, "for finally coming around to the view that habeas reform is an essential ingredient of any serious anti-terrorism plan").

⁶ See 141 CONG. REC. S7850 (daily ed. June 7, 1995) (reporting Senate vote on key amendment to remove what became 28 U.S.C. § 2254(d)(1) from the bill, which was defeated by a 53-46 margin).

⁷ *Clinton Hits Congress for Inaction on Terrorism Bill*, AGENCE FRANCE-PRESSE, Apr. 13, 1996, 1996 WL 3837617 ("President Bill Clinton on Saturday used the approaching anniversary of the Oklahoma City bombing to slam the U.S. Congress for failing to pass anti-terrorism legislation.").

cuted under the authority of the United States. Yet, the death penalty process that AEDPA undertakes to make more “effective” is, by and large, the one available for federal court review of *state* criminal convictions and sentences. Indeed, federal capital prisoner McVeigh was *twice* removed from the category of prisoners who suffer AEDPA’s most disastrous “collateral damage,” namely *state* prisoners serving *noncapital* sentences. Although AEDPA’s many complications and interpretive conundrums are, at times, a boon to relatively well-represented capital habeas corpus petitioners, they are a nightmarish obstacle course for unrepresented (i.e., for the vast majority of) noncapital petitioners.⁸ Ironically, therefore, Congress sold AEDPA to the public on the ground that it would deprive Timothy McVeigh of the type of post-conviction review that, as a *federal capital* prisoner, he was never in a position to receive. Moreover, even if McVeigh had been granted that review, he had every intention of waiving it in his self-proclaimed quest for a swift and public martyrdom at the hands of his obliging government oppressors.

B. *Some Background*

So, what did AEDPA do to make the death penalty more “effective” in the thirty-eight states that use it?⁹ Here, again, some background is important.

As long as there have been federally enforceable protections for state criminal defendants in the United States, its statutes have provided convicted defendants with a right, on demand, to plenary review on the merits in an Article III court of any claimed deprivation of those protections.¹⁰ I state the

⁸ Capital habeas prisoners represent a minuscule proportion of the federal habeas corpus petitions filed each year. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2043-44 n.64 (2000) (documenting that only about 200 (2%) of the approximately 10,000 federal habeas petitions filed each year involve prisoners sentenced to death).

⁹ The states with the death penalty are: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

¹⁰ See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055-94 (1992).

point categorically because, on the eve of AEDPA's adoption, it was a categorical legal fact. Since 1867 in many such cases, and since the second decade of the twentieth century in nearly all such cases, federal habeas corpus has been the mechanism for providing convicted prisoners with plenary review as of right of claimed deprivations of federal legal protections.¹¹

Since its inception in thirteenth century England, habeas corpus has been a principal mechanism for testing the legality of custody at the hands of the state. During most of that period, habeas corpus was defined by two fundamental principles: First, there were no time limits on a prisoner's capacity to test the legality of his incarceration. Second, *res judicata* did not apply. No matter how many prior petitions had failed, the prisoner could try, try again.¹²

By 1995, the U.S. Supreme Court had cut back on the *res judicata* principles when state prisoners sought successive *federal* court review of the legality of state convictions. Yet, until 1996 the Court held firm to two principles. First, there were no time limits on federal habeas review.¹³ Second, a *state* court's prior adjudication of the legality of a state prisoner's conviction or sentence had *no binding legal effect* on the federal court's obligation to independently assess the legality of state action leading to incarceration, and to grant relief if the action was inconsistent with federal law in effect when the action occurred.¹⁴

This is not to say that, before 1996, the Supreme Court had placed no limits on habeas review. On the contrary, in addition to limits on successive federal challenges to state custody,¹⁵ the Court enforced a strict procedural default bar on claims and evidence not properly preserved in state court pro-

¹¹ See *id.* at 2063-81.

¹² On the history of habeas corpus in this regard, see 2 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 28.2(a)-(b) n.3 (3d ed. 1998) (discussing history of treatment of successive habeas corpus petitions in England and United States).

¹³ See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (reiterating that the filing of habeas corpus petitions was not subject to time limits).

¹⁴ See, e.g., *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring); *Miller v. Fenton*, 474 U.S. 104, 110-11 (1985); *Brown v. Allen*, 344 U.S. 443, 458 (1953).

¹⁵ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 318-19 (1995); *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991).

ceedings,¹⁶ and confined habeas appeals to substantial federal questions.¹⁷

C. *Some Provisions of AEDPA*

In 1996 came the Effective Death Penalty Act.¹⁸ It included the following five preclusive provisions, listed here from least to most significant:

First, AEDPA made it even harder for state prisoners to appeal district court denials of habeas relief.¹⁹ Second, the Act made the Supreme Court's already strict standard for filing second or successive federal petitions challenging a state criminal verdict nearly impossible to satisfy.²⁰ Third, the Act made it even harder for the prisoner to present facts in federal court that his or her lawyer had (even incompetently) failed to present in state court.²¹

Fourth—and here, I think, Congress' cleaver moved from flesh to bone—AEDPA imposed a one year statute of limitations on the filing of federal habeas corpus.²² As I have already mentioned, this time bar was unprecedented in the history of habeas corpus. Even worse, states can easily lure prisoners into missing the time bar simply by withholding lawyers from them at the state post-conviction stage of review. This is because of what may be called “Catch-22, AEDPA-style,” which goes something like this:

Rule 22-A: You may not get habeas relief unless you take no more than one year after direct appeal to file a federal habeas petition. But there's a catch, *22-A:* You cannot go directly and rapidly from state direct review to federal habeas review. Instead you must first file a state post-conviction petition in order to exhaust your state remedies.²³

Rule 22-B: Luckily, once you file a state post-conviction

¹⁶ See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986).

¹⁷ See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983).

¹⁸ AEDPA, *supra* note 2.

¹⁹ 28 U.S.C. § 2253(c) (West 1994 & Supp. 2001).

²⁰ *Id.* §§ 2244(a), 2244(b).

²¹ *Id.* § 2254(e)(2).

²² *Id.* § 2244(d).

²³ *Id.* §§ 2254(b), 2254(c).

petition, that stops the one-year statute of limitations from running.²⁴ But there is a catch here, as well—in fact, there are four catches: *Catch 22-B-1*: The statute of limitations is not tolled until you actually file a state post-conviction petition.²⁵ *Catch 22-B-2*: To secure that tolling protection and to exhaust your state remedies, any state post-conviction petition you file must be “properly filed,” and it must raise all the claims you want reviewed on federal habeas.²⁶ *Catch 22-B-3*: Properly filing that petition, and raising all the necessary claims, requires a lawyer.²⁷ *Catch 22-B-4*: Neither AEDPA, nor the U.S. Constitution, nor state law in most states, gives you a right to the lawyer you need to navigate the other three catches—or even to understand that they exist in the tangled verbal thicket that is AEDPA.²⁸

This description of AEDPA is neither fanciful nor hypothetical. At this moment, there are more than thirty prisoners on death row in Alabama who have not yet received—and now may be time-barred from receiving—any *state* or *federal* post-conviction review of their death sentences due to the lack of any lawyers to represent them.²⁹

That’s not all. There is, in addition, a fifth and yet more preclusive AEDPA provision: 28 U.S.C. § 2254(d)(1).³⁰ Section 2254(d) provides that a federal habeas judge (1) who has jurisdiction to determine the legality of a state court criminal verdict, and (2) who finds that the state court imposed that verdict in violation of the U.S. Constitution as interpreted at the time of the state court’s ruling, nonetheless cannot deprive that unconstitutional state court decision of its legal force and effect—unless the federal court concludes that the state decision was not just wrong as a matter of federal law, but was *unreasonably* wrong.³¹ Sometimes, that is, a federal court will have jurisdiction to review a state court decision of law, will conclude

²⁴ 28 U.S.C. § 2244(a)(2).

²⁵ *Id.*

²⁶ *Id.* See *Rose v. Lundy*, 455 U.S. 509 (1982).

²⁷ 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 7.2 (4th ed.) (forthcoming 2001).

²⁸ See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989).

²⁹ *Death Row Inmates Lack Lawyers, Says Legal Agency*, BIRMINGHAM NEWS, Mar. 25, 2001, <http://www.bhamnews.com> (last visited Feb. 8, 2002).

³⁰ 28 U.S.C. § 2254(d)(1).

³¹ See *id.*, as interpreted in *Williams v. Taylor*, 529 U.S. 362, 403-05 (2000).

that the decision violated supreme federal law, and yet will be required to give legal effect to that illegal decision, including where the effect is a human being's execution.

D. *The Last Provision's Unconstitutionality: An Example*

Suppose, for example, a retarded man, let's call him John Paul Penry, is on death row in Texas. When he was first tried capitally, his jury was told of his substantial retardation but was then given oral and written instructions to sentence him to die if the jurors answered three questions in the affirmative. None of the questions gave any mitigating effect to a capital defendant's retardation.³²

Suppose that in 1989, Mr. Penry's case reaches the U.S. Supreme Court. The Court holds that the Eighth Amendment's Cruel and Unusual Punishment Clause leaves states free to execute retarded people like Mr. Penry, but *only* if the jury that sentenced him to die was required to give some mitigating effect to his retardation. Because the jury instructions at the state criminal trial withheld that mitigating effect, Mr. Penry's death sentence had to be reversed.³³

Assume further that Mr. Penry gets a new trial at which he presents the *same* evidence of substantial retardation as at the first trial. And suppose the trial judge gives the *same* written instructions: "Sentence Penry to death if you, the jurors, answer three questions in the affirmative," none of which gives any mitigating effect to retardation. Assume as well that the judge gives the same oral instructions, but supplements them with two sentences that someone with twice Penry's I.Q., and with powers of textual interpretation worthy of Antonin Scalia, could understand as follows: "If you want to, jurors, you may rely upon the evidence of retardation as a reason to violate your oath and answer any one of the three questions 'no' even though in point of fact the truthful answer is 'yes.'" Suppose that—needless to say—the jury answers all three questions "yes," and again sentences Penry to die.

On appeal, the state courts affirm, prompting Penry to

³² One of the questions did, however, give aggravating effect to his retardation, making it a good reason to sentence him to die.

³³ See *Penry v. Lynaugh*, 492 U.S. 302 (1989).

petition for a federal writ of habeas corpus, and the case eventually reaches the U.S. Supreme Court a second time. Citing the new § 2254(d), Texas responds that, “You may not exercise your habeas jurisdiction to overturn Mr. Penry’s death sentence, even if you believe it was imposed in violation of the Eighth Amendment as you previously interpreted it in Penry’s earlier case, unless you determine that in addition to being *wrong*, the state court decision was ‘*unreasonably wrong*.’”³⁴

At this point, a Supreme Court Justice, let’s call him Breyer, peers down from the bench over his reading glasses, and asks Texas’s attorney: “You mean to say that if we find that the trial judge violated the U.S. Constitution as we previously interpreted it in this very case, we cannot enforce the Constitution, *or* our own mandate, unless we find that the trial judge acted ‘crazy,’ as well as unconstitutionally? Can that be constitutional?” To which the state’s attorney gives his slam dunk reply: “Yes, your honor, that is precisely what Congress provided when it adopted section 2254(d). And it surely is constitutional because that’s just how this Court interpreted the provision last year in a case called *Williams v. Taylor*.”³⁵

The *Penry* case is not my invention, of course, but a real case recently argued in the Supreme Court for the second time, under the circumstances as I described them.³⁶ And in a case decided last year called *Williams v. Taylor*,³⁷ the Supreme Court indeed interpreted § 2254(d) to limit habeas corpus relief to only “unreasonable” constitutional violations—while declining to give Mr. Williams’ constitutional objection to that interpretation the time of day.³⁸

But *Williams* notwithstanding, there is a serious constitutional problem with the Court’s interpretation of § 2254(d).³⁹

³⁴ The quoted statement is a paraphrase of Transcript of Oral Argument, *Penry v. Johnson*, No. 00-6677, available at 2001 U.S. Trans. LEXIS 31, at *40-41 (Mar. 27, 2001).

³⁵ *Id.* (statement by Justice Breyer during oral argument that “I’m worried about the implications” for “the authority of this Court in criminal cases” if section 2254(d)(1) is interpreted and employed in a manner that results in the Supreme Court’s “issu[ing] mandates and . . . those mandates could be ignored by a state as long as the way in which the state ignores the mandate commends itself to some reasonable . . . lawyer . . . though most reasonable lawyers decide the contrary.”).

³⁶ 532 U.S. 782 (2001).

³⁷ 529 U.S. 362 (2000).

³⁸ *Id.* at 405-06.

³⁹ See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The*

Let me briefly explain why that is so, based on a careful study of the drafting of the Constitution⁴⁰ and of the Court's Article III jurisprudence since then.⁴¹

As the likes of James Madison, Alexander Hamilton, and James Wilson structured the Constitution, and as the Court's classic separation of powers decisions have understood and maintained that structure ever since, the most fundamental role of Article III courts is to assure that state law, including state decisional law, does not contravene the U.S. Constitution and other federal law.⁴² As Hamilton wrote in *The Federalist No. 80*, Article III courts' principal role is to exercise "some effectual power . . . to restrain or correct" state court "infractions" of federal law and thereby to enforce the Supremacy Clause of the Constitution.⁴³ According to the Supremacy Clause: "This Constitution and the Laws of the United States . . . and all Treaties...shall be the supreme Law of the Land, and the *Judges in every State shall be bound* thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."⁴⁴

The Court has repeatedly construed these provisions in such landmark cases as *Marbury v. Madison*,⁴⁵ *Martin v. Hunters Lessee*,⁴⁶ *Cohens v. Virginia*,⁴⁷ *Abelman v. Booth*,⁴⁸ *Crowell v. Benson*,⁴⁹ and *Yakus v. United States*.⁵⁰ Together, these decisions define the core attribute of the federal-supremacy-inflected "judicial power" that Article III insulates from congressional control or limitation. That core attribute is a federal court's "effectual power," when granted jurisdiction over a matter, to deny force and effect to state decisional and other law of the land as of the time the state law was made.⁵¹ And yet, as

Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696 (1998).

⁴⁰ *See id.* at 705-73.

⁴¹ *See id.* at 773-850.

⁴² *Id.* at 705-72.

⁴³ THE FEDERALIST No. 80, at 445 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁴⁴ U.S. CONST. art. VI, cl. 2 (emphasis added).

⁴⁵ 5 U.S. (1 Cranch) 137 (1803).

⁴⁶ 14 U.S. (1 Wheat.) 304 (1816).

⁴⁷ 19 U.S. (6 Wheat.) 264 (1821).

⁴⁸ 62 U.S. (21 How.) 506 (1859).

⁴⁹ 285 U.S. 22 (1932).

⁵⁰ 321 U.S. 414 (1944).

⁵¹ *See* Liebman & Ryan, *supra* note 39, at 773-850.

Justice Breyer seemed to recognize at the *Penry* oral argument,⁵² it is precisely that “effectual power” that § 2254(d), as interpreted in *Williams*,⁵³ withholds from federal habeas courts.⁵⁴

II. THE PRACTICAL EFFECT: AEDPA AND ERROR DETECTION

I could say more about the impressive constitutional authority that lines up against the interpretation of § 2254(d) in *Williams*.⁵⁵ Instead, I want to use the results of a study of the death penalty in the United States, from 1973 to the eve of AEDPA’s adoption in 1995,⁵⁶ to assess the extent to which all five of AEDPA’s preclusive provisions contribute to the “effective death penalty” to which AEDPA aspires.

A. *Was the Death Penalty “Safe and Effective” Prior to AEDPA?*

“Effectiveness” conjures up images of productivity. So, for a moment, consider the death penalty as a system that generates a product—death verdicts—that, if made correctly, are a reliable and effective means of imposing that penalty on only those offenders for whom state and federal law permit death as a punishment. One method used by enterprises to measure the reliability and effectiveness of their products is to track the results of their own quality-control inspections and their products’ consequent success and scrap rates.

In June 2000, my colleagues and I published a study using this same method to gauge the reliability and effectiveness of the death penalty in the United States from 1973 to 1995.⁵⁷ During that period, nearly 6,000 death sentences rolled down

⁵² See *supra* note 36 (quoting Justice Breyer’s concern).

⁵³ *Williams*, 529 U.S. at 405-06.

⁵⁴ See Liebman & Ryan, *supra* note 39, at 864-84.

⁵⁵ See *id.*

⁵⁶ James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), [hereinafter *A Broken System*], available at http://www.law-columbia.edu/instructionalservices/liebman/liebman_final.pdf, abridged and reprinted in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839 (2000) [hereinafter *Capital Attrition*].

⁵⁷ *Id.*

the penological production lines of thirty-four states towards the three sets of quality control reviews mentioned earlier: direct appeal in state supreme courts, post-conviction review in state trial and appellate courts, then habeas corpus review in federal trial and appellate courts.⁵⁸

A painstaking count of the results of that three-stage inspection process revealed that forty-one percent of the nearly 4,600 death verdicts reviewed on direct review were sent back due to findings of reversible error. Of the fifty-nine percent of those verdicts that went on for a second inspection, at least ten percent more were sent back to be reworked or scrapped, leaving about fifty-three percent of the original death sentences available for the third and final inspection. Of these an additional forty percent were found to be too flawed to carry out.⁵⁹ Overall only thirty-two percent of the original capital judgments were approved for execution, while sixty-eight percent were reversed.⁶⁰ Error rates were high and persistent across time and space, surpassing fifty percent in all but three years and two states studied.⁶¹

Chronically high error or reversal rates might suggest two conclusions about our death penalty system. First, capital trials are not “safe” because they do not provide a reliable mechanism for identifying the murders for which death is a proper punishment. Second, our capital system is not “effective” because it is not a satisfactory deterrent or

retributive mechanism for responding to those murders. We concluded that the capital system is “broken” in both these ways.

1. Not Safe

Answers to the following four questions led us to conclude that chronically high reversal rates in capital cases provide strong evidence of an excessive risk that capital verdicts condemn people for crimes they did not commit, or for crimes for which death is not a lawful penalty.

⁵⁸ See *A Broken System*, *supra* note 56, at 18-22, 29.

⁵⁹ See *id.* at 29-30.

⁶⁰ *Id.*

⁶¹ See *id.* at 8.

First, can we trust the inspectors? Do their incentives dispose them to be generous or stingy with their findings of reversible error? That ninety percent of the thousands of reversals were by *elected* state judges,⁶² and that Republican appointees to the federal bench were a majority of the judges voting to overturn the death verdicts in over half of the remaining ten percent of cases,⁶³ suggest that the judges finding reversible error had no undue propensity to overturn trial verdicts absent serious problems.

Second, how serious are the *bases* for reversal? Here, we have data for the second and third inspection stages. At those two stages, seventy-five to eighty percent of the reversals arose from violations requiring the *prisoner* to prove either inherent prejudice or an actual probability that the violation led to the wrong outcome—tough standards that go directly to unreliability. Although we do not have comparable information about the first (state direct appeal) inspection stage, there is no reason to think that the errors it detects are substantially less serious. On the contrary, the first review stage probably screens out many of the most glaring errors.

Third, do outcomes in fact change when errors are cured on retrial? Here, our data are from the state post-conviction

stage, and reveal that on retrial fully eighty-two percent of the reversals resulted in a sentence *less* than death, including seven percent ending in *acquittals*.⁶⁴

Finally, the persistence of error over time, across jurisdictions, and at all three stages of review, suggests serious deficiencies—as does the fact that even three inspections sometimes are not enough. Too often, all three sets of courts have approved men and women for execution whom film makers, reporters, undergraduate students or (in one case) a *burglar* have later shown to be innocent.⁶⁵

⁶² See *id.* at 9.

⁶³ Our data show that appointees of Republican presidents were a majority of the judges at the last stage of review who voted to reverse capital verdicts in fifty-four percent of the federal habeas corpus proceedings in which death verdicts were overturned between 1973 and 1995. (data on file with author).

⁶⁴ See *A Broken System*, *supra* note 56, at 5.

⁶⁵ See Death Penalty Information Center, *Innocence and the Death Penalty*, at

2. Not Effective

The results are no more encouraging from the perspective of the nation's two-third's majority of death penalty supporters, who look to that penalty for swift and sure retribution and deterrence. For, as a result of high error rates and the intensive review needed to catch and cure it, only thirty-two percent of capital verdicts getting full review during the study period were approved for execution.⁶⁶ Even that paltry figure vastly overstates the success rate because most cases at any given time are stuck in the system, awaiting review. During the twenty-three year study period, the average time from sentence to execution was *nine years*.⁶⁷ Taking into account the many cases awaiting review, only about six percent of the death sentences entering the review process during the twenty-three year study period were approved for execution by the courts.⁶⁸ And only five percent of the death sentences were actually carried out during the period.⁶⁹ Moreover, in any given year, including 1999 when the nation lethally injected or electrocuted ninety-eight men and women, the highest number since 1951, it still never executed more than three percent—

and, in a typical year, it only executes about 1.3 percent—of the people on death row.⁷⁰

Presumably, the retributive or deterrent capacity of the death penalty requires something more than a one in twenty chance that any death sentence imposed within a twenty-three year span will actually be carried out during that period. If this is so, then the current system is achieving neither retribution nor deterrence.

<http://www.deathpenaltyinfo.org/innoc.html> (last visited Aug. 30, 2001).

⁶⁶ See *A Broken System*, *supra* note 56, at 30.

⁶⁷ See *id.*

⁶⁸ Of the 5760 death sentences imposed during the study period, 362 (6.3%) were approved for execution by all three levels of reviewing courts. See *id.* at 29-30.

⁶⁹ See *id.* at 29.

⁷⁰ See Liebman, *supra* note 8, at 2063-65 & tbl. 4.

B. *Has AEDPA Enhanced the Safety or Effectiveness of the Death Penalty Since 1996?*

These numbers show that on the eve of AEDPA's adoption, the modern American death penalty was neither safe, in the sense of being a reliable means of identifying the people for whom the law allows the death penalty, nor effective, in the sense of being administered with the swiftness and sureness needed to achieve its penological goals.

What, then, can we expect AEDPA's effect to be on the penalty's safety and effectiveness? I say "expect" because we do not have the data to establish that effect given our study's culmination in 1995, and given the many years it takes to identify cases and document their outcomes. But what we know about the pre-1995 situation and about the AEDPA's design permits a fair prediction of its effect.

Most crucially, as far as we can tell, there have been no systematic trial-level improvements that have coincided with AEDPA's adoption and implementation. On the contrary, in 1995, Congress *defunded* death penalty resource centers that theretofore had assisted capital defense lawyers in about twenty states.⁷¹ The net result of AEDPA, therefore, is to leave intact an already, and perhaps increasingly, flawed production process, while simultaneously complicating, and diminishing the error-detecting capacity of, the quality control process.

⁷¹ See, e.g., Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 84 ("In 1995, Congress weighed in on the need for speedier executions when it eliminated the \$20 million annual budget for Post-Conviction Defender Organization, which had provided some of the most sophisticated and effective counsel for death-row inmates in twenty death-penalty states"); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996). See also, e.g., Editorial, *Death Penalty Blunder*, WASH. POST, July 12, 2001 ("The Virginia Supreme Court has adopted guidelines that effectively slash the fees of court-appointed attorneys in death penalty cases. The move comes at a time when national attention has been focused on the low quality of counsel in capital cases."); *Death Row Takes a Toll on Lawyers: Money, Resources Are in Short Supply*, NEW ORLEANS TIMES-PICAYUNE, Aug. 20, 2001, <http://www.nola.com/t-p/> (last visited Feb. 8, 2001) ("After Congress pulled federal funding for post-conviction appeals in 1996, the number of capital cases in Louisiana kept climbing and defense lawyers working pro bono for death row inmates already were scarce. With urging by the Louisiana Supreme Court, which has put specific death penalty appeals on hold until the defendants had lawyers, the state responded in 1999 and enacted a law that gives those on death row the right to representation. But legislators didn't provide the \$1.3 million they themselves said was needed for the program.").

AEDPA complicates review, first, because of its poor drafting. AEDPA's opaque language has proliferated conflicting interpretations, requiring the Supreme Court to grant certiorari to resolve a conflict in interpretation at least fourteen times since AEDPA's adoption in 1996, nine of them in capital cases.⁷² Justice Souter certainly was right when he said for the Court that, in a world of "silk purse" and "sow's ear" drafting, AEDPA does not belong in the former category.⁷³

AEDPA further complicates matters by adding litigation steps, rather than cutting them. Because of AEDPA, virtually every step of a habeas case now proceeds in three steps, instead of the previous one or two. First, federal habeas courts must decide whether they can even reach the merits;⁷⁴ second, they must resolve the merits—whether the state courts violated the Constitution;⁷⁵ and third, federal courts must decide the § 2254(d) question—whether the violation was "unreasonable."⁷⁶

This proliferation of litigation explains why, since 1996, the average time from death sentence to execution has risen from about nine to over twelve years,⁷⁷ and why the only empirical study of the matter—by a think tank run by the National State Courts Association—found that AEDPA has exhibited an "almost complete lack of success" in moderating the burden habeas corpus petitions place on the states.⁷⁸ Existing evidence suggests, therefore, that as of yet AEDPA has not made the death penalty more "effective," even in the narrow sense of enabling more death verdicts to clear judicial inspection and be carried out more quickly.

In addition, and more critically, the five AEDPA provi-

⁷² See HERTZ & LIEBMAN, *supra* note 27, at § 3.2 (collecting and discussing the relevant cases).

⁷³ *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

⁷⁴ See, e.g., 28 U.S.C. § 2244(d) (creating timing bar to reaching merits, depending upon complex set of rules governing the filing date of habeas petitions).

⁷⁵ See 28 U.S.C. §§ 2241(c)(3), 2254(d), as interpreted in *Williams v. Taylor*, 529 U.S. 362, 404, 412 (2000).

⁷⁶ 28 U.S.C. § 2254(d)(1), as interpreted in *Williams v. Taylor*, 529 U.S. 362, 404, 412 (2000).

⁷⁷ See Bureau of Justice Statistics, U.S. Department of Justice, Bulletin: Capital Punishment 1999, NCJ 184795, at <http://www.ojp.usdoj.gov/bjs/abstract/cp99htm> (last visited June 12, 2001).

⁷⁸ Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POLY 89, 90, 95, 99, 105 (2000).

sions discussed above greatly diminish the reliability of the capital system's review process and of the capital verdicts that the system produces. To see why this is so, suppose AEDPA *had* caused, or eventually *does* cause, a speed-up in executions. Would that by itself mean AEDPA has engendered a more "effective death penalty"? Suppose an airline company found itself plagued by delays due to its aircrafts' frequent failure to pass its battery of pre-flight safety checks. Surely, the vice president in charge of operations would not be permitted to make those operations more "effective" by speeding up and truncating the airline's inspections.

Yet, that is precisely the solution to which AEDPA aspires. Indeed, AEDPA now achieves the worst of all possible worlds: without improving, and probably worsening, the death penalty's "on time" record, AEDPA's reforms have made the system substantially less safe and reliable. How's that as a plan for saving United Airlines, or Value Jet?

C. *A More Effective Solution*

Let me close by stating the nonobvious: Cutting back on post-trial quality control is not the wrong solution. It is simply the *wrong* half of the solution to implement *first*. Making our death penalty system safe, as well as effective, requires that we first improve the reliability of the trial process for producing death sentences, and only then—for the death sentences that emerge from improved trials—adopt the streamlined review that these improvements make possible.

As far as I can tell, there is only one past or current death row inmate whose case approximates that rational solution: Timothy McVeigh. For all one can tell, he had a superb trial, at which he was represented by top-notch defense lawyers, prosecuted by highly professional government lawyers, and watched over by a careful and strong-willed trial judge.⁷⁹

⁷⁹ For discussions of the trial, see, e.g., STEPHEN JONES & PETER ISRAEL, *OTHERS UNKNOWN: THE OKLAHOMA BOMBING CASE AND CONSPIRACY* (1998); LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING* (2001); Stephen Jones & Jennifer Gideon, *United States v. McVeigh, Defending "The Most Hated Man in America,"* 51 OKLA. L. REV. 617 (1998); Peter Amin & Tom Morgenthau, *The Verdict: Death*, NEWSWEEK, June 23, 1997, at 40; *We Did the Best We Could*, NAT'L L.J. June 30, 1997, at A6.

Who, then, can doubt McVeigh's conclusion that there was little to be gained from the review process he chose to waive? But who, also, can doubt the supreme irony that Timothy McVeigh—alone among 3,700 *other* death row inmates⁸⁰—has gotten his wish for the swift, reliable, and effective death penalty that the U.S. Congress in his name has withheld from everyone else?

⁸⁰ NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.*, Spring 2001, at 7, available at <http://www.deathpenaltyinfo.org/DeathRowUSA1.html>.

THE PRISON LITIGATION REFORM ACT: THE NEW FACE OF COURT STRIPPING*

John Boston[†]

INTRODUCTION

One of the pillars of civic pride in the United States is the idea of equal justice under law. In that light, it is interesting to contemplate the Prison Litigation Reform Act (“PLRA”),¹ which is explicitly dedicated to creating unequal justice under law, and does so by establishing a code of special restrictive rules for one unpopular group of litigants. Indeed, in typescript the PLRA comprises twelve rather closely spaced pages dedicated to the purpose of making it more difficult for prisoners to get into court and, once there, harder to get relief on claims concerning the conditions of their confinement.

But for purposes of this discussion, it may be more appropriate to describe the PLRA as representing what may become the new face of court stripping. In the past, debate about court stripping was usually framed in terms of Congress’s ability to take away federal court jurisdiction over certain kinds of

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¹ Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

constitutional claims, or certain kinds of remedies for constitutional violations—i.e., to put them out of bounds and off limits.²

The PLRA takes what might be described as a more nuanced approach. On the surface, at least, it does not draw lines and erect walls so much as it sets new standards and establishes new procedures. But a study of the statute and its consequences will show that its effects may well be as devastating to the enforcement of constitutional rights as the simple yes/no, on/off restricting-jurisdiction approach that marked prior efforts at court stripping.

Much of the PLRA is not properly described as concerning court stripping, at least in any direct way. It is about litigant stripping. The statute contains a series of measures addressing the potential plaintiff rather than the court, discouraging prisoners from bringing suit or even barring them entirely. For example, the statute requires indigent prisoners, unlike any other indigent federal court civil litigant, to pay the entire filing fee in installments over a period of time, however long it may take.³ This requirement may not sound particularly consequential until one realizes that prisoners are, as a category, probably the most impoverished people in the United States. A filing fee of \$150 or \$105 represents an enormous commitment of resources for them. Paying off such fees of those amounts over a period of time when they are getting paid pennies an hour, or nothing, for their labor,⁴ or are confined in a segregation unit with no opportunity to work, is a daunting proposition.

Second, the PLRA establishes, uniquely for prisoners challenging prison conditions, a categorical requirement of ex-

² See, e.g., Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981) (citing measures then pending to eliminate federal court authority to rule on state abortion laws or the induction or registration of women for military service).

³ 28 U.S.C. § 1915 (a)-(b) (2001).

⁴ See, e.g., *Tourscher v. McCullough*, 184 F.3d 236, 239 (3d Cir. 1999) (noting prisoners' monthly pay of about \$15); *Jennings v. Lombardi*, 70 F.3d 994, 995 (8th Cir. 1995) (noting lack of pay for prisoners' work in Arkansas); *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988) (noting lack of pay for most prisoners' work in Texas); *Gaston v. Coughlin*, 102 F. Supp. 2d 81, 83 (N.D.N.Y. 2001) (noting daily pay of \$1.55 for prisoner working in food service).

haustion of administrative remedies.⁵ In the abstract, such a requirement may not seem objectionable. However, applied to the mostly uneducated, unsophisticated, and legally uncounselled population of the prisons, the requirement invites technical mistakes resulting in inadvertent non-compliance with the exhaustion requirement, and barring litigants from court because of their ignorance and uncounselled procedural errors.⁶ It also subjects prisoners' right to sue over unconstitutional conduct to the considerable power of prison staff to retaliate against and intimidate prisoners and to manipulate the operation of grievance systems.⁷

⁵ "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

⁶ For example, it is not obvious that a prisoner who seeks only damages for a completed act such as a physical assault must exhaust administrative grievance procedures that do not provide damages, but the Supreme Court so held in *Booth v. Churner*, 532 U.S. 731 (2001). One wonders how many prisoners will manage to learn that rule in the very short time periods allowed by some prison systems for filing grievances. See, e.g., Rhode Island Dep't of Corrections, Policy No. 13.10 DOC (May 20, 1996), at 3 (allowing three days); Metro Dade (Florida) Dep't of Corrections and Rehabilitation, D.S.O.P. No. 15-001 (January 9, 1995) at 2, 4-5 (allowing three working days to file, forty-eight hours to appeal). Prisoners' claims have also been held barred for non-exhaustion for their failure to appreciate fine distinctions that many lawyers would miss. See, e.g., *Giano v. Goord*, 9 F. Supp. 2d 235, 239 (W.D.N.Y. 1998), *aff'd in part, vacated in part on other grounds*, 250 F.3d 146 (2d Cir. 2001) (holding that prisoner who had appealed a disciplinary conviction he alleged was filed in retaliation for protected conduct, based on false misbehavior reports and evidence and a mishandled urine sample, had not exhausted administrative remedies because he had not also filed separate grievances about the retaliation, the mishandling of his urine sample, and the false misbehavior reports and evidence); *Hattie v. Hallock*, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (holding that in order to challenge a prison rule, the prisoner must not only appeal from the disciplinary conviction for breaking it, but must also separately grieve the validity of the rule), *judgment amended*, 16 F. Supp. 2d 834 (N.D. Ohio 1998).

⁷ One of the dirty secrets of American corrections is the persistence of covert threats and retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory. Despite the enormous difficulty of proving this kind of claim, there is a steady stream of court and jury findings documenting such actions. See, e.g., *Walker v. Bain*, 257 F.3d 660, 663 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances); *Hunter v. Heath*, 95 F. Supp. 2d 1140 (D. Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for

The PLRA restricts, in prisoner cases, the statutory attorneys' fees that are available to all other successful civil rights litigants,⁸ making it more difficult for prisoners to obtain the assistance of counsel in civil cases, and thereby devastating their ability to get relief even if they manage to get into court.

Finally,⁹ and most offensive in principle, the so-called three strikes provision bars prisoners from using the *in forma pauperis* provisions if they have previously had three or more complaints or appeals dismissed as frivolous, malicious, or failing to state a claim.¹⁰ This PLRA provision allows an exception for persons in "imminent danger of serious physical injury," but not for persons who seek redress for past serious injury, or persons in imminent danger of loss of other important constitutional rights. Thus, these prisoners must ante up \$105 or \$150 up front or they are simply out of court. There is no time limit

sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F. Supp. 2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), *on reconsideration*, 102 F. Supp. 2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F. Supp. 2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

⁸ 42 U.S.C. § 1997e(d); *compare* 42 U.S.C. § 1988, the fee statute applicable to non-prisoner litigants.

⁹ "Finally" is rhetorical, since this discussion does not exhaust the strictures of the PLRA. The statute also contains provisions restricting the use of special masters in prison cases, 18 U.S.C. § 3626(f); expanding the scope of *sua sponte* dismissal of prisoner cases (as well as non-prisoner *in forma pauperis* cases) from those that are frivolous or malicious to include those that merely fail to state a claim, 28 U.S.C. § 1997e(c)(1), 28 U.S.C. § 1915(e)(2) and requiring the early screening of prisoner cases to that end, 28 U.S.C. § 1915A; excusing defendants from filing answers in prisoner cases until ordered to do so by courts, 42 U.S.C. § 1997e(g); encouraging hearings by telecommunications and at prisons, 42 U.S.C. § 1997e(f); and permitting courts to deprive adult federal prisoners of time off for good behavior if the court finds that a claim was filed maliciously or for harassment, or the claimant testified falsely or otherwise presented false evidence or information, 28 U.S.C. § 1932 (2001); requiring prisoners' damage awards to be paid directly to satisfy their restitution orders, Pub. L. No. 104-134, Title I, § 101[(a)][Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76 *renumbered* Title I Pub. L. No. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327 (not codified; appears after 18 U.S.C.A. § 3626); and requiring notification of crime victims of such damage awards. Pub. L. No. 104-134, Title I, § 101[(a)][Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76; *renumbered* Title I Pub. L. No. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327 (not codified; appears after 18 U.S.C.A. § 3626).

¹⁰ 28 U.S.C. § 1915(g).

on this disqualification,¹¹ which has been applied retroactively to count “strikes” from before the PLRA’s enactment.¹² This provision is more than a nuisance or even a hardship. It is an absolute barrier to a litigant who does not have the money for filing fees—and many do not. This class of absolutely indigent prisoners is composed disproportionately of the most oppressed people in the prison system, those held in administrative and disciplinary segregation units, frequently the locus of the worst abuses and harshest conditions in the prison system.¹³ These prisoners are generally barred from prison jobs and have no means of earning money. Under the PLRA, their indigency will bar many of them from any ability to seek judicial redress.¹⁴

¹¹ See, e.g., *Evans v. McQueen*, No. 97-6471, 1997 U.S. App. LEXIS 26886 (4th Cir. Sept. 29, 1997) (barring prisoner from proceeding IFP based on “strikes” from 1981-84).

¹² See, e.g., *Welch v. Galie*, 207 F.3d 130 (2d Cir. 2000).

¹³ See, e.g., *Blissett v. Coughlin*, 66 F.3d 531 (2d Cir. 1995) (affirming damage award for confinement in feces-smear strip cell in mental observation unit); *Sheppard v. Phoenix*, 1998 WL 397846, at *8 (S.D.N.Y. July 15, 1998) (noting settlement of suit in which defendants conceded constitutional violation with respect to unnecessary and excessive force in Rikers Island segregation unit); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding a pattern of excessive force, denial of adequate medical care, and other Eighth Amendment violations in Pelican Bay segregation unit).

¹⁴ To date, all the federal appeals courts that have considered the question have upheld the constitutionality of the three strikes provision. See *Medberry v. Butler*, 185 F.3d 1189, 1192-93 (11th Cir. 1999); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *White v. State of Colorado*, 157 F.3d 1226, 1233-34 (10th Cir. 1998); *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 723-29 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997). *But see* *Lewis v. Sullivan*, 135 F. Supp. 2d 954, 959-69 (W.D. Wis. 2001) (applying strict scrutiny, holding provision unconstitutional as a violation of right of court access and of equal protection as applied to constitutional claims), *rev’d*, 2002 WL 126607 (7th Cir. Feb. 1, 2002); *Ayers v. Norris*, 43 F. Supp. 2d 1039, 1050-51 (E.D. Ark. 1999) (applying similar rationale), *overruled by* *Higgins v. Carpenter*, 258 F.3d 797, 801 (8th Cir. 2001).

I believe the three strikes provision is unconstitutional for reasons not yet passed on by any court. Litigation is protected by the Petition Clause of the First Amendment, which is governed by the same strict standards as other expressive activity. *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). Since litigation takes place in court and not in prison, prisoners’ litigation is governed by “free world” First Amendment standards and not the diluted standards applicable when considerations of prison administration are at stake. Compare *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989). Sanctions for litigation are subject to a narrow tailoring principle which *inter alia* limits their application to conscious abuse of the judicial system. See *Profl Real Estate Inv., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993) (holding litigation may be suppressed under antitrust statutes only when it is objectively baseless and for a forbidden anticompetitive purpose); *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (applying same principle under National Labor Relations Act). The three strikes provision is therefore unconstitutional insofar as it sanc-

In addition to these litigant-stripping provisions, other significant provisions of the PLRA do operate more directly as court-stripping provisions. The most notable of these are the provision barring actions for mental or emotional injury to prisoners in the absence of physical injury¹⁵ and the series of provisions restricting prospective relief in prison conditions litigation.¹⁶ The remainder of this Essay will discuss some of the interpretive problems, separation of powers issues, and practical obstacles to the vindication of constitutional rights that these provisions raise.

I. THE BAN ON ACTIONS FOR MENTAL OR EMOTIONAL INJURY WITHOUT PHYSICAL INJURY

The PLRA's mental or emotional injury provision may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code. It provides in its entirety: "No 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."¹⁷ It is unclear from the phrase "a prior showing of physical injury" what "prior" refers to. Since the statute regulates bringing civil actions, the only grammatically sensible interpretation of "prior" is that the showing of injury must occur before the action is filed, a construction which conjures up visions of hopeful litigants, with their crutches and bandages and wheelchairs and eye patches, queued outside the clerk's office waiting to display

tions prisoners for complaints that do not state a claim or are legally frivolous, rather than limiting its scope to those that are malicious or otherwise intentionally abusive. It is also unconstitutional insofar as it applies a three-strikes rule to all litigants rather than individually assessing their conduct and insofar as the prohibition on use of *in forma pauperis* procedures is unrestricted in time.

Interestingly, Congress has taken the "three strikes" notion a step further in a little-known provision of the Civil Asset Forfeiture Reform Act of 2000 which precludes prisoners who have had three dismissals as frivolous or malicious from contesting a civil forfeiture or appealing in a forfeiture case *at all*—not just via the *in forma pauperis* statutes—absent "extraordinary and exceptional circumstances." 18 U.S.C. § 983(h)(3). To date this statute does not appear to have attracted the attention of any federal court.

¹⁵ 42 U.S.C. § 1997e(e).

¹⁶ 18 U.S.C. § 3626(a-g).

¹⁷ 42 U.S.C. § 1997e(e).

their stigmata so they can file their cases. Obviously that is not what Congress had in mind, especially in a statute addressing litigants who are behind bars. Since no rational construction of Congress's intent is apparent, the courts have mostly just pretended that "prior" is not there, because there is nothing they can do with it, and have inquired instead whether the plaintiff has sufficiently pleaded or has submitted admissible evidence of injury.¹⁸

On its face, the statute would appear to give prison officials carte blanche to impose all the mental and emotional injury they want on prisoners as long as they do not leave any marks. The courts have partly turned back from that abyss, holding that the statute does not preclude injunctive litigation, only damage claims.

The courts have arrived at this conclusion through somewhat facile means. One appeals court observed, plausibly enough, that the statutory use of the past tense "suffered" suggests that the provision does not apply to claims addressed to the threat of prospective injury. However, it continued: "But more critical is the fact that suits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself."¹⁹ It is not apparent why a suit intended to *avoid* a mentally injurious constitutional violation is not a "civil action . . . for mental or emotional injury" to the same extent as is a suit to redress such a violation after the fact.

¹⁸ See, e.g., *Liner v. Goord*, 196 F.3d 132, 135-36 (2d Cir. 1999) (holding that alleged physically intrusive strip searches, characterized as sexual assaults, met the physical injury requirement at the pleading stage); *Sarro v. Essex County Corr. Facility*, 84 F. Supp. 2d 175, 177 (D. Mass. 2000) (noting plaintiff's failure to allege in his complaint or subsequently any physical injury resulting from restricted ventilation); *Luong v. Hatt*, 979 F. Supp. 481, 485-86 (N.D. Tex. 1997) (holding that evidence of abrasions, contusions, cuts, scratches, and bruises did not meet the physical injury threshold).

¹⁹ *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *accord*, *Harris v. Garner*, 190 F.3d 1279, 1288 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) ("The underlying claim of an Eighth Amendment violation, however, is distinct from this claim for resulting emotional damages"; holding that claims for declaratory and injunctive relief survive); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 808 (10th Cir. 1999); *Zehner v. Trigg*, 133 F.3d 459, 461-63 (7th Cir. 1997); *Amaker v. Goord*, 1999 WL 511990 at *5 (S.D.N.Y., Jul 20, 1999) (citing *Perkins*, 165 F.3d at 807-08; *Davis*, 158 F.3d at 1346).

The source of judicial discomfort with this provision is stated most explicitly in the leading case of *Zehner v. Trigg*,²⁰ which held that only the availability and enforceability of injunctive relief saved the statute's constitutionality.²¹ The *Zehner* reasoning is, relatively speaking, encouraging, because one widely held traditional view of court stripping was that to forbid *all* federal court remedies for a constitutional violation would not by itself be unconstitutional.²² Nowadays, prisoner advocates take their victories where they find them, even if they do not have any effect on the outcome of a particular case. But this may yet prove a weak reed; we do not know whether the courts will stick to it when they are presented, as surely they will be, with a statute that removes the injunctive powers of the courts in some category of Bill of Rights challenges.

The next question presented by § 1997e(e) is one of definition: what *is* mental or emotional injury? Many highly intelligent people have spent years thinking about the mind/body problem. The drafters of the PLRA do not appear to have been among them. The statutory language leaves enormous latitude for interpretation, and there is no clarifying

²⁰ 133 F.3d 459 (7th Cir. 1997).

²¹ The Court of Appeals stated:

The district court notes near the conclusion of its discussion on the issue of Congress' power that "[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without in essence taking away the rights themselves." 952 F. Supp. at 1331. Because other remedies, such as "injunctive relief backed up with meaningful sanctions for contempt," exist even when damages are not available, "[t]hat point has not been reached by enactment of § 1997e(e) as applied here." *Id.* As a legal conclusion, this point is unassailable. . . . Because these remedies remain, Congress' decision to restrict the availability of damages is constitutional as applied in this case.

Id.

Other appellate courts have followed *Zehner's* reasoning without being so explicit about the unconstitutionality of a prohibition on injunctive relief. See *Harris v. Garner*, 190 F.3d 1279, 1288-89 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970, 972, 985 (11th Cir. 2000) (en banc); *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998).

²² "Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953), *reprinted in* PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 393 (3d ed. 1988).

gloss in its legislative history.²³ The result has been a wide range of judicial responses.

At one end of the range are statements like the one from a New York District Court: “The term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts.”²⁴ Other courts have arrived at similar results from the opposite direction, asserting, for example, that “[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”²⁵ At the other extreme are cases exemplified by *Allah v. Al-Hafeez*,²⁶ in which the prisoner complained that prison policies prevented him from attending services of his religion, and the court, in the course of holding that he could not pursue a compensatory damage claim, simply assumed that the injury for which he sought compensation must be a mental or emotional one.²⁷

Is not being able to go to church a mental or emotional injury? On its face, it is a concrete deprivation that occurs in

²³ In general, the legislative history of the PLRA is remarkably thin with respect to the purpose and operation of many of its provisions, including this one. The only substantial legislative report addresses an earlier version of the bill which did not include that provision. See H.R. REP. NO. 104-21, at 24-28 (1995). The conference report merely reports the language of the provision without explanation. See H.R. REP. NO. 104-378, at 65-77 (1995). The floor debate consisted mainly of rhetorical assertions about “liberal federal judges who . . . micromanage State and local prison systems,” 141 CONG. REC. S14413, S14414 (daily ed., Sept. 27, 1995), the need for criminals to do “hard time,” *id.* at S14419, and prisoners’ “churning out lawsuits with no regard to this cost or their legal merit.” *Id.* at S14419. There were also many anecdotes about supposed frivolous prisoner lawsuits over melted ice cream, 141 CONG. REC. S14611, S14629, the wrong brand of sneakers, 141 CONG. REC. S14413, S14418, etc. The only reference to a case of mental or emotional injury without physical injury is to a California prisoner who “claimed that he suffered mental anguish worrying that tear gas would be used if he refused to exit his cell.” 141 CONG. REC. S14611, S14628. It is unaccompanied by any discussion of the application of the statutory language, and other references to the mental/emotional injury provision are similarly devoid of interpretive guidance. See 141 CONG. REC. S7523, S7525; 141 CONG. REC. S14413, S14414, S14417.

²⁴ *Amaker v. Haponik*, 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) (declining to dismiss First Amendment claim of interference with legal mail); *accord*, *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (“The domain of the statute is limited to suits in which mental or emotional injury is claimed.”).

²⁵ *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999).

²⁶ 226 F.3d 247 (3d Cir. 2000).

²⁷ *Id.* at 250 (“Allah seeks substantial damages for the harm he suffered as a result of defendants’ alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”).

the real world and not in someone's head, and characterizing it as a mental or emotional injury seems to miss the point.

Another example is arrest without probable cause, resulting in days or more in a police precinct or jail waiting for bail to be posted or the charges dismissed. Is the injury mental or emotional? One would think not; it is more accurately characterized as a deprivation of liberty, the loss both of the general freedom of choice enjoyed by free persons and of the specific choices, opportunities, and associations that a particular wrongly arrested person is prevented from engaging in. One would hope that such a fundamental deprivation would not be dismissed as merely mental or emotional.²⁸

The same reasoning would seem to apply to a prisoner who is thrown in the hole (or "special housing," "intensive management," or another of corrections' countless euphemisms). That is, he is removed from ordinary confinement, in which prisoners spend their sleeping hours and some of their waking hours locked in their cells, but are able to leave their cells during the day to work at jobs or attend prison programs, to go to a congregate recreation yard or gym, a library, or a day room with a television. Instead, he is placed into a regime of twenty three-hour cell confinement, deprived of most of the limited personal property allowed prisoners, deprived of almost all the standard activities and privileges of prison life, usually subject to strict limits on communications both with outsiders and with other prisoners, and generally

condemned to idleness and monotony.²⁹ Is this physical removal from ordinary prison life to a much more restricted and often explicitly punitive setting only a mental or emotional injury? Some of the limited case law to date suggests that it may be.³⁰ Moreover, that view has been applied to cases alleging

²⁸ So far it has not been so dismissed. The only case on point known to me holds, albeit conclusorily, that a claim of arrest without probable cause is not one for mental or emotional injury. *Friedland v. Fauver*, 6 F. Supp. 2d 292, 310 (D.N.J. 1998).

²⁹ See *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000) (describing "normal" conditions in disciplinary Special Housing Unit); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 625-26 (S.D.N.Y. 1998) (describing harsher SHU conditions at SHU-only facility).

³⁰ See *Higgs v. Carver*, 2000 WL 1902190, at *9 (S.D. Ind. Dec. 15, 2000); *Taormina v. Phillips*, 2000 WL 1923511, at *2 (E.D. Mich. Nov. 30, 2000).

segregated confinement under conditions so squalid as arguably to violate the Eighth Amendment's prohibition on cruel and unusual punishment.³¹

In my view, such decisions are in error. The "minimal civilized measure of life's necessities" guaranteed by the Eighth Amendment means more than freedom from physical, mental, or emotional injury.³² Dismissing claims of grossly oppressive conditions as involving "merely" mental or emotional injury appears inconsistent with Eighth Amendment doctrine as set forth by the Supreme Court, under which it is the objective seriousness of the conditions, and not a prisoner's perceptions or reactions to them, that determines their lawfulness.³³ Describing a claim alleging conditions that are *objectively* intolerable as an "action for mental or emotional injury" seems to miss the mark considerably, even if such injury (not surprisingly) results from those conditions. Of course, subjection of prisoners to such conditions is likely to result in mental or emotional injury,³⁴ but that fact does not make the resulting lawsuit an ac-

³¹ Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999) (barring compensatory damage claims for placement in filthy cells where plaintiff was exposed to the deranged behavior of psychiatric patients).

This view is not unanimous. In *Waters v. Andrews*, 2000 WL 1611126 (W.D.N.Y. Oct. 16, 2000), the plaintiff alleged that after she requested mental health care, she was placed in a filthy punishment cell, kept in a soiled and bloody paper gown, denied a shower and other personal hygiene measures, and exposed to the view of male correctional staff and construction workers. The court held *inter alia* that her Fourth and Eighth Amendment claims were not subject to § 1997e(e) because mental or emotional distress is not a necessary element of either claim. *Id.* at *4.

³² Cf. Austin v. Hopper, 15 F. Supp. 2d 1210, 1258 (M.D. Ala. 1998) (holding that deprivation of "basic human necessities" of toilet facilities "plainly violates the Eighth Amendment," as does failure to permit prisoners who have soiled themselves to clean their bodies; PLRA not discussed).

³³ Wilson v. Seiter, 501 U.S. 294, 303 (1991); see *Helling v. McKinney*, 509 U.S. 25, 35-37 (1993) (instructing as to objective assessment of environmental tobacco smoke exposure). To establish that prison conditions constitute cruel and unusual punishment in violation of the Eighth Amendment, prisoners must show both a subjective component and an objective component. The former turns on the state of mind of the responsible officials, which in most cases must amount to deliberate indifference or knowing disregard of prisoners' rights. See *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). The latter requires a showing of conditions amounting to "unquestioned and serious deprivations of basic human needs" or of the "minimal civilized measure of life's necessities." See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

³⁴ For example, one court has observed that it is both obvious and supported by "plenty of medical and psychological literature" that prolonged isolated confinement inflicts "substantial psychological damage." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313, 1316 (7th Cir. 1988), (citing Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983)); accord, *Baraldini v. Meese*, 691

tion “for” mental or emotional injury. It is an action “for” the redress of objectively unconstitutional prison conditions,³⁵ and mental or emotional injury is at most an additional element of damages to be considered if a violation of the Constitution is found.

What is striking and disappointing about the case law under § 1997e(e) is not only the courts’ failure to adopt this suggested approach, but also their widespread failure even to ask the right question about the nature of constitutional protections and the interests that they serve.³⁶ The Bill of Rights, the fundamental charter of American liberty, protects more than just freedom from physical, mental, or emotional injury and to characterize its violation solely in those terms trivializes it. A construction of § 1997e(e) that respects the scope of our liberty requires that courts define these protections in a way that acknowledges that there is more to constitutionally protected interests such as freedom of speech and the free exercise of religion than protection from psychological injury.

The third large question raised by § 1997e(e) is what is an “*action . . . for mental or emotional injury*”? Generally, an “action” is a lawsuit, and the plain meaning of the statute is that if an action is determined to be one “*for mental or emotional injury*,” that action is barred from federal court absent some physical injury.

F. Supp. 432, 446-47 (D.D.C. 1988), *rev'd on other grounds*, 884 F.2d 615 (D.C. Cir. 1989); *cf. In re Medley*, 134 U.S. 160, 168 (1890) (stating, of the Nineteenth Century use of solitary confinement: “A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”).

³⁵ See, e.g., *Ustrak v. Fairman*, 781 F.2d 573, 578 (7th Cir. 1986) (holding that “[t]he loss of amenities within prison is a recoverable item of damages,” provable by testimony concerning differences in physical conditions, daily routine, etc.; the court does not mention mental or emotional injury as part of the analysis).

³⁶ There are a few honorable exceptions in a small body of case law that limits the application of § 1997e(e) to cases in which mental or emotional injury is central to or an element of the claim, not a potential element of damages. See *Shaheed Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 107 (D. Mass. 2001) (“Where the harm that is constitutionally actionable *is* physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—§ 1997e(e) does not govern.”); *Waters v. Andrews*, 2000 WL 1611126 (W.D.N.Y. Oct. 16, 2000).

Applying that language literally leads to problems under the liberal joinder rules of the federal courts, which permit the amalgamation into a single suit of “as many claims, legal, equitable, or maritime, as the party has against an opposing party.”³⁷ A reading of the statute that requires dismissal of an entire multi-claim suit simply because of the presence of any claim for mental or emotional injury without physical injury “would be not only gratuitous, but also contrary to the fundamental procedural norm that when a complaint has both good and bad claims . . . only the bad claims are dismissed; the complaint as a whole is not.”³⁸ However, the courts have gone much further than this: they have disassembled “actions” not just into claims, but into elements of relief. For example, the decision discussed above that held the deprivation of churchgoing to be a mental or emotional injury did not dismiss the plaintiff’s entire case; rather, it held that the claim for compensatory damages was barred but that the claims for nominal and punitive damages could go forward.³⁹ In effect, this court and those ruling similarly have rewritten a statute that bars the filing of a certain kind of civil action so that it bars the award of certain kinds of damages instead. In doing so they have sidestepped the difficult task of making sense out of the statutory term “*action for . . . mental or emotional injury.*”⁴⁰

The application of § 1997e(e) is far from settled. However, as the case law is presently developing, it appears the statute at best has dealt a severe blow to prisoners’ ability to enforce fundamental constitutional rights. The preservation of injunctive relief by *Zehner* and its progeny, while valuable, does not affect the vast bulk of prisoner litigation, which con-

³⁷ FED. R. CIV. P. 18(a).

³⁸ *Robinson v. Page*, 170 F.3d 747, 748-49 (7th Cir. 1999).

³⁹ *Allah*, 226 F.3d at 251. Other courts have made similar distinctions. See, e.g., *Wagnoon v. Gatson*, 2001 WL 709276, at *5 (S.D.N.Y. June 25, 2001); *Waters v. Andrews*, 2000 WL 1611126, at *7, *9 (alternate holding); *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999); *Mason v. Schriro*, 45 F. Supp. 2d 709, 720-21 (W.D. Mo. 1999).

⁴⁰ As noted *supra* at note 36, a few cases limit the scope of § 1997e(e) to cases in which mental or emotional injury is central to or an element of the claim, not a potential element of damages. This approach is in fact more consistent with the statutory language barring “*action[s]* . . . brought *for* mental or emotional injury” (emphasis added) than is the construction that disassembles the “action” and eliminates selected elements of damages.

sists of damage claims.⁴¹ The reason for this preponderance is that much of the unconstitutional conduct by staff to be found in prisons and jails is not a matter of regulations or acknowledged policies. Rather, it consists of arbitrary and/or retaliatory actions, often contrary to official policy, directed toward particular prisoners who are deemed troublesome, in many cases because of behavior that is at least arguably protected by the Constitution.⁴² Such behavior is rarely amenable to injunctive relief, and even in instances where an informal custom or policy could in theory be shown,⁴³ prisoners proceeding *pro se*—as do the vast majority of prisoner litigants in federal court⁴⁴—are rarely capable of pleading and proving a case of such complexity. Similarly, holdings that prisoners may still seek nominal and punitive damages for abusive treatment and oppressive conditions⁴⁵ do not compensate for the prohibition on compensatory damages. There is a high threshold for the award of punitive damages, they are discretionary even if that standard is met,⁴⁶ and the reduced prospect of damages is a significant new impediment to prisoners' already difficult task of obtaining counsel for meritorious litigation.⁴⁷

⁴¹ This statement is based on my reading of decisions and correspondence with prisoners concerning litigation they have filed or intend to file, and it reflects my observation that many of the injunctive claims included by prisoners in those suits are not viable, either because the challenged conduct is not amenable to injunctive relief (e.g., an assault by staff, with no evidence that the same prisoner is likely to be assaulted again) or because the prisoner has been transferred to another institution, thereby mooting the claim.

⁴² See, e.g., *McClary v. Coughlin*, 87 F. Supp. 2d 205 (W.D.N.Y. 2000), *aff'd*, 237 F.3d 185 (2d Cir. 2001) (upholding damage award to prisoner convicted of notorious police murder who had been kept in administrative segregation through sham reviews); see also *supra* note 7.

⁴³ See, e.g., *Daskalea v. District of Columbia*, 227 F.3d 433, 441-42 (D.C. Cir. 2000) (affirming verdict of municipal deliberate indifference to routine practice of sexual harassment of women prisoners).

⁴⁴ U.S. Dep't of Justice, Bureau of Justice Statistics, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, at tbl. 6 (Dec. 1994), <http://www.ojp.usdoj.gov/bjs/pub/ascii/ccopaj.txt> (last visited Feb. 8, 2002) (reporting that 96% of prisoner civil rights suits proceed *pro se*).

⁴⁵ See *supra* note 39.

⁴⁶ *Smith v. Wade*, 461 U.S. 30, 52 (1983); see, e.g., *Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir. 1992) (affirming denial of punitive damages where plaintiff's misconduct provoked prison staff's abusive treatment); *Castle v. Clymer*, 15 F. Supp. 2d 640, 668-69 (E.D. Pa. 1998) (denying punitive damages to prisoner notwithstanding finding of retaliation for First Amendment-protected activity).

⁴⁷ While 42 U.S.C. § 1988 provides generally that prevailing parties in civil rights litigation may recover attorneys' fees that are "reasonable in relation to the

II. LIMITS ON PROSPECTIVE RELIEF

The PLRA's provisions concerning prospective relief⁴⁸ are among the most litigated portions of the statute. Unlike the laconic mental/emotional injury provision, the prospective relief sections are long and explicit and their consequences are multifarious.

First, the statute sets a standard for the grant of prospective relief in prison cases.⁴⁹ Relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" and the court must find that it

is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.⁵⁰

In addition, the court must refrain from ordering local or state officials to exceed their authority or to violate local or state law unless it is necessary to remedy a violation of federal law.⁵¹

This part of the prospective relief provisions carries a certain rhetorical force but does not significantly change the law.⁵² Courts of equity have always been expected to exercise

success achieved," *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), the PLRA limits fee recovery in prisoners' cases to 150% of the judgment, up to 25% of which must be paid from the prisoner's recovery. 42 U.S.C. § 1997e(d)(2). Thus, an attorney representing a prisoner who recovers nominal damages of \$1.00 (a not uncommon occurrence in prisoners' cases enforcing First Amendment and other intangible rights) and no punitive damages will be entitled to a fee of \$1.50. *See Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000).

⁴⁸ 18 U.S.C. § 3626.

⁴⁹ The statute defines prospective relief as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). Read literally, that definition would include nominal and punitive damages. The courts have not suggested that the statute be read that literally.

⁵⁰ 18 U.S.C. § 3626(a)(1)(A).

⁵¹ 18 U.S.C. § 3626(a)(1)(B).

⁵² The federal courts have acknowledged that the PLRA standard is generally consistent with pre-existing law. *See Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000); *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996) (holding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); *Williams v. Edwards*, 87 F.3d 126, 133 n.21 (5th Cir. 1996); *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986) (applying similar standard pre-PLRA). Public safety and criminal justice system concerns

their powers with restraint and with concern for the external effects that their actions may have.⁵³ However, one aspect of this codification of equitable practice marks a drastic departure from prior practice. The PLRA restricts the circumstances under which courts may “grant *or approve*” prospective relief⁵⁴—i.e., its restrictions apply not only where the case is tried and a federal law violation is found, but also in cases where the parties decide to settle. This point is repeated in a separate section of the statute, which states explicitly that consent judgments can be entered only upon compliance with the requirements of 18 U.S.C. § 3626(a).⁵⁵ Parties may avoid that stricture only by entering into “private settlement agreements” which are enforceable only in state court.⁵⁶ In non-prison cases, by contrast, the parties can still settle for virtually anything they want that is not affirmatively illegal and is not outside the scope of the litigation as framed by the pleadings.⁵⁷

At least in theory, this requirement undermines a large part of the basis of injunctive settlements: the parties’ desire to avoid findings that they have acted illegally, and their desire to avoid the burdens and publicity of a trial. In practice, courts have been willing to approve consent judgments that stipulate conclusorily to the required PLRA findings,⁵⁸ sometimes with

have been given great weight in injunctive prison litigation. *See, e.g.*, *Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985) (enforcing jail crowding order). Federal courts have required compelling justification to grant injunctions overriding state and local law. *See* *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 853 (D.C. Cir. 1998) (stating, in a non-PLRA case: “Disregarding local law . . . is a grave step and should not be taken unless absolutely necessary.”); *Stone v. City and County of San Francisco*, 968 F.2d 850, 861-65 (9th Cir. 1992) (discussing extent of federal courts’ authority to override state and local law).

⁵³ *See* *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) (“The issuance of an injunction is the exercise of an equitable power, and is subject to the equitable constraints that have evolved over centuries in recognition of the heavy costs that injunctions can impose (including costs to innocent third parties) and the potential severities of contempt.”). *Cf.* *Younger v. Harris*, 401 U.S. 37, 43 (1971) (citing historic “fundamental purpose of restraining equity jurisdiction within narrow limits” as well as additional federalism concerns raised by intervention into state functions).

⁵⁴ 18 U.S.C. § 3626(a)(1)(A) (emphasis added).

⁵⁵ *Id.* § 3626(c)(1).

⁵⁶ *Id.* § 3626(c)(2).

⁵⁷ *See* *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986).

⁵⁸ *See, e.g.*, *Sheppard v. Phoenix*, No. 91 Civ. 4148 (RPP), Stipulation of Settlement at 4 (S.D.N.Y. July 10, 1998) (“[T]he parties stipulate, based on the entire record, that the remedies set forth in this Stipulation and Proposed Order are narrowly drawn, extend no further than necessary to correct violations of the federal rights of the plaintiff class, and are the least intrusive means necessary to accomplish re-

significant reservations,⁵⁹ and have not required evidentiary proceedings to support the entry of such agreed orders. To date, this practice appears to have remained unchallenged, and significant injunctive settlements have been reached in some cases subsequent to the PLRA's enactment.

Second, the prospective relief section of the PLRA also includes provisions targeting specific types of relief. Preliminary injunctions must not only be supported by the need/narrowness/intrusiveness findings; their life is also limited to ninety days unless the injunction is made final—i.e., the litigation completely concluded—within that time.⁶⁰ Since prison litigation of any significant scope is rarely concluded so quickly, the utility of preliminary injunctions is thereby drastically reduced, probably accounting for the dearth of case law applying this provision.⁶¹

The ability of federal courts to remedy prison overcrowding is restricted by provisions concerning “prisoner release orders,”⁶² defined as “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.”⁶³ Such an order may be entered only if other less intrusive relief has been tried and has failed to remedy the violation of federal law.⁶⁴ A three-judge court must be convened,⁶⁵

dress . . .”).

⁵⁹ See, e.g., *United States v. Clay County, Georgia*, No. 4:97-CV-151, Consent Decree (M.D. Ga. filed Aug. 20, 1997), *approved*, Order (M.D. Ga. Aug. 26, 1997) (stipulating to conclusory PLRA findings, stating that liability had not been litigated, and disclaiming any preclusive effect except between the parties); *Makinson v. Bonneville County*, No. CIV97-0190-E-BLW (D. Idaho Apr. 30, 1997) (stipulating that agreements are not findings of fact or conclusions of law with respect to the parties' claims or defenses); *Lozeau v. Lake County, Montana*, No. CV-95-82-M RFC, Decree at 15 (D. Mont. Oct. 23, 1996) (referring to “alleged” violation of federal rights). In some cases, the court has supplied the PLRA findings without a stipulation from the parties. See *Duffy v. Riveland*, No. C92-1596R, Stipulation and Order at 2-3 (W.D. Wash. Aug. 31, 1998) (including stipulation disclaiming admissions of liability or violation and conclusory recitation by court of the PLRA findings).

⁶⁰ 18 U.S.C. § 3626 (a)(2).

⁶¹ One recent decision holds that successive preliminary injunctions may be entered if the circumstances justifying the initial injunction remain unchanged. See *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1154 (E.D. Cal.), *aff'd*, 258 F.3d 930 (9th Cir. 2001).

⁶² 18 U.S.C. § 3626(a)(3)(E).

⁶³ *Id.* § 3626(g)(4).

⁶⁴ *Id.* § 3626(a)(3)(A).

and may enter a prisoner release order only if it finds by clear and convincing evidence that crowding is the “primary cause” of the federal law violation and no other relief will correct it.⁶⁶ There has been little judicial construction of this part of the PLRA, probably because there have been few attempts to obtain new overcrowding relief since its enactment.⁶⁷

Finally, the most consequential aspect of the PLRA’s recasting of prospective relief law is its provision for the termination of relief.⁶⁸ Upon the filing of a motion by defendants, the court must terminate prospective relief unless it finds a “current and ongoing violation” of federal law and makes the same need/narrowness/intrusiveness findings required for the initial entry of relief. Such a motion may be filed two years after the entry of relief and every year thereafter until successful.⁶⁹ In

⁶⁵ *Id.* § 3626(a)(3)(B).

⁶⁶ *Id.* § 3626(a)(3)(E).

⁶⁷ Since enactment of the PLRA, such orders have been entered, if at all, by consent. *See* *Inmates of Occoquan v. Barry*, No. 86-2128 (D.D.C., Jan. 20, 1998) (approving order by three-judge court reciting both prisoner release order and prospective relief requirements of PLRA); *Duran v. Johnson*, No. 77-0721-JC, Amended Stipulation (D.N.M. Aug. 11, 1997) (approving dormitory bed limits and square footage requirements by single judge, with stipulation not to move under PLRA for specified time); *Lozeau v. Lake County, Montana*, No. CV 95-82-M RMH (D. Mont. Oct. 23, 1996) (approving square footage requirements by single judge, reciting prospective relief requirements of PLRA but not prisoner release order requirements).

In the widely publicized litigation about recently convicted state prisoners retained in grossly overcrowded Alabama county jails, the federal court that entered injunctive relief did not mention the PLRA prisoner release provisions. The reason may be that the order did not require release of prisoners, but only their transfer from jail to prison, and is therefore arguably not a prisoner release order. *See* *Maynor v. Morgan County*, 147 F. Supp. 2d 1185 (N.D. Ala. 2001).

Other judicial constructions of this part of the statute have been confined to the definition of “prisoner release order,” *see* *Berwanger v. Cottey*, 178 F.3d 834, 836 (7th Cir. 1999) (noting that a maximum population provision is a prisoner release order); *Tyler v. Murphy*, 135 F.3d 594, 595-96 (8th Cir. 1998) (holding order limiting technical probation violator population in a jail is a prisoner release order); *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869, 883 (D. Mass. 1997) (holding, *contra Tyler, supra*, that a population cap is not a prisoner release order in the absence of an order to release), *aff’d as modified and remanded on other grounds*, 129 F.3d 649 (1st Cir. 1997), and to the provision permitting state and local officials to intervene to oppose and seek termination of prisoner release orders. *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998).

⁶⁸ 18 U.S.C. § 3626(b).

⁶⁹ Some post-PLRA settlements have waived this right at least for defined periods of time. *See, e.g.,* *Prison Legal News v. Crawford*, No. CV-N-00-0373-HDM-RAM, Stipulation and Judgment at 6 (D. Nev. Sept. 27, 2000) (agreeing not to seek to terminate for five years); *Duffy v. Riveland*, No. C92-1596R, Stipulation and Order at 2-3 (W.D. Wash. Aug. 31, 1998) (agreeing not to challenge the

cases where the need/narrowness/intrusiveness findings were not made when the judgment was entered, a motion to terminate may be filed immediately.⁷⁰ Such motions are directed to be decided “promptly,”⁷¹ and the cost of delay—inevitable in complex litigation like most prison injunctive cases—is imposed entirely on the plaintiffs: the statute provides that the mere filing of a termination motion operates as a “stay” (better described as a suspension) of the relief starting thirty days after the motion is filed, which may be extended to ninety days for good cause.⁷² This automatic stay provision has been upheld by the Supreme Court against attack based on the separation of powers doctrine.⁷³

This section of the PLRA has had immediate and significant consequences for prisoners. In many jurisdictions, legal protections obtained through years of labor have been swept away.⁷⁴ It has also had significant consequences for the shape of the remedial process in prisoners’ civil rights litigation. Prior law, still applicable in non-prison cases, recognized that institutional change takes time and may face resistance. Accordingly, the Supreme Court has held that a decree should be ended only when the defendant shows that there has been full and satisfactory compliance with the order for a reasonable period of time, the defendant has exhibited a good-faith commitment to the decree and the legal principles that warranted judicial intervention, and the defendant is “unlikely . . . [to] return to its former ways.”⁷⁵ Now, it appears, that likelihood of future recurrence of the constitutional violation has been defined out of the inquiry in prisoner cases.⁷⁶

settlement for four years).

⁷⁰ 18 U.S.C. § 3626(b).

⁷¹ *Id.* § 3626(e)(1).

⁷² *Id.* § 3626(e)(2)-(3).

⁷³ *Miller v. French*, 530 U.S. 327, 348 (2000).

⁷⁴ *See, e.g., Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996).

⁷⁵ *Board of Educ. of Okla. v. Dowell*, 498 U.S. 237, 247-50 (1991); *accord, Freeman v. Pitts*, 503 U.S. 467, 490-93 (1992).

⁷⁶ One court, while upholding the statute as a whole, has suggested in dicta that depriving courts of the power to act in the face of the prospect of reversion to unconstitutional practices presents a serious separation of powers problem. *Gilmore v. California*, 220 F.3d 987, 1009 n.27 (9th Cir. 2000).

In any case, the notion of excluding the likelihood of future recurrence from consideration is not as simple as it seems. Some relevant substantive legal standards are satisfied by proof of the prospect of future injury based only on a current risk. *See*

Thus, there is a paradox at the heart of the judgment termination provision. If a constitutional violation has been successfully held in check by an injunction, there is no “current and ongoing violation,” and the PLRA’s response is to do away with the injunction that suppressed it. If the legal violation recurs after the injunction is gone, Congress’s answer is to file another lawsuit—an endeavor it simultaneously made more difficult.⁷⁷ Meanwhile, since the PLRA’s enactment, much of the already scarce resources for litigation advancing prisoners’ rights has been consumed in defending past gains against motions to terminate.

In addition to its practical consequences for prisoners, the PLRA termination provision has significantly compromised the independence of the judiciary and the separation of powers doctrine. One of the most basic principles of the separation of powers doctrine is the immunity of the final judgment of an Article III court from legislative revision.⁷⁸ Yet the PLRA has

Helling v. McKinney, 509 U.S. 25, 33 (1993) (holding risk of future damage to health actionable under the Cruel and Unusual Punishment Clause). Moreover, institutional life and conditions do not take place instantaneously and sometimes can only be meaningfully assessed over a period of time. Analogously, under the Clean Water Act, the Supreme Court has observed that either “continuous or intermittent violation” can be “ongoing noncompliance,” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987), and Justice Scalia added: “A good or lucky day is not a state of compliance. . . . Nor is the dubious state in which a past . . . problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated.” *Id.* at 69 (concurring opinion). In this light, statements that the statutory phrase “current and ongoing” addresses conditions “at the time the district court conducts the § 3626(b)(3) inquiry,” *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000), or “as of the time termination is sought,” *Benjamin v. Jacobson*, 172 F.3d 144, 166 (2d Cir. 1999), beg a significant part of the question.

⁷⁷ At the same time Congress passed this invitation to litigation do-overs, it enacted the administrative exhaustion requirement of 42 U.S.C. § 1997e(a), which my conversations with other practitioners as well as my own practice suggest is now the major practical obstacle to the commencement of new injunctive litigation on behalf of prisoners. Congress also passed restrictions on the attorneys’ fees recoverable in prison litigation, 42 U.S.C. § 1997e(d), with the purpose and effect of making it more difficult for prisoners to obtain counsel, and, in addition, prohibited recipients of funds from the federal Legal Services Corporation from representing prisoners. Legal Services Corporation Act, 42 U.S.C. § 504(a)(15), 110 Stat. 1321-55 (2001).

⁷⁸ That principle was not formally announced by the Supreme Court until *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Justice Scalia indicated that its belated proclamation simply reflected its status as a constitutional no-brainer: “Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.” *Id.* at 230.

commanded the termination of injunctions, many of which were entered years before the terms of the PLRA were conceived, much less enacted.

The courts have rationalized this result by holding, in effect, that injunctions are not final in the same way that a money judgment is final. Injunctions remain “subject to alteration due to changes in the underlying law.”⁷⁹ This is a familiar and unobjectionable proposition in cases enforcing statutory rights since, otherwise, courts might find themselves enforcing rights that Congress has altered or abolished.⁸⁰ One would think this principle inapplicable in constitutional cases, where the law being enforced is immune from legislative modification. However, courts applying the PLRA have identified the relevant change in law as Congress’s action in “establishing new standards for the enforcement of prospective relief in § 3626(b).”⁸¹ Thus, even if constitutionally based, an existing judgment can be changed by Congress if Congress changes the law of judgments.⁸²

This tautological analysis places constitutional cases on a similar footing to statutory cases for purposes of congressional second-guessing. It essentially destroys, for injunctive cases, the principle of immunity of Article III judgments from legislative revision that the Court announced so vigorously in *Plaut v. Spendthrift Farm, Inc.*⁸³ only a year before the PLRA’s

⁷⁹ *Miller*, 530 U.S. at 344-45. While *Miller* addressed the constitutionality of the PLRA’s automatic stay provision, 18 U.S.C. § 3626(e), its separation of powers rationale is essentially the same as that of the courts of appeals in upholding the judgment termination provisions of 18 U.S.C. § 3626(b). See, e.g., *Benjamin v. Jacobson*, 172 F.3d 144, 161-62 (2d Cir.1999) (en banc); *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1088 (8th Cir. 1997).

⁸⁰ See *System Fed’n v. Wright*, 364 U.S. 642 (1961), in which a consent decree forbade union and employer from discriminating against non-union workers. After Congress amended the Railway Labor Act to permit union shops, thus specifically allowing discrimination against non-union workers, the Supreme Court held that the consent decree should be modified to bring it into conformity with the amended statute. *Id.* at 651.

⁸¹ *Miller*, 530 U.S. at 346-47; accord, *Berwanger v. Cottey*, 178 F.3d 834, 839 (7th Cir. 1999) (stating that “new criteria for relief” are “a constitutionally sufficient ground for reopening the prospective component of a judgment”); *Benjamin*, 172 F.3d at 161.

⁸² Characterizing this PLRA provision as a change in law permitted the Court to dismiss as inapposite the holding of *United States v. Klein*, 80 U.S. 128 (1871), that Congress may not “prescribe rules of decision to the Judicial Department of the government in cases pending before it.” *Id.* at 146.

⁸³ 514 U.S. 211 (1995).

enactment. This result has troubled only one of the appeals courts that has passed on the question. That court distinguished between the constitutionally troublesome act of terminating final judgments and the more benign alternative of merely depriving those judgments of prospective effects, holding that the PLRA merely accomplished the latter.⁸⁴ This distinction between the prospective effect of a judgment, the only purpose of which is to have prospective effect, and the judgment itself—a distinction the court itself termed “formalistic” though “seminal”⁸⁵—is reminiscent of the old joke that defines legal reasoning as the art of thinking about something that is inextricably intertwined with something else but without thinking of the something else. Forget life imitating art; here, the law imitates satire.

To appreciate the significance of this doctrinal development for enforcement of constitutional rights, it is necessary to consider it in conjunction with one of the Supreme Court’s prior decisions concerning separation of powers, *Robertson v. Seattle Audubon Society*,⁸⁶ part of the highly publicized controversy over protection of the Northern spotted owl. While the case was pending, Congress passed the Northwest Timber Compromise statute,⁸⁷ which provided that compliance with certain provisions of that new law would be deemed to constitute compliance with other provisions of prior law. To make its intent crystal clear, Congress cited the pending litigation by caption and docket number.⁸⁸ The Supreme Court found nothing offensive to the separation of powers in this legislatively directed resolution of pending federal court proceedings, since it

⁸⁴ *Gilmore v. State of California*, 220 F.3d 987 (9th Cir. 2000).

⁸⁵ *Id.* at 1003.

⁸⁶ 503 U.S. 429 (1992).

⁸⁷ See Dep’t of the Interior and Related Agencies Appropriations Act, §§ 1 *et seq.*, 318, 103 Stat. 701 (1990).

⁸⁸ In Congress’s own words:

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89-99 . . . and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, Civ. No. 87-1160-FR.

Robertson, 503 U.S. at 434-35 (quoting Department of the Interior and Related Agencies Appropriations Act, 1990, 108 Stat. 745, § 318(b)(6)(A)).

amended existing statutory law, albeit narrowly.⁸⁹ The Court was untroubled by the fact that the legislation was explicitly shaped to dictate the result in particular pending cases.

Putting these pieces together, *Robertson* stands for the proposition that where Congress has the substantive power to legislate, it can do so in a way that is targeted and tailored to particular pieces of litigation. The PLRA cases, including the Supreme Court's decision in *Miller v. French*,⁹⁰ appear to give Congress the equivalent power to legislate with respect to the remedial powers of the courts in constitutional cases and to apply new laws to prior judgments. The emerging syllogism would seem to be completed by the proposition that now, if a federal court does something that Congress does not like in the course of enforcing the Constitution, Congress can direct the termination or the modification of that specific judicial act. It cannot (yet) reverse a court's finding that the Constitution was violated. But arguably it could say, for example: the judgment will have a life of only one year; or the particular kind of remedy that appears in this judgment must terminate immediately and can only be reinstated after the court has tried six other remedies and made findings based on a new record that they did not work; or even that Congress disapproves the kind of remedy prescribed in paragraph forty-four of an injunction, and that paragraph will terminate upon enactment of the legislation. Thus, a recalcitrant litigant aggrieved by a federal court injunctive order now has de facto a continuing right of appeal to the legislative branch in addition to the usual single appeal to an appeals court. One need only try to envision the course of Southern school desegregation, had such a rule been in effect during the late 1950s and the 1960s, to appreciate the havoc that may be in store for the judicial enforcement process in future acrimonious civil rights controversies.

Can this possibly be the law? One would think and hope not. Certainly, such a formulation, which would make Congress a collateral appeals court and in some cases a co-manager of constitutional litigation, contravenes the idea of separation

⁸⁹ *Id.* at 438-41. In so characterizing Congress's action, the Court dismissed the argument that the statute was unconstitutional under the rule of *Klein*, 80 U.S. at 146, which forbids Congress to "prescribe rules of decision" for the judiciary in particular cases. *Robertson*, 503 U.S. at 441.

⁹⁰ 530 U.S. 327 (2000).

of powers in the most literal fashion. It crashes head-on into the more specific command that the decisions of an Article III court may not be reviewed and revised by other branches of government.⁹¹ But the appeals courts and the Supreme Court seem, at least rhetorically, to have painted the law into a corner, leaving no identifiable doctrinal stopping place to the incursion of the legislature on the remedial powers of the federal courts in constitutional cases, other than the bare proposition that Congress cannot overturn a finding of constitutional violation. By dismantling important parts of the conceptual armory of the separation of powers, they have opened the door to a new and genuinely radical proposition of legislative supremacy over the work of the courts. And until and unless the courts devise new (or refurbish old) conceptual tools to defend their remedial authority replacing those they have kicked aside in upholding the PLRA, the constitutional rights, not just of prisoners, but of all litigants, will have lost much of the security historically afforded by our independent judiciary. Consistent with the familiar logic of Pastor Niemoller,⁹² persons other than prisoners may soon have good reason to regret the enactment and the judicial embrace of this statute.

CONCLUSION

The Prison Litigation Reform Act represents a fundamental shift in the long-running debate about court stripping. The vexed question whether Congress may exclude controver-

⁹¹ See, e.g., *Chicago & S. Air Lines, Inc., v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned, or refused faith and credit by another Department of Government."); *Gordon v. United States*, 117 U.S. Appx. 697, 700-04 (1864) (opinion of Taney, J.) (holding judgments of Article III courts "final and conclusive" and not subject to review by a non-Article III body); *Hayburn's Case*, 2 U.S. 409, 411 (1792).

⁹² In Germany they came first for the communists, and I didn't speak up because I wasn't a communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up.

Martin Niemoller, quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 684 (Justin Kaplan ed., 16th ed. 1992).

sial constitutional issues from federal judicial review, never definitively answered, is effectively sidestepped by the PLRA, which instead imposes a series of restrictions and disincentives on congressionally disfavored litigants and disfavored claims. Individually and cumulatively, these provisions significantly impair the enforcement of constitutional rights and erode the principle of separation of powers, and they drastically compromise the ideal of equal justice under law, creating a class of second-class litigants and second-class constitutional claims. The judiciary has failed to date to respond effectively to these incursions on its independence, or even to suggest definable limits on congressional power to make such incursions. This failure suggests that the structure of constitutional enforcement through judicial review may now be at significant risk, not of wholesale abolition, but of impotence imposed piecemeal by restrictive measures directed at popular and legislative scapegoats *du jour*.

THE 1996 IMMIGRATION LEGISLATION AND THE ASSAULT ON THE COURTS*

Lee Gelernt†

INTRODUCTION

In 1996, Congress passed, and President Clinton signed, two pieces of legislation that made sweeping changes to the Nation's immigration laws. The first law was the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted on April 24, 1996.¹ The second law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), was enacted five months later, on September 30, 1996.²

The two Acts contain a number of provisions that have greatly restricted the substantive rights of immigrants. The two Acts also include a variety of procedural revisions that make it substantially more difficult for immigrants to enforce those rights that do remain in the aftermath of the 1996 legislation. Among the procedural revisions are a number of "court-stripping" provisions that restrict the power of the judicial branch to review certain immigration decisions of the Attorney General. It is these court-stripping provisions on which I want

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† Senior Staff Counsel, ACLU Immigrants' Rights Project. This Essay is a revised version of a lecture originally given on April 5, 2001, as part of Brooklyn Law School's annual Edward V. Sparer Public Interest Law Fellowship Symposium. At the time of the lecture, the ACLU was preparing its briefs in two immigration court-stripping cases then pending before the Supreme Court, *INS v. St. Cyr* and *Calcano-Martinez v. INS*. Those cases subsequently were decided in June 2001. A postscript has been added addressing the decisions.

¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

² Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996).

to focus, and that, in my view, are the most troubling provisions in the 1996 laws.

The 1996 court-stripping provisions not only have the potential to cause enormous hardship to immigrants and their families, but also raise serious and delicate constitutional issues, issues that have potentially far-reaching implications for the Judiciary's role in our tripartite constitutional system. Indeed, if the Justice Department's interpretation of the 1996 court-stripping provisions is upheld, it will be the first time in the peacetime history of this country in which a resident immigrant could be arrested, detained, and deported based solely on the Executive branch's unilateral assurance that it has complied with the law, without any court, at any time, reviewing whether the deportation order is fully consistent with the law. What is at stake, therefore, is the prospect of a radical departure from 200 years of unbroken constitutional practice and tradition in this country.

Rather than focusing too heavily on the pure legal issues raised by the 1996 court-stripping provisions, I would like to focus primarily on the practical consequences of these provisions. First, I want to give a quick sense of who is affected by the 1996 laws. Next, I want to provide an overview of the litigation brought by the ACLU Immigrants' Rights Project to challenge the court-stripping provisions, litigation that has now reached the United States Supreme Court in two companion cases, *INS v. St. Cyr*³ and *Calcano-Martinez v. INS*.⁴ Finally, I will briefly discuss some of the strategic thinking that has gone into litigating the 1996 court-stripping provisions.

I. THE COURT-STRIPPING PROVISIONS

The 1996 immigration legislation contains a number of different provisions designed to restrict the power of the courts to review the Executive branch's immigration policies and decisions. I will focus on only one of these court-stripping

provisions—the one most heavily litigated to date and cur-

³ 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001).

⁴ 232 F.2d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001).

rently before the Supreme Court in the *St. Cyr* and *Calcano-Martinez* cases.

The provision states that “no court shall have jurisdiction to review” any deportation order that is based on one of a specified list of criminal offenses.⁵ The wording of the provision raises a number of subtle interpretive questions, but for the present discussion I want to put most of those issues to one side. Instead, I will focus on two overriding points regarding the practical breadth of the provision.

First, the provision does not apply only to individuals who are in the country without documentation, so-called “illegal” immigrants. Rather, it applies to all non-citizens who have been convicted of one of the listed criminal offenses and are now subject to deportation on the basis of that conviction. It applies, therefore, to individuals who entered the country legally and who have been granted lawful permanent resident status, a status one step removed from U.S. citizenship. In street parlance, it applies to “green card” holders.

Included in this group are individuals who have lawfully resided in this country for years and who have contributed greatly to the United States and their local communities, not just through their labor and taxes, but also in myriad other ways, including service in the U.S. military. They are individuals who may have entered the country when they were small children, who have lived here continuously for virtually their entire lives, and who may now lack any genuine connection to their country of origin, including any familiarity with the language or customs of that country. These are also individuals who very likely have close family members—including spouses and children—living in the United States as either U.S. citizens or lawful permanent residents. In fact, one of the named parties before the Supreme Court in *Calcano-Martinez* has four children with U.S. citizenship and has lived in this country continuously since arriving thirty years ago at the age of three.

The second point I want to stress about the breadth of the court-stripping provision concerns the types of crimes to which it applies. The provision is not limited to the most serious criminal offenses. In fact, just the opposite is true. The

⁵ 8 U.S.C. § 1252(a)(2)(C) (2001).

provision also restricts access to the courts for lawful residents who have committed even minor crimes. As one court noted, the court-stripping provision would apply to such crimes as “turnstile jumping” in the subway.⁶

Moreover, not only does the court-stripping provision apply to minor crimes, but it also applies regardless of whether the individual received *any* prison time. Individuals who committed offenses that were viewed as too minor to warrant a day of jail time are thus subject to the court-stripping provision. Equally significant, the court-stripping provision is triggered even when the offense was committed years or even decades ago, perhaps when the individual was only eighteen or nineteen years old.

In short, the 1996 court-stripping provisions sweep broadly. They affect individuals who have been granted lawful status in this country, who have committed very minor crimes, and who have literally spent their entire lives here. Thus, however one may seek to justify the policy decision to pass the 1996 court-stripping provisions, it cannot be on the ground that the provisions were narrowly drafted to target only individuals who lack close ties to this country. Nor can the justification be that the provision affects only those individuals who have committed the most serious offenses.

I am not suggesting that the United States, as a sovereign nation, lacks the legal authority to deport lawful residents who have committed minor criminal offenses. Nor is my focus here on whether the United States should, as a matter of national policy or basic fairness, deport such individuals. That is an important discussion, but it is one for another time. My aim here is simply to ensure that there are no misconceptions about the sweep of the 1996 court-stripping provisions.

Court stripping is serious business and has been rightly treated as such since the founding of this Nation. That is particularly true where, as here, the Justice Department is seek-

⁶ *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (discussing AEDPA § 440(d), which applies to same set of crimes as AEDPA § 440(a), the court-stripping provision), *aff'd sub nom.*, *Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999). The court-stripping provisions also would apply to such minor crimes as misdemeanor theft. *See, e.g.*, *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (holding that larceny constitutes an “aggravated felony”).

ing to depart from 200 years of constitutional tradition and to diminish the judiciary's role to an extent never before seen in the history of this country. Given the seriousness of the endeavor, any discussion regarding the wisdom of the 1996 court-stripping provisions must be based on a clear sense of precisely who will be affected.

Let me turn then to the litigation over the court-stripping provisions. As I hope to show, although court-stripping issues may often have an abstract quality about them, the effect on long-time legal residents will be both concrete and quite devastating if the government's position were to prevail.

II. THE COURT-STRIPPING LITIGATION

The ACLU Immigrants' Rights Project has been challenging the court-stripping provisions in every circuit in the country for the past five years, beginning with the passage of AEDPA in April 1996. It would be next to impossible for me to describe all the litigation that has taken place over the past five years, given its national scope and the variety of contexts in which the court-stripping issues have played out. Let me focus, therefore, on one specific context in which the court-stripping litigation has arisen most frequently. That context concerns the new "automatic deportation" provisions that were enacted in 1996 along with the court-stripping provisions. It is in this context in which the Supreme Court will consider the court-stripping issue this Term in *St. Cyr* and *Calcano-Martinez*.

Prior to 1996, non-citizens who committed criminal offenses *could* be deported on the basis of their criminal conviction. The critical point, however, was that deportation was not mandatory except in the most serious cases, generally cases where the individual served at least five years of prison time for an "aggravated felony" offense. In all other cases, an administrative immigration judge could grant lawful permanent residents who committed criminal offenses a "waiver" of deportation, thereby allowing them to remain in the country and retain their lawful status. In other words, deportation was *not* automatic.

To qualify for consideration for a waiver, individuals

had to satisfy two principal criteria set forth by Congress: they had to be lawful permanent residents and they must have resided continuously in the United States for at least seven years.⁷ Individuals who met these statutory eligibility criteria were entitled to apply for a waiver of deportation and to have their applications adjudicated by immigration judges. An immigration judge then decided, in the exercise of discretion, whether to grant the waiver based on a balancing of various factors, such as the seriousness of the crime, demonstrated rehabilitation, the number of years the individual has lived in the United States, the individual's ties to the United States (including the presence of family members living lawfully in the United States), employment history, community service, military service, and any other factor that might appropriately be considered in assessing whether the individual deserved to remain in the country.⁸

In the past, the waiver was granted in approximately fifty percent of the cases.⁹ The fact that the waiver was granted in roughly one out of every two cases is not surprising. To begin with, the waiver is available only to lawful permanent residents with at least seven years residence. Moreover, the immigration laws, even before 1996, cast an exceedingly wide net and thus subject individuals with even minor offenses to deportation. The power to grant a waiver to long-time lawful residents gave immigration judges the ability to tailor the law to individual circumstances and to avoid unnecessarily harsh consequences. The waiver was thus an indispensable feature of the deportation process, providing some assurance that the system would operate fairly and humanely, and would not result in the deportation of long-time lawful permanent residents who have committed only minor crimes, who have substantial ties to this country, and for whom the United States is the only country they (and their children) may have ever known.

In 1996, the situation changed dramatically. Congress

⁷ The immigration laws contain several different forms of "waivers." The waiver discussed above and the one at issue in the court-stripping cases before the Supreme Court is commonly referred to as a "212(c)" waiver. See Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA).

⁸ See, e.g., *Matter of Marin*, 16 I. & N. Dec. 581, 585, 1978 WL 36472 (1978) (listing factors).

⁹ See *Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (citing Justice Department statistics), *cert. denied*, 526 U.S. 1004 (1999).

eliminated the possibility of waivers in almost all cases and enacted substantive provisions mandating that deportation would now be *automatic* in virtually all cases where the individual had been convicted of a criminal offense, even for those who committed only minor crimes and had not served a day of jail time. These new automatic deportation provisions would have had drastic consequences if the Attorney General had sought to apply them only prospectively. But the Attorney General took the position that the new provisions should be applied in all cases—prospectively and retroactively—even if the crime had been committed decades ago.

Immigrants with pre-1996 crimes who were denied the right to apply for a waiver immediately went to court and argued that the Attorney General had misinterpreted the 1996 laws by applying the new automatic deportation provisions retroactively to cases involving pre-1996 events. The Justice Department defended the Attorney General's decision to apply the new provisions retroactively, arguing that the Attorney General had correctly interpreted the new deportation provisions to apply both prospectively and retroactively. More fundamentally, however, the Justice Department offered a threshold jurisdictional defense. It argued that the 1996 court-stripping provisions eliminated the power of the courts to review the Attorney General's decision to apply the new automatic deportation provisions retroactively.

According to the Justice Department, it now had the unilateral and unreviewable power to arrest, physically detain and deport long-time lawful permanent residents based solely on the Attorney General's interpretation of the new automatic deportation laws, and no court, including the U.S. Supreme Court, could review the legality of the deportation, even by habeas corpus. Thus, even if it were manifestly clear to a federal court that Congress had never intended to apply these automatic deportation provisions retroactively, the Justice Department's view is that the courts are powerless to correct the error and must stand by while long-time lawful residents are detained and deported based on a mistaken interpretation of the law.

If the government's jurisdictional position were to prevail, it will mean that the Justice Department would effectively serve the dual role of prosecutor and judge. The Attorney Gen-

eral would decide which immigrants to place into deportation proceedings, would then prosecute their cases, and if any dispute arose during that prosecution as to the meaning of the automatic deportation laws, would unilaterally resolve those disputes. The prospect of an executive agency acting in this dual role as prosecutor and judge is troubling under any circumstances. It is particularly unsettling where an individual's liberty is at stake and the Attorney General is under enormous political pressure to enforce the Nation's immigration laws. As the Supreme Court has made clear, court-stripping provisions will be viewed with less disfavor in areas that are "relatively immune from political pressures."¹⁰ That is plainly not the case in the politically and emotionally charged area of immigration.

To be clear, the ACLU has never argued, and is not arguing before the Supreme Court, that any immigrant has a right to be granted a waiver. The ACLU is arguing only that the lawful residents in these cases have a right to *apply* for a waiver and that Congress never intended to eliminate this right retroactively. If we prevail, it will not mean that individuals are entitled to remain in the country, but only that these individuals will have an opportunity to appear before an immigration judge in the hope of persuading the judge that they deserve continued residence in the United States. If, on the other hand, the government's position prevails, then potentially thousands of legal immigrants will be subject to mandatory and automatic deportation, with all the hardship that such deportations entail.

The lower federal courts have overwhelmingly rejected the government's arguments and have held that the 1996 court-stripping provisions do not leave the courts powerless to review the Attorney General decision to apply the new automatic deportation provisions retroactively. Specifically, the courts of appeals have concluded, as a matter of statutory construction, that although the 1996 court-stripping provisions eliminated most forms of judicial review, the provisions did not eliminate habeas corpus review—the historic means of testing whether individuals have been unlawfully deprived of their liberty. Importantly, the courts have also stressed that the court-stripping provisions would have raised serious constitu-

¹⁰ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986).

tional concerns had they eliminated *all* avenues of review, including habeas corpus, over the Attorney General's interpretation of a federal law.¹¹

The courts of appeals have also overwhelmingly rejected the government's position on the merits and have held that the Attorney General erred in finding that the new automatic deportation provisions are fully retroactive. Although the lower courts have arrived at differing conclusions about whether the new automatic deportation provisions might be applied in a partially retroactive fashion, no circuit has accepted the Attorney General's position that these new provisions are fully retroactive and apply to all cases.¹²

¹¹ The circuit decisions fall into two basic categories: those involving AEDPA's and/or IIRIRA's "transitional" jurisdictional rules, and those involving IIRIRA's permanent provisions, which generally apply to cases in which administrative immigration proceedings commenced on or after April 1, 1997. See *Henderson*, 157 F.3d at 117-18 n.7 (noting effective dates for the three sets of provisions), *cert denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999). The three sets of provisions present the same basic issues. The cases before the Supreme Court, *St. Cyr* and *Calcano-Martinez*, fall under IIRIRA's permanent provisions; the Court denied certiorari in the cases governed by AEDPA's and/or IIRIRA's transitional rules.

Cases under IIRIRA's permanent rules finding habeas jurisdiction: *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 2590 (2001); *I.N.S. v. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *cert. denied sub nom.*, *Rodriguez v. INS*, 121 S. Ct. 2590 (2001); *Flores Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000). *But see* *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *vacated*, 121 S. Ct. 2585 (2001); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000).

Cases under AEDPA's and IIRIRA's transitional provisions finding habeas jurisdiction include: *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert denied sub nom.*, *Reno v Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). *See also* *Lee v. Reno*, 15 F. Supp. 2d 26 (D.C.D.C. 1998). *But see* *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000) (finding no habeas jurisdiction, but reserving question whether Attorney General's decision may be reviewed by petition for review in the court of appeals).

¹² Cases under IIRIRA's permanent rules include *I.N.S. v. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001); *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000).

Cases decided under AEDPA's and IIRIRA's transitional provisions sustaining a retroactivity challenge: *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom.*, *Reno v Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225

Of course, in the absence of the threshold finding that the courts retained jurisdiction to review the Attorney General's legal rulings, none of these retroactivity rulings would have been possible. Long-time legal residents would have been deported automatically and the courts would have been powerless to stop the deportations, despite the fact that the courts have now concluded that Congress never authorized full retroactive application of the new automatic deportation provisions.

III. THE ACLU'S LITIGATION STRATEGY

Finally, I have been asked to discuss briefly some of the strategic thinking that has gone into litigating these court-stripping cases. Needless to say, the ACLU has had to make countless tactical and strategic decisions over the past five years of litigation. As an initial matter, we obviously had to develop and choose among legal arguments to present to the courts. But presenting the pure legal arguments was only part of our task. We also wanted to tell the courts the "story" of our court-stripping cases: what the cases are about in practical terms, why the issues are important, what is fundamentally at stake, and what the consequences are for the affected individuals if the court rules against them. What I want to discuss here concerns how we ultimately chose to characterize the issues in our court-stripping cases, i.e., what story we ultimately chose to tell the courts.

Deciding how to frame one's case so that it appears compelling in human terms can be a difficult task, often considerably more difficult than developing the strictly legal arguments. In the court-stripping cases, at least three factors made the task even more difficult. First, for reasons I will discuss, we were not able to control the flow of the litigation. Second, as I have already suggested, court-stripping issues can

(3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). *But see DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000).

have a technical, abstract feel to them, even for federal judges accustomed to dealing with such issues, and thus, do not always lend themselves to compelling storytelling. Third, our cases had several potential stories worth telling. That may seem like a luxury rather than a problem, but in the end the prospect of choosing the wrong story, or choosing to tell too many stories, may have been what caused us the greatest concern.

We ultimately chose to tell the following three stories: (1) the life stories of the individual petitioners in the cases directly before the court; (2) the broader story of how the 1996 legislation affected the immigrant community as a whole; and (3) the story of judicial review in the United States and the institutional role our courts have historically played in protecting the rights of vulnerable groups, including immigrants.

The challenge for us was to decide how best to tell each story and to convey to the courts what in our view was most fundamentally troubling about the 1996 court-stripping provisions. I cannot recreate all of our thinking, but let me try and give you a quick sense of how we viewed each of the three stories.

The first and narrowest story is the story of the individual immigrant petitioners: What were the petitioners' lives like before the 1996 legislation, what has happened to them as a result of the legislation, and most importantly, what will happen to them in the future if the courts rule in favor of the government? The story of the individual petitioners obviously needed to be told, as it almost always does in every case. The question, then, was not whether we were going to tell this story, but the prominence to give it.

Ultimately, we chose not to focus too heavily on the specific facts of the individual petitioners. As an initial matter, it seemed to us that the court-stripping issues raised concerns that went well beyond the facts of any given individual and that an inordinate amount of attention on individual petitioners potentially could deflect the court from these broader issues. We therefore believed that a broader story had to be told. The best way to tell a broad story in a given case is, of course, through concrete, specific examples, and generally, those examples would and should be based on the circumstances of the

individual petitioners who are actually before the court. The problem for us, however, was that we did not control the flow of the litigation, and thus, could not be certain that the test cases that initially reached the courts would involve representative petitioners who would illustrate the larger, fundamental concerns at stake.

The reason we could not control the flow of litigation was principally because of the nature of immigration law, which put us in a purely defensive litigating posture. Immigrants receive individual deportation hearings before immigration judges, whose decisions are then appealable to the Board of Immigration Appeals. Any judicial review of the final administrative decision generally would be through an appeal on behalf of the individual. At the time the 1996 laws were passed, there were probably hundreds of individual immigration cases pending in the federal courts. When the 1996 legislation went into effect, the Justice Department invoked the new court-stripping provisions in many, if not most, of these cases, making each one a potential test case. We had to react defensively, find the cases that happened to be moving the quickest through the federal courts, and litigate the court-stripping issue in those cases.

Because the Attorney General was a party in each of the cases, the Justice Department was at least aware of each case. But even the Justice Department could not completely control the flow of cases. For the most part, the order in which cases arose was out of anyone's control and depended simply on where in the pipeline an individual case happened to fall when the 1996 legislation passed. Given the possibility that the cases that happened to reach the courts first might not involve representative petitioners whose stories would illustrate the larger legal and practical issues raised by court-stripping provisions, we decided against devising an entire national litigation strategy that would significantly depend on the facts of a particular case. We concluded, therefore, that we had to tell two broader stories in addition to whatever story we were able to tell about the individual petitioners in each case.

The first of these broader stories concerned the effect the new laws would have on the immigrant community as a whole. Part of this story was simply to describe the broad sweep of the court-stripping provisions and to explain who in

the immigrant community potentially would be affected by these provisions. Thus, as I have previously mentioned, we had to make certain that the courts understood that the provisions covered long-time lawful permanent residents who may have committed only minor crimes decades ago and who have significant ties to this country. But we also had to do more than simply describe the breadth of the provisions. We had to move from the abstract to the concrete and specific, and to convey as best we could the immense hardship that would be imposed on immigrant communities throughout the country if the government prevailed in this litigation. Our challenge was to ensure that the human side of what was occurring was not obscured by a blur of aggregate statistics and overly-generalized images about the immigrant community.

Toward that end, what we have sought to convey to the courts is that because of the 1996 laws there are now families in every immigrant community throughout the United States sitting down at kitchen tables having profound conversations about their futures. The individuals affected by the new laws are explaining to their spouses and children that they may face deportation for something they did many years ago and that, as a consequence, their families may have to make a choice. One choice for these families is to move together to a new country and remain as a family, even if it means moving to a country that their spouses and children have never visited and that these individuals left decades ago; indeed, the children and spouses may be U.S. citizens who have lived here their entire lives and for whom moving to a small, possibly impoverished, country in Eastern Europe, Asia, Central America, Africa, or the Middle East was previously unimaginable. Alternatively, the family can choose to do what immigrant families from every ethnic group in every generation have done for hundreds of years. They can allow their children to remain in the United States, either with the remaining spouse or with other family members, in the hope that the children will have the opportunity for a better life—even if it means that they will not be there to watch their children grow up.

Children and spouses will inevitably ask why after all this time deportation is necessary. The answer will be that the Justice Department has decided that deportation is now automatic and mandatory for individuals who have committed cer-

tain crimes, regardless of how long ago the crime was committed, how minor the crime may have been, or how much their spouses and children may depend upon them. This, in turn, will provoke the next logical question: If you think the decision is wrong, why can't you "go before a judge" and explain the situation? That this last question is routinely asked should not be surprising. For immigrants, it is the very right to go before a judge that, in their minds, is one of the features that critically separates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago—that "[t]he history of American freedom is, in no small measure, the history of procedure."¹³

This leads me to the final story that we have sought to tell the courts—the history of judicial review in the United States, both generally and with respect specifically to immigrants. The story is a familiar one. The Framers believed in an independent judiciary that would not fear reprisal from political majorities. Over the years, the judiciary has been criticized from all sides. Some believe the courts have moved too slowly to enforce the rights of unpopular groups, while others have argued that the judiciary has overstepped its bounds. By and large, however, the Framers' vision has proved extraordinary. No matter how politically unpopular or vulnerable any individual or group may be in this country, they have been able to enforce their rights because our

constitutional system has allowed the courts to serve their vital and constitutionally-assigned checking role over the two political branches.

We have not attempted to tell every aspect of our country's judicial review story, nor could we do so given its long and complicated history. Instead, we have focused largely on providing the courts with some measure of historical perspective to make them aware of the unprecedented nature of the government's position.

In particular, we have sought to provide the courts with an historical overview of immigration law and policy in this

¹³ *Malinski v. New York*, 324 U.S. 401, 414 (1945).

country. That history reveals a country that has welcomed immigrants and celebrated their contributions like no other nation in the world. But it also reveals a country with a cyclical hostility toward newcomers that has resulted in bitter, vicious bigotry toward *every* immigrant group when they first arrived in the United States. And with this hostility has often come restrictive new laws, including court-stripping laws designed to insulate the immigration process from judicial scrutiny. Yet even during the most virulent periods of anti-immigrant hostility, an unflinching judiciary rejected *every* attempt to short-circuit the system and abandon the principle of judicial review in response to ephemeral popular passions or perceived short-term gains.

Thus, as I have already emphasized, if the government's interpretation of the 1996 court-stripping provisions were to prevail, it would be the first time in this country's history that resident immigrants could be taken into custody, deprived of their liberty, and then deported without having a full opportunity to test the legality of their custody and deportation in court. A departure of that magnitude from our constitutional traditions should give us all pause.

Nor is the historical significance limited to the immigration area. There simply has never been a time in this country's history during which any individual, citizen or immigrant, could be deprived of his or her liberty without access to the courts to test the legality of the government's actions. At a minimum, the Great Writ of habeas corpus, inherited from England and enshrined in our Constitution, has always been available during peacetime.

Of course, none of these stories matters if the law is clear-cut, but rarely is that the situation in cases that find their way to the Supreme Court. More often than not, there will be some degree of ambiguity in the relevant legal texts. It is in this context in which the stories we have tried to tell will hopefully make some difference, not by appealing to the individual policy preferences and sympathies of the judges and Justices, but by helping to illuminate the values underlying the governing legal texts and by showing what Congress may have been thinking when it enacted the 1996 laws.

Thus, for example, the fact that the government's jurisdictional position would create an unprecedented situation in American history may militate strongly in favor of the Court requiring express and unmistakable evidence that Congress intended to depart so radically from our constitutional traditions. Similarly, the fact that the government's interpretation of the 1996 automatic deportation laws would cause such enormous hardship to the immigrant community might lead the Court to assume that Congress did not intend such a result in the absence of clear and unambiguous evidence of that intent in the text of the new law. In the end, however, it remains to be seen whether the Supreme Court will find the 1996 laws ambiguous in any respect, and if so, whether any of the themes that I have discussed will influence the Court's view of how that ambiguity should be resolved.

CONCLUSION

In his celebrated dialogue on the federal courts, Professor Henry Hart suggested that the courts must remain open for any individual, citizen or immigrant, who is threatened with a loss of liberty, and that any peacetime law that barred access to the courts in such a situation would be unconstitutional. In his view, however, the issue was largely an academic one because he did not envision a time when Congress would ever enact such a law. Presciently, though, he observed that if the issue ever did arise, immigrants might

provide the constitutional testing crucible given their political vulnerability and their already-diminished constitutional status.¹⁴

Now, after more than 200 years of our Nation's constitutional history, the government is arguing that Congress had finally taken this extraordinary step. The stakes are thus high. We are hopeful that the Supreme Court will reject the govern-

¹⁴ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396-98 (1953). See also *id.* at 1388-91.

ment's position and reaffirm the bedrock principle that no individual may be deprived of his or her liberty without access to the courts. That would be a victory not just for immigrants and their families, but also for the Nation's commitment to maintaining a constitutional democracy based on the rule of law—a commitment that has now withstood challenge for more than two centuries.

POSTSCRIPT

On June 25, 2001, the Supreme Court issued its decisions in *St. Cyr*¹⁵ and *Calcano-Martinez*.¹⁶ The Court ruled, five to four, against the government on both the court-stripping and retroactivity issues.

The jurisdictional question before the Court was whether the courts have jurisdiction to review the Attorney General's decision to apply the new automatic deportation provisions retroactively. That question, in turn, raised two distinct issues. The first concerned the proper mechanism and forum to challenge the Attorney General's retroactivity decision—a district court habeas corpus action under the general federal habeas statute, 28 U.S.C. § 2241,¹⁷ or a “petition for review” filed in the court of appeals directly from the Board of Immigration Appeals (the primary means since 1961 of challenging a deportation order). On this issue, the Court concluded that IIRIRA's jurisdictional provisions barred the courts of appeals from reviewing the Attorney General's retroactivity decision by means of a petition for review, and that insofar as review of the Attorney General's decision remained available, it must be sought in a district court habeas action.¹⁸ The Court then squarely rejected the government's position that IIRIRA's jurisdictional provisions had eliminated access to § 2241 and stressed that, under its prior precedents, § 2241 habeas jurisdiction could be repealed only by an express and unambiguous directive, a directive the Court found lacking in the 1996 legislation.¹⁹ Accordingly, the Court held in *St. Cyr* that the immigrant in that

¹⁵ 533 U.S. 289, 121 S. Ct. 2271 (2001).

¹⁶ 533 U.S. 348, 121 S. Ct. 2268 (2001).

¹⁷ 28 U.S.C. § 2241 (2001).

¹⁸ *Calcano-Martinez*, 121 S. Ct. at 2269-70; *St. Cyr*, 121 S. Ct. at 2283-87.

¹⁹ *St. Cyr*, 121 S. Ct. at 2278-80, 2283-87.

case had properly sought review in a district court habeas action.²⁰ The Court also issued a short, separate opinion in *Calcano-Martinez* dismissing for lack of jurisdiction the petitions for review filed by the three immigrants in that case.²¹

The second jurisdictional issue confronted by the Court was whether the scope of review in a § 2241 habeas action encompassed a challenge to the Attorney General's decision to apply the new automatic deportation provisions retroactively, *i.e.*, a statutory (non-constitutional) claim challenging whether St. Cyr was eligible to apply for a discretionary waiver of deportation. The Court did not dispute that the 1996 jurisdictional provisions had restricted federal jurisdiction and acknowledged that immigrants deportable on the basis of certain criminal offenses (those enumerated in 8 U.S.C. § 1252(a)(2)(C)) were likely no longer entitled to the same type of broad judicial review that previously had been available under the Immigration and Nationality Act.²² But the Court held that St. Cyr's statutory challenge was nonetheless reviewable.

The Court noted that although the ultimate grant or denial of a waiver was within the discretion of the Attorney General, St. Cyr was not challenging the Attorney General's exercise of discretion, but rather, whether he was *statutorily* eligible to apply for the waiver. Thus, the Court stressed that St. Cyr's challenge to the Attorney General's retroactivity decision raised a pure question of law regarding the proper interpretation of a federal statute and that review of non-constitutional questions of law were authorized by the plain terms of § 2241.²³ The Court also undertook a comprehensive historical analysis of habeas precedent and found that questions of law historically had been reviewable in both the immigration and non-immigration areas. As the Court noted, habeas jurisdiction under the general federal habeas corpus statute has been available since 1789 and has routinely been available for non-citizens to challenge deportation and exclusion orders, even during those periods when Congress had eliminated all

²⁰ *Id.* at 2283-87.

²¹ *Calcano-Martinez*, 121 S. Ct. at 2269 (stating that petitioners must proceed with habeas petitions if they wish to obtain relief).

²² *St. Cyr*, 121 S. Ct. at 2283-87.

²³ *Id.* at 2275-78, 2283-84.

review except that required by the Constitution.²⁴ Finally, and significantly, the Court emphasized that the absence of review over a pure question of law concerning the proper interpretation of a federal statute would raise substantial constitutional questions and that these constitutional concerns strongly militated in favor of construing the 1996 legislation to permit review.²⁵

Having found habeas jurisdiction in *St. Cyr*'s case, the Court turned to the merits. The Court noted that the waiver provision under which *St. Cyr* had sought relief from deportation²⁶ had been repealed by IIRIRA as of April 1, 1997 (IIRIRA's general effective date)²⁷ and that *St. Cyr* had been placed into administrative immigration proceedings after that date.²⁸ The Court further noted that the new waiver provisions created by IIRIRA applied to an extremely narrow class of immigrants²⁹ and that *St. Cyr* was not eligible to apply for a waiver under these new waiver provisions.³⁰ But the Court rejected the Attorney General's position that relief under the old waiver provision was no longer available for any individual placed into immigration proceedings after April 1, 1997. The Court held that the repeal of the old waiver provisions did not apply retroactively to all cases commenced after April 1, 1997, and that *St. Cyr*, who had pled guilty to his deportable criminal offense prior to passage of AEDPA and IIRIRA, remained eligible to apply for a waiver of deportation under the pre-1996

²⁴ *Id.* at 2279-84.

²⁵ *Id.* at 2279-82, 2287. That jurisdiction over deportation decisions need not be as broad as that authorized by the Administrative Procedure Act ("APA"), and that it can be limited to the comparatively narrower scope of review available in habeas corpus, is unremarkable and consistent with historical precedent. Congress began regulating immigration in 1875. In 1891, Congress began passing a series of "finality" provisions which had the effect of eliminating all review except "insofar as required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). These finality provisions governed for more than sixty years, until passage of the 1952 Immigration and Nationality Act. During this sixty year period, the Court consistently affirmed an alien's right to habeas corpus review, but also rejected attempts by aliens to obtain broader review, such as that authorized by the APA. *Heikkila*, 345 U.S. at 234-35; *St. Cyr*, 121 S. Ct. at 2281-84.

²⁶ 8 U.S.C. § 1182(c) (1997) (repealed).

²⁷ *St. Cyr*, 121 S. Ct. at 2287. *See also id.* at 2275-78.

²⁸ *Id.* at 2275, 2287.

²⁹ *Id.* at 2277.

³⁰ *Id.*

provision.³¹

In holding that St. Cyr remained eligible to apply for a waiver under the pre-1996 laws, the Court applied the familiar two-step retroactivity test.³² Under this test, the Court stressed that application of the new waiver laws to St. Cyr's case would have a retroactive effect and thus could not be applied to him in the absence of an express and unambiguous directive in the statute—a directive the Court found lacking.³³ Among other factors, the Court noted that St. Cyr's pre-AEDPA/IIRIRA conviction had been pursuant to a plea agreement and that immigrants may have entered into pre-Act pleas on the understanding that pleading guilty would not subject them to automatic deportation.³⁴

Because St. Cyr's pre-AEDPA/IIRIRA conviction had been pursuant to a plea agreement, the Court had no occasion to decide any of the other possible factual permutations on the retroactivity issue, such as whether immigrants could seek relief under the old waiver provisions if their pre-AEDPA/IIRIRA convictions had not been pursuant to a plea agreement, or whether relief under the old waiver provisions remained available for immigrants whose criminal *conduct*, but not convictions, occurred before passage of AEDPA and IIRIRA. Importantly, however, the Court provided significant guidance on these remaining issues. In particular, the Court rejected the government's attempt to place immigration in a separate category for purposes of retroactivity analysis and made clear that the Court's general retroactivity jurisprudence applies with equal force to immigration legislation.³⁵ Thus, any further government attempts to apply the new waiver laws retroactively to cases involving pre-AEDPA/IIRIRA events must be analyzed in light of the same strong presumption against retroactive legislation that governs in other areas of the law.

The Court's decisions prompted separate dissents from Justices Scalia and O'Connor. Justice Scalia, joined by Chief

³¹ *St. Cyr*, 121 S. Ct. at 2293.

³² See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *St. Cyr*, 121 S. Ct. at 2287-88, 2290 (setting forth the two-step test).

³³ *St. Cyr*, 121 S. Ct. at 2287-93.

³⁴ *Id.* at 2291-93.

³⁵ *Id.* at 2292-93.

Justice Rhenquist and Justice Thomas, dissented on the jurisdictional issue, without reaching the merits of the Attorney General's retroactivity decision.³⁶ Justice Scalia argued that the 1996 legislation had eliminated all means of reviewing the Attorney General's retroactivity decision, including a district court habeas corpus action under 28 U.S.C. § 2241,³⁷ and that the complete preclusion of review was constitutional under the Suspension Clause for two principal reasons.³⁸

As an initial matter, Justice Scalia argued broadly that the 1996 legislation's restrictions on judicial review did not violate the Suspension Clause because Congress in the 1996 Acts "has not temporarily withheld operation of the writ, but has permanently altered its content."³⁹ In Justice Scalia's view, "To 'suspend' the writ was not to fail to enact it, much less to refuse to accord it particular content."⁴⁰ To suspend the writ was, rather, to "temporarily but entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."⁴¹ He contended that this latter problem was "a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience. . . ."⁴² Justice Scalia's second and narrower argument was that the Suspension Clause did not guarantee review of the Attorney General's decision because the petitioners conceded they were deportable on the basis of their prior criminal convictions and were challenging only whether they were eligible to apply for a waiver of deportation, a form of relief whose ultimate grant or denial rested in the discretion of the Attorney General.⁴³

Justice O'Connor also dissented on the jurisdictional issue without reaching the merits.⁴⁴ Like Justice Scalia, she believed that the 1996 legislation repealed all jurisdiction over the Attorney General's retroactivity decision and that the total

³⁶ *St. Cyr*, 121 S. Ct. at 2293; *Calcano-Martinez*, 121 S. Ct. at 2271.

³⁷ *St. Cyr*, 121 S. Ct. at 2293-98.

³⁸ Justice Scalia rejected out of hand any suggestion that the preclusion of review raised constitutional problems under the Due Process Clause or Article III. *Id.* at 2302-04.

³⁹ *Id.* at 2300.

⁴⁰ *Id.* at 2999.

⁴¹ *Id.*

⁴² *St. Cyr*, 121 S. Ct. at 2999.

⁴³ *Id.* at 2301-03.

⁴⁴ *Id.* at 2293; *Calcano-Martinez*, 121 S. Ct. at 2270.

preclusion of review was constitutional. She found it unnecessary, however, to address Justice Scalia's broad constitutional contention regarding the circumstances under which restrictions on habeas corpus constitute a "suspension" of the writ, and instead rested her dissent solely on the narrower ground offered by Justice Scalia—that petitioners were challenging their eligibility for a *discretionary* form of relief, and not the threshold finding that they had committed a deportable offense.⁴⁵

The Court's 5-4 decisions in *St. Cyr* and *Calcano-Martinez* have given hope to thousands of immigrants and their families throughout the Nation. More broadly, the decisions represent a sweeping affirmation of the constitutional values and principles that had come under attack as a result of the 1996 legislation—values and principles that were held in especially high esteem by the Framers.

Indeed, before passage of the Bill of Rights in 1791, the Constitution as originally enacted by the Framers in 1787 included few specific protections for individual rights. Notably, however, two of the individual rights it did include were protection against suspension of the writ of habeas corpus⁴⁶ and protection against retroactive legislation.⁴⁷ The Court's decisions protecting these two bedrock constitutional principles would thus have been significant under any circumstances. The decisions are particularly impressive because they protected these cherished rights on behalf of a disadvantaged and politically vulnerable class of individuals whose only recourse was to turn to the best traditions of the federal courts.

⁴⁵ *St. Cyr*, 121 S. Ct. at 2293.

⁴⁶ Suspension Clause, U.S. CONST., art. I, § 9, cl. 2.

⁴⁷ Ex Post Facto Clause, U.S. CONST., art. I, § 10, cl. 1. The Supreme Court has held that the Ex Post Facto Clause does not apply to civil immigration legislation. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). Consequently, the Ex Post Facto Clause was not directly implicated in the *St. Cyr* and *Calcano-Martinez* cases. However, even in cases not strictly governed by the Ex Post Facto Clause, the Court frequently has looked to its Ex Post Facto jurisprudence to illuminate the general anti-retroactivity principle embodied by the Clause, and has stressed that the general principle has long and deep roots in our country, dating back to English common law. *See, e.g.*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997); *St. Cyr*, 121 S. Ct. at 2288 (noting that "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic") (internal quotation marks and citations omitted). *See also St. Cyr*, 121 S. Ct. at 2293 (relying on Court's Ex Post Facto Clause decision in *Lindsey v. Washington*, 301 U.S. 397 (1937)).

