The Review of Litigation

Winter 2018 Pages 1 to 122 Vol. 37, No. 1
Published by The University of Texas School of Law

THE REVIEW OF LITIGATION

VOLUME 37 WINTER 2018 NUMBER 1

ARTICLES

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VOLUME 37 WINTER 2018 NUMBER 1

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Cite as: REV. LITIG.

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THE REVIEW OF LITIGATION

2018 VOLUME 38 2019

THE REVIEW OF LITIGATION

2017 VOLUME 37 2018

Critical Contours of Fraud on the Court

Douglas R. Richmond*

INTRODUCTION

Fraud committed in connection with litigation has long been grounds for setting aside a judgment, provided that an innocent party timely moves for relief. In federal court, for example, a party seeking to vacate a judgment for an opponent's fraud, misrepresentation, or other misconduct under Federal Rule of Civil Procedure 60(b)(3) must act within a reasonable time and "no more than a year after the entry

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of the judgment or order or the date of the proceeding."[1] If fraud qualifies as "fraud on the court," however, Rule 60(d)(3) allows a court to exercise its inherent power to set aside a judgment even after one year.[2] Absent a contrary court rule or rule of civil procedure in a particular state,[3] a judgment tainted by fraud on the court may be set aside at any time;[4] there is no statute of limitations for moving to vacate a judgment on this ground.[5] Laches is no defense to a motion to set aside a judgment for fraud on the court.[6] Furthermore, a court may vacate a judgment procured through fraud on the court on its own initiative.[7]

The recognition that some frauds are so offensive that they justify departing from normal time limits for challenging judgments, and thus from the principle of finality of judgments and the strong public policy favoring an end to litigation, invites an obvious question: what sort of misconduct constitutes fraud on the court? Or, quite simply, what is fraud on the court? These questions defy easy or uniform answers. Even courts find fraud on the court to be an "elusive" and "nebulous" concept.[8] The term is not defined in Rule 60 or elsewhere in the Federal Rules. It is certainly true, however, that not all fraud in the course of litigation qualifies as fraud on the court.[9] In fact, *most* litigation-related fraud falls short of fraud on the court.

Lawyers who hope to obtain relief for clients through allegations of fraud on the court based on, for example, an adversary's deceit or dishonesty in discovery, knowingly false testimony by an

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1. FED. R. CIV. P. 60(c)(1).

2. FED. R. CIV. P. 60(d)(3).

3. *See, e.g.*, ALA. R. CIV. P. 60(b) ("This rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three (3) years after the entry of the judgment . . . to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.").

4. *In re* Golf 255, Inc., 652 F.3d 806, 809 (7th Cir. 2011); Jahangirizadeh v. Pazouki, 27 N.E.3d 1178, 1182 (Ind. Ct. App. 2015).

5. Chewning v. Ford Motor Co., 579 S.E.2d 605, 609–10 (S.C. 2003).

6. 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 60.21[4][g], at 60-66-67 (2016) [hereinafter 12 MOORE'S FEDERAL PRACTICE] (noting, however, that a court probably will consider the delay involved in evaluating alleged fraud on the court, with deference to the finality of the judgment increasing as the delay lengthens).

7. *Jahangirizadeh*, 27 N.E.3d at 1182.

8. Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982).

9. *See* United States v. Sierra Pac. Indus., Inc. [hereinafter *Sierra Pacific II*], 862 F.3d 1157, 1167 (9th Cir. 2017) (quoting *In re* Levander, 180 F.3d 1114, 1119 (9th Cir. 1999)); Doe v. Smith, 200 So. 3d 1028, 1033 (Miss. 2016) ("Not just any falsity or misstep, even if intentional, is enough for relief.").

opposing party, an adversary's falsification or forgery of documents that are introduced as evidence at trial, or an opponent's persistent litigation of the validity of a patent after engaging in inequitable conduct in obtaining the patent, are routinely disappointed. Courts narrowly apply the fraud on the court doctrine.[10] The standard for finding fraud on the court is "higher and distinct" from the standard for granting relief from a judgment based on other forms of fraud under Rule 60(b)(3).[11] A high standard for fraud on the court is necessary to avoid trampling on the finality of judgments, to discourage collateral attacks on judgments, and to avoid gutting Rule 60(b)(3) and state analogs, which limit the time in which to set aside judgments based on fraud, misrepresentation, or other misconduct.

To rise to the level of fraud on the court, the fraud generally must be of a type that could not have been discovered within one year of the judgment through due diligence;[12] it must be intentional or willful,[13] although in at least one jurisdiction conduct that reflects a "reckless disregard for the truth" will suffice;[14] it must harm the integrity of the judicial process;[15] it must relate to a central issue in the case;[16] and it must have influenced the court's decision or affected the outcome of the litigation.[17] In short, fraud on the court is restricted to

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10. Lundeen v. Frye, 666 F. App'x 539, 542 (7th Cir. 2016); Stronger v. Sorrell, 776 N.E.2d 353, 357 (Ind. 2002); McGee v. Gonyo, 140 A.3d 162, 167 (Vt. 2016).

11. United States v. Smiley, 553 F.3d 1137, 1144–45 (8th Cir. 2009).

12. *In re* Golf 255, Inc., 652 F.3d 806, 809 (7th Cir. 2011).

13. *Sierra Pacific II*, 862 F.3d at 1168 (quoting *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009)); Bessa v. Anflow Indus., Inc., 51 N.Y.S.3d 102, 106 (App. Div. 2017) (quoting CDR Créances S.A.S. v. Cohen, 15 N.E.3d 274, 282 (N.Y. 2014)); *see also* United States v. Gordon, 657 F. App'x 773, 779 (10th Cir. 2016) (observing that "a mistake does not, alone, constitute a fraud on the court").

14. Gen. Med., P.C. v. Horizon/CMS Health Care Corp., 475 F. App'x 65, 71–72 (6th Cir. 2012).

15. *Sierra Pacific II*, 862 F.3d at 1167–68 (quoting v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011)); *Bessa*, 51 N.Y.S.3d at 106 (quoting *CDR Créances S.A.S.*, 15 N.E.3d at 282).

16. *Sierra Pacific II*, 862 F.3d at 1168 (quoting *Estate of Stonehill*, 660 F.3d at 452).

17. *Id.* (quoting *Estate of Stonehill*, 660 F.3d at 448); Followell v. Mills, 317 F. App'x 501, 506 (6th Cir. 2009) (quoting Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993)); Stronger v. Sorrell, 776 N.E.2d 353, 357 (Ind. 2002); *see, e.g.*, Rodriguez v. Honigman Miller Schwartz & Cohn LLP, 465 F. App'x 504, 509 (6th Cir. 2012) (rejecting the plaintiff's fraud on the court claim where there was no evidence that the courts involved were actually deceived by the alleged fraud).

egregious misconduct that is directed at the court.[18] The party alleging fraud on the court may further be required to show that judicial action with respect to the judgment is necessary to prevent a grave miscarriage of justice.[19] Fraud perpetrated by one party solely against another, while reprehensible, is not fraud on the court.[20]

Vague or conclusory allegations of fraud on the court will not suffice, nor will a mere preponderance of the evidence carry the day. Rather, a party must prove fraud on the court by clear and convincing evidence.[21] Naturally, any supporting evidence must be admissible.[22]

Although a finding of fraud on the court should generally be expected to result in the court setting aside the tainted judgment, that is not the only possible consequence or outcome. A court may exercise its discretion and, instead of vacating the judgment, amend it.[23] Alternatively, the court may, instead of vacating the judgment, invoke its inherent authority to fashion an appropriate sanction against the culpable party, the offending lawyers, or both.[24] In addition, lawyers

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18. *See, e.g.*, Fernandez v. Fernandez, 358 P.3d 562, 568 (Alaska 2015) (pursuing a sham marital dissolution action to shield marital property from creditors in the husband's bankruptcy); *In re* Ibanez, 834 N.W.2d 306, 312 (S.D. 2013) (stating that fraud on the court "must involve egregious conduct causing injury to more than a single litigant and must seriously affect the integrity of the judicial process"); McGee v. Gonyo, 140 A.3d 162, 167 (Vt. 2016) (finding fraud on the court where the fraud was accomplished by both parties agreeing to perpetrate a fraud on the court and the judicial process, rather than the fraud being directed by one party at the other).

19. Space Hunters, Inc. v. United States, 500 F. App'x 76, 78 (2d Cir. 2012) (quoting United States v. Beggerly, 524 U.S. 38, 47 (1998)).

20. Brown v. S.E.C., 644 F. App'x 957, 959 (11th Cir. 2016) (quoting Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985)); Withrow v. Williams, 607 S.E.2d 491, 497 (W. Va. 2004).

21. Council v. Am. Fed'n of Gov't Emps. (AFGE) Union, 559 F. App'x 870, 873 (11th Cir. 2014); Orient Mineral Co. v. Bank of China, 416 F. App'x 721, 725 (10th Cir. 2011); Wickens v. Shell Oil Co., 620 F.3d 747, 759 (7th Cir. 2010); Alaska Fur Gallery, Inc. v. First Nat'l Bank Alaska, 345 P.3d 76, 85 (Alaska 2015) (quoting Murray v. Ledbetter, 144 P.3d 492, 498 (Alaska 2006)); Kuhn v. Coldwell Banker Landmark, Inc., 245 P.3d 992, 1001–02 (Idaho 2010); Rea v. Moore, 74 S.W.3d 795, 801 (Mo. Ct. App. 2002); Finch v. Finch, 137 So. 3d 227, 234–36 (Miss. 2014); CDR Créances S.A.S. v. Cohen, 15 N.E.3d 274, 284 (N.Y. 2014); Lett v. Providence Journal Co., 798 A.2d 355, 364 (R.I. 2002).

22. *See, e.g.*, Citizens for Appropriate Rural Roads v. Foxx, 815 F.3d 1068, 1080 (7th Cir. 2016) (rejecting the plaintiffs' fraud on the court claim due to a lack of admissible evidence).

23. Hongsermeier v. Comm'r of Internal Revenue, 621 F.3d 890, 899 (9th Cir. 2010).

24. United States v. Williams, 790 F.3d 1059, 1071 (10th Cir. 2015) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)).

who commit fraud on the court or who assist clients in doing so unquestionably tempt professional discipline,[25] and may risk civil liability to aggrieved parties for fraud or for aiding and abetting their clients' fraud. Some forms of fraud on the court, such as a lawyer's subornation of perjury by a witness, may have criminal consequences.

This article examines critical contours of fraud on the court in an effort to lend some clarity to this poorly understood doctrine. Part II begins our analysis with a look at the leading case on the subject, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[26] and courts' subsequent consideration of misconduct by lawyers when evaluating allegations of fraud on the court.[27] For that matter, most of the principles that govern fraud on the court claims derive from the decision in *Hazel-Atlas*.[28]

Part III discusses perjury as fraud on the court. Although perjury is a serious offense, isolated instances of perjury by witnesses are not considered fraud on the court. As this Part explains, however, perjury may rise to the level of fraud on the court where lawyers suborn it, where lawyers commit perjury in their role as officers of the court rather than as witnesses, or where the perjury was so fundamental that it undermined the adversary process itself.

Picking up on the analysis in Part III of perjury by lawyers as fraud on the court, Part IV asks whether a lawyer's knowingly false statements of material fact to a court while appearing as an advocate could qualify as fraud on the court. The short answer to this question is yes, as Part IV explains in discussing lawyers' duty of candor under rules of professional conduct. On the right facts, lawyers' breaches of their duty of candor in other contexts may also constitute fraud on the court.

Part V discusses the non-disclosure of facts or information as fraud on the court. Courts treat non-disclosure like perjury, meaning

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25. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2017) (stating that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent"); *id.* r. 8.4(c) (prohibiting conduct by a lawyer involving dishonesty, fraud, deceit or misrepresentation).

26. 322 U.S. 238 (1944), *overruled on other grounds by* Std. Oil Co. of Cal. v. United States, 429 U.S. 17 (1976).

27. Lawyers may commit fraud on the court without any participation by, or even the knowledge of, the parties they represent. *See, e.g.*, NC-DSH, Inc. v. Garner, 218 P.3d 853, 858–60 (Nev. 2009) (involving a lawyer who settled his clients' case without their knowledge and forged the settlement papers that he submitted to the court).

28. David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L.J. 707, 727 (2016).

that non-disclosure generally does not rise to the level of fraud on the court. As this Part further explains, however, non-disclosure may work a fraud on the court where—as with perjury—the non-disclosure was so fundamental that it undermined the adversary process itself.

Parts VI and VII briefly address related issues. Part VI explains that a finding of fraud on the court does not require harm or prejudice to a party. Viewing what is in essence the other side of the same coin, Part VII explains that a party may commit fraud on the court even if it does not benefit from the fraud.

Finally, Part VIII considers the effect of settlement on fraud on the court claims. In short, relief based on fraud on the court is generally foreclosed by a settlement where a party, despite knowing of misconduct that might qualify as fraud on the court, settles anyway. Even if an innocent party does not know of possible fraud on the court when it settles, the terms of the settlement agreement may scuttle such claims later.

I. MISCONDUCT BY LAWYERS AS AN INFLUENTIAL FACTOR IN FRAUD ON THE COURT

A. The Hazel-Atlas Case

Understanding fraud on the court begins with a review of the Supreme Court's 1944 decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[29] *Hazel-Atlas* traced back to 1926 and Hartford-Empire Co.'s (Hartford) application for a patent on a machine that poured glass into molds in a method known as gob feeding, which was stalled in the U.S. Patent and Trademark Office (USPTO).[30] To advance the patent application, Hartford executives and lawyers schemed to have an article ostensibly written by a disinterested expert that would describe gob feeding "as a remarkable advance in the art of fashioning glass" published in a trade journal.[31] A Hartford lawyer ghostwrote the article, which was published in a glass industry trade journal in July 1926 under the name of William Clarke, a glass industry union leader.[32] In October 1926, Hartford introduced the article as part of the record in support of its pending patent application, and in January 1928 the USPTO granted the application as Patent No. 1,655,391.[33]

29. 322 U.S. 238 (1944).
30. *Id.* at 240.
31. *Id.*
32. *Id.*
33. *Id.* at 240–41.

In June 1928, Hartford sued Hazel-Atlas (Hazel) for infringing the gob feeding patent.[34] The case was tried in 1929.[35] Hazel's lawyers knew of the article and had heard murmurings that it had been written by a Hartford lawyer, but disregarded such chatter in successfully defending the infringement action on other grounds.[36] Then, in 1932, the Third Circuit reversed Hazel's win at trial, quoting the spurious article in the process.[37] This turn of events caused Hazel to send an investigator to Toledo, Ohio to interview Clarke, who refused to cooperate with Hazel.[38] Unbeknownst to Hazel, a Hartford emissary had beaten Hazel's investigator to Toledo and obtained an affidavit from Clarke falsely taking credit for the article.[39] Hartford later paid Clarke $8,000 for his loyalty.[40] In the meantime, unable to prove the fraud on the court it suspected due to Clarke's intransigence, Hazel resignedly paid Hartford $1 million and entered into certain licensing agreements.[41]

These unseemly facts surfaced in 1941 in an antitrust action between Hartford and another company.[42] Newly energized, Hazel petitioned the Third Circuit to vacate the judgment against it based on fraud on the court.[43] The Third Circuit denied Hazel's petition because the fraud was not newly-discovered, the article was not the principal basis of the prior decision, and it did not have the power to grant relief because the court term during which the prior decision had been rendered had expired.[44] Hazel successfully petitioned the Supreme Court for a writ of certiorari.

The Supreme Court noted that federal courts generally declined to alter or set aside judgments after the expiration of the term at which they were entered out of "the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered."[45] But here the fraud "demand[ed]

34. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 241 (1944).
35. *Id.*
36. *Id.*
37. *Id.* at 241–42.
38. *Id.* at 242.
39. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 242 (1944).
40. *Id.* at 243.
41. *Id.*
42. *Id.*
43. *Id.* at 239.
44. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 243-44 (1944).
45. *Id.* at 244. Before the 1937 adoption of the Federal Rules of Civil Procedure, potential relief from a judgment required that the court be in the same term in which the judgment was entered. United States v. Beggerly, 524 U.S. 38, 42

the exercise of the historic power of equity to set aside fraudulently begotten judgments" because Hartford had a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals."[46]

As for the Third Circuit's conclusion that Hazel had not been suitably diligent in exposing Hartford's fraud, the Court did not understand how Hazel could have been expected to do more than it did.[47] Regardless, Hartford's fraud could not be excused solely for that reason because the case did not "concern only private parties."[48] Rather, "tampering with the administration of justice in the manner indisputably shown here involve[d] far more than an injury to a single litigant."[49] The fraud in this case was "a wrong against the institutions set up to protect and safeguard the public," and it could not be that the "preservation of the integrity of the judicial process" had to "wait upon the diligence of litigants."[50]

The Supreme Court was also unimpressed by the Third Circuit's denial of relief based on the supposed tangential importance of the article to its 1932 decision:

> Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit . . . in the District Court . . . they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only

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(1998). The Federal Rules of Civil Procedure did away with the notion that a term of court affected a court's power. *Id.* at 43.

46. *Hazel-Atlas*, 322 U.S. at 245.
47. *Id.* at 246.
48. *Id.*
49. *Id.*
50. *Id.*

> title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.[51]

The Court concluded that Hartford's cumulative fraud, begun in the USPTO and continued through appeal to the Third Circuit, required the complete denial of relief to Hartford for Hazel's alleged patent infringement.[52] The Court therefore invalidated the patent and vacated the judgment against Hazel.[53]

B. Lawyers' Role in Fraud on the Court Following Hazel-Atlas

The *Hazel-Atlas* court plainly considered Hartford's lawyers' participation in the fraud in setting aside the judgment.[54] Indeed, Hartford's lawyers' involvement in the fraud—recall that one of them ghostwrote the spurious article—was a distinguishing feature of the case.[55] Consequently, subsequent courts analyzing allegations of fraud on the court have generally considered lawyers' participation in the challenged conduct to be either an essential element of the offense or a factor to be considered in evaluating the merit of the allegations.[56] For example, the First, Third, and Sixth Circuits consider misconduct by an "officer of the court" to be an essential element of fraud on the court claims.[57] Lawyers are officers of the court,[58] at least when they are functioning in a representative capacity.[59] The Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits do not require a lawyer to have participated in the

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51. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247 (1944).

52. *Id.* at 250.

53. *Id.* at 251.

54. *See id.* at 247 (observing that Hartford's "lawyers thought the article material," helped conceive it, and prepared it).

55. 12 MOORE'S FEDERAL PRACTICE, *supra* note 6, § 60.21[4][b], at 60–68.

56. *Id.*

57. Herring v. United States, 424 F.3d 384, 390 (3d Cir. 2005); Workman v. Bell, 245 F.3d 849, 852 (6th Cir. 2001) (quoting Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993)); George P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 n.5 (1st Cir. 1995).

58. *In re* Brown, 392 P.3d 474, 478 (Alaska 2017); *In re* Reno, 283 P.3d 1181, 1243 (Cal. 2012); *In re* Fay, 111 A.3d 1025, 1029–30 (D.C. 2015); NC-DSH, Inc. v. Garner, 218 P.3d 853, 858 (Nev. 2009); *In re* Chavez, 299 P.3d 403, 409 (N.M. 2013); Lawyer Disciplinary Bd. v. McCloskey, 793 S.E.2d 23, 31 (W. Va. 2016).

59. Glenwood Farms, Inc. v. O'Connor, 666 F. Supp. 2d 154, 179–81 (D. Me. 2009); McGee v. Bevill, 111 So. 3d 132, 137 (Ala. Civ. App. 2012).

fraud for it to constitute fraud on the court, but may consider the lawyer's role when deciding whether the fraud is so egregious that it rises to the extreme level of fraud on the court.[60] In these courts and in others where a lawyer's participation in the fraud is not a required element of the offense, a party alone may be guilty of fraud on the court.[61]

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60. *See* SEC v. N. Am. Clearing, Inc., 656 F. App'x 947, 949 (11th Cir. 2016) (stating that the "'fraud on the court' standard is more exacting than the standard for fraud under Rule 60(b)(3), encompassing only the most egregious misconduct, such as . . . the fabrication of evidence by a party in which an attorney is implicated"); Fox *ex rel.* Fox v. Elk Run Coal Co., 739 F.3d 131, 136 (4th Cir. 2014) (explaining that fraud on the court "is limited to situations such as 'bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged'" (quoting Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982)); Space Hunters, Inc. v. United States, 500 F. App'x 76, 78 (2d Cir. 2012) (asserting that fraud on the court "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" (quoting Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995)); *In re* Golf 255, Inc., 652 F.3d 806, 809 (7th Cir. 2011) (offering as an example of fraud on the court "fraudulent submissions by a lawyer for one of the parties in a judicial proceeding, such as tendering documents he knows to be forged or testimony he knows to be perjured"); Turner v. Pleasant, 663 F.3d 770, 776–77 (5th Cir. 2011) (reasoning that a defense lawyer's relationship with the judge could have caused the judge to rule against the plaintiffs, in which case the judgment should not be enforced); United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011) (quoting *In re* Intermagnetics Am., Inc., 926 F.2d 912, 916 (9th Cir. 1991)); Thomas v. Parker, 609 F.3d 1114, 1120 (10th Cir. 2010) (quoting Zurich N. Am. v. Matrix Serv., Inc., 426 F.3d 1281, 1291 (10th Cir. 2005), and stating that the appellant's allegations did not establish fraud on the court "because, at most, they show[ed] the nondisclosure of evidence or the alteration of evidence by a party, with no showing of attorney involvement"); Greiner v. City of Champlin, 152 F.3d 787, 789 (8th Cir. 1998) (observing that "[a] finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as . . . fabrication of evidence by counsel" (quoting Landscape Props., Inc. v. Vogel, 46 F.3d 1416, 1422 (8th Cir. 1995)); Baltia Air Lines, Inc. v. Transaction Mgmt., Inc., 98 F.3d 640, 643 (D.C. Cir. 1996) (stating that fraud on the court includes "the knowing participation of an attorney in the presentation of perjured testimony"); Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085–86 (Fed. Cir. 1993) (quoting a treatise for the proposition that fraud on the court should embrace only frauds that subvert the integrity of the court or are perpetrated by officers of the court so that the judicial machinery cannot properly function).

61. *See, e.g.*, Wunderlich v. Alexander, 92 S.W.3d 715, 719 (Ark. Ct. App. 2002) (affirming the trial court's finding of fraud on the court where the parties entered into a sham adoption); McNeil v. Hoskyns, 337 P.3d 46, 50–51 (Ariz. Ct. App. 2014) (rejecting the argument that "fraud on the court may be committed only by an officer of the court, not by a party"); Ray v. Ray, 647 S.E.2d 237, 241 (S.C.

Even when a lawyer is involved in the alleged fraud or her conduct is alleged to be central to it,[62] fraud on the court is still hard to prove. Courts rightfully give lawyers the benefit of the doubt in some instances.[63] But, while successful fraud on the court claims are rare, there certainly are cases in which lawyers' participation in the fraud supports such a finding. *Trehan v. Von Tarkanyi*[64] is representative.

Anton Von Tarkanyi was an Australian businessman who visited New York in July 1981 to explore business opportunities for his company, Unigulf.[65] While in New York, he looked into acquiring an apartment for Unigulf executives to use when in the city on business.[66] A real estate broker introduced him to Surinder Trehan, who was trying to sell his cooperative apartment for $1.9 million.[67] In their initial negotiations, Trehan did not reveal that he and his wife had declared bankruptcy and were in the midst of those proceedings, so they could not sell the apartment without the bankruptcy court's approval.[68] When Von Tarkanyi flew back to Australia in early August 1981 without contracting to buy the apartment, Trehan raced to Unigulf's New York office and duped an executive there, Trevor Bailey, into signing a contract on Von Tarkanyi's behalf.[69] Later, Trehan called Von Tarkanyi in Australia and asked him to authorize Bailey to enter into a sale contract for the apartment.[70] Von Tarkanyi refused, told Trehan that Bailey was not authorized to execute documents on his or on Unigulf's behalf, and said that nothing should be done with respect to the apartment until he returned to New York.[71]

2007) (concluding that the wife in a divorce case committed fraud on court by misrepresenting the existence of marital assets in a court-ordered accounting).

62. Again, lawyers may commit fraud on the court without any participation by, or even the knowledge of, the parties they represent. *See, e.g.*, NC-DSH, Inc. v. Garner, 218 P.3d 853, 858–60 (Nev. 2009) (involving a lawyer who committed fraud on the court by settling his clients' case without their knowledge and forging the settlement papers that he submitted to the court).

63. *See, e.g.*, W. Liberty Foods, L.L.C. v. Moroni Feed Co., 1 F. Supp. 3d 951, 958–60 (S.D. Iowa 2014) (declining to vacate an arbitration award based on fraud on the court where Moroni's lawyer had offered conflicting testimony and rejecting the allegation that he had been dishonest).

64. 63 B.R. 1001 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

65. *Id.* at 1003.

66. *Id.*

67. *Id.*

68. *Id.*

69. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1003 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

70. *Id.* at 1004.

71. *Id.*

Despite knowing these facts, the Trehans' lawyer, Alex Spizz, appeared in the bankruptcy court on August 12, 1981, and told the judge that the Trehans had found a buyer for the apartment; that Bailey had executed a contract of sale on Von Tarkanyi's behalf; and that Von Tarkanyi had executed a power of attorney authorizing Bailey to enter into the sale contract.[72] To satisfy the Trehans' skeptical creditors, the bankruptcy court ordered Spizz to produce the contract and the power of attorney in court.[73] Spizz turned over a copy of the contract, but told the creditors that he did not have the power of attorney.[74]

The sale contract signed by Bailey was contingent upon Von Tarkanyi obtaining a $1.425 million mortgage.[75] The Trehans' creditors, however, would only approve an all cash sale of the apartment.[76] The Trehans knew that the bankruptcy court would auction off the apartment if the creditors did not approve the sale terms.[77] To avoid this result, Spizz falsely informed the bankruptcy court on August 25 that Von Tarkanyi had converted his offer into an all cash deal.[78] Just a day earlier, Spizz had filed an affidavit by Trehan falsely stating that Trehan thought it was proper for Bailey to sign the sale contract and that he had understood Bailey to have Von Tarkanyi's power of attorney.[79]

On August 27, Spizz submitted to the bankruptcy court a purported amended sale contract which he said Bailey had signed that same day.[80] In fact, the document was the original contract with handwritten modifications.[81] The mortgage contingency clause had been deleted, thus converting the sham sale into an all cash deal.[82] Spizz never produced a signed power of attorney from Von Tarkanyi authorizing Bailey to execute a contract to purchase the apartment.[83] Instead, he submitted an unsigned telex from the day before supposedly sent by Von Tarkanyi to confirm the purchase of the

72. *Id.*
73. *Id.*
74. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1004 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1004 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).
80. *Id.*
81. *Id.* at 1004–05.
82. *Id.* at 1005.
83. *Id.*

apartment.[84] The telex was fraudulent.[85] The Trehans' creditors and the bankruptcy court sensed all of this, and the court ordered that the apartment be advertised for sale subject to court approval.[86]

Von Tarkanyi returned to New York on August 28, 1981, wholly unaware of the intervening events.[87] When he learned most of what had happened while he was away, he assumed that he was through dealing with the Trehans.[88] He still did not know that Bailey had signed the sale contract in his name.[89]

In late September 1981, the Trehans sold their apartment to Ella Cisneros for $1.45 million in cash in a transaction approved by the bankruptcy court.[90] Spizz handled the sale.[91] The Trehans, represented by Spizz, then sued Von Tarkanyi in an adversary action.[92] They sought $450,000, which was the difference between the price in the sale contract that Trehan had tricked Bailey into signing on Von Tarkanyi's behalf and the purchase price paid by Cisneros.[93] The adversary complaint, signed by Spizz on the Trehans' behalf, contained numerous misrepresentations and omitted key facts that made many of the allegations misleading.[94] Indeed, most of the material "facts" pled in the complaint were false, and Spizz apparently knew as much.[95]

Von Tarkanyi returned to Australia, and as a result of a confluence of unusual facts and procedural irregularities, the Trehans obtained a $450,000 default judgment against him in August 1982.[96] He was never notified of the default judgment.[97] He learned of the judgment in September 1983 when he read about it in an Australian newspaper.[98] He hired an Australian lawyer who reached out to Spizz

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84. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1005 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

85. *Id.* n.6.

86. *Id.* at 1005.

87. *Id.*

88. *Id.*

89. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1007 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

90. *Id.* at 1005.

91. *Id.*

92. *Id.*

93. *Id.* at 1006.

94. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1006 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

95. *See id.* (discussing the facts alleged in the complaint).

96. *Id.* at 1008.

97. *Id.* at 1008–09.

98. *Id.* at 1010.

and was told that the Trehans had a valid judgment on which they intended to collect.[99] In August 1984, Spizz filed an action in Australia to enforce the judgment.[100] The Australian court stayed those proceedings so that Von Tarkanyi could challenge the default judgment in New York, which he did in September 1985.[101] In February 1986, the bankruptcy court declined to vacate the default judgment, calling Von Tarkanyi's effort to do so "too little, too late."[102] Von Tarkanyi then sought review of the bankruptcy court's order by the district court.

The district court held a show cause hearing to determine whether the default judgment should be vacated.[103] The district court was persuaded that "[i]n light of the procedural improprieties which pervaded [the] proceedings, and the omissions and misrepresentations made by the [Trehans] and [Spizz] in the complaint, and renewed by them in the hearings and subsequent affidavits" in the bankruptcy court and the district court, "a gross injustice may have resulted."[104] The *Trehan* court therefore remanded the case to the bankruptcy court "to reconsider anew whether the default judgment [was] void and whether there was a fraud on the court, requiring that the judgment be set aside."[105] The *Trehan* court additionally directed the bankruptcy court to evaluate whether the Trehans and Spizz should be sanctioned for their misconduct.[106]

On remand, the bankruptcy court found that the Trehans were guilty of fraud on the court and vacated their default judgment against Von Tarkanyi.[107] While the bankruptcy court also recommended that the Trehans be sanctioned under Rule 11 for their bad faith conduct, it surprisingly recommended against sanctioning Spizz.[108] The district court deferentially accepted the bankruptcy court's recommendations, although with respect to Spizz, the court added that it was "doubtful

99. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1010 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Trehan v. Von Tarkanyi, 63 B.R. 1001, 1010 (S.D.N.Y. 1986), *vacated,* 85 B.R. 920 (S.D.N.Y. 1988).

105. *Id.*

106. *Id.*

107. Trehan v. Von Tarkanyi, 85 B.R. 920, 920–21 (S.D.N.Y. 1988).

108. *Id.* at 922.

that [it] would have reached the same conclusion on the uncontrovertible facts" in the record.[109]

II. PERJURY AS FRAUD ON THE COURT

Trehan richly illustrates how a dishonest party, aided and abetted by a reckless or unscrupulous lawyer, may perpetrate a fraud on a court. Trehan's willingness to lie in affidavits submitted to the courts by Spizz to implement his scheme further serves as a reminder of the potentially corrosive effect of perjury. "Perjured testimony threatens the fair administration of justice and seriously undermines the rule of law."[110] Even so, perjury by a party or witness standing alone is not fraud on the court.[111] There are three reasons for this rule. First, perjury should be exposed at trial rather than through a later attack on a judgment.[112] To hold otherwise would disruptively perpetuate litigation and potentially undermine the stability of all judgments. Second, the legal system contains other penalties for perjury.[113] Most obviously, perjury is a crime punishable by imprisonment.[114] Third, courts generally view perjury as a fraud injuring a single litigant rather than as an assault on the integrity of the court or the judicial system.[115] But while an isolated instance of perjury by a party or witness is not fraud on the court, perjury may escalate to that level where a lawyer suborns it or it is committed by a

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109. *Id.*

110. DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 609 (2d ed. 2016).

111. United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157, 1168 (9th Cir. 2017) (quoting United States v. Estate of Stonehill, 660 F.3d 415, 444–45 (9th Cir. 2011)); Council v. Am. Fed'n of Gov't Emps. (AFGE) Union, 559 F. App'x 870, 873 (11th Cir. 2014); Rodriguez v. Honigman Miller Schwartz & Cohn LLP, 465 F. App'x 504, 509–10 (6th Cir. 2012); *In re* Golf 255, Inc., 652 F.3d 806, 809 (7th Cir. 2011); Herring v. United States, 424 F.3d 384, 390 (3d Cir. 2005); *Ex parte* Third Generation, Inc., 820 So. 2d 89, 90 (Ala. 2001); Alaska Fur Gallery, Inc. v. First Nat'l Bank Alaska, 345 P.3d 76, 86 (Alaska 2015) (quoting State v. Alaska Cont'l Dev. Corp., 630 P.2d 977, 991 (Alaska 1980)); *In re* Marriage of Gance, 36 P.3d 114, 118 (Colo. App. 2001); Std. Mgmt., Inc. v. Kekona, 43 P.3d 232, 236–38 (Haw. Ct. App. 2001); Boldridge v. Nat'l City Bank, No. 109, 276, 2013 WL 6389341, at *3 (Kan. Ct. App. Dec. 6, 2013).

112. *Council*, 559 F. App'x at 873; *In re* Levander, 180 F.3d 1114, 1120 (9th Cir. 1999).

113. Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982).

114. 18 U.S.C. § 1621 (2012).

115. *See, e.g.*, Denny v. Ford Motor Co., 959 F. Supp. 262, 268 (N.D.N.Y. 2013) (quoting Gleason v. Jandrucko, 860 F.2d 556, 560 (2d Cir. 1988)).

lawyer as an officer of the court. Perjury may further qualify as fraud on the court where, as the *United States v. Estate of Stonehill*[116] court observed, the false testimony "was so fundamental that it undermined the workings of the adversary process itself."[117]

A. Perjury Suborned by a Lawyer as Fraud on the Court

If a lawyer participates in some way in perjury, as by suborning it, conduct that might otherwise have been viewed as fraud directed against another party may become fraud on the court.[118] A lawyer's complicity in perjury by a party or witness makes the false testimony more difficult to determine within a year of the related judgment and, accordingly, supports review of a judgment after the time for challenging the judgment normally would have passed.[119] Lawyers' knowing participation in perjury while representing a party also undermines the judicial process because in that role they are officers of the court and are held to a correspondingly high standard of honesty.[120]

A Delaware case, *Johnson v. Preferred Professional Insurance Co.*[121] illustrates how lawyers' participation in perjury will support fraud on the court allegations. *Johnson* arose out of a medical malpractice action by Letoni Wilson on behalf of her young son, Tirese Johnson, against Dr. Phyllis James and her physician's assistant, Michelle Montague.[122] Montague allegedly failed to properly diagnose Johnson's jaundice, leading to his development of Kernicterus and resulting severe brain damage.[123] After Montague missed the diagnosis and Johnson was later admitted to a local hospital by an alert emergency room doctor (sadly too late), Dr. James and

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116. 660 F.3d 415 (9th Cir. 2011).

117. *Id.* at 445.

118. *See, e.g.*, Chewning v. Ford Motor Co., 579 S.E.2d 605, 611 (S.C. 2003) ("Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs." (footnote omitted)).

119. *See In re* Golf 255, Inc., 652 F.3d 806, 809–10 (7th Cir. 2011) (distinguishing between "simple perjury and perjury (or the equivalent, such as a forged exhibit) suborned or committed by counsel").

120. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993) ("As an officer of the court, every attorney has a duty to be completely honest in conducting litigation.").

121. 91 A.3d 994 (Del. Super. Ct. 2014).

122. *Id.* at 999.

123. *Id.* at 999–1000.

Montague discussed the situation and recognized the latter's error.[124] In this meeting "a coverup began."[125] Dr. James and Montague apparently worried that Montague's original office note regarding Johnson's symptoms would reveal her missed diagnosis.[126] Thus, Montague removed the original note from Johnson's patient chart and replaced it with a new office note that she prepared.[127] Dr. James coached her on how to rewrite the office note.[128] The altered note described Johnson's jaundice in a materially different fashion, thereby suggesting that Montague had not misdiagnosed his condition.[129]

Dr. James and Montague were insured by Preferred Professional Insurance Co. (PPIC), which hired lawyers from separate law firms to defend them in the malpractice action: Daniel McCarthy for Dr. James and Mason Turner for Montague.[130] After McCarthy and Turner deposed Wilson in the malpractice case, Turner told McCarthy about Montague's alterations to Johnson's chart and gave him copies of Dr. James's and Montague's original notes.[131] Now, both lawyers knew that their clients had altered the notes after they had learned of the catastrophe that had befallen Johnson.[132] Neither McCarthy nor Turner revealed the alterations to the plaintiffs.[133] Nor did they reveal the alterations in connection with Dr. James's or Montague's depositions in which both witnesses allegedly perjured themselves with their lawyers' knowledge.[134] The lawyers did, however, promptly inform PPIC in-house lawyer Luanne Cornell of the fraud, and sent her copies of both sets of office notes.[135] McCarthy, Turner, and Cornell apparently put their heads together and decided to not produce the original notes to the plaintiffs because revealing the alterations would sabotage the defense of the case.[136]

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124. *Id.* at 1000.

125. *Id.*

126. *See* Johnson v. Preferred Professional Insurance Co., 91 A.3d 994, 1000-01 (Del. Super. Ct. 2014) (describing how James and Montague changed the office note to reflect a different spread of jaundice and thus a reasonable diagnosis).

127. *Id.* at 1000.

128. *Id.* at 1002.

129. *Id.* at 1000–01.

130. *Id.* at 1001.

131. Johnson v. Preferred Professional Insurance Co., 91 A.3d 994, 1001 (Del. Super. Ct. 2014).

132. *Id.*

133. *Id.*

134. *Id.* at 1001, 1011–12.

135. *Id.* at 1001.

136. Johnson v. Preferred Professional Insurance Co., 91 A.3d 994, 1001 (Del. Super. Ct. 2014).

Montague won summary judgment when the plaintiffs could not satisfy a statutory requirement that they provide admissible expert testimony to the effect that Montague's conduct fell below the standard of care for a physician's assistant.[137] The case against Dr. James went to trial and resulted in a $6.25 million plaintiffs' verdict.[138] Because the verdict far exceeded the liability limits of her PPIC insurance policy, Dr. James sued PPIC for bad faith.[139] During discovery in the bad faith action, Wilson and her lawyer learned for the first time about the alterations to Johnson's patient chart.[140]

The plaintiffs filed an action for fraud on the court against Montague, PPIC, Turner, and Turner's law firm to vacate Montague's summary judgment.[141] The defendants moved to dismiss the case, arguing in pertinent part that their misconduct was not sufficiently egregious to constitute fraud on the court,[142] and that the plaintiffs were complaining at most about "'mere perjury,'" which again would not support a finding of fraud on the court.[143] The *Johnson* court quickly rejected both arguments.

With respect to the defendants' first argument, the court could not see "how the alleged conduct, if true, would be deemed anything but egregious."[144] Montague had allegedly perjured herself with Turner's knowledge.[145] Turner allegedly suborned Montague's perjury, never corrected her false testimony, and colluded with McCarthy and Cornell in advancing Montague's false testimony throughout the course of the litigation.[146]

Drawing on the decision in *Hazel-Atlas* for guidance, the court next rejected the defendants' "mere perjury" theory:

> Had this case involved only the alleged fraud and misrepresentations by Montague . . . it may well be that fraud on the court would not be found. Courts have held that fraud on the court is a concept that should be

137. *Id.* at 1000.
138. *Id.*
139. *Id.*
140. Johnson v. Preferred Professional Insurance Co., 91 A.3d 994, 1000 (Del. Super. Ct. 2014).
141. *Id.* at 1004.
142. *Id.* at 1011.
143. *Id.* at 1012 (footnotes omitted).
144. *Id.* at 1011.
145. Johnson v. Preferred Professional Insurance Co., 91 A.3d 994, 1011-12 (Del. Super. Ct. 2014)..
146. *Id.* at 1012.

> construed narrowly. Even under the most narrow construction, however, the allegations in the present case would almost certainly fall within the definition of fraud on the court, if true . . . .
>
> The case at hand is far more similar to the nature and extent of fraud present in *Hazel–Atlas*, than it is to any case of simple, traditional perjury by a witness. If Plaintiffs' allegations are true, two attorneys . . . allowed a witness to testify falsely, concealed evidence, used the perjured testimony as support for later filings, and possibly conspired with the insurance company to keep the evidence secret. This is exactly the kind of behavior that does or attempts to "defile the Court itself."[147]

After considering the defendants' other arguments, the *Johnson* court denied their motion to dismiss the plaintiffs' fraud on the court claim.[148] Assuming the truth of the plaintiffs' allegations as described in the opinion, any other result arguably would have granted the fraud on the court doctrine an unreasonably narrow construction.

In contrast, consider the situation in *United States v. Sierra Pacific Industries, Inc.*[149] In that case, Sierra Pacific alleged that government lawyers suborned perjury by a fire investigator, David Reynolds, concerning his placement of a small white flag to indicate the point of origin of a massive wildfire.[150] Some photos taken during the investigation appeared to show that the white flag was not placed in the same location as the point of origin identified in the official government report on the cause and origin of the fire to which Reynolds had contributed.[151] In a meeting prior to Reynolds's deposition, the government lawyers told him that they considered the location of the white flag to be a non-issue.[152] Reynolds revealed this conversation in his deposition.[153] When Reynolds later testified in a

147. *Id.* (footnotes omitted) (quoting 12 MOORE'S FEDERAL PRACTICE § 60.21[4][a]).

148. *Id.* at 999.

149. United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157 (9th Cir. 2017).

150. *Id.* at 1170.

151. United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 967 (E.D. Cal. 2015), *aff'd*, 862 F.3d 1157 (9th Cir. 2017).

152. *Sierra Pacific II*, 862 F.3d at 1170.

153. *Sierra Pacific I*, 100 F. Supp. 3d at 968.

second deposition that he could not see the white flag in the pictures being shown to him,[154] Sierra Pacific accused him of perjury and claimed that the government lawyers' characterization of the location of the white flag in their meeting with him as a non-issue was tantamount to an instruction to commit perjury.[155] The district court rejected this theory.[156] So did the Ninth Circuit: "[t]he attorneys' comment that they saw the white flag as a 'nonissue' [was] merely an opinion about the relative importance of an element of the case; it [was] not an instruction to commit perjury."[157] As the court further stated, "it is not fraud on the court for a party's attorneys to have their own theory of the case and discuss it with their witnesses."[158]

B. Perjury by Lawyers as Fraud on the Court

If a lawyer commits fraud on the court by suborning perjury, it would seem to follow that perjury *by* a lawyer must be fraud on the court. In fact, whether a lawyer's perjury is fraud on the court probably depends on whether the lawyer was an officer of the court at the time of the false testimony or was simply a witness.[159] For example, the court in *Glenwood Farms, Inc. v. O'Connor*[160] reasoned that while lawyers appearing in a representative capacity are officers of the court and their dishonest conduct would constitute fraud on the court, the result is different where a lawyer is a party or witness.[161] In the latter instance, the lawyer's perjury is a hazard that litigants are expected to address through discovery or cross-examination.[162] The "logical inference," then, is that while lawyers' dishonesty in a representative capacity "impairs the ordinarily adequate mechanisms of discovery and cross-examination," their dishonesty as parties or witnesses does not.[163] Thus, the *Glenwood Farms* court concluded, perjury by a

154. *Id.* at 968–69.

155. *Id.* at 968; *Sierra Pacific II*, 862 F.3d at 1170.

156. *Sierra Pacific I*, 100 F. Supp. 3d at 969.

157. *Sierra Pacific II*, 862 F.3d at 1170.

158. *Id.* at 1170–71.

159. *See, e.g.*, *In re* Golf 255, Inc., 652 F.3d 806, 810 (7th Cir. 2011) (explaining that a lawyer in a bankruptcy proceeding lied in his capacity as a creditor rather than as a lawyer, so his false statements were merely perjury by a witness, not fraud on the court).

160. 666 F. Supp. 2d 154 (D. Me. 2009).

161. *Id.* at 180 (quoting Pearson v. First NH Mortg. Corp., 200 F.3d 30, 38 (1st Cir. 1999)).

162. *Id.* (quoting George P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995)).

163. *Id.*

lawyer as party or witness is not fraud on the court.[164] Otherwise, "the judgment in any case in which an attorney was a party or testified as a witness would forever be vulnerable to collateral attack merely upon the revelation of new evidence tending to show nondisclosure or perjury."[165] That result would be "strikingly inconsistent" with Supreme Court precedent limiting fraud on the court to cases of egregious misconduct that justified departure from the venerable doctrine of res judicata.[166]

An Alabama appellate court embraced the *Glenwood Farms* court's reasoning in *McGee v. Bevill*.[167] *McGee* arose out of a divorce action in which the husband, who was a lawyer, allegedly lied in his deposition as a party about property he owned.[168] The wife alleged that his perjury cheated her out of her interest in the property and amounted to fraud on the court because he was a practicing lawyer at the time he testified.[169] The court rejected the wife's fraud on the court claim and approvingly quoted the *Glenwood Farms* decision in the process.[170] The court further noted that if the husband committed perjury (which he denied) his dishonesty should have been ferreted out when he was deposed about the property in dispute.[171]

In contrast, the court in *Conant v. O'Meara*[172] was backed into the conclusion that a lawyer testifying as a witness rather than appearing in a representative capacity was an officer of the court and thus his perjury constituted fraud on the court.[173] *Conant* arose out of a fee dispute between lawyer Timothy O'Meara and his clients, James and Anita Conant.[174] O'Meara asserted that he was due a $2 million contingent fee from the Conants for successfully representing them in a personal injury action.[175] The Conants agreed to pay O'Meara $750,000 of the $2 million he claimed he was owed, to place the remaining $1.25 million in escrow, and arbitrate his entitlement to the remainder.[176] The arbitrators awarded O'Meara $837,000 of the

164. *Id.* at 180–81.
165. Glenwood Farms, Inc. v. O'Connor, 666 F. Supp. 2d 154, 180 (D. Me. 2009).
166. *Id.* (quoting United States v. Beggerly, 524 U.S. 38, 46 (1998)).
167. 111 So. 3d 132, 132 (Ala. Civ. App. 2012).
168. *Id.* at 133.
169. *Id.* at 133–37.
170. *Id.* at 137 (quoting *Glenwood Farms, Inc.*, 666 F. Supp. 2d at 179–80).
171. *Id.* at 138.
172. 117 A.3d 692 (N.H. 2015).
173. *Id.* at 702.
174. *Id.* at 695–96.
175. *Id.* at 696.
176. *Id.*

disputed funds and returned $413,000 to the Conants.[177] In the arbitration, O'Meara perjured himself when he falsely testified that the Conants had agreed to a $2 million contingent fee.[178] The Conants subsequently filed an ethics complaint against him which resulted in his disbarment.[179] The Conants then filed this case against O'Meara and his law firm as an independent action in equity seeking to recover all fees they had paid.[180]

The trial court granted the Conants summary judgment and ordered O'Meara to disgorge the $750,000 that the Conants had paid him.[181] O'Meara appealed to the New Hampshire Supreme Court, where he argued that for several reasons the Conants' fraud claims were untimely.[182] The trial court had rejected his statute of limitations arguments on the basis that he had committed fraud on the court under the *Hazel-Atlas* approach and New Hampshire common law.[183] After reviewing New Hampshire case law bearing on "whether, or under what circumstances, a judgment may be set aside . . . on grounds of perjury, long after the original judgment was rendered,"[184] the *Conant* court held "that fraud on the court, as recognized in *Hazel-Atlas* and found by the trial court in this case—in particular, perjury by an officer of the court—constitutes sufficient grounds . . . to set aside a judgment or award."[185]

Retreating, O'Meara argued that he was not functioning as an officer of the court when he perjured himself in the arbitration because, although he was a lawyer, when he testified he did so as a fact witness.[186] That is, he was not an officer of the court during the arbitration because he did not appear in a representative capacity.[187] Unfortunately for him, this argument was dead on arrival because in his disciplinary case, the court had found that he was an officer of the court at the time he testified falsely even though he was not then

177. Conant v. O'Meara, 117 A.3d 692, 696 (N.H. 2015).
178. *Id.*
179. *In re* O'Meara's Case, 54 A.3d 762, 770–71 (N.H. 2012).
180. *Conant*, 117 A.3d at 696.
181. *Id.*
182. *Id.* at 697–98.
183. *Id.* at 698.
184. *Id.*
185. Conant v. O'Meara 117 A.3d 692, 700 (N.H. 2015).
186. *Id.* at 702.
187. *Id.*

representing the Conants.[188] That finding required the rejection of his officer of the court argument in this case.[189]

The court concluded that because O'Meara committed perjury as an officer of the court, the trial court properly vacated the arbitration award in accordance with the fraud on the court doctrine.[190] The court also concluded that the trial court properly exercised its discretion in ordering O'Meara to disgorge the $837,000 in fees awarded him by the arbitrators.[191]

C. *Perjury so Fundamental that it Undermined the Adversary Process as Fraud on the Court*

It is also possible that perjury by a party or witness may become fraud on the court if the false testimony "was so fundamental that it undermined the workings of the adversary process itself."[192] Unfortunately, that is an indeterminate standard. It may be that this form of perjury is like hard core pornography in that courts know it when they see it.[193] If so, then *Mt. Ivy Press, LP v. Defonseca*[194] illustrates *X*-rated facts.

Mt. Ivy Press arose out of Misha Defonseca's lawsuit against Mt. Ivy Press and its owner, Jane Daniel, to recover royalties due to Defonseca from the publication of her autobiography.[195] In a nutshell, Defonseca heroically claimed to be a Holocaust survivor who had escaped the Nazis as a child, avoided recapture by wandering alone through European forests and villages, and endured the Nazis' siege of the Warsaw ghetto.[196] She attributed her survival to "her strong will and guile, as well as to the food and protection she received from a wolf pack."[197] She doggedly pursued her case against Mt. Ivy Press and Daniel, and in 2002 obtained a $22.5 million judgment.[198]

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188. *Id.*
189. *Id.*
190. Conant v. O'Meara 117 A.3d 692, 702 (N.H. 2015).
191. *Id.*
192. United States v. Estate of Stonehill, 660 F.3d 415, 445 (9th Cir. 2011).
193. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ." (footnotes omitted)).
194. 937 N.E.2d 501 (Mass. App. Ct. 2010).
195. *Id.* at 504–05.
196. *Id.* at 504.
197. *Id.*
198. *Id.* n.4.

After the judgment was entered, Daniel learned of information suggesting that Defonseca's memoir was the product of a vivid imagination.[199] With the assistance of a forensic genealogist, Daniel eventually learned that Defonseca's real name was Monica De Wael and that she had been a young Belgian schoolgirl at the time of her supposed adventures.[200] Somehow the Belgian press got hold of this information and began to investigate Defonseca's story, and in late 2007 or early 2008, her fraud unraveled.[201] In a February 2008 interview with a Boston Globe reporter, Defonseca admitted that every major element of her autobiography was false, that her trial testimony was perjured, and that she filed false court documents to mislead the court and the jury.[202]

In 2008, approximately six years after their loss at trial, Mt. Ivy Press and Daniel filed an action to set aside Defonseca's judgment based on fraud on the court.[203] In their complaint, they alleged that "the judgment was the product of a deliberate and cleverly concealed fraud, purposefully carried out by Defonseca with the aid of her counsel."[204] The trial court dismissed the action on the basis that Defonseca's fraud was of garden variety, so that Mt. Ivy Press and Daniel needed to challenge the judgment within one year of its entry; this action was too little too late.[205] Mt. Ivy Press and Daniel appealed the dismissal to the Appeals Court of Massachusetts.

The *Mt. Ivy Press* court quickly concluded that Mt. Ivy Press and Daniel had pled facts that met the standard for fraud on the court—at least at the motion to dismiss stage.[206] They had alleged "an extraordinary fraud that touched every part of Defonseca's case against them and resulted in a huge verdict."[207] While recognizing that perjury usually does not constitute fraud on the court, the court reasoned that DeFonseca's misconduct stretched far beyond simple perjury.[208] As the court explained:

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199. Mt. Ivy Press, LP v. Defonseca, 937 N.E.2d 501, 506 (Mass. App. Ct. 2010).

200. *Id.*

201. *Id.*

202. *Id.* at 507.

203. *Id.* at 506.

204. Mt. Ivy Press, LP v. Defonseca, 937 N.E.2d 501, 506 (Mass. App. Ct. 2010) (footnote omitted).

205. *Id.* at 507.

206. *Id.* at 508–09.

207. *Id.* at 509.

208. *Id.*

> Defonseca's entire case, and the manner in which she procured the judgment, was buttressed on . . . a lie. The pleadings she filed were false and based on false information. The affidavits she submitted were premised on her phony life story. Her testimony at trial reiterated, and reinforced, her sympathetic but ultimately false tale.[209]

The *Mt. Ivy Press* court further reasoned that there "are some falsehoods that are so emotionally inflammatory that they impede the jury's ability impartially to evaluate facts and adjudicate a case."[210] In the court's eyes, falsely claiming to be a Holocaust victim and survivor is one such lie, "particularly where—as here—the claim [was] the foundation of a book the publication, distribution, and marketing of which were the subjects of the suit."[211] Defonseca's pervasive dishonesty was at the core of the case.[212]

Accepting the allegations of the plaintiffs' complaint as true and considering that Defonseca had prosecuted "an entire case buttressed by falsehoods," the court concluded that Mt. Ivy Press and Daniel had stated a claim for fraud on the court.[213] The court thus returned the case to the trial court for further proceedings.[214]

The fraud in *Mt. Ivy Press* was egregious, it was intentional, it went to the heart of the case, it was directed at the court, and it was a contributing factor to the outcome of the litigation. But Defonseca's dishonesty was also the type of fraud that courts might reasonably expect to have been exposed much earlier. For one thing, the co-author that Daniel hired to assist Defonseca firmly cautioned while the manuscript was in preparation that "many facts, including historical facts," needed to be checked.[215] For another thing, Defonseca claimed to have been fed and sheltered by wolves while on the run. Not Gypsies or partisans, mind you, but *wolves*. Although some people may use the phrase "raised by wolves" when criticizing someone's

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209. Mt. Ivy Press, LP v. Defonseca, 937 N.E.2d 501, 509 (Mass. App. Ct. 2010).

210. *Id.* at 510.

211. *Id.*

212. *Id.*

213. *Id.*

214. *See* Mt. Ivy Press, LP v. Defonseca, 937 N.E.2d 501, 511 (Mass. App. Ct. 2010) (reversing the dismissal of the complaint with respect to Defonseca, but not with respect to Defonseca's co-author and co-plaintiff in the underlying case, who had no role in the fraud).

215. *Id.* at 505.

poor manners, no one believes that wolves raise stray children who wander into their packs (as compared to eating them, which seems more likely). Defonseca's raised-by-wolves-claim undermined her entire life story; it was a giant red flag that clearly called for an investigation to expose her fraudulent tale at trial or before. Accordingly, Defonseca's wild dishonesty arguably was not fraud on the court because it could and should have been exposed before or during trial through due diligence by Mt. Ivy Press and Daniel.[216] The obvious counter-argument is that although Mt. Ivy Press and Daniel were strangely lax in discovering the dishonesty, a lack of diligence alone should not cement a judgment procured through fraud on the court.[217] The success or failure of that argument may depend on the jurisdiction, but it represents an uphill battle regardless.

Assuming that the unusual facts of *Mt. Ivy Press* make the case an unreliable predictor, what makes some perjury so fundamental that it undermines the workings of the adversary process and thus transforms it into fraud on the court? Three types of cases potentially fit this mold.

The first category consists of those cases in which perjury is combined with other serious misconduct directed at the court, central to the case, material to the outcome of the litigation, and sufficiently obscured so that the fraud cannot reasonably be exposed at trial. That may actually be the scenario that *Mt. Ivy Press* presents if, in fact, the forensic genealogy required to reveal Defonseca as a charlatan required years to complete and therefore Mt. Ivy Press and Daniel could not expose her fraud sooner.

The second category consists of those cases in which multiple witnesses perjure themselves as part of an orchestrated scheme to defraud the court. That was the situation in *CDR Créances S.A.S. v. Cohen*,[218] in which the court affirmed the trial court's decision striking the defendants' pleadings and entering default judgment against them as a sanction for their "carefully orchestrated scheme of lies and

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216. *See* United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157, 1169 (9th Cir. 2017) (stating that "fraud on the court is reserved for material, intentional misrepresentations that could not have been discovered earlier, even through due diligence").

217. Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1133 (9th Cir. 1995) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)); McNeil v. Hoskyns, 337 P.3d 46, 51 (Ariz. Ct. App. 2014). *But see Sierra Pacific II*, 862 F.3d at 1169 (discounting *Pumphrey* and explaining that fraud on the court requires "misrepresentations that could not have been discovered earlier, even through due diligence").

218. 15 N.E.3d 274 (N.Y. 2014).

evidence fabrication."[219] The heart of the defendants' conspiracy was their subornation of perjury by four key witnesses.[220] Although the egregious fraud in *CDR Créances S.A.S.* was discovered in the midst of the litigation rather than post-judgment, the court clearly considered the defendants' misconduct to be fraud on the court and repeatedly so characterized it.[221] There is a reasonable basis to think that a court would consider a perjury conspiracy equally as serious or corrupting to the judicial system if it were not revealed until well after the case concluded despite the exercise of due diligence by the innocent party.[222]

The third category consists of those cases in which the innocent party does not have the opportunity to expose the perjury at trial or in a hearing and the perjured testimony influences the court's decision.[223] That was the scenario in *In re Levander*,[224] in which a corporation, All-Carr Communications Company, Inc. (All-Carr), was a judgment debtor of the debtors in a Chapter 11 bankruptcy, the Levanders.[225]

Broadly sketched, All-Carr filed a baseless proof of claim in the bankruptcy and thus faced an award of attorneys' fees against it.[226] To escape that liability, All-Carr secretly transferred its assets to a related partnership with a nearly identical name.[227] When deposed in connection with the fee award, an All-Carr corporate officer lied and said that All-Carr held assets and was an active company when, in fact, it was a shell.[228] Following a hearing in which the officer's deposition testimony came into evidence, the bankruptcy court assessed

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219. *Id.* at 280, 285–86.

220. *Id.* at 279–80.

221. *Id.* at 277, 282–85.

222. *But see* Ullman-Briggs, Inc. v. Deerfield Housewares, Inc., No. 95-7827, 1996 WL 20512, at *1 (2d Cir. Jan. 19, 1996) (reasoning that two witnesses' alleged conspiracy to commit perjury was nothing more than simple perjury that did not rise to the level of fraud on the court).

223. *See, e.g.*, Wildcat Enters., LLC v. Weber, No. 11 C 4922, 2017 WL 1545693, at *5 (N.D. Ill. Apr. 28, 2017) ("[T]he fraud at issue here could not reasonably have been discovered at the time the Turnover Order was entered. Based on [several aligned parties'] representations, there was no reason to suspect that they were in collusion; and no other party was in a position to bring the deception to light.").

224. 180 F.3d 1114 (9th Cir. 1999).

225. *Id.* at 1116.

226. *Id.* at 1116–17.

227. *Id.* at 1117.

228. *Id.* at 1120.

attorneys' fees of around $44,000 against All-Carr.[229] Neither the Levanders nor the court knew about the partnership at the time of the hearing, nor did they have reason to doubt the officer's honesty.[230] The Levanders did not learn the truth until two years later when they were forced to obtain a writ of execution to try to collect the fee award.[231]

The *In re Levander* court concluded that this was a case of fraud on the court and not one of simple perjury because the officer's false testimony about All-Carr's assets "was not—and could not have been—an issue at the attorneys' fees hearing, as neither the court nor the Levanders knew that the [p]artnership existed."[232] The perjury clearly influenced the bankruptcy court's decision because the court relied on it in assessing attorneys' fees against the corporation rather than against the partnership, i.e., the entity with the assets.[233]

III. LAWYERS' DUTY OF CANDOR AND KNOWINGLY FALSE STATEMENTS OF MATERIAL FACT BY LAWYERS AS FRAUD ON THE COURT

As noted in the discussion of perjury as fraud on the court, a lawyer's perjury as an officer of the court may be fraud on the court. To be an officer of the court—at least in some jurisdictions—a lawyer must be appearing before a court in a representative capacity.[234] But lawyers rarely testify under oath in such a capacity. They do, however, routinely make representations of material fact to courts while advocating for clients. In doing so, they owe the court a duty of candor under Model Rule of Professional Conduct 3.3 and state analogs.[235]

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229. In re Levander, 180 F.3d 1114, 1117, 1120 (9th Cir. 1999).
230. *Id.*
231. *Id.* at 1117.
232. *Id.* at 1120.
233. *Id.*
234. *But see* People v. Benight, No. 16PDJ032, 2016 WL 7856476, at *9 (Colo. O.P.D.J Dec. 8, 2016) (describing a lawyer as an officer of the court when discussing the lawyer's criminal conduct in his private life); People v. Sanders, No. 15PDJ060, 2016 WL 7856475, at *5 (Colo. O.P.D.J Dec. 1, 2016) ("Lawyers are officers of the court and must obey all court orders. By failing to pay court-ordered child support and arrearages, [the] [r]espondent disregarded her obligations under the rules of a tribunal and violated her duty to the legal system."); *In re* Disciplinary Proceedings Against Brandt, 766 N.W.2d 194, 202 (Wis. 2009) (disciplining a lawyer for driving while intoxicated and stating that "[a]ttorneys are officers of the court and should be leaders in their communities and should set a good example for others").
235. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2017) (stating that that a lawyer shall not knowingly "make a false statement of fact

Lawyers' duty of candor to the tribunal under Rule 3.3 is stringent.[236] When addressing a court as an advocate, a lawyer's statements are essentially made under oath.[237] Moreover, lawyers' duty of candor is critical to the justice system as a whole:

> Our adversary system . . . rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. . . . Even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.[238]

The nature of lawyers' duty of candor and its importance to the integrity of the judicial process invites an obvious question: can a lawyer's knowingly false statements of material fact to a court in violation of her duty of candor constitute fraud on the court? The answer is yes.[239] There are at least two sound reasons for recognizing this possibility. First, a lawyer addressing a court on a client's behalf is not subject to cross-examination like a witness would be.[240] Other means of rooting out dishonesty are similarly unavailable where a lawyer's false statements to a court (as compared to a witness's false testimony) are concerned.[241] Thus, a lawyer's dishonesty may not be exposed until much later.[242] Second, lawyers' duty of candor makes it

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or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

236. *See In re* Discipline of Wilka, 638 N.W.2d 245, 249 (S.D. 2001) (stating that the duty of candor "requires every attorney to be fully honest and forthright").

237. Kappa Sigma Fraternity v. Price-Williams, 40 So. 3d 683, 693 (Ala. 2009) (quoting Molton v. State, 651 So. 2d 663, 670 n.6 (Ala. Crim. App. 1994)); State v. Maskiell, 918 A.2d 293, 300 (Conn. App. Ct. 2007) (quoting State v. Webb, 680 A.2d 147 (Conn. 1996), and citing Rule 3.3). *But cf. In re* Estate of Bell, 292 S.W.3d 920, 926–27 (Mo. Ct. App. 2009) (requiring a lawyer testifying in a representative capacity to be sworn notwithstanding his duty of candor and status as an officer of the court).

238. United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).

239. Pentagen Techs. Int'l Ltd. v. CACI Int'l, Inc., 282 F. App'x 32, 34 (2d Cir. 2008) (citing Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993)).

240. *See In re* Golf 255, Inc., 652 F.3d 806, 809 (7th Cir. 2011) (explaining that lawyers are not witnesses and therefore are not subject to cross-examination).

241. *Id.*

242. *See id.* (outlining the difficulty of uncovering lawyers' false statements within one year of final judgment).

more likely that courts and opposing parties will accept their factual representations as true.[243] Again, this decreases the likelihood that the fraud will be exposed during the proceedings or within one year of final judgment.

Lawyers' duty of candor under Rule 3.3 extends far beyond statements in court. For example, lawyers cannot knowingly offer falsified documents into evidence, file or submit court documents that they know to be false or make knowingly false statements in responses to discovery or requests for admissions.[244] Whether lawyers' breach of their ethical duty of candor through dishonesty outside the courtroom may be fraud on the court, however, must be determined on a case-by-case basis. *Estate of Adams v. Fallini*[245] is an interesting recent case.

Michael Adams was killed when his car hit a cow owned by a rancher, Susan Fallini, on a Nevada highway that crossed land designated as open range.[246] A Nevada statute defined "open range" as unenclosed rural land where cattle and other domestic animals are grazed or permitted to roam.[247] Another open range statute provided: "No person . . . owning, controlling or in possession of any domestic animal running on open range has the duty to keep the animal off any highway traversing or located on the open range, and no such person . . . is liable for . . . injury to any person caused by any collision between a motor vehicle and the animal occurring on such a highway."[248]

Adams's estate (the Estate) sued Fallini for negligence despite knowing that the accident occurred on open range.[249] Fallini's lawyer, Harry Kuehn,[250] filed an answer pleading the open range statute as an

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243. *See In re* Discipline of Wilka, 638 N.W.2d 245, 249 (S.D. 2001) (quoting *In re* Discipline of Schmidt, 491 N.W.2d 754, 755 (S.D. 1992)).

244. RICHMOND ET AL., *supra* note 110, at 551–53.

245. 386 P.3d 621 (Nev. 2016).

246. *Id.* at 623.

247. *Id.* n.1 (quoting NEV. REV. STAT. § 568.355).

248. NEV. REV. STAT. § 568.360 (2013).

249. *Estate of Adams*, 386 P.3d at 623. Regardless of what Aldrich knew about Fallini's land, Adams's family certainly knew that it was open range because they had created a memorial website prior to the lawsuit being filed, which stated that the accident had occurred on open range and opined that open range laws were unjust. *Id.*

250. *See* Mike Blasky, *Conflicted Judge's Decision Looms in Rancher's Lawsuit*, LAS VEGAS REV.-J. (July 28, 2014), https://www.reviewjournal.com/local/local-las-vegas/conflicted-judges-decision-looms-in-rancher-lawsuit (identifying Harry Kuehn as Fallini's lawyer).

affirmative defense, but then abandoned the case.[251] Thereafter, the Estate's lawyer, John Aldrich,[252] served requests for admissions that asked Fallini to admit that her property was *not* open range even though he knew or reasonably should have known that it was.[253] Because Kuehn had dropped the case, the Estate's requests for admissions went unanswered, and Fallini was deemed to have admitted that her land was not open range.[254] Armed with this admission, Aldrich filed an unopposed partial summary judgment motion on the issue of Fallini's negligence, which the trial court granted.[255] When Fallini eventually learned of her predicament—Kuehn had lied to her and told her the case was over[256]—she hired new counsel and moved for reconsideration of the partial summary judgment order.[257] The trial court denied the motion for reconsideration, struck her answer, entered a default judgment for the estate, and ultimately entered judgment against her for just under $1.3 million.[258]

Fallini subsequently moved to set aside the judgment on the basis that Aldrich committed fraud on the court "when he sought and relied on the admission that the accident did not occur on open range."[259] The trial court agreed, vacated the judgment, and dismissed the case.[260] The Estate appealed to the Nevada Supreme Court where it contended among other things that Aldrich's conduct did not rise to the level of fraud on the court.[261] The supreme court disagreed, starting

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251. *Estate of Adams*, 386 P.3d at 623 & n.2 (noting that Kuehn was later disbarred).

252. Blasky, *supra* note 250 (identifying John Aldrich as the Estate's lawyer).

253. *Estate of Adams*, 386 P.3d at 623.

254. *Id.*

255. *Id.*

256. Blasky, *supra* note 250.

257. *Estate of Adams*, 386 P.3d at 623.

258. *Id.* The trial court originally entered a $2.5 million judgment but Fallini appealed, and the Nevada Supreme Court concluded that the trial court had miscalculated the damages and remanded the case to the trial court to recalculate the Estate's damages. Fallini v. Estate of Adams, Docket No. 56840, 2013 WL 1305503, at *3 (Nev. Mar. 29, 2013). Fallini lost her attempt to reverse the partial summary judgment on an open range defense because the supreme court concluded that she was bound by her admission by default that the accident did not occur on open range. *Id.* at *2. Although Fallini argued that the partial summary judgment was based "on false factual premises," she did not assert fraud on the court as a basis for vacating the judgment against her. *Id.* The trial court entered the roughly $1.3 million judgment described above on remand. *Estate of Adams*, 386 P.3d at 623.

259. *Estate of Adams*, 386 P.3d at 623.

260. *Id.*

261. *Id.* at 625.

with the recognition that it had previously defined fraud on the court to include "'fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.'"[262] The *Estate of Adams* court held that the trial court did not abuse its discretion in setting aside the judgment because:

> First, the initial judgment in this case would likely not have been obtained but for Fallini's counsel's abandonment of his client. . . . Standing alone, that might not warrant relief. As the lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent. . . . But here, the Estate's counsel seized on that abandonment as an opportunity to create a false record and present that record to the [trial] court as the basis for judgment. Together, these acts and omissions merited relief.[263]

Continuing, the court explained that a lawyer violates his duty of candor to the court when he "(1) proffers a material fact that he knew or should have known to be false . . . and (2) relies upon the admitted false fact to achieve a favorable ruling."[264] So it was here, where Aldrich surely knew that the fatal accident occurred on a stretch of highway crossing open range and still sought partial summary judgment and a default judgment based on the false premise that the accident did not occur on open range.[265]

Finally, Aldrich's fraud frustrated the trial court's proper adjudication of the case.[266] The Estate admitted that the open range statute absolved Fallini of liability, yet, through an improper request for admission, it deceived the trial court into entering a seven-figure judgment in its favor.[267] In summary, the *Estate of Adams* court held that Aldrich's "duty of candor required him to refrain from relying on [Kuehn's] default admission that the accident did not occur on open

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262. *Id.* (quoting NC-DSH, Inc. v. Garner, 218 P.3d 853, 858 (Nev. 2009)) (emphasis omitted).

263. *Id.* at 623 (citations omitted).

264. Estate of Adams v. Fallini, 386 P.3d 621, 625-26 (Nev. 2016) (citations omitted).

265. *Id.* at 626.

266. *Id.*

267. *Id.*

range, when he knew or should have known that it was false . . . ."[268] As a result, the trial court did not err in determining that Aldrich "committed a fraud upon the court when he failed to fulfill his duties as an officer of the court with candor."[269]

Inasmuch as vacating a judgment based on fraud on the court is equitable relief, few lawyers would doubt that the *Estate of Adams* court reached the right result. Still, the case has three interesting aspects, two of which did not and should not have altered the outcome, and a third that might very well have spun the decision 180 degrees. First, while Kuehn's unexplained abandonment of Fallini allowed Aldrich's fraud to proceed, it did not afford the Estate a defense to Fallini's fraud on the court claim because the fraud on the court doctrine is focused on "the integrity of the adjudication process itself."[270] Besides, Aldrich's fraud was intentional, making it ill-suited to any sort of comparative fault defense.[271]

Second, the Estate argued that there could be no fraud on the court because in entering the default judgment the trial court apparently took judicial notice of the fact that the accident occurred on open range.[272] In other words, the trial court was not actually deceived.[273] But the trial judge later confessed that he "did not know that 'open range' had a significant legal consequence, much less that it gave Fallini a total defense to liability."[274] Thus, the trial court was still deceived through the Estate's scheme as a whole. Furthermore, lawyers' duty of candor exists precisely because courts can never know as much about their cases as the lawyers do; they necessarily have to rely on the lawyers to honestly present facts and arguments if they are to reach correct results.[275] If anything, the trial court's unawareness of the open range statute sharpened Aldrich's duty of candor and aggravated his deception rather than excusing it.

Third, the Estate argued on appeal that the trial court erred by setting aside the judgment because in doing so it relied on hearsay

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268. *Id.*

269. *Id.* (footnote omitted).

270. 12 MOORE'S FEDERAL PRACTICE, *supra* note 6, § 60.21[4][i], at 60-67.

271. *See* Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A., 374 F.3d 521, 528 (7th Cir. 2004) (noting that comparative negligence is no defense to an intentional tort).

272. *Estate of Adams*, 386 P.3d at 626 n.4.

273. *See* United States v. Smiley, 553 F.3d 1137, 1145 (8th Cir. 2009) (noting that the power to set aside a judgment for fraud on the court involves "the court actually being deceived by the misrepresentation").

274. Estate of Adams v. Fallini, 386 P.3d 621, 626 n.4 (Nev. 2016).

275. RICHMOND ET AL., *supra* note 110, at 544.

testimony and unauthenticated documents.[276] That could have been a winning argument that would have resulted in the default judgment being affirmed; after all, not only must a party prove fraud on the court by clear and convincing evidence, but the evidence must be admissible.[277] Fallini would have failed on both counts. Fortunately for her, the Estate waived this argument on appeal by failing to raise it in the trial court.[278] Had Aldrich been more careful in the trial court, the result in *Estate of Adams* might have been very different.

IV. NON-DISCLOSURE GENERALLY IS NOT FRAUD ON THE COURT

Just as courts do not consider ordinary perjury to be fraud on the court, they also do not consider a party's mere failure to disclose evidence or information in discovery or other pretrial proceedings to be fraud on the court.[279] There is a practical side to this position. As the Seventh Circuit reasoned over 30 years ago:

> It would be psychologically unrealistic, given the adversary setting, to call a failure to go out of one's way to produce damaging documents a "fraud" on opposing counsel and so, perhaps, on the court. To respond to specific discovery requests is one thing; to construe them broadly is another . . . . We agree that a lawyer's "failure to disclose an instrument which he could have supposed reasonably—although, as it now appears, erroneously—to have been known to his adversary" is not fraud on the court.[280]

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276. *Estate of Adams*, 386 P.3d at 626 n.5.

277. *See, e.g.*, Citizens for Appropriate Rural Roads v. Foxx, 815 F.3d 1068, 1080 (7th Cir. 2016) (rejecting the plaintiffs' fraud on the court claim because there was no admissible supporting evidence).

278. *Estate of Adams*, 386 P.3d at 626 n.5.

279. United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011); Parker v. Gosmanova, 378 F. App'x 816, 817 (10th Cir. 2010); *In re* Marriage of Gance, 36 P.3d 114, 118–19 (Colo. App. 2001); Eliopulos v. Idaho State Bank, 922 P.2d 401, 408 (Idaho Ct. App. 1996); Olio v. Olio, 54 A.3d 510, 515 (Vt. 2012); *see also* Fox *ex rel.* Fox v. Elk Run Coal Co., 739 F.3d 131, 136–37 (4th Cir. 2014) (concluding that the defendant's failure to disclose certain medical records to its own expert witnesses was not fraud on the court because it involved harm to a single litigant).

280. USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 509 (7th Cir. 1982) (quoting Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1081 (2d Cir. 1972)).

The general rule that non-disclosure is not fraud on the court, like the general rule that simple perjury is not fraud on the court, paints only a partial picture. The non-disclosure of evidence or information may constitute fraud on the court where the non-disclosure was so fundamental that it undermined the adversary process itself.[281] A non-disclosure that had only a "limited effect" on the court's decision or that did not "significantly change[ ] the information available" to the court, however, does not reach this level.[282] Even if the non-disclosure has a material effect on the court's decision or significantly changes the information presented to the trial court, however, it will not qualify as fraud on the court if the innocent party could have discovered it through due diligence.[283]

There are occasional cases in which non-disclosure may qualify as fraud on the court. Recall, for example, *Johnson v. Preferred Professional Insurance Co.*,[284] where the two defendants in a medical malpractice action altered their office notes to hide their negligence and their lawyers withheld the original notes from the plaintiffs despite having a duty to produce them because their disclosure would significantly complicate the defense of the case.[285] The defense lawyers concealed their clients' alterations from the plaintiffs throughout the entire litigation and also let their clients' false deposition testimony regarding the notes stand uncorrected, such that all the pleadings in the case were "tainted by or based upon fraud and the purposeful concealment of evidence."[286] In determining that the plaintiffs had adequately alleged fraud on the court, the *Johnson* court relied in significant part on the defense lawyers' concealment of the original office notes and the defendants' dishonest alteration of them.[287]

Parties arguing for non-disclosure as fraud on the court frequently cite the Sixth Circuit's decision in *Demjanjuk v. Petrovsky*[288] as support for their positions. *Demjanjuk* should seldom be persuasive, however, for at least two reasons.

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281. *Estate of Stonehill*, 660 F.3d at 444.
282. *Id.*
283. Appling v. State Farm Mut. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003); Williams v. Bd. of Regents, 90 F.R.D. 140, 143 (M.D. Ga. 1981).
284. 91 A.3d 994 (Del. Super. Ct. 2014).
285. *Id.* at 1001–02, 1006.
286. *Id.* at 1006.
287. *Id.* at 1012.
288. 10 F.3d 338 (6th Cir. 1993).

First, in most jurisdictions conduct must be intentional or willful to qualify as fraud on the court.[289] In *Demjanjuk*, however, the Sixth Circuit reasoned that lawyers' reckless disregard for their duty to reveal information in discovery rises to the level of fraud on the court.[290] This is a distinctly minority view.[291] The *Demjanjuk* standard for non-disclosure as fraud on the court simply will not apply in federal courts outside the Sixth Circuit, nor is it likely to carry the day in most states.

Second, *Demjanjuk* was an extradition and denaturalization case brought by the United States Department of Justice's Office of Special Investigations (OSI) against John Demjanjuk based on Demjanjuk's identification as a war criminal for his role as a guard at the Treblinka concentration camp.[292] Because the government sought to denaturalize Demjanjuk and extradite him to Israel for his alleged criminal activity, the Sixth Circuit reasoned that the OSI lawyers handling the case had pretrial disclosure obligations like those imposed on prosecutors in criminal cases under *Brady v. Maryland*.[293] Thus, the OSI lawyers' failure to produce critical exculpatory documents to Demjanjuk worked a fraud on the lower court.[294] Of course, *Brady* generally does not apply to civil cases.[295] Because lawyers in civil cases have no disclosure obligations beyond normal discovery requirements,[296] *Demjanjuk* is not relevant to the

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289. *See, e.g.*, United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157, 1168 (9th Cir. 2017) (quoting *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009)); Bessa v. Anflow Indus., Inc., 51 N.Y.S.3d 102, 106 (N.Y. App. Div. 2017) (quoting CDR Créances S.A.S. v. Cohen, 15 N.E.3d 274, 282 (N.Y. 2014)).

290. *Demjanjuk*, 10 F.3d at 349–50.

291. United States v. MacDonald, 161 F.3d 4, No. 97-7297, 1998 WL 637184, at *3 (4th Cir. Sept. 8, 1998); *see* United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 975, 978–80 (E.D. Cal. 2015) ("Defendants have not cited and this court is not aware of a single circuit that has joined the Sixth Circuit in allowing something less than intentional conduct to arise to fraud on the court."), *aff'd*, 862 F.3d 1157 (9th Cir. 2017).

292. *Demjanjuk*, 10 F.3d at 340, 353.

293. *Id.* at 353 (discussing Brady v. Maryland, 373 U.S. 83 (1963)).

294. *Id.* at 354.

295. United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157, 1171 (9th Cir. 2017) (citing Dist. Atty's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009); Fox *ex rel.* Fox v. Elk Run Coal Co., 739 F.3d 131, 138–39 (4th Cir. 2014)).

296. *Sierra Pacific II*, 862 F.3d at 1171 (stating that the government had no obligation to disclose information "beyond its standard discovery obligations").

overwhelming majority of fraud on the court claims predicated on alleged failures to disclose evidence or information.

V. FRAUD ON THE COURT DOES NOT REQUIRE HARM OR PREJUDICE TO A PARTY

In most fraud on the court cases, the innocent party challenging the judgment has been harmed or prejudiced by the fraud on the court. Indeed, it will be a rare case in which fraud on the court does not prejudice a party. Be that as it may, prejudice to a party is not an element of fraud on the court.[297] Fraud on the court may be found in the absence of any prejudice to a party.[298] This should not be a surprise, since fraud on the court pivots on harm to the integrity of the judicial process rather than on harm to the litigants.[299] Furthermore, the party or person that perpetrated the fraud "should not be allowed to dispute the effectiveness of the fraud after the fact."[300]

Harm or prejudice may play a role, however, where the party claiming fraud on the court was not a party to the action in which the fraud occurred. Although it is true that a party that challenges a judgment based on fraud on the court need not have been a party to the action in which the judgment was entered,[301] the challenger must possess an interest that gives it a right to intervene in that action,[302] or it must have suffered an injury in fact giving it standing to file an independent action for fraud on the court.[303] The injury in fact requirement for standing will likely be satisfied where the litigation "strongly affected" the challenger's interests.[304] So, while harm or prejudice to a *party* is not an element of fraud on the court, it does

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297. Dixon v. Comm'r of Internal Revenue, 316 F.3d 1041, 1046 (9th Cir. 2003).

298. *See* United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 956 (E.D. Cal. 2015) (stating that "a showing of prejudice to the party seeking relief is not required" to find fraud on the court), *aff'd*, 862 F.3d 1157 (9th Cir. 2017).

299. *See Dixon*, 316 F.3d at 1046 ("Fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced.").

300. *Id.*

301. 12 MOORE'S FEDERAL PRACTICE, *supra* note 6, § 60.21[4][e], at 60-64.

302. *See, e.g.*, FED. R. CIV. P. 24(b) (discussing intervention as of right).

303. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (explaining that to have standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision").

304. *See* Grace v. Bank Leumi Tr. Co. of N.Y., 443 F.3d 180, 188 (2d Cir. 2006) (discussing Rule 60(b)).

factor into the determination of *non-party's* right to intervene or standing to pursue a fraud on the court claim.

Although fraud on the court is seldom alleged by someone who was not a party to the action in which the suspect judgment was entered, such cases occasionally arise. Consider, for example, *General Medicine, P.C. v. Horizon/CMS Health Care Corp.*,[305] where HealthSouth Corp. intervened in an action between General and Horizon and moved to set aside their consent judgment under Rule 60(b)(6)[306] and Rule 60(d)(3), the latter rule governing fraud on the court.[307] HealthSouth's motion was focused on a confidential settlement agreement between General and Horizon that accompanied the consent judgment and contemplated subsequent litigation by General against HealthSouth to collect on the judgment.[308] HealthSouth argued that General and Horizon committed fraud on the court by not disclosing the settlement agreement when they jointly presented the consent judgment to the district court.[309] HealthSouth ultimately lost, but that result does not change the fact that it was able to pursue a fraud on the court claim despite not having been a party to the case.[310] Interestingly, the district court concluded that HealthSouth had standing to seek relief under Rule 60(b) because the litigation strongly affected its interests, but did not discuss standing for Rule 60(d) purposes.[311] The district court apparently and sensibly assumed that standing for purposes of one rule applied equally to the other.[312] The Sixth Circuit did not discuss standing in its opinion.

VI. FRAUD ON THE COURT DOES NOT REQUIRE THAT A PARTY BENEFIT FROM THE FRAUD

Just as fraud on the court does not require prejudice to a party, neither does it require that a party benefit from the alleged fraud.[313]

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305. 475 F. App'x 65 (6th Cir. 2012).

306. This is the catch-all provision of Rule 60(b) that allows a court to relieve a party from a final judgment for any reason other than those listed in subparts (1)–(5) that justifies relief. FED. R. CIV. P. 60(b)(6).

307. *Gen. Med.*, 475 F. App'x at 70.

308. *Id.* at 66.

309. *Id.* at 72.

310. *Id.* at 71–75.

311. *See* Gen. Med. P.C. v. Horizon/CMS Health Care Corp., No. 96-72624, 2009 WL 1447346, at *2–5 (E.D. Mich. May 21, 2009), *rev'd*, 475 F. App'x 65 (6th Cir. 2012) (making no mention of standing).

312. *Id.*

313. 12 MOORE'S FEDERAL PRACTICE, *supra* note 6, § 60.21[4][e], at 60-64.

This principle is consistent with the rule that fraud must be directed at the court or the judicial process to qualify as fraud on the court. Fraud on the court, in the absence of benefit to a party, is most often found where a lawyer's fraud harms the lawyer's own client, such as where a plaintiff's lawyer settles her client's case without the client's consent or knowledge, persuades an unknowing court to enter a judgment or order dismissing the case, and then steals the settlement proceeds.[314] The fraud on the court in these cases is the lawyer's deception of the court in obtaining the judgment or order of dismissal, whether by forging the client's signature on a stipulation or similar document that will be submitted to the court,[315] or by lying to the court outright.

In *NC-DSH, Inc. v. Garner*,[316] for example, Lawrence Davidson, who represented the plaintiffs in a medical malpractice action, settled the action for $160,000 without his clients' authority, forged the necessary settlement papers, obtained the defense lawyer's signature on a stipulated judgment of dismissal which he presented to the trial court for signature and entry, and thereafter absconded with the settlement proceeds.[317] The Nevada Supreme Court easily decided that Davidson had committed fraud on the trial court.[318] The court reached that conclusion even though Davidson's clients clearly did not benefit from his fraud on the court. The defendant did not benefit from Davidson's fraud on the court either, because it saw litigation that it thought it had put behind it reopened, although the court at least gave it credit for the funds it paid to Davidson against any future judgment in the case.[319]

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314. *See, e.g.*, Huffman v. Delacruz, 719 So. 2d 385, 385–86 (Fla. Dist. Ct. App. 1998) (affirming the trial court's order vacating a stipulated dismissal for fraud on the court where the plaintiff's lawyer signed the settlement stipulations without his client's permission and forged his client's signature on the settlement check); Flowers v. Rigdon, 655 N.E.2d 235, 235–37 (Ohio Ct. App. 1995) (upholding the trial court's order vacating a stipulated judgment where the plaintiffs' lawyer falsely informed the defendants that he had authority to settle, forged his clients' signatures on the entry of dismissal, release, and settlement check, and stole the settlement proceeds).

315. *See, e.g.*, *Flowers*, 655 N.E.2d at 237 ("In this case, the trial court could reasonably conclude that [the lawyer] perpetrated a fraud upon court. In forging the [plaintiffs'] signatures to the dismissal entry, [the lawyer] not only violated his duty to his clients, he defiled the court itself.").

316. 218 P.3d 853 (Nev. 2009).

317. *Id.* at 855–60.

318. *Id.* at 858–60.

319. *Id.* at 861.

VII. THE EFFECT OF SETTLEMENT ON FRAUD ON THE COURT ALLEGATIONS

Finally, it is necessary to consider the effect of settlement on fraud on the court allegations. After all, almost all civil litigation settles.[320]

If a party settles with no knowledge of fraud on the court, it may later seek relief for the after-discovered fraud.[321] That assumes, of course, that the parties' settlement agreement does not by its terms release as yet unknown fraud on the court claims. If it does release the then-unknown claims, even after-discovered fraud on the court claims will be lost.[322] Although this result may initially seem unfair since the fraud was directed at the court rather than at the innocent settling party, it is not. The fraud on the court doctrine is intended to prevent grave miscarriages of justice,[323] which "cannot result from enforcing the clear and deliberate terms of a settlement agreement."[324] If a court were to ignore the plain language of a settlement agreement, the parties could never be reasonably assured that their settlement was actually final.[325]

Relief based on fraud on the court is generally foreclosed by a settlement where the innocent party, despite knowing of the misconduct, settles anyway.[326] "This limitation arises because issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should be exposed at trial.'"[327] A party's suspicion of fraud by another party does not equate to knowledge thereof, although it probably compels the innocent party to reasonably inquire or run the risk of losing any fraud on the court

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320. *See* RICHMOND ET AL., *supra* note 110, at 701 (stating that 95 percent or more of all civil litigation settles).

321. *See* United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157, 1168 (9th Cir. 2017) (stating that relief for fraud on the court is available only where the alleged fraud was not known to the complaining party at the time of the settlement or judgment).

322. *See, e.g.*, United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 967 (E.D. Cal. 2015) (determining that the parties' release eliminated the after-discovered fraud on the court claims at issue), *aff'd*, 862 F.3d 1157 (9th Cir. 2017).

323. *See* United States v. Beggerly, 524 U.S. 38, 46 (1998) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)).

324. *Sierra Pacific I*, 100 F. Supp. 3d at 967; *see also Sierra Pacific II*, 862 F.3d at 1169–70 (enforcing the broad terms of a settlement agreement).

325. *Sierra Pacific I*, 100 F. Supp. 3d at 967.

326. *Sierra Pacific II*, 862 F.3d at 1168.

327. *Id.* (quoting *In re* Levander, 180 F.3d 1114, 1120 (9th Cir. 1999)).

claim for failing to discover the fraud through due diligence.[328] It cannot be the rule, however, that every rumor or whiff of dishonesty somewhere in the background mandates an investigation, for that standard would be unnecessarily distracting and time-consuming.

United States v. Sierra Pacific Industries, Inc.[329] illustrates the irreconcilability of known instances of possible fraud on the court and settlement. There are two reported decisions in the case, one by the district court and one by the Ninth Circuit, which we'll call *Sierra Pacific I* and *Sierra Pacific II*, respectively.

The case arose out of a massive wildfire known as the Moonlight Fire, which scorched some 46,000 acres of the Plumas and Lassen National Forests in California.[330] Government investigators concluded that the fire started when a bulldozer, operated by an employee of Howell's Forest Harvesting Co., struck a rock and created a spark that ultimately ignited brush.[331] Sierra Pacific Industries had hired Howell's to conduct logging operations on private land near the national forests.[332] In 2009, the United States government sued Sierra Pacific Industries, Howell's, and several landowners to recover its damages caused by the Moonlight Fire.[333] The damages were significant; the government sought nearly $800 million from the defendants.[334]

The case was ferociously litigated and, as it neared trial in 2012, the defendants had identified eight instances of alleged fraud on the court by the government or the Assistant United States Attorneys prosecuting the government's case.[335] Nonetheless, they settled with the government three days before trial was to begin.[336] Sierra Pacific Industries agreed to pay $47 million and convey 22,500 acres of land to the government, Howell's agreed to pay $1 million, and the landowner-defendants agreed to collectively pay $7 million.[337]

At the parties' request and pursuant to the settlement agreement, the district court dismissed the case with prejudice and

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328. *See Hazel-Atlas*, 322 U.S. at 246 (reasoning that Hazel acted reasonably in attempting to discover Hartford's fraud on the court).

329. 100 F. Supp. 3d 948 (E.D. Cal. 2015), *aff'd*, 862 F.3d 1157 (9th Cir. 2017).

330. *Id.* at 953.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Sierra Pacific II*, 862 F.3d at 1164.

335. *Sierra Pacific I*, 100 F. Supp. 3d at 962.

336. *Id.* at 953.

337. *Id.*

directed the clerk to enter judgment in July 2012.[338] Then, in October 2014, the defendants moved to set aside the judgment based on fraud on the court.[339]

The defendants conceded that they knew of the eight instances of alleged fraud on the court before they settled.[340] But despite knowing of the alleged fraud and having the opportunity to persuade the jury of the government's bad acts, they chose to settle and forego the trial.[341] That tactical choice doomed their fraud on the court claim:

> The significance of defendants' decision to settle with the government cannot be overstated. A settlement, by its very nature, is a calculated assessment that the benefit of settling outweighs the potential exposure, risks, and expense of litigation. Here, the parties acknowledged these competing considerations in their settlement agreement: "This settlement is entered into to compromise disputed claims and avoid the delay, uncertainty, inconvenience, and expense of further litigation." (Settlement Agreement & Stipulation ¶ 12). In any lawsuit, it is not uncommon for the parties to disagree not only on the ultimate issues in the case, but also about whether witnesses are telling the truth or the opposing party complied with its discovery obligations. Any settlement agreement would become just a meaningless formality if a settling party could set aside that agreement at any later time based upon alleged fraud the party knew of when entering into the agreement.[342]

It was beyond question that the defendants would have had the chance to expose the government's alleged fraud at trial had there been one.[343] Indeed, they had deposed several witnesses at length on the issues they now said constituted fraud on the court.[344]

The defendants tried to escape the effect of their admitted pretrial knowledge by arguing that their hands would have been tied

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338. *Id.*
339. *Id.* at 954.
340. United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 962 (E.D. Cal. 2015).
341. *Id.*
342. *Id.* at 964.
343. *Id.*
344. *Id.*

at trial by several in limine rulings, but that argument went nowhere because they would have had the opportunity to reopen any in limine ruling at trial and subsequently test it on appeal if need be.[345] Instead, they "elected to forego the normal procedures of litigating a dispute."[346] To allow them to bypass standard appellate process and seek relief in this form would "erroneously allow 'fraud on the court' to 'become an open sesame to collateral attacks.'"[347] As the *Sierra Pacific I* court further explained:

> The litigation process not only uncovered the alleged fraud, it equipped [the] defendants with the opportunity to prove it. Instead, [they] made the calculated decision on the eve of trial to settle the case knowing everything that they now claim amounts to fraud on the court. . . . A party's voluntary settlement with full knowledge of and the opportunity to prove alleged fraudulent conduct cannot amount to a "grave miscarriage of justice" . . . . To argue otherwise is absurd.[348]

After considering a variety of other arguments, the *Sierra Pacific I* court denied the defendants' motion to vacate the judgment.[349] The defendants then appealed to the Ninth Circuit, where they fared no better.[350]

The *Sierra Pacific II* court easily affirmed this aspect of the district court's ruling, stating that relief from fraud on the court is available only where the fraud was not known to the complaining party at the time of settlement.[351] This limitation is part and parcel of the well-established principle that "issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should be exposed at trial.'"[352] After indulging the defendants' weak arguments regarding other aspects of the district

345. United States v. Sierra Pac. Indus. (*Sierra Pacific I*), 100 F. Supp. 3d 948, 965 (E.D. Cal. 2015).

346. *Id.*

347. *Id.* at 965 (quoting Oxxford Clothes XX, Inc. v. Expeditors Int'l of Wash., Inc., 127 F.3d 574, 578 (7th Cir. 1997)).

348. *Id.* (citations omitted).

349. *Id.* at 981.

350. United States v. Sierra Pac. Indus., Inc. (*Sierra Pacific II*), 862 F.3d 1157 (9th Cir. 2017).

351. *Id.* at 1168.

352. *Id.* (quoting *In re* Levander, 180 F.3d 1114, 1120 (9th Cir. 1999)).

court's ruling, the *Sierra Pacific II* court affirmed the district court's decision in its entirety.[353]

It is worth wondering whether a party that knew of instances of possible fraud on the court when it settled could later escape that settlement by arguing that it was forced to settle because the potential damages were so great that it could not afford to risk losing at trial. There is no merit to such an argument.[354] A party that knows of possible fraud on the court in time to expose it at trial must attempt to do so then and thereafter appeal if necessary.[355] In *Sierra Pacific II*, for example, the lawyer for the defendant-landowners contended at oral argument that they had to settle despite knowing of the government's alleged fraud because there was "a $700 million gun held to their head" in the form of the potential damages to which they were exposed if they went to trial and lost.[356] The Ninth Circuit obviously did not buy this argument,[357] nor should it have. To accept it would, in the words of the Seventh Circuit, allow fraud on the court allegations to "become an open sesame to collateral attacks" on judgments.[358]

CONCLUSION

Long described as an elusive and nebulous concept by courts themselves, the offense of fraud on the court is reserved for egregious misconduct directed at a court. To the extent there is fraud in litigation, very little of it rises to the level of fraud on the court because courts narrowly and strictly apply the fraud on the court doctrine. Fraud by one party directed at another, while disturbing, is not fraud on the court because it affects an individual litigant rather than the judicial process as a whole. Where fraud on the court is deemed to have been committed, a lawyer's involvement or participation in the fraud

353. *Id.* at 1176.

354. Nor would there be any merit to an argument by a plaintiff that it had to settle for less than a case was worth despite knowing of fraud on the court by the defendant because it could not afford to risk going to trial and losing.

355. *See Sierra Pacific II*, 862 F.3d at 1168–69 (distinguishing authority that the defendants argued supported their position).

356. Cara Bayles, *Sierra Pacific Asks 9th Circ. to Nix Fire Deal, Cites Fraud*, LAW360 (May 17, 2017), https://www.law360.com/articles/925305/sierra-pacific-asks-9th-circ-to-nix-fire-deal-cites-fraud.

357. *See Sierra Pacific II*, 862 F.3d at 1168–70 (discussing the consequences of the defendants' settlement).

358. Oxxford Clothes XX, Inc. v. Expeditors Int'l of Wash., Inc., 127 F.3d 574, 578 (7th Cir. 1997).

frequently is a critical consideration, and in some jurisdictions may be a required element of the offense.

The standard for finding fraud on the court is higher and distinct from the standard for granting relief from a judgment based on other forms of fraud. That is as it should be. A high standard for fraud on the court is necessary to avoid trampling on the finality of judgments, to discourage collateral attacks on judgments, and to avoid gutting Federal Rule of Civil Procedure 60(b)(3) and state equivalents, which limit the time in which to vacate judgments for fraud, misrepresentation, or other misconduct.

From Brown to Rule 23: The Rise and Fall of The Social Reform Class Action

Barak Atiram*

ABSTRACT

In modern class action lawsuits, we've grown accustomed to clientless representation. Class action attorneys usually initiate the legal suit and assume the active role of determining its claims and requested remedies, while class members remain passive, and in most cases oblivious, to the fact that a legal suit is filed and litigated on their behalf. But the history of Class Action law, prior to the 1966 amendment, presents a substantially different paradigm. Delving into the era of the civil rights movement and examining such momentous class actions as Brown v. Board of Education, Browder v. Gayle, *and* Williams v. Wallace, *reveals two intriguing facts. The first is that social-reform class actions have been a decisive motivating force in the work of the 1966 advisory committee on Rule 23—a rule that pushed the class action well beyond the boundaries of human rights causes, and ultimately led to the rise of class actions as we know them today. The second is that the design of Rule 23 by the 1966 committee failed to capture the importance of grassroots empowerment and community awareness and participation (bolstered by the leadership of such figures as Martin Luther King and Claudette Colvin), to the success of the social-reform class action in the Fifties and Sixties. Thus, the 1966 rule minimized the role of social activism, and paved the way for the modern, clientless, class action.*

INTRODUCTION

Unlike modern representative suits, an inclusive understanding of representation, which accepted as a matter of course the participation of weakened communities in legal proceedings, stood behind the civil-rights class action of the 1950s. Social awareness and consciousness, public demonstrations and protest, social gatherings, and other forms of communal involvement were all perceived as part and parcel of an empowering experience that played a vital role in the success of the legal suit. In the face of economic and social obstacles, and sometimes violent resistance, the involvement and support of communities became essential to the implementation of court rulings. Active participation by plaintiffs, leaders, and laymen encouraged individuals like Barbara Rose Jones, Claudette Colvin, and Martin Luther King to take on the mantle of breaking old stereotypes of inferiority and engage in an active collective struggle against human rights violations.

In the ongoing struggle of weakened communities to enforce their constitutional civil liberties, the individual suit proved an inadequate means for tackling the tremendous challenges presented by such collective wrongs as racial discrimination. In the absence of appropriate legislative tools, it was up to the federal courts to act and stretch the boundaries of civil procedure by allowing the then newly developed social-reform class action to be heard in the courtroom.

Judicial divergence from the formal categories of civil procedure provided the Federal Courts with a way to exercise the valuable right, and moral obligation, of confronting the most pressing social and legal questions of that time. The ingenuity of civil rights activists in forming and shaping the social-reform class action, and the judicial adaptation of civil procedure to encompass collective wrongs, such as racial segregation, both had a substantial impact on the 1966 amendment to Rule 23, crafted under the careful guidance of Benjamin Kaplan.

However, when the 1966 committee tried to ensure the fate of desegregation class actions in Rule 23(b)(2), it did not include in it the most important elements of the social-reform class action. Consequently, the socially-empowering legal action, of which community forces, social awareness, and protest were an integral part, had been replaced by a representative suit, which could be filed by a single plaintiff, on behalf of a passive and silent crowd. The cry of weakened communities, as well as the experience, knowledge, and feelings said communities possessed, with their unique contribution to the legal process, were therefore marginalized, and ceased to play a paramount role in class action proceedings. At the same time, modern legal proceedings in class action law ceased to strive for empowerment of the weak and direction of victims to legally appropriate avenues of protest.

In this article, I shall present the historical context of race relations in America in the 1950s, and the interaction between the social and legal struggle of the time. I will then analyze the characteristics and reasoning behind leading desegregation cases, prior to the 1966 revision of Rule 23, and maintain that the 1966 committee failed to acknowledge the full breadth of social-reform class actions, thus minimizing their social and legal potential. The next chapters in the article will go on to introduce and examine the central attributes of the social-reform class action as it was developed by both the judiciary and civil rights activists. This will include an examination of the protocols of the 1966 committee, and the underlying dilemmas, motives, and resolutions found within them. Subsequently, the revision of Rule 23 will be juxtaposed with the central attributes of the social-reform class action as they were presented in major class action cases like *Brown v. Board of Education* and *Browder v. Gayle*.

I. THE INTERACTION BETWEEN SOCIAL AND LEGAL CHANGE

Despite the constitutional protection of the rights to life, liberty and the equal protection of the laws, racial segregation in the first half of the twentieth century was maintained and preserved by a set of rigid statutes, commonly referred to as the Jim Crow laws.[1] Coined after a derogatory caricature of an African-American slave,[2] the Jim Crow laws aimed to prevent racial interaction in most public spheres, including education, housing, transportation, parks, and restaurants.[3] In the same way the Supreme Court helped preserve racial subordination in *Dred Scott v. Sandford*,[4] the legal system helped preserve similar subordination during the time of Jim Crow. When constitutionally challenged in the famous *Plessy v. Ferguson*,[5] the Supreme Court of the United States found no relation between the sense of inferiority of African-Americans and the Jim Crow laws, thereby approving of legally ordained racial segregation and dehumanization.[6]

Contrary to the *separate but equal* doctrine promulgated by the *Plessy* court, in reality the practiced segregation employed, rather conspicuously, only partial separation, along with extreme forms of discrimination. Racial covenants made sure that African-Americans

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1. *See, e.g.*, S.C. Const. of 1895 art. XI, § 7; S.C. Code of Laws of 1942 § 5377 (both demanded that separate schools shall be provided for children of the other race). *See also* Keith J. Damon, *Reflections after Thirty-Two Years*, 25 HOW. L.J. 203, 204–05 (1982) (describing the vast impact of racial segregation in Washington, D.C.); G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY 579 (1962).

2. *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 506 n.2 (2007) (explaining the origin of the term "Jim Crow").

3. *See* Damon, *supra* note 1, at 204 (describing the common areas that maintained racial segregation).

4. *See* Dred Scott v. Sandford, 60 U.S. 393 (1856), (holding that an African-American cannot be a free citizen and that the federal government lacks the power to free slaves in its territories) *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

5. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (deciding that legal racial separation does not violate the Fourteenth Amendment and that the law cannot promote racial integration when it goes against community sentiments) *overruled by* Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483 (1954).

6. Justice Brown stated that if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is . . . solely because the colored race chooses to put that construction upon it . . . ." *Id.* at 551.

could not reside in all-white neighborhoods, but these usually excluded black servants and butlers.[7] Similarly, though racial separation existed in most aspects of social life, white children were oftentimes fed and nursed by black maids.[8] That is to say, in everyday life, what dominated was not so much separation, but rather racial hierarchy and subordination.[9] Sitting in the back of municipal buses was about humiliation, not separation, just as being excluded from the best schools on account of skin color had nothing to do with equality.[10] The courts, however, did not acknowledge this plain reality, and were generally reluctant to confront and criticize social norms and concepts, many of which commanded them as a socio-legal institution.[11]

Frequent legal challenges of Jim Crow proved unsuccessful, but they did direct social-reform activists away from individual legal struggles. Leading civil rights advocates, like Charles Hamilton Houston,[12] attempted to confront social and legal injustices in two distinct, but complementary, fashions. The first was changing the legal system from within. Houston, Dean of Howard Law school, put his heart and soul into training and mentoring future African-American lawyers, believing they would later "move about in the courts and the community . . . [gain] the respect and confidence of the community [,

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7. The typical racial restrictive covenant exempted the "domestic servant." *See* R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1557 (2011) (citing the typical racial restrictive covenant, according to which: "No person of . . . African or Negro blood . . . be permitted to occupy a portion of said property, or any building thereon except a domestic servant or servants who may actually and in good faith be employed by white occupants of such premises").

8. On diversion from the rules of racial segregation in private homes, see MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION AND THE SENSES 91-2 (North Carolina Press 2006).

9. On the basis of hierarchy in racial partial separation, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1049–50 (1995).

10. On the shifting standards and applications of racial segregation, see SMITH, *supra* note 8, at 91.

11. Victor Suthammanont, *Judicial Notice: How Judicial Bias Impacts Unequal Application of Equal Protection Principles in Affirmative Action Cases* 49 N.Y.L. SCH. L. REV. 1173, 1178–81 (2005) ("Most interpretations of the Fourteenth Amendment . . . cemented this pattern of oppression, all the while hiding behind the rhetoric of 'separate but equal.' . . . [Furthermore] the language and rhetoric of racism . . . maintained the existing social order by its dehumanization of minorities.").

12. Charles Hamilton Houston was the Dean of Howard Law School and the NAACP litigation director. On the contribution to the struggle against Jim Crow, see GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 83–84 (University of Penn. Press 1983).

and] whittle away on the immediate concrete local problems of the mixed community life: better schools, improved streets, specific abuses of justice, and so forth."[13] Mentoring the new generation of African-American scholars was an important phase in bringing the arguments and feelings of the African-American community into the courtroom.

The second mode of operation was the inclusion of the African-American community itself (not African-American lawyers) in the legal process, aimed at vindicating their civil rights.[14] Besides increasing the awareness of the general public to the repercussions of racial segregation, both kinds of inclusion advanced three separate objectives.[15] First, when African-American lawyers litigated their case in the court as equals, it helped break down old stereotypes of passivity and inferiority.[16] Exclusion of African-Americans from the legal process, which shaped policymaking decisions, was, after all, as damaging as the racial separation in the public sphere.[17] Moreover, allowing individuals from weakened communities to share their private experiences and claims made class action attorneys and courts accountable, and provided them with relevant information and legitimacy for determining the rights violated and appropriate remedies for said violations. This kind of inclusion proved essential, because in any type of social group, a balancing of inner conflicts eventually becomes necessary.[18]

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13. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L. J. 256, 284–85 (2005); Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 16 (2009).

14. Houston explained that "lawsuits mean little unless supported by public opinion." He therefore believed that litigation should "arouse and strengthen the will of the local communities to demand and fight for their rights . . . ." Courts were used by civil rights lawyers as "medium of public discussion [attempting] to activate the public into organized forms of protest and support behind these cases . . . ." Mack, *supra* note 13, at 347–48.

15. Jose Felipe Anderson, *Maryland Lawyers Who Helped Shape the Constitution*, 44 MD. B.J. 5, 6 (2011).

16. This is especially true when racial conceptions are partially based on the statistical absence of racial minorities in distinguished positions.

17. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 487–88 (1976).

18. John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 437 & n.166 (2000) (arguing that the inevitable rise of inner conflicts is a reason to advance a more democratic approach to class actions).

Lastly, the legal process doesn't end with the court's ruling, and in many instances, especially when dealing with social tensions, the decision is only the first step in the long road to social reform. Often, after groundbreaking decisions, weakened communities must endure socio-economic backlashes. Standing together throughout the legal process and acting as a cohesive community afterwards allows the communities to better cope with the socio-economic upheaval brought about by a substantive legal change. Such power in numbers is especially important, as a change of this kind is likely to be accompanied by attempts to circumvent the ruling and diminish its power.[19] A thorough implementation of the court's ruling, therefore, demands a continued concerted effort by those who seek to protect their civil liberties.[20]

The understanding that legal struggles for the enforcement of civil rights demand social awareness and involvement by those whose rights are being pursued in court has led to the development of the early civil-rights class action. In the ongoing struggle to dismantle Jim Crow, class actions served as a cardinal instrument in major human rights suits like *Brown*, *Browder*, and *Wallace*. It is therefore not surprising that 11 out of the 13 lawyers who litigated the *Brown* cases, Thurgood Marshall amongst them,[21] were taught and mentored by Charles Hamilton Houston himself.[22]

II. THE *BROWN* CASES

An important example of the success of class actions in confronting collective wrongs is the twelfth case in Kansas to challenge racial segregation in the public school system,[23] *Brown v. Board of Education of Topeka*.[24] The beginnings of this suit grew from the decision of the NAACP leadership to take an active role in the preparation of central cases against racial segregation in public

19. Civil rights lawyers came to realize that "litigation and social movement politics reinforced each other . . . litigation was a necessary, but not sufficient, part of the movement to make African-American citizenship real." Mack, *supra* note 13, at 349.

20. In the words of Derrick Bell "even successful school litigation will bring little meaningful change unless there is continuing pressure for implementation from the black community." Bell, *supra* note 17, at 514.

21. Ogletree, *supra* note 13, at 6.

22. *Id.* at 15–16.

23. Cheryl Brown Henderson, *The Legacy of* Brown *Forty-Six Years Later*, 40 WASHBURN L. J. 70, 74 (2000).

24. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483 (1954).

schools.[25] With the support of the NAACP, thirteen African-American parents, among them Oliver L. Brown, attempted to enroll their children in all-white segregated schools.[26] Their experiences throughout the process, as well as the details and explanations of their dismissal, were recorded by the NAACP legal counsel. This information furnished the basis of a class action suit, which aimed to capture the full breadth of the repercussions of racial segregation,[27] and was filed on behalf of all African-Americans with similar standing towards the Topeka Board of Education.

The dominance of the class action device in desegregation cases came to the fore when all the legal suits, which would later be consolidated under the name of Brown, were submitted as class actions.[28] These cases hailed from five different jurisdictions, and are generally referred to as "School Segregation Cases."[29] There was

25. Among them was Mckinley Burnett, the President of the Topeka chapter. *See* Henderson, *supra* note 23, at 74–75 (discussing the socio-legal settings in Kansas leading to Brown).

26. Initially there were fourteen families, however, only thirteen remained. *Id.* at 75.

27. The details of the thirteen applications and denials provided "the basis for a class action suit against the Topeka Board of Education." *Id.*

28. This reality did not go unnoticed and it affected the treatment of class actions in the following civil-rights class actions. *See* Orleans Parish School Bd. v. Bush, 242 F. 2d 156, 165 (5th Cir. 1957) This was especially true when defendants attacked the use of class action in antidiscrimination cases and in response the court stated that: "there is not merit in this contention. Here is a well-defined class whose rights are sought to be vindicated . . . Moreover, it is worthy of note that the series of cases generally known as the School Segregation cases themselves were all class actions in the same sense as is the one before us." *Id.* The court of appeals made it clear that "[a]ll four of the original School Segregation cases were class actions and described as such in the opinions." United States v. Jefferson Cty. Bd. of Educ., 372 F. 2d 836, 865–66 (5th Cir. 1966), *aff'd en banc*, 380 F. 2d 385 (1967).

29. Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2161, 2165 (1998).

Bolling v. Sharpe,[30] the Washington, D.C. case;[31] *Gebhart v. Belton*,[32] consolidated with *Gebhart v. Bulah*,[33] which made up the Delaware Case;[34] *Briggs v. Elliott*,[35] the South Carolina case;[36] *Davis v. County*

30. Bolling v. Sharpe, 347 U.S. 497 (1954); Bolling v. Sharpe, No. 4949-50 (D.D.C. Apr. 9, 1951). Apparently, United States Supreme Court Justices, especially Felix Frankfurter, wanted the case to be part of the consolidated cases in *Brown*, and therefore had the court invite the plaintiffs' counsel to file a petition for certiorari, even though the case was not before the court. *See* Brown v. Bd. of Educ. of Topeka, Kan., 344 U.S. 1, 3 (1952) (deciding that "the nature of the issue posed in those appeals now before the Court . . . and also the effect of any decision which it may render in those cases, are such that it would be well to consider, simultaneously, the constitutional issued posed in the case of Bolling v. Sharpe."); Phillip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 826 (1987).

31. *See* Bolling v. Sharpe, 347 U.S. 497, 498 (1954) (the petitioners alleged that segregation in the public schools of the District of Columbia "deprives them of due process of law under the Fifth Amendment"); Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L. J. 549, 587–88 (2002). The plaintiffs could not employ the Equal Protection Clause of the Fourteenth Amendment, since at that time it applied only to state actions, and the District of Columbia was a federal territory and not a state. *See* Leland Ware, Brown *at 50: School Desegregation from Reconstruction to Resegregation*, 16 U. FLA. J. L. & PUB. POL'Y 267, 276–277 (2005) (explaining that Bolling v. Sharpe "differed from the other cases . . . :As a federal territory, the District of Columbia was not subject to the Fourteenth Amendment, which applies only to state actions . . . In Bolling . . . the legal challenge alleged violations of the Due Process Clause of the Fifth Amendment").

32. Gebhart v. Belton, 87 A.2d 862 (Del. Ch. 1952); *see also* Charles J. Ogletree, Jr., *50th Anniversary of Brown v. Board of Education: Chapter 1 The Significance of Brown*, 20 HARV. BLACKLETTER J. 1, 3–4 (2004) (describing the social background of Gebhart v. Belton).

33. Bulah was reported together with the *Belton* case at 87 A.2d 862 (Del. Ch. 1952). Both Belton and Bulah were represented by NAACP Attorney, Louis Redding. *Id.* at 3–4.

34. In Delaware Court of Chancery, Chancery Seitz, ruled that African-American schools were inferior in every aspect to the schools reserved for whites. He therefore ordered that African-American students would be admitted to white schools. The Delaware Supreme Court affirmed this. *See* Leland B. Ware, *Educational Equity and* Brown v. Board of Education*: Fifty Years of School Desegregation in Delaware*, 47 HOWARD L.J. 299, 306–08 (2004) (describing how "Chancellor Seitz visited the schools to compare them . . . [and] found that the facilities maintained for black students were, in all respects, inferior to those reserved for whites . . . [and therefore] failed to comply with Plessy's equivalency requirement.").

35. Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951).

36. The action was brought by the plaintiffs "and on behalf of many others . . . and the suit is denominated a class suit . . . ." *Id.* at 538.

School Board,[37] the Virginia case;[38] and *Brown v. Board of Education*,[39] the Kansas case.[40] All of these dealt with the ramifications of racial segregation in the public school system, and the violation of the right to equal protection of the laws, of African-American pupils.[41]

Unlike the modern class action, in which the plaintiffs are often unaware of the pending suit, the continued involvement of the community in the *Brown* cases was part of the legal and intellectual vision of its initiators.[42] In Kansas, civil activist Lucinda Todd stepped forward as a plaintiff,[43] convinced thirteen others to join the suit, and gathered 1,500 signatures in order to show that their case enjoyed the support of the community.[44] A public campaign for abolishing racial segregation was launched, and it changed the minds of thousands of

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37. Davis v. Cty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952).

38. Due to the poor conditions of the all-black Robert Moton High School, a sixteen-year-old student named Barbara Johns, who was the niece of civil rights advocate Vernon Johns, organized students to stage a walkout. Later they filed a class suit. *Davis* at 338. In this case African-American students, and among them a nine-grade student named Dorothy Davis, brought an action against their county school board and school superintendent for denying them of equal protection of law. They claimed that due to their adherence to racial separation in public schools, according to section 22-221 of the Virginia Code of 1951, African-American children were stigmatized as unwanted and their educational opportunities were abridged. Following their walk-out, they filed a class suit "[f]or themselves and their classmates, a large number of these Negro students." *Id.* Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, The NAACP, And Brown*, 90 VA. L. REV. 1667, 1668–69 (2004).

39. Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951).

40. This class action was submitted by thirteen Topeka parents against the Board of Education in Topeka, Kansas, challenging racial segregation in public school, and arguing that their children's equal protection of law under the Fourteenth Amendment to the U.S. Constitution has been violated.

41. An exception was *Bolling*, in which the suit was based on the violation of the due process clause in the Fifth Amendment.

42. Robert L. Carter, *Fifty Years of Reflection:* Brown v. Board of Education *and its Universal Implications: The Conception of* Brown, 32 FORDHAM URB. L.J. 93, 99 (2004).

43. Lucinda Todd was the secretary of the NAACP local chapter. Her daughter, Nancy, could not attend the all-white school near her house and had to take the bus to an all-black school a few miles away, which on one occasion nearly ran her over. *See* Michael F. Blevins, *Remembering Lucinda Todd*, THE COVENANT COMPANION, 7 (2004) (describing how "it wasn't until Mrs. Todd watched her fourth-grade daughter Nancy nearly get struck and killed by her school bus that she got motivated enough, angry enough, to demand no more waiting. The time had come to take the battle public and file suit").

44. *Id.* at 8.

Topeka residents.[45] In South Carolina, Reverend Joseph Delaine organized wary local residents against racial segregation, turning their attention to the poor conditions of segregated black schools. This eventually led to the filing of *Briggs v. Elliott*, a suit headed by 66 representative plaintiffs.[46] These efforts by Delaine and his family were met by harsh socio-economic reprisals, and put their lives at risk.[47] In Prince Edward County, Virginia, Barbara Rose Jones led strikes and marches by hundreds of students against racial segregation and the poor conditions in Moton High School.[48] And in *Briggs*, use was made of the pioneering research of psychologists Kenneth and Mamie Clark, who observed black children ages three to seven in a series of experiments known as the "doll tests." Their work gave the U.S. Supreme Court insight into the self-identification of black children in a segregated environment,[49] as, in preparation for the legal

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45. Explaining the change in public education policy, it was suggested that: "the grassroots activism of the local branch of the NAACP in Topeka, Kansas, in connection with the proactive litigious position of the national NAACP influenced the public education desegregation policy of the 1950's." *See* Jessica Davis, *The Historical Convergence in the Desegregation Policy of Education in the United States*, 7 J. RACE GENDER & POVERTY 37, 50, 51 (2016) (describing the social impetus "behind the desegregation of public education in the 1950's if the Topeka schools were better than white schools in some cases and a significant part of the population of black parents and teachers did not want to pursue litigation").

46. *See* Special 50th Anniversary Symposium: Brown v. Board of Education *and The Principle of Equality in Higher Education: Roundtable Discussion: Knights at the Roundtable: Panel Reflections and Discourse on* Brown I *and* Brown II, 34 STETSON L. REV. 499, 507–08 n.21 (2005) (describing how Reverend Delaine and his colleagues grew upset at the conditions of African-American children and as a result "worked to put together a lawsuit aimed at achieving educational equality between blacks and whites.").

47. *See* Stephen E. Gottlieb, Brown v. Board of Education *and the Application of American Tradition to Racial Division*, 34 SUFFOLK U. L. REV. 281, 282 (2001) (describing the social background that led to Briggs v. Elliott).

48. Barbara Rose was brave, but only 16, and her ability to form a concerted social struggle based on community support and participation was limited. Also, the African-American community was not prepared for the massive resistance to *Brown*, which caused all public schools to be shut down, and left children without any formal education for several years. Barbara Rose herself had to leave the state due to threats of violence against her. *See* Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as A Matter of Justice*, 11 MICH. J. RACE & L. 419, 420, 441 (2006) (describing the social backlash following Briggs).

49. Testifying as expert witnesses in *Briggs*, their research showed that African-American children equated the "white" dolls with positive qualities such as "good" and "pretty", whereas the "black" dolls were equated with negative attributes like "bad" and "ugly." The children also preferred to play with white dolls, and when asked to paint the color of their own skin, they chose a lighter shade than their actual

proceedings, Kenneth Clark conducted his tests on the children of Clarendon County and presented his findings in court.[50] Grassroots efforts of this kind were essential as members of the local community feared socio-economic backlashes, and possible firings of black teachers.[51]

The *Brown* cases represent a substantive and inclusive approach to procedural law. In *Bolling v. Sharpe,*[52] the District Court of Columbia ruled that racial segregation in public schools was constitutional, but after this decision the Clerk of the United States Supreme Court contacted the plaintiffs' counsel and explained that the Supreme Court wanted to hear them argue their case as part of the desegregation cases in *Brown.*[53] Quite possibly, the Supreme Court, which understood the magnitude and complexity of the racial question, attempted to broaden its sources of information and social

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skin color. *See* Leland Ware, *"Color Struck": Intragroup and Cross-Racial Color Discrimination*, 13 CONN. PUB. INT. L.J. 75, 106 (2013) (describing Kenneth and Mamie Clark's research about self-identification).

50. Wade Kolb III, Briggs v. Elliott *Revisited: A Study in Grassroots Activism and Trial Advocacy from the Early Civil Rights Era*, 19 J. S. LEGAL HIST. 123, 146, 155 (2011).

51. In the 1940's most of the black community did not support the integration of the public school system. *See* Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas*, 1950–1956, 5 LAW & HIST. REV. 351, 366 (1987) (explaining the reasons for dissention in the black community regarding racial integration). Black parents believed their children benefited from the support of their classmates, and feared black teachers would lose their jobs in the case of integration. *See* Jessica Davis, *The Historical Convergence in the Desegregation Policy of Education in the United States*, 7 J. RACE GENDER & POVERTY 37, 50 (2016) (explaining that "the Topeka Council of Parents and Teachers . . . representing the four black schools in Topeka . . . was not confident that their students would thrive in an integrated environment without the support of their black classmates and teachers."). Their fears weren't without merit. In response to the pending Brown cases, the Superintendent of the Topeka Schools notified the six newest black teachers that their contracts wouldn't be renewed. *See* Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas*, 1950—1956, 5 LAW & HIST. REV. 351, 373 (1987) (explaining how "[i]n Topeka, the six newest black teachers were notified that their contracts would not be renewed").

52. The leading counsel in this case was Charles Hamilton Houston, who was replaced when he became ill by two Howard Law School professors, James Nabrit, Jr. and George E. C. Hayes. *See* Ogletree, *supra* note 32, at 4 (describing the involvement of Charles Hamilton Houston in the preliminary stages of Bolling).

53. Genna Rae McNeil, *Community Initiative in the Desegregation of District of Columbia Schools, 1947–1954: A Brief Historical Overview of Consolidated Parent Group, Inc. Activities from* Bishop *to* Bolling, 23 HOWARD L. J. 25, 37–38 (1980).

backing,[54] even at the cost of the *Bolling* case bypassing the Court of Appeals.[55] In *Brown*, the Supreme Court overturned *Plessy*, and accepted the plaintiffs' claim that racial separation negatively impacted both African-American and white pupils.[56] The decision to abolish racial segregation affected every pupil similarly situated to the representative plaintiffs.[57] It is reasonable to assume that the large number of plaintiffs involved helped the Supreme Court grasp the true magnitude of the problem, and find the courage to submit a decree with far-reaching implications on race relations.[58]

III. FROM *BROWN* TO *BROWDER*

The *Brown* decision did not bring about immediate relief for African-Americans.[59] The Supreme Court did not set a specific timeline for the desegregation of the public school system, and instead settled for a gradual, "with all deliberate speed" implementation of its ruling.[60] But the lack of a concrete plan for desegregation was not the only problem—public schools in certain parts of America were closed, so that the only option for gaining an education was private, all-white

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54. This is one of the major reasons the Justices pursued a unanimous decision. *See* Phillip Elman, *supra* note 30, at 822–23 ("Frankfurter wanted the Court to deal with the issue . . . more than anything else, unanimously. He did not want the segregation issue to be decided by a fractured Court . . . . He wanted the Court to stand before the country on this issue united and speaking in a single voice . . . with an appearance of unity, so that the Court as an institution would best be able to withstand the attacks that inevitably were going to be made on it.").

55. McNeil, *supra* note 53, at 38.

56. On the psychological experiment of Dr. Kenneth B. Clark, that was brought to the attention of the court by the counsels of the Briggs Case. *See* Ogletree, *supra* note 32, at 2–3 ("The doll test suggested to the Clarks that black children expressed positive identification with the white dolls and negative identification with the black dolls.").

57. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

58. Comment, *The Class Action Device in Antidesegregation Cases*, 20 U. CHI. L. REV. 577, 581 (1952) [hereinafter, *The Class Action Device*]. It was asserted that "the wide geographical range gave the anticipated decision a national flavor and would blunt any claim that the South was being made a whipping boy." Bell, *supra note 17*, at 474.

59. Racial segregation existed in most aspects of public life. *See* Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY, 663, 669 (2005) (describing the continuing racial segregation in Montgomery City buses despite and following Brown) .

60. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 301 (1955).

segregated schools.[61] Both these strategic attempts to nullify the court's ruling and the socio-economic turmoil that followed *Brown* stress the importance of active participation of communities in social-reform litigation.[62] Eventually, it was this social involvement that caused the ideas of *Brown* to permeate to other areas of racial segregation, chief amongst them the social struggle against racial segregation in public transportation.[63]

There was no more degrading form of racial segregation than the one that existed in the municipal transportation system.[64] Every day, on their way to work, school, or just getting around town, African-Americans were forced to pay the fare at the front, enter the bus from the back, and take designated places in the rear.[65] As their seats were "temporary," the African-American passengers were ordered to vacate them whenever there were more white passengers than "white-only" seats.[66] Bus drivers, entrusted with policing authority, resorted to verbal and physical violence when enforcing these rules.[67] This is but one example of a type of racial segregation, which was minimally influenced, if at all, by the groundbreaking decision in *Brown*.[68] And yet, the grassroots empowerment that accompanied the decision as well as the intertwinement of social forces and legal proceedings did eventually change the lives of African-Americans. These changes consisted in their perception of themselves and of their place and rights in American society.[69] The *Brown* cases gave leaders and layman faith in their ability to repeal Jim Crow, and helped them realize that societal forces need not stand

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61. In Prince Edward County in Virginia, the public school system shut down, leaving only private, all-white segregated schools, despite subsidies by the state. *See* Griffin v. Cty. Sch. Bd., 377 U.S. 218, 222–23 (1964).

62. Bell, *supra* note 17, at 514.

63. On the attempt of Vernon Johns, Barbara Jones's uncle, to disobey the racial segregation code, and the reluctance of ordinary people to join him, see R. Gregory Robert, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement [comment]*, 48 AM. U. L. REV. 229, 263 (1999).

64. Coleman, *supra* note 59, at 669.

65. *Id.* at 669–70.

66. *Id.* at 670.

67. *Id.*

68. On the limited impact of Brown on racial segregation, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363–85 (2004).

69. On the African-American sense of emancipation following Brown, see Coleman, *supra* note 59, at 703 n.31.

idly by, waiting for the resolution of the lengthy judicial proceedings.[70]

A judicial process like *Brown* can stretch on for years as day-to-day realities, like the hiring and firing of teachers, the establishment of private schools, or closing of public schools, render the court's decision redundant. But Brown was never merely a legal proceeding. It relied heavily on social awareness and involvement.[71] That is why, less than a week after *Brown*, Joe Ann Robinson, a member of the Women's Political Council in Montgomery, Alabama, demanded that William Armistead Gayle, Montgomery's mayor, reform the municipal transportation system. Robinson informed him that if he did not comply, the African-American community would boycott municipal buses.[72] Her demand relied on and benefited from the legal basis for a constitutional challenge of the Montgomery racial segregation ordinances, and yet, Robinson understood that legal proceedings could supplement, but not replace, social participation and awareness.[73]

Joe Ann Robinson was not the only one who was moved into action by the social forces of the time. A 15-year-old student named Claudette Colvin also stood up for her rights.[74] On March 2, 1955, Colvin was ordered to vacate her seat in the back of the bus, designated for African-Americans, for a white person.[75] She refused, and continued to call out against this offensive violation of her constitutional rights even as police officers arrived, handcuffed her, and forcibly dragged her to prison.[76]

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70. On the ability of legal proceeding to empower weakened communities by way of involvement and active participation, see Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L. J. 999, 1064 (1989).

71. *See* chapter E, subchapter: *The Law and the Empowerment of the Weak: Rousing the Victim to Action and Forming a Solidarity Community* (analyzing the advantages that grassroots empowerment and social awareness can bring to social-reform litigation).

72. Coleman, *supra* note 59, at 672.

73. She therefore "alerted the mayor that a boycott might be in the offing . . . a boycott that she claimed could be financially devastating to the bus company because of the large black ridership . . . the WPC made plans to print 50,000 notices calling on people to boycott the buses; only the specifics of time and place had to be added." *Id*, at 672–23.

74. Foehrenbach Brown, *Inside Voice: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 285 (2013).

75. Jonathan L. Entin, *Bus Ride to Justice: A Conversation with Fred Gray*, 64 CASE W. RES. L. REV. 733, 740 (2014).

76. *Id.* at 741.

While these two examples are telling, they are part of a more sweeping social change that followed Brown. By this point, the African-American community as a whole began to openly question and challenge Jim Crow, as more individuals followed in the footsteps of Claudette Colvin, among them Aurelia Browder, Susie McDonald, Mary Louise Smith, Jeanette Reese, and of course, Rosa Parks.

Civil-rights activists considered using Colvin as the face of their protest, hoping to garner widespread public support against racial segregation in municipal bus-lines. But Colvin was a strong-minded teenager, pregnant with a married man's child, and they worried that her temperament and the facts of her story would divert public attention away from the injustices of racial segregation.[77] Fortunately, nine months later, on December 1955, Rosa Parks refused to give up her seat for a white passenger.[78] Parks was a youth consultant and secretary of the Montgomery chapter of the NAACP, who helped raise funds for Colvin's legal defense.[79] Unlike Colvin, she was a quiet, dignified, married woman, with a secure job, and was therefore a better fit for leading the social outcry against racial segregation.[80]

Fred Gray, who defended both Colvin and Parks, believed that individual litigation frameworks were insufficient. Therefore, he and other leading civil-rights activists like Joe Ann Robinson, integrated their legal struggle with a wide-scale public protest, known as the Montgomery Bus Boycott, in which the African-American community refrained from riding Montgomery municipal bus-lines for one day.[81] In order to increase public participation they approached a young, unknown pastor, named Martin Luther King.[82] By the end of that successful day of demonstrations, thousands of African-

77. *See* Anders Walker, *Horrible Fascination: Segregation, Obscenity & the Cultural Contingency of Rights*, 89 WASH. U. L. REV. 1017, 1050 (2012) (explaining why the local rights leaders in Montgomery rejected the idea of using Colvin as a plaintiff in a test case).

78. Entin, *supra* note 75, at 734.

79. Coleman, *supra* note 59, at 708.

80. Explaining the importance of Rosa Parks as a representative figure of the protest, it was argued that "Claudette Colvin and Mary Louise Smith . . . were passed over in favor of Parks, an employed, married, light-skinned woman, who was considered a more suitable representative for the movement." Kim D. Chanbonpin, *We Don't Want Dollars, Just Change: Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth about Torture Commission*, 6 NW. J.L. & SOC. POL'Y 1, 12 (2011).

81. Entin, *supra* note 75, at 743.

82. *Id.* at 744–46.

Americans chose to continue the boycott against racial segregation indefinitely.[83]

A main motivation for the social movement behind the Montgomery boycott was the socio-legal struggle in *Brown*.[84] Just as the social strikes and demonstrations were prompted by the possibility of legally abolishing Jim Crow, just as the legal proceeding drew strength and legitimacy from the public outcry against the grave injustices of racial segregation.[85] In his first speech, Martin Luther King made it clear that the Montgomery Boycott and the socio-legal struggle in *Brown* were inextricably linked: "If we are wrong—the Supreme Court of this nation is wrong. . . and we are determined here in Montgomery—to work and fight until justice runs down like water, and righteousness like a mighty stream."[86]

After *Brown* and the aforementioned demonstrations, the African-American community hoped to reach common ground with Montgomery officials through negotiation. When that failed, they continued their socio-legal struggle by filing a class action in federal court, challenging the constitutionality of the Montgomery ordinances.[87] The suit was filed on behalf of all African-Americans situated in similar circumstances, but headed by five women who experienced the hardships of racial segregation first hand, Claudette Colvin amongst them.[88] Being a class action, the suit empowered those who were powerless to battle racial segregation as individuals.

Thus, Claudette Colvin, whose personal issues would have distracted the public from the wrongs of racial segregation, were she the face of the battle, became a representative plaintiff in the class action that ended racial segregation in Montgomery municipal bus-lines. Similarly, Mary Louise Smith, who was arrested and fined, but never considered continuing her personal struggle, in part because of her family's drinking problem,[89] found the courage to challenge Jim Crow when the African-American community looked for representatives in the collective struggle against segregation. When one of the plaintiffs was pressured to pull out of the suit, in the interest

83. Coleman, *supra* note 59, at 674.

84. On the early decision to combine social and legal actions, see *id.* at 673.

85. *Id.* at 674. On the strategic use of socio-legal actions, see Kenneth Mack, *supra* note 13, at 348–49.

86. *Id.*

87. *Id.* at 681–82.

88. Browder v. Gayle, 142 F. Supp. 707, 711 (1956).

89. Walker, *supra* note 77, at 1050.

of canceling the suit, it was this shared effort of the community that prevented it.[90]

The class action, which enjoyed the benefits of grassroots empowerment, unified and even celebrated those individuals who tried to fight for the rights of their entire community. Led, directed, and litigated by African-Americans, the class action attracted public attention, legitimized the legal struggle and its desired remedies, as well as broke down old stereotypes of passivity and inferiority. 381 days passed before the Montgomery Bus Boycott finally came to an end, when the decision in the *Browder* suit, led by four representative women including Claudette Colvin, came into force.[91] Since the struggle for social reform started before *Browder* and continued after it, and since the class action grew out of a wide-scale, socio-legal movement, the activists were now capable of weathering future obstacles and hardships in the bumpy road to abolishing Jim Crow.

IV. *WILLIAMS* V. *WALLACE*—THE SELMA TO MONTGOMERY MARCHES

Nearly a century after the Fifteenth Amendment was ratified, the southern states were still blatantly infringing upon the right to vote of African-Americans; discriminatory tactics, ordained by law, made it virtually impossible for African-Americans to exercise their civil rights.[92] These strategies included limiting the voter registration process to two days each month and incorporating discriminatory "literacy tests."[93] These tests did not affect white people, as "grandfather clauses" exempted those whose ancestors had already gained the right to vote. By 1965, there was not a single African-American registered to vote in the entire Lowndes County in Alabama, even though 80% of its population was African-American. In Dallas

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90. *See* Wilhelmina Wright, *Recent Publications, The Montgomery Bus Boycott and the Women Who Started It: The Memoir of Jo Ann Gibson Robinson*, 23 HARV. C.R.-C.L.L. REV. 281, 285 (1988) (describing the legal pressures on the leading plaintiffs, plaintiffs' attorney, and black boycotters during the Montgomery Bus Boycott).

91. Robert Jerome Glennon, *The Role of Law in Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59, 86–87 (1991).

92. Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking our Democracy's Discrimination Checkpoint in Shelby County & the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL'Y REV. ONLINE S11, S15 (2016).

93. The process included a demand to recite sections from the constitution, and levying a cumulative poll tax. *Id.*

County, where Selma was located and African-Americans considerably outnumbered whites, less than 2.25% of African-Americans of voting age were registered to vote.[94]

The law was by no means the only reason why African-Americans were denied their rights. After years of discrimination, African-Americans internalized their inferior racial status and rejected all attempts to confront or challenge prevailing norms and practices. *Brown*, with its grassroots empowerment, and the non-violent action of the Montgomery Bus Boycott, were instrumental in driving social reform from the bottom up, as they galvanized African-Americans to challenge preexisting laws and practices.[95] In 1965, trying to keep up the momentum, the primary focus of civil rights organizations[96] like the Dallas County Voters League, the Student Nonviolent Coordination Committee (SNCC), and the Southern Christian Leadership Conference (SCLC),[97] was to arrange mass protests against attempts by southern cities to nullify the rights of African-Americans to vote under the 1957 Civil Rights Act.[98]

The protests were met with social violence and state trooper brutality. Protesters were fired from their jobs, students were expelled from colleges, and, in several cases, marchers were severely beaten and even killed. On February 18, 1965, after trying to register to vote, unsuccessfully, for three years, Jimmie Lee Jackson attended a march for voting rights in Marion, Alabama, along with two hundred others.[99] Trying to protect his mother and grandfather from attacks by state troopers, he was eventually shot.[100] This was a watershed

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94. *Id.*

95. One of the famous examples is the sit-in protests of the sixties. On the first sit-ins, in which students occupied all white lunch counters and restaurants, see Norman C. Amaker, *De Facto Leadership and the Civil Rights Movement: Perspective on the Problems and Role of Activists and Lawyers in Legal and Social Change*, 6 S.U.L. REV. 225, 232 (1980).

96. Wendy Marie Laybourn & Gregory S. Parks, *Brotherhood and the Quest for African American Social Equality: A Story of Phi Beta Sigma*, 16 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 42 (2016).

97. One of the ministers who took a prominent role in the formation of this organization was Martin Luther King. *See* Amaker, *supra* note 95, at 241 (describing the efforts of civil rights organizations).

98. Anders Walker, *"Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934–1964*, 40 LOY. U. CHI. L.J. 385, 425 (2009).

99. James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOWARD L. J. 343 (2000).

100. Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 74 (2003).

moment, and at his funeral, James Bevel, the Director of Direct Action of the SCLC,[101] called for a march from Selma, near Marion, to the state capital of Montgomery, where the marchers would present Governor George Wallace with their grievances concerning the process of registration to vote.[102] Two weeks later, on Sunday, March 7th, 1965, 600 African-Americans, led by Amelia Boynton, Jon Lewis of the SNCC,[103] and Reverend Hosea Williams, of the SCLC, set off on the fifty-four mile march from Selma to Montgomery.[104] In what came to be known as "Bloody Sunday," Sheriff Jim Clark's deputies and state troopers, enforcing the Governor's order, prohibiting the march, brutally attacked the marchers, clubbing them and trampling them with their horses.[105] The violence left fifty-eight marchers injured, among them Amelia Boynton and John Lewis, who suffered from a fractured skull.[106]

The following day a class action suit was filed,[107] seeking injunctive restraint against the state troopers and deputies, as well as an order from the court permitting the march.[108] The idea was to secure judicial protection for the right of African-Americans to assemble and protest against the ongoing violation of their right to vote, and prevent intimidations and violence by the state.[109] As the class action suit was complemented by social awareness and participation, the Middle District of Alabama had both the accountability and legitimacy for a far-ranging decision. Federal Judge Frank Minis Johnson, did more than issue an injunction. He delved into the systematic pattern of infringement of the right of African-Americans to register to vote, including in the decision's appendix the statistics of applications to

101. Laybourn *supra* note 96, at 42.

102. John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, 32 HUM. RTS. 2 (2005); Samuel Spital, *A Doctrine of Sameness, not Federalism: How the Supreme Court's Application of the Equal Sovereignty Principle in* Shelby County v. Holder *Undermines Core Constitutional Values*, 34 N. Ill. U. L. REV. 561, 564 (2014).

103. John Lewis was the chairman of the Student Non-Violent Coordinating Committee. *See* Lewis, *supra* note 102, at 3 (describing the walk from Selma to Montgomery on March 7, 1965).

104. Richard Chused, *Dream Vignettes*, 59 N.Y.L. SCH. L. REV. 111, 117 (2015).

105. Guinier, *supra* note 100, at 75.

106. Haygood, *supra* note 92, at S16.

107. Williams v. Wallace, 240 F. Supp. 100, 102 (1965).

108. Amaker, *supra* note 95, at 275–76.

109. FRANK MINIS JOHNSON, DEFENDING CONSTITUTIONAL RIGHTS 64–65 (University of Georgia Press, 2001).

register by African-Americans and their rejections.[110] The evidence exposed that only a small fraction of African-Americans could vote, while the opposite was true for whites.[111]

These numbers also reflected the impact that years of social intimidation and segregation had on the self-esteem and political awareness of African-Americans—many did not even try to vote. Thus, in Wilcox County, 100% of the white population in 1963 was registered to vote, and 0% of the African-American population.[112] But, out of 6,085 African-Americans of voting age, only 29 tried to register, and between 1959–1962 not a single African-American applied to register to vote.[113] In other words, the discriminatory laws were only part of the problem—just as challenging was their social and political influence on the way African-Americans perceived themselves. The public demonstrations and inclusive class action suit were part of an attempt to amend past wrongs by changing these conceptions and helping African-Americans to re-conceptualize their place in American society.

Judge Frank Johnson was well aware of the need to combine social and legal forces. When he examined the state troopers' brutality, he emphasized the legitimacy of peaceful demonstrations by African-Americans, as well as the legitimacy of their interest in ending discriminatory voter registration practices, and encouraged African-Americans to register.[114] He then criticized the way the state troopers interfered and discouraged African-Americans from exercising their basic civil rights.[115] In his analysis, Judge Johnson drew a connection between the years of intimidation and racism endured by African-Americans, the cause of the Civil Rights Movement, the Marches, the sit-ins, and the civil action suit before him. More than just a legal suit,

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110. A clear example was Hale County, in which only 3.6% of the 5,999 African-Americans of voting age were registered, compared to 94.4% of the 3,594 Whites. *See* Appendix "A" (providing the registration statistics in Alabama); *Wallace*, 240 F. Supp. at 106.

111. Examples mentioned in the decision are Wilcox County, in which 0% of 6,085 African-Americans were registered to vote, compared to 100% of 2,647 whites; and Dallas County, in which only 2.2.% of African-Americans of voting age were registered. *See Wallace*, 240 F. Supp. at 104 (analyzing the registration data provided in Appendix "A").

112. *See* Appendix "A" (providing the registration data in Wilcox County, Alabama).

113. *Wallace*, 240 F. Supp. at 104.

114. State trooper brutality included harassment, intimidation, coercion, beatings, mass arrests, electric shocks, and even shootings. *Id.*

115. *Id.* at 105.

the judge realized this was about changing the perceptions, beliefs, and opportunities of weakened communities, and replacing passivity and anger with productive and empowering socio-legal actions.[116]

On March 17, Federal Judge Frank Johnson issued an injunction enjoining state troopers and deputies from intimidating, threatening, coercing, or interfering with the proposed march, and ordering them to provide the marchers with adequate police protection.[117] Then, on March 21st, 1965, 3,200 people, led by Martin Luther King, set out from Selma. By the time they reached Montgomery they were 25,000 strong.[118] A stage was erected to celebrate this accomplishment, and famous singers like Nina Simone, Tony Bennett, and Harry Belafonte went on to sing for the marchers.[119] Martin Luther King gave a moving speech, emphasizing that the march was not just part of a struggle for voting rights—it was "a tool for reaching and activating the victim."[120]

The collaboration of social and legal forces led to the passage of the Voting Rights Act of 1965.[121] President Johnson had this to say when he introduced the bill to a joint session of Congress: "Even if we pass this bill, the battle will not be over. What happened in Selma is part of a larger movement. . . it is the effort of American Negroes to secure for themselves the full blessings of American life."[122]

V. SURMOUNTING THE LIMITS OF INDIVIDUALITY

Prior to the 1966 amendment, the legal procedure of class actions was inaccessible to victims of mass torts. Benjamin Kaplan, Reporter to the Advisory Committee,[123] expressly stated that mass

116. *Id.* at 104–05.

117. *Id.* at 110.

118. Winston P. Nagan, *Struggle for Justice in the Civil Rights March from Selma to Montgomery: The Legacy of the Magna Carta and the Common Law Tradition*, 6 FAULKNER L. REV. 1, 13 (2014).

119. *Id.*

120. *Id.* at 14.

121. The Voting Rights Act was passed by President Johnson on the basis of that march from Selma to Montgomery, on March 7, 1965. *See* Guinier, *supra* note 100, at 75 ("Within five months, President Johnson signed the Voting Rights Act of 1965 . . . Johnson later admitted that they passed the 1965 Voting Rights Act on a bridge on March 7, 1965, heading from Selma to Montgomery.").

122. Nagan, *supra* note 118, at 13.

123. Kaplan also drafted the 1966 amendment to Rule 23.

torts were, as a rule, excluded from class suits.[124] It was civil rights litigation rather than mass torts that dominated representative actions prior to the amendment.[125] Interestingly, at the time, class members in "spurious" class actions did not receive notice, and the dispositions of courts could not bind absent parties.[126] Desegregation class actions, which were usually based on several rights,[127] should have been categorized as "spurious" class actions, and therefore should not have bound absent parties.[128] Nevertheless, the courts made the rather ground-breaking decision to treat desegregation class actions as preclusive, in many cases not even bothering to categorize the suit according to the formal classifications of Rule 23.[129]

Plaintiffs in suits pertaining to race relations were at an extreme adversarial disadvantage as far as access to legal proceedings,

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124. Benjamin Kaplan explicitly stated that: "mass accident will be, and probably ought to be, excluded from the class suit." *See* Benjamin Kaplan, Federal Civil Rules Advisory Committee Meeting, 14, November 1, 1963: Transcript of Session on Class Actions 10 (Oct. 31, 1963-Nov. 2, 1963), microformed on CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.) (discussing the purpose and formulation of Rule 23). The members of the committee and parties to this discussion were Benjamin Kaplan, the reporter and Professor, Harvard Law School; Thomsen, Reszel C., Chief Judge, U.S. District Court; Doub, George, Weinberg and Green; Joiner, Charles W., Associate Dean, University of Michigan Law School; Wyzanski, Charles E., Jr., United States District Court; Louisell, David W., Professor, University of California Law School; Frank, John P., Lewis, Roca, Scoville, Beauchamp and Linton; Acheson, Dean, Chairman, Covington and Burling; Albert M. Sacks, Associate Reporter, Professor, Harvard Law School; Oberdorfer, Louis F., Assistant Attorney General; Elliott, Shelden D., Professor, New York University.

125. John Frank, a practicing lawyer and a member to the 1966 Advisory Committee stated, "certainly we want the segregation cases covered somewhere here. However, in the cou[r]se of covering the segregation cases, we'. . . covered the universe as well." John Frank, Federal Civil Rules Advisory Committee, *supra* note 124, at 36.

126. Fed. R. Civ. P. 23.

127. Only after the 1966 amendment did class actions abandon any demand for prior relations. *See* MARTIN H. REDISH, WHOLESALE JUSTICE, CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 10 (Stanford Univ. Press, 2009) (explaining that prior to 1966 class actions could not be based on random, unrelated class members).

128. There was however, severe confusion in the categorization of desegregation class actions as "true" or "spurious" class action. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 383 (1968) (explaining that some courts differed in their identification of "spurious" and "true" class actions, while others did not examine categories and simply stated that it was a class action).

129. C. WRIGHT, FEDERAL COURTS 271 (1963) (cited in Kaplan, *id.* at 383).

education, and political power were concerned. Apparently, the judicial system realized that socio-economic pressures and limited bargaining power in suits against state officials, as well as the complexity and long-term aspects of race relations, made individual suits a flawed vehicle for tackling such issues. In other words, the move to class actions in race relations stemmed from the understanding that an inclusive collective process was essential in dealing with collective wrongs against weakened communities.

A. Socio-Economic Pressures on Plaintiffs and Judges

Social tensions caused by the possibility of desegregation made individual plaintiffs an easy target for socio-economic intimidation[130]—this went as far as bombing houses and murdering civil-rights demonstrators.[131] These violent methods of coping with prospective change could easily have deterred any plaintiff from challenging racial segregation in the first place.[132] But, class actions limited the power of such socio-economic hindrances. The fact that representative plaintiffs could be replaced by any class member whose claims remained in issue[133] reduced the incentive to exert such pressures on plaintiffs, which in turn, increased their safety. Moreover, working as an organized community rather than a collection of isolated individuals gave the group the collective financial and social support necessary to tackle the obstacles in their path.[134]

The far-ranging implications of desegregation suits exposed the judicial system to socio-economic threats.[135] Federal Judges and

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130. Briggs v. Elliott, 98 F. Supp. 529, 538 (E.D.S.C. 1951); Charles J. Ogletree, *Cover Story: Reflections on the First Half-Century of* Brown v. Board of Education – *Part 1*, 28 CHAMPION 6 (2004).

131. In the struggle towards justice African Americans had to face extreme violence, including the murders of whites who joined the demonstration. *See* Amaker, *supra* note 95, at 274–75 (describing "the effects not only of the actual violence but the continually threatening air of violence").

132. This is not surprising when you take into account the difficulties they had to face. Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half-Century of Brown Vs. Board of Education*, 66 MONT. L. REV. 283, 290 (2005) (describing the suffering of African-Americans, an example of which is the lynching of Emmett Till, following *Brown*).

133. Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest*, 63 B.U. L. REV. 597, 627 (1983).

134. Coleman, *supra* note 59, at 666–95.

135. A known example is the social isolation of Judge Waring, who argued against racial prejudice in *Briggs*. *See* Gottlieb, *supra* note 49, at 282 ("Judge

their families were subjected to personal and professional pressures, as well as acts of violence.[136] Taking on the entire social construct of racial segregation on the basis of an isolated and specific individual suit, therefore, would have seemed imprudent.[137] A class action, on the other hand, based on grassroots empowerment, civil rights demonstrations, and public awareness, enabled the Federal Courts to better cope with the socio-economic repercussions, which legal suits of this magnitude generated.[138]

B. The Mootness Doctrine

Socio-economic pressures were not the only challenge an individual suit needed to overcome in order to reach its intended resolution. There was, for example, the obligation of the Federal Judicial System to dismiss a *moot case*, in which the court's decision no longer had any effect.[139] A plaintiff who, due to a lengthy legal process, graduated from a different school, rendered the court's order ineffective and led to the dismissal of the case.[140] In much the same way, if the plaintiff passed away, decided to leave the relevant jurisdiction, or was admitted in the course of the proceedings to her desired school, the court would be required to dismiss the case due to mootness.[141]

This doctrine induced defendants to do whatever was necessary to dismiss the case, and minimize its impact on future, or even current, challenges towards racial segregation. These strategies included unnecessarily delaying the legal process and pressuring

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Waring . . . paid for that dissent, as well as other courageous decisions, with social ostracism.").

136. Burke Marshall, *In Remembrance of Judges Frank M. Johnson, Jr. and John Minor Wisdom*, 109 YALE L.J. 1208, 1209 (2000).

137. *The Class Action Device*, *supra* note 58, at 581.

138. Explaining the advantages of the civil procedure of a class action, it was asserted that "[i]t *is advantageous . . . to come before the court, not alone, but as a representative of many* . . . rather than a mere isolated and individual complaint." Ronald E. Young, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization* 22 U. FLA. L. REV. 631, 648 (1969) (emphasis added).

139. U.S. CONST. art. III § 2; Defunis v. Odegaard, 416 U.S. 312 (1974). A student filed a suit against racial segregation in the University of Washington Law School, but before the end of the proceedings nearly completed his law studies. The court dismissed the case due to the mootness doctrine.

140. *Id.*

141. *The Class Action Device*, *supra* note 58, at 578–79.

plaintiffs to enter a different school.[142] In some instances, the defendant even chose to admit the student in question, just for the sake of preventing the possible far-reaching implications of the court's decision. By contrast, in class actions, when the representative's claims became moot, courts could not terminate the litigation due to the continued claims by other members of the class.[143]

C. *Limited Framework and Impact: Legal Problems, Possible Remedies, and Their Binding Reach*

While individuals may face racial segregation and discrimination when going to court, such wrongs and their accompanying remedies should not be based on the contextual circumstances of a specific case. Racial discrimination is a collective wrong, its causes and repercussions concern and affect an entire community. It should therefore be analyzed through the prism of a collective process.[144] The psychological and sociological effects of racial segregation may very well demand gradual remedies and temporary compromises, especially since desegregation involved transferring black pupils from neighborhood schools to distant and potentially hostile schools where they were the minority.[145] Seeing as social-reform suits can profoundly affect an entire community, they

142. Though not substantiated in controversial cases like desegregation suits, there were theoretical avenues for designating liberal limits to the mootness doctrine, including the "capable of repetition, yet evading review" and the "voluntary cessation" exceptions. *See* Wilton, *supra* note 133, at 629–33 (explaining the major exceptions to the mootness doctrine in non-class lawsuits).

143. The "continuing controversy" exception was first accepted in desegregation class actions. *See* Young, *supra* note 138, at 649 (explaining that according to the "continuing controversy" exception "[a] defendant cannot gain dismissal by granting the relief sought by the representative when it can be shown that other persons "similarly situated will not be afforded similar treatment""); George M. Strickler Jr. *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 121–22 (1985).

144. Similarly, the certification of a class action widened the scope of admissible evidence due to the broader reach of class actions. *See* Young, *supra* note 138, at 649 (explaining that "a class action widens the scope of admissible evidence . . . it encompasses a wider limit of proof . . . [and] improves the plaintiff's chances of recovery by making it more difficult to defend against the suit").

145. It was therefore argued that "ordered desegregation has often been coercive for both black and white parents." Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 NAT'L BLACK L.J. 176, 177 (1973).

need to take into account a collective framework of thought.[146] Part of this framework should include a collective effort for voicing inner conflicts and goals,[147] analyzing collective harm, past and future, and finding possible remedies, gradual or otherwise, as well as necessary compromises.[148] The collective perspective of class actions, when supplemented by community involvement and participation, can supply the legitimacy, social backing, and accountability necessary for rallying around a common purpose and reaching relevant settlements.[149]

Then again, if the court settled individual claims without a thorough analysis of the bigger, more complicated, picture of racial segregation, the remedy would most likely fail in righting past wrongs and directing future conduct.[150] An individual suit would not deal with the big questions, such as: what should the design of the integrated system be? Should the integration process include the admission of African-American teachers to previously all-white schools? Would it include the busing of white pupils to previously all-black schools? How should the integration affect the curriculum and study materials?

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146. It was similarly expressed that "[m]ore than any other category of litigation, the fashioning of relief in desegregation litigation goes to the core of community . . . Effective community requires the power to make choices . . . ." *Id.* at 181.

147. Emphasizing the importance of giving voice to class members, John Coffee explained that "client autonomy should be a central goal of class action reform . . . Nowhere should the governing principle be that of 'professionals-know-best'" and in the face of inner conflicts, as in desegregation cases, he suggested that "it does not follow that the plaintiffs' attorneys should have the discretion to choose the preferred solution . . . .Instead, a more democratic approach to ascertaining the views of class members is needed." John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 437 & n.166 (2000).

148. Ultimately, "[i]f segregation is a wrong, it is a group wrong, and the mode of redress must be group-wide to be adequate . . . ." *The Class Action Device*, *supra* note 58, at 577–78. On African-American conflicting interests in desegregation cases, see Bell, *supra* note 17, at 482–87.

149. It was claimed that "a school board might admit the successful litigant . . . and bar all others . . . the utility of the class action prevents the separate suit problem from being one of the numerous means of evasion." Donald A. Way & Richard M. Schulze, *What Remedies are available to Enforce the Supreme Court's Mandate to Desegregate and who May Use Them* [comment], 9(2) HASTINGS L.J. 167, 177 (1957).

150. Individual suits against racial segregation preceded *Brown*. *See* Bibb v. Mayor of Alton, 233 Ill. 542, 84 N.E. 664 (1908) (A successful non-class action suit challenging the racial segregation inWashington public school system—however, only the plaintiff, Minnie Bibb, had been admitted).

How would the integration process affect governmental financial aid to the African-American community and the previously all-black schools?

An individual suit, lacking any authority and accountability towards the community,[151] would also shy away, as far as remedies go, from making the necessary compromises and wouldn't enjoy the social backing necessary for its enforcement. The binding effect of an individual perspective would most likely be minimal, as future defendants would try to diminish its scope with an interpretation based on, and limited to, a specific set of individual circumstances. In fact, prior to *Brown*, this individual viewpoint actually served as one of the numerous means for blocking attempts to desegregate the public-school system.[152]

Though *Brown* took the form of a class action, the social controversy surrounding it caused a number of states to adopt a contextual implementation process based on individual factors, which were used to limit and circumvent *Brown's* directives and restore an individual admission perspective.[153] There were also federal judges who adopted a narrow interpretation of *Brown*, based on the private and public dichotomy,[154] and judges who openly rejected it, regardless of its procedural configuration.[155] These responses to *Brown* only stress the advantages of an inclusive class action[156] grounded in

151. Derrick Bell pointed to several dilemmas in that respect: "How should the term 'client' be defined in school desegregation cases . . . How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members . . . to advocate their divergent views?" Bell, *supra* note 17, at 471.

152. *Id.*

153. *See* Gerald Nathan, *The Effect of Pupil Placement Laws upon Southern Education* [comment], 23 ALB. L. REV. 376, 382–83 (1959); Paul Hartman, *The United States Supreme Court and Desegregation*, 23 MOD. L. REV. 353, 366 (1960) (noting that such laws, like the Alabama School Placement law, demanded that the transfer and assignment of pupils among schools be based on individual factors, like the suitability of the curriculum to the particular student, scholastic aptitude, intelligence, mental energy, psychological qualification, and risk of disorder). Pupil placement laws were upheld as constitutional in South Carolina, Alabama, North Carolina and Arkansas. Nathan. at 367.

154. *See* Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Constitution . . . does not forbid such segregation as occurs as the result of voluntary action.").

155. Burke, *supra* note 136, at 209.

156. Focusing on individual rights rather than the collective problem, Kansas adopted a desegregation plan eight months prior to the ruling in *Brown*, based on neighborhood attendance boundaries and without transit buses. All-black schools were still racially segregated, however, and the blame was cast on the . . .

concerted social forces and able to withstand the expected backlashes and ensure that the court's ruling is implemented.[157]

D. *The Law and the Empowerment of the Weak: Rousing the Victim to Action and Forming a Solidarity Community*

Years of intimidation and discrimination would have profound sociological and psychological effects on any weakened community. The racial stereotypes, violence, and inequality that accompanied segregation caused the victim to internalize her demeaning and inferior social status, transforming it into psychological reality.[158] Straightforward consequences of racial discrimination included passivity and lack of proper incentives for overcoming socio-economic obstacles and pursuing one's capabilities and desires.[159] In the absence of hope, the discriminated many times turned to violence, crime, and self-defeat. All these could not be undone by a single decision of the court, especially since the legal system played a major role in bringing about these problematic realities and perpetuating the subjugation.

The social-reform class action provided a bridge between the legal process and the protests of the civil rights movement and inevitably became a political and social expression.[160] The class action, complemented and completed by a socio-legal process which led to the adjudication, confronted its socio-economic backlashes, strengthened the social protest, and vice versa. Social involvement, however, was not based on a majoritarian rule or continuous and direct pressures on state officials. It was contextual, dynamic, open to compromises, and adaptive to the times and different circumstances of

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predominantly colored neighborhoods. *See* Mary L. Dudziak, *supra* note 46, at 379–80 (describing the Topeka Board of Education plan to "change Topeka to a school system governed by neighborhood attendance boundaries").

157. It was therefore asserted that "even successful school litigation will bring little meaningful change unless there is continuing pressure for implementation from the black community." Bell, *supra* note 17, at 514.

158. Regarding the internalization of the demeaning role of discriminated communities, see John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L.REV. 1133, 1145 (1976).

159. On the need to rouse the victim into action, see the discussion in chapter D.

160. *See* NAACP v. Button, 371 U.S. 415, 429 (1963) ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; . . . It is . . . a form of political expression.").

Brown, *Browder*, and *Williams*. Many tools were employed in order to bring about the inclusion of weakened communities, create a common purpose, and galvanize into action those who were passive: public discussion, boycotts on public transportation, crowds outside the courtroom, non-violent marches and demonstrations, and dozens of representative claimants. As a social process, it centered around giving voice to the claims, feelings, and history of the victims, as well as a sincere attempt to form an open decision-making process for finding common ground and reaching temporary compromises when necessary.[161] As a legal process, the suit was based on a non-violent, collective action, which harnessed the law for its own purposes, while the community did not wait passively for the court's final decision,[162] understanding full well that otherwise socio-political forces would have nullified the judicial process by determining the facts on the ground.[163]

VI. THE OVER-PROTECTIVE APPROACH OF THE 1966 COMMITTEE AND ITS UNDESIRED CONSEQUENCE

Under the traditional categories of the 1938 version of Rule 23, it was not clear whether the court could entertain a civil-rights class action, but even if it could, the suit would be classified as "spurious,"[164] that is, class members would be permitted to join the action, but it wouldn't bind absent parties.[165] For it to have a binding effect, the suit needed classification as a "true" class action, namely, a class action dealing with rights held in common. Constitutional rights, however, could be enforced on an individual basis,[166] and their

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161. Contrary to typical modern class actions, in human rights class actions: "The ties among class members are more likely to predate the litigation and to be lasting and deep . . . ." Paul Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH L. REV. 1152, 1158–59 (2004).

162. *See* Coleman, *supra* note 59, at 700 (noting that the success of the civil rights movement was based on "a partnership between nonviolent direct action and legal action").

163. In the words of Charles Houston: "a court demonstration unrelated to supporting popular action is usually futile and a mere show." Mack, *supra* note 13, at 348–49.

164. Jinks v. Hodge, 11 F.R.D. 346, 347 (E.D. Tenn. 1951).

165. Editorial Note, *Class Actions – Classifications under Rule 23 of the Federal Rules* [editorial note], 2 HOWARD L.J. 111, 119 (1956).

166. Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952) (holding that the individual, and not the class, is entitled to equal protection of the laws, and therefore, a class action cannot be entertained on the basis of its denial).

vindication did not require a collective approach.[167] And yet, civil-rights class actions, especially desegregation cases, in which theoretical and practical conflicts in class action law were explored, encouraged federal courts to broaden the original scope of such suits, in both theory and practice.

Whether the courts chose to classify the class action as "true,"[168] and therefore binding,[169] or to simply disregard the Rule's legal categories,[170] its motivation was the same: to establish a substantive approach to the application of class actions in particular and procedural law in general.[171] Federal courts and legal scholars realized that a narrow and formalistic view of procedural law would prevent necessary policy questions from ever reaching the courtroom.[172] Broadening the scope of class actions, on the other hand, allowed moral policies to shape substantive justice[173] and provided the

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167. *The Class Action Device*, *supra* note 58, at 589.

168. System Federation No. 91 v. Reed, 180 F. 2d 991, 996–97 (6th Cir. 1950) (the court entertained a civil-rights class action by simply determining that under the circumstances the right is joint or common). On the confusion of the courts in implementing the categories of Rule 23, see Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV 629, 630–36 (1965).

169. Strickler, *supra* note 143, at 111–12.

170. *See* Charles Alan Wright, Handbook of the Law of Federal Courts 271 (1963) (cited in Kaplan, *supra* note 128, at 380–83) (explaining the attitude of the courts towards antidiscrimination class actions, Professor Wright stated that: "some courts have thought it 'true,' others have thought it 'spurious,' while most have simply called it a class action without further identification").

171. Lance v. Plummer, 353 F. 2d 585, 591 (5th Cir. 1965) Responding to a contention against class actions being an adequate vehicle, the court stipulated that "Congress did not intend to do away with the right of named persons to proceed by a class action for enforcement of the rights contained in Title II of the Civil Rights Act." *Id.*

172. Considering the regressive effects of the formal implication of Rule 23, the following was asserted: "It is submitted that the decision to be made on the res judicata effect of class actions on the unnamed members of the class is a policy decision." *See The Class Action Device*, *supra* note 58, at 592 (explaining that the use of the class action device should extend beyond the equity practice and that "the class suit is eminently suited to the purpose of affording relief to racial, religious and national groups which have been made the objects of segregation").

173. Commenting on the realistic approach of the Federal Judiciary, Yeazell asserted that "[t]he supreme court seemed willing to reverse a half-century of constitutional law in the name of racial equality." STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 243 (Yale University Press, 1987).

plaintiffs with a viable opportunity to challenge racial and discriminatory practices.[174]

Following the innovative application of Rule 23 in civil rights litigation,[175] the 1966 advisory committee embraced the judicial renovation of Rule 23,[176] and elevated the substantive access of individuals to legal proceedings.[177] In the words of Benjamin Kaplan, a member and reporter to the committee, one of the dual missions in the reconstruction of Rule 23 was "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[178]

This theoretical approach was based on the social and historical context of desegregation class actions and the impracticability of individual suits in vindicating the constitutional rights of weakened communities.[179] After all, it was the same Benjamin Kaplan who asserted that "if by any chance the desegregation case could be found by a judge not to be a class action after the adoption of the rule, we would of course be in a very, very bad way. If there is any doubt on the matter, we certainly ought to

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174. *See* Benjamin Kaplan, *supra* note 128, at 384 (noting that "right answers should not depend on the . . . terminology of rule 23, but rather on the play of the intrinsic policies").

175. In the words of Benjamin Kaplan: "desegregation suits . . . are . . . spurious class actions, but there isn't a judge in the world that's treating them that way . . . ." *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for The Modern Class Action*, 63 FLA. L. REV. 657, 697 (2011) (explaining the important role desegregation class actions played in changing the old categories of class actions).

176. The Committee Reporter, Albert M. Sacks, who later became Dean of HLS, emphasized the fact that: "there [have] been some . . . which have been classified . . . as spurious . . . and yet judges have suggested that they be binding, so that . . . you have a developing law in the field." *See id.* at 696 (explaining the development of procedural law as a result of the challenges raised by desegregation class actions).

177. On the composition of the Advisory Committee, see Judith Resnik, *From 'Cases' to 'Litigation,'* 54 LAW & CONTEMP. PROB. 5, 8–9 (1991).

178. The other mission was "to reduce units of litigation." *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (explaining the purpose behind the reconstruction of Rule 23).

179. Here too, Kaplan stressed the fact that: "If a school desegregation case . . . is maintained by an individual . . . rather than as a class action, very likely the relief will be confined to admission of the individual . . . and will not encompass broad corrective measures . . . ." Letter from Benjamin Kaplan to John P. Frank (Feb. 7, 1963) (cited in Marcus, *supra* note 175, at 700–01).

carry language which includes the desegregation suit."[180] John P. Frank, a member of the committee, followed suit when he explained that "the energizing force which motivated the whole rule . . . was the firm determination to create a class action system which could deal with civil rights . . . ."[181]

Clearly, the committee designed Rule 23(b)(2) as a bracket for civil-rights class actions, commonly referred to as mandatory class actions,[182] since the rule did not entitle class members to notice, or the right to exclude themselves (opt out) from the legal proceeding.[183] The committee decided to limit this bracket to suits seeking injunctive or declaratory relief in order to remove potential obstacles that might stand in the way of civil-rights class actions.

Trying to curtail the role of the NAACP in social-reform class actions, criminal legislation was passed barring solicitation by a "capper"—this proved an alarming challenge to civil rights litigation.[184] Chapter 33 of the Virginia Code is a prime example of this,[185] as it expanded the definition of "capper" to include organizations that retained lawyers in legal actions to which they had no pecuniary rights.[186] The legal staff of the NAACP, which litigated many of the racial discrimination cases, was compensated directly by the NAACP and was therefore not pursuing monetary rewards in court.[187] Statutes like Chapter 33 reflected a critical view of the NAACP and its legal staff for their supposed lack of commitment and accountability towards their clients.[188]

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180. Kaplan then said: "So if there be any question about it, (2) ought to remain in." Kaplan, *supra* note 124, at 10. Rule 23 reflected an innovative understanding of what a class is and how the law should treat it. It is therefore not surprising that in Kaplan's first draft, he did not distinguish between injunctive and monetary relief. *See* Marcus, *supra* note, 175 at 704 ("Kaplan's first draft of Rule 23 did not distinguish between injunctive relief and money damages class suits.").

181. Patricia A. Seith, *Civil Rights, Labor, And The Politics of Class Action Jurisdiction*, 7 STAN. J. C. R. & C. L. 83, 89–90 (2011).

182. Fed. R. Civ. P. 23(b)(2).

183. Fed. R. Civ. P. 23(c)(3).

184. Southern states like Georgia, Mississippi, South Carolina, and Tennessee enacted such statues. Susan D. Carle, *From Buchanan To Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 299 (2001).

185. VA. CODE ANN. §§ 54-74, 54-78, 54-79, as amended by Acts of 1956, Ex. Sess., c. 33 (Repl. Vol. 1958).

186. *Id.*

187. NAACP v. Button, 371 U.S. 415, 420 (1963).

188. That was the reasoning of the Virginia Supreme Court of Appeals, which held that the activities of the NAACP fell within the definition of improper solicitation. *Id.* at 425–26.

When the organization was constitutionally challenged in *NAACP v. Button*, a powerful dissent by Justice Harlan stressed the rightful interest of these statutes to protect the trust, confidence, and personal relations between lawyers and their clients, as well as the lawyers' responsibility towards the courts they serve.[189] Lawyers, he explained, could not serve extrinsic interests, like those of the NAACP, when these interests deviated, or even negated, the interests of their clients, whose causes they were championing.[190] If not for an interim change in judges, the majority of the USSC (including a decision Frankfurter had already written), would have found the NAACP subject to criminal ethics sanctions.[191] It is therefore more than reasonable to assume that a leading scholar like Benjamin Kaplan, who focused on protecting desegregation class actions, was aware of such possible legal challenges when he shaped the newly developed civil-rights class action.

Chapter 33 and Justice Harlan's dissent, though well-intentioned, challenged the core of civil-rights litigation. They did so by bringing attention to the fact that class attorneys needed to be responsible towards class members—in effect, they questioned those attorneys' commitment to represent the interests of their clients, as opposed to substantive policies, which had little to do with the feelings and desires of the people they represented.[192] Instead of trying to get around it, the 1966 committee should have embraced this challenge and acknowledged the unique role that grassroots empowerment and civil rights activists like Martin Luther King assumed in shaping the social-reform class action during the fifties. The decisions in *Brown*, *Browder*, and *Williams* were, after all, attuned to the inner world of the African-American community.

As Tomiko Brown-Nagin suggests in her groundbreaking research, while elite-dominated interest-group litigation possessed the symbolic impact of social-reform litigation,[193] it also undermined the role of the social movement as an insurgent group and limited its discourse to existing frameworks of constitutional law.[194] Grassroots

189. *Id.* at 461.

190. *Id.* at 462–63.

191. Carle, *supra* note 184, at 299.

192. Button, *supra* note 187, at 462–63.

193. On the political and mobilizing impact of social-reform litigation, see MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 5–12 (1994).

194. Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1511 (2005).

empowerment, on the other hand, like that of *Brown* and *Browder*, secured concrete changes in the lives of weakened communities and helped break the psychological chains imposed by Jim Crow.[195] The inclusion of weakened communities in legal proceedings also assisted in accumulating social and political capital, which then mitigated the socio-economic backlashes that, as Michael Klarman argued,[196] could potentially nullify the advantages of a revolutionary judicial decision. It is therefore surprising that the 1966 advisory committee did not give the necessary attention in its deliberations to this social legal interaction.

Though it did not appear in the first draft, Benjamin Kaplan decided to add Rule 23(b)(2) as a mandatory category, limited to injunctive and declaratory reliefs.[197] This was an attempt to reinforce desegregation class actions, but it failed in that it did not account for what made decisions like *Brown* successful conduits for change—it lacked the attribute hinted at in Chapter 33 and Harlan's dissent—thus, the socially-empowering legal action, in which the community actively participated (absent from this rule), was replaced by a representative suit, which could be filed by a single plaintiff, on behalf of a passive, voiceless crowd. As a result, the benefits, both legal and social, gained by giving voice to the cry of weakened communities, by hearing conflicting views, and finding common purposes and possible compromises—all of which provided social support and legitimacy to the court's decision—ceased to play a significant role in the civil-rights class action. Bearing in mind the complexities and costs of grassroots empowerment, class attorneys were no longer obligated, nor did they possess the necessary incentive, to do the hard work needed to empower the weak and direct victims to legally deserving avenues of protest.

Moreover, in order to prevent possible challenges to the cohesiveness of the class, the remedies of declaratory or injunctive relief were presented as undeniably common to it.[198] But, history

195. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LOCAL CIVIL RIGHTS MOVEMENT 264–66 (2011).

196. On the way social-reform litigation can bring about severe socio-economic backlashes and therefore challenge the institutional capacity of the courts to generate social change, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 462 (2006); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 481–82 (2005).

197. Marcus, *supra* note 175, at 704.

198. The context here was that of desegregation class actions, and the necessity of forming and filing such a collective action. *Id.*

challenged this assumption and showed that injunctive or declaratory relief sometimes produced strong distributive effects between the class members.[199] In moving away from abstract declarations to concrete implementation, conflicting interests arose many times within the class, challenging its cohesiveness and the adequacy of the class action as a legal framework.[200] This shift presented a myriad of practical and theoretical options for bringing about desegregation,[201] and yet in the face of conflicts between class members, which arose in real life, grew the need for social awareness and community involvement, as part of a process towards reaching an agreement regarding common claims and remedies. Moreover, the continued circumvention of injunctive and declaratory relief in civil rights litigation cast doubt on the adequacy of such class actions, suggesting that levying monetary damages could assist in directing the behavior of public officials.[202]

In contrast to Rule 23(b)(2), Rule 23(b)(3) presents a more flexible category, in which the class action is not mandatory, and class members are given the right to opt out and object to the suit.[203] Rule

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199. Despite the terminology of Rule 23(b)(2), when a wrong has affected the class as a whole, there may still be varying interests within the class, in which case different injunctive relief would be required. Nevertheless, the language of Rule 23(b)(2) reflects the understanding that desegregation class actions are an appropriate legal framework. *See* STEPHEN C. YEAZELL, *supra* note 173, at 247 (explaining that "[t]he certainty manifested by 23(b)(2)(with its declaration that relief 'with respect to the class as a whole' is 'appropriate') thus reflects a consensus that the civil-rights actions were themselves 'appropriate'").

200. Rule 23(b)(2) doesn't require that courts give class members notice of the suit. The reason is that the rule is based on the appearance of commonality of interest, and therefore it doesn't provide plaintiffs with the right to be excluded from the class. *Id.*

201. Similarly, the use of buses in getting to distant and mostly-white schools had produced mixed interests among the plaintiffs. There were, of course, other alternatives, like opening new public schools. *See* Griffin v. Cty. Sch. Bd., 377 U.S. 218, 222–23 (1964) (describing Prince Edward County's resistance to *Brown*'s order to desegregate its public schools and ultimately resolution to close its public schools and open a segregated private school system, still supported by public funds).

202. Following Prince Edward County circumvention of Brown's directives by closing its public schools a class action was filed against Prince Edward County for its rejection of Brown. *Griffin* at 234. The Supreme Court ruled that the time for "deliberate speed" has run out, and affirmed the district court's decision which ordered Prince Edward County to stop funding private schools, and carry out its duty to levy taxes for public education. *Id.*

203. Prof. Moore criticized Rule 23(b)(3) for "trying to compel a common course of claimants in situations where a judge thinks he should. Now that sort of goes against my grain of the right of the litigant to run his own lawsuit . . . ." Advisory Committee Meeting, *supra* note 124.

23(b)(3) also dictates that this kind of class action must be better suited to vindicating claimants' rights than other legal mechanisms and that common questions regarding class members must predominate over those of individual class members.[204] The rule provides courts with broad judicial discretion in deciding whether the class suit is desirable, in light of the interests and issues that need to be resolved on an individual basis.[205]

It seems that the intention of the authors of the 1966 Amendment was to make sure that civil-rights class actions would be easier to file, and that they would constitute, from that point on, the bulk of class action suits.[206] The same authors also believed that mass accidents shouldn't typically lead to class actions,[207] and that they would therefore constitute only a negligible portion of class action litigation.[208] Still, some members of the advisory committee were under the impression that the flexible terms used in Rule 23(b)(3), together with the day-to-day practice of it, might change things.[209] John Frank, a member of the committee, believed that lawyers and even defendants would be more than happy to file class actions and pursue quick settlements.[210] Judge Roszel Thomsen even went so far as to maintain that judges might be too eager to endorse extensive use

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204. Fed. R. Civ. P. 23(b)(3).

205. One of the central critiques against Rule 23(b)(3), raised by George Doub, in the 1966 Advisory Committee meeting, was that it is "such an open door," and that they could not tell "where that door is going to take us." Advisory Committee Meeting, *supra* note 124.

206. Benjamin Kaplan asserted that "mass torts would and should be typically excluded from class suits." *Id.*

207. Explaining why cases of mass torts shouldn't be treated as class actions, Mr. Frank, a member of the 1966 committee, observed: "when we take class (2), which are said to be segregation cases, I am satisfied . . . . The rest of what is to be included . . . I would exclude . . . I think ever to allow a mass accident . . . just plain bribery on counsel to go a little soft and take it a little easy is just to frightening to contemplate. It's just not necessary." *Id.*

208. When explaining the use of Rule 23(b)(3), Professor Kaplan stressed that it was "the 'flexible' category. These are cases . . . like the following: Common fraud cases claimed by beneficiaries of a trust . . . or . . . private antitrust claims arising from a corporate dealing." As to whether mass accidents fulfilled the predominance requirement, he asserted: "Well, how often is that likely to be true in cases of mass accidents?" *Id.*

209. *See* Mr. George Doub comments at n.205. *Id.*

210. He therefore stressed that "there are just more ways of cheating people with class actions than with any other rule that I've been able to put my finger on . . . The motion that this can be prevented by any amount of notices, etc., is, if I may say so, simply a mirage in most cases . . . ." *Id.*

of class actions for reasons of local pride,[211] and George Doub, Assistant Attorney General, asserted that judges were fond of important litigation, and the flexible terms of Rule 23(b)(3) might serve as "an invitation for them to take hold."[212]

Thus, despite the central role that class actions played in the social struggles of minorities and the enforcement of constitutional rights,[213] and despite the social context which shaped the 1966 Amendment to Rule 23,[214] the authors of the amendment created an imbalanced system. Once the question of whether a spurious class action could bind absent players was settled by the 1966 committee, a single class action could be brought forth in the name of millions.[215] This made monetary class actions highly attractive to attorneys due to the high fees involved,[216] and in turn, also attracted students and academic scholarship to this field, with its growing social and financial importance. As a result, today mass torts are no longer the rare exception, and civil-rights class actions no longer the norm.[217] Though class attorneys are informally referred to as private attorney

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211. Referring to the interests involved in the wrongful certification of class actions, Judge Thomsen maintained that "[t]here are terrific pressures on the lawyer, on honesty . . . you got terrific local pride when the judge gets involved in a thing like that . . . .I'm just worried . . . whether the language of (3) is so general that it invites treating these mass accidents and negligence cases as class actions." *Id.*

212. George Doub asserted: "that most district judges, no matter how able . . . like to have important litigation, and I think this is an invitation for them to take hold." *Id.*

213. *See supra* discussion accompanying note 179 (discussing the impact of the social and historical context of desegregation class actions on the 1966 reconstruction of Rule 23).

214. On the development of spurious class actions through civil rights litigation, and their prominent place in the discussions of the advisory committee, see Marcus, *supra* note 175, at 697.

215. Despite the seemingly onerous requirements of Rule 23(b)(3), in practice, most class actions filed under subdivision b(3) are de facto mandatory class actions. The reality is that class members are usually passive and even indifferent to the class action process.

216. This is especially true when hasty settlements are an option. *See* John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647–48 (1987) (explaining that "[b]y settling, the attorney avoids the usually substantial risk of an adverse judgment. The net result is . . . 'structural collusion.' While no honest defendant's attorney would offer to exchange a low settlement for a high fee award (nor would a responsible plaintiff's attorney accept such an offer, if made), neither has to offer any such 'bribe,' because the legal rules applicable to class actions essentially do it for them").

217. On this historical shift, see Resnik, *supra* note 177, at 6.

generals,[218] these lawyers are less likely to file and work with local communities on class actions in which mere declaratory or injunctive relief are sought, even if it is in the public interest.[219] This new reality has shifted the focus of research and scholarship to monetary class actions, leaving the history and development of civil-rights litigation marginalized.

CONCLUSION

It is widely acknowledged that *Brown* opened the floodgates for class actions pertaining to various aspects of race relations, such as public transportation, public facilities, and the political process.[220] But, it did more than that. The *Brown* cases and the active role assumed by the Supreme Court, as well as the continued intertwinement of social protest and legal proceedings in *Browder v. Gayle* and *Williams v. Wallace*, represent the culmination of the judicial shift from procedural efficiency, as the theoretical background of Rule 23 of 1938, to a substantive theory of adversarial equality.

The need to address longtime collective wrongs through a collective device, supported by grassroots empowerment, is made evident by both the employment of class actions by the NAACP and the Court's ruling regarding their binding effect. The Jim Crow laws could not have been successfully abolished using an individual lens, especially since this struggle demanded the courts to interpret *Brown* as a call for active integration.[221] A collective approach, which emphasized the primacy of social groups and their relationship with

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218. On the term "private attorney general" and its meaning in the context of class action counsels in general, see Bryant Garth, Ilene H. Nagel and Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988).

219. Civil-rights class actions still exist, but they take up a small percentage of class action litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993:2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 262 (2010) (providing empirical data on the use of class actions in different legal fields including civil rights).

220. *See* Strickler, *supra* note 143, at 111–12 ("The Decision in Brown v. Board of Education opened the floodgates for civil-rights class actions.").

221. This was the result of different interpretations of *Brown*: the first maintained that *Brown* called for active integration, while according to the second, *Brown* simply forbade active racial discrimination. Thus, it was asserted that "[t]he Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action." Briggs v. Elliott, E.D. S.C. 132 F. Supp. 776, 777 (1955).

the legal debate, was essential.[222] The social-reform class action, which was based on social awareness and community participation, provided the necessary socio-legal platform for change.

Over the years, the concept of class actions has undergone a fundamental change, and its socioeconomic role and motivations are now largely forgotten. Class actions today are thought of as suits triggered by the fees of class attorneys, filed in the name of an aggregation of numerous claimants, who are entitled to marginal damages and are usually indifferent to the suit and their representation.[223] It is therefore considered expensive and unnecessary to make the class action process accessible to the claimants represented by it.[224] In fact, these days, a considerable percentage of class actions never see the inside of a courtroom, and many end with private settlements that few class members know about.[225] The prevalent goal of class actions has thus become making tortfeasors pay for the damages they inflict, in order to achieve a supposedly proper level of deterrence.[226] But as maintained and showed above, historically, class actions were more than that.[227] They were, and perhaps should be again, a substantive mechanism for righting collective wrongs,[228] in which dissimilarities are confronted rather

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222. It's impossible to examine collective wrongs, such as the ones that the de facto segregated system created, using an individual device. In an individual suit "evidence of the group nature of the wrong might not be relevant. But in a class suit, evidence of discrimination against any and all members of the class would be admissible, enabling the plaintiff to broaden the nature of his proof and increase the difficulties of rebuttal." *The Class Action Device*, *supra* note 58, at 581.

223. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 848 (2002).

224. *Id.* at 840.

225. Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 KAN. L. REV. 809, 841 (2010); Thomas E. Willging & Emery G. Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775, 791–92 (2010).

226. On the deterrence theory in class actions, see David Rosenberg, *Adding A Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, U. CHI. LEGAL F. 19, 27 (2003).

227. On the conflicting interests in desegregation cases, see *supra* text accompanying note 179.

228. Accordingly, seventeenth-century group litigation, which was based on status, cannot and should not be regarded as the antecedent of the modern class action. *See* Stephen C. Yeazell, *Group Litigation and Social Context: Toward A History of the Class Action*, 77 COLUM. L. REV. 866, 871 (1977) (explaining the social differences between seventeenth-century group litigation and modern class actions).

than concealed—a legal framework with accountability towards the community which it represents, one that allows individuals to reshape their thoughts and perceptions, as well as voice their experiences and feelings: after all, should not a class action allow the individuals that it supposedly serves to take an active part in finding their common goal and the desired path to accomplishing it?

BOOK REVIEW

The New Bible of Trial Advocacy: Why Every Trial Lawyer and Wannabe Should Never Try A Jury Trial Without It

ON THE JURY TRIAL: PRINCIPLES AND PRACTICES FOR EFFECTIVE ADVOCACY [HEREINAFTER ON THE JURY TRIAL] BY THOMAS M. MELSHEIMER & JUDGE CRAIG SMITH

Review by Judge Mark W. Bennett†

> *You are foolish to try a jury trial without reading this book.*[1]

INTRODUCTION

Why would a federal district court judge in Iowa write a Book Review about yet another book on trial advocacy? I plead guilty to

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† Judge Bennett is in his 24th year as a federal district court judge in the Northern District of Iowa. He has tried hundreds of jury trials, including by designation in the Southern District of Iowa, the District of Arizona, the District of the Northern Mariana Islands (Saipan), and the Middle District of Florida. He has taught trial advocacy at both the University of Iowa College of Law and the Drake University Law School; spoken at more than 500 CLE programs in thirty-eight states and several foreign countries about various aspects of trial law; and has written nearly two dozen law review articles and a plethora of other articles on various aspect of trial practice. He has also reviewed scores of trial transcripts, sitting by designation on both the Eighth and Ninth Circuit Courts of Appeals. On August 15th Bennett accepted a position and started at the Drake University Law School as its first Director of its new Institute for Justice Reform & Innovation. He will formally retire from his judgeship on March 1, 2019.

1. Attribution for this quote is revealed in the last paragraph of this Book Review.

being, for more than four decades, an ultimate hoarder, aficionado, and voracious reader of trial advocacy books and articles. I think, write, eat, speak, and breathe trial advocacy. Indeed, my recent law review article (my favorite), *The Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker: "I am a Litigator,"* was written for and published by *The Review of Litigation*,[2] reflecting my passion for all things trial advocacy. I am also a huge fan of Texas trial lawyer, Thomas Melsheimer, one of the authors of *On The Jury Trial*. I suspect I am the only trial judge in the nation who requires all lawyers who file an appearance in a civil case to read his and another famous Texas trial lawyer, Steve Susman's, law review article: *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, published by this terrific law review.[3] I also require the lawyers to file an affidavit indicating they have both read the article and discussed it with their clients.[4]

The authors of *On The Jury Trial*—Judge Craig Smith and Tom Melsheimer—have more than fifty-five years of combined trial lawyer experience in the trenches, plus Judge Smith's more than a

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2. Mark W. Bennett, *The Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker: "I am a Litigator,"* 33 REV. LITIG. 1 (2014).

3. Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431 (2013).

4. This is what my case-management order requires:

> ***IV. TRIAL BY AGREEMENT***: Within thirty (30) days of this order, each lawyer who has appeared on behalf of any party, and within thirty (30) days of any other lawyer appearing on behalf of any party, must file a short affidavit that they have read the following article: Steve D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431 (2013). Each lawyer must also state in his affidavit that he has discussed the basic principles of Trial by Agreement with his client(s) and whether he is willing to make a good faith effort to apply the basic principles of this article and the concepts contained in Pretrial Agreements Made Easy, found at http://trialbyagreement.com/pretrial-agreements/pretrial-agreemetns-made-easy to this case. Lawyers have the right not to follow these principles of Trial by Agreement, but the failure to timely file the affidavit will result in a $250 sanction. The money will go to the court's "Library Fund" and will be used for the benefit of the bar.

decade experience as a state trial judge in Dallas County. Thus, *On The Jury Trial* is not written by some trial advocacy law professor or litigator pontificating about what trial lawyers need to know while sharing phony war stories imagined from two years in private practice doing document review in a large warehouse, but the real deal, the consummate voice of experience from a highly regarded trial lawyer and state trial judge on how to *really* try lawsuits from fender-benders to bet-the-company high stakes civil jury trials. The lessons learned by Tom Melsheimer and Judge Craig Smith are presented in a variety of ways: general wisdom gems that are overarching principles; examples from real trials with insightful running commentary; specific do's and dont's and insider tips that every trial lawyer needs to know; and concise checklists that shape your trial preparation and presentation.

The bottom line is that *On The Jury Trial* is a must-read for law students aspiring to be real trial lawyers; to experienced trial lawyers wanting to improve their craft; and to wannabe trial lawyers and "litigators" who would like to shed that moniker and become something more than office Clarence Darrow or Jerry Spence pretenders.

Section I of this Review lays out the general organization of *On The Jury Trial.* Section II describes the qualities of *On The Jury Trial* which make it an excellent study trial advocacy text. Section III examines the methods used in most chapters to communicate the lessons learned through several techniques. The Conclusion summarizes why *On The Jury Trial* should be read and the practices discussed used by every trial lawyer and wannabe.

I. THE ORGANIZATION OF *ON THE JURY TRIAL*

There is one true mystery about *On The Jury Trial.* How did the authors pack so much invaluable information into less than 250 pages? After all, Francis Lewis Wellman's classic book on just the subject of cross-examination, *The Art of Cross-Examination*, exceeds 450 pages.[5]

The organization of book chapters in *On The Jury Trial* is impressive. Of course, like most trial advocacy books, it has chapters on the distinct and critical components of every jury trial, e.g. voir dire, opening statements, direct and cross examination, and closing

5. FRANCIS LEWIS WELLMAN, THE ART OF CROSS-EXAMINATION (4th ed. 1997).

arguments. But, *On The Jury Trial* offers much more than that. There are chapters on WORKING WITH EXPERT WITNESSES, USING DEMONSTRATIVE EXHIBITS AND OTHER AIDS IN TRIAL, THE COURT'S CHARGE, and MOTIONS IN LIMINE. Other unique aspects of *On The Jury Trial* are the key chapters: KNOW YOUR AUDIENCE, JUDGE'S VIEWPOINT, and TRIAL LAWYER'S VIEWPOINT.

But there's more! It also features a critical and insightful APPENDIX ON PREPARING WITNESSES FOR DEPOSITION adopted from a "deposition memorandum guide developed by Steve Susman and his partners at Susman Godfrey LLP."[6] I found, during my trial lawyer days decades ago, that preparing my own witnesses for depositions was one of my greatest weaknesses. I loved preparing to take a deposition. I dreaded preparing my own witnesses—often with less than desirable results. This appendix is worth its weight in platinum.

But there's more! The second and last APPENDIX ON LEGAL WRITING TIPS, offers a very concise guide on telling the story narrative, four priceless tips on maintaining credibility with the court, and numerous, but succinct tips on persuasive writing style.[7] This short APPENDIX ON LEGAL WRITING TIPS is easily worth, if followed, ten times the price of *On The Jury Trial*.

In sum, the organization of the book is exceptionally straightforward. It does not intend to be encyclopaedical and it is not. As discussed below, the strength and major virtue of this Book lies in its brevity and conciseness—and, no footnotes!

II. WHAT MAKES *ON THE JURY TRIAL* DIFFERENT AND BETTER THAN OTHER TRIAL ADVOCACY BOOKS

My *The Eight Traits of Great Trial Lawyers* law review article was intended as an inspirational piece for lawyers to strive to attain traits that I thought were crucial to becoming a great trial lawyer. While it gave many general suggestions, *On The Jury Trial*, is ***the*** go to step-by-step manual for how to achieve greatness as a jury trial lawyer. So how do Texas rock stars Thomas M. Melsheimer and Judge Craig Smith manage to infuse so much wisdom and trial gems into each chapter? My dear, dear friend and one of the most admired federal trial court judges to ever serve our nation, now retired and

6. THOMAS M. MELSHEIMER & CRAIG SMITH, ON THE JURY TRIAL: PRINCIPLES AND PRACTICES FOR EFFECTIVE ADVOCACY 237 (2017).

7. *Id.* at 251–54.

founding Dean of UNT Dallas College of Law, Royal Furgeson, nailed it in the Forward of *On The Jury Trial*:

> "Now, in *On the Jury Trial*, this remarkable trial lawyer and this remarkable trial judge have put together what I view as a "must have" reference for any trial lawyer aspiring to excellence or seeking to maintain it. What Tom Melsheimer and Judge Craig Smith have done is both practical and scholarly. Looking for fly-on-the-wall insight into world-class trial preparation and strategy? Here it is. A behind-the-scenes tour of the inner workings of the judicial process? This book has you covered. Its combination of advice, illustration, and commentary is every bit as valuable as it is unique. There is no better picture, in my view, of how to prepare for a jury trial. Every litigator should have this book on the shelf, no matter the state where they practice."[8]

It is no secret that trial lawyers borrow and steal ideas and techniques from better trial lawyers in their goal to become great. Otherwise, you would not be reading this Book Review and buying *On The Jury Trial.* Judges do the same thing. To paraphrase a line from Dean Royal Furgeson's quoted forward above, what makes *On The Jury Trial* so good is the collective combination of years of advice honed in the crucible of jury trials, with illustrations from transcripts, and incredibly insightful commentary. I might also add that a little birdie let slip that the proceeds of the sale of the book are not going to line the pockets of the authors, but to a great cause to support legal education.

The goal of the authors of *On The Jury Trial*, articulated in their introduction, was to take their experience "in the trenches" and "translate it into a practical guide that an inexperienced lawyer, or even a modestly experienced one, might use in the preparation and conduct of a jury trial."[9] Each chapter fulfills this goal and is chock-full of relevant examples and illustrations. The examples are brought to life in the courtroom by illustrating the key points. The chapters on traditional components of the trial conclude with an invaluable checklist. Lawyers should duplicate these checklists and include them

8. *Id.*
9. *Id.* at 1.

as the first page of the corresponding section of their trial notebook for every case. In my experience, great trial lawyers don't wait until a few months, weeks, or days before trial to assemble their trial notebook (either in hard copy or electronic). They start during the first meeting with a client. When I was in private practice, I was dumbfounded by the number of calls I would get from lawyers asking if I had a good set of jury instructions on their issues. I would always ask: "When is your trial date?" The typical answer would be "Next week." The jury instructions should be done before you accept representation of the client—otherwise you do not know exactly what you need to prove or disprove. The authors of *On The Jury Trial* understand preparing the instructions or charge "early will help you tailor your discovery and focus . . . on the elements that you will have to prove at trial."[10]

On The Jury Trial has several "value-added" chapters not seen in most trial advocacy texts. The chapter titled JUDGE'S VIEWPOINT"[11] is a superb example. Judge Craig Smith begins this chapter with a candid confession: "After 26 years as a civil trial lawyer, I thought I knew just what judges thought and expected. When I took the bench ten years ago, I realized how mistaken I was!"[12] The rest of the chapter is filled with Judge Smith's wisdom gems forged as both a trial lawyer and experienced trial judge. From how to create and keep a "reputation for being candid and truthful,"[13] to insights on the best use of visual aids,[14] and the importance of work-life balance,[15] Judge Smith is generous and gracious in sharing his insights. The chapter concludes with eighteen Final Tips.[16] Faithfully follow these eighteen Final Tips and you are well on your way not only to improving your craft but, in finding your work more fulfilling.

Another "value-added" chapter is titled: WORKING WITH EXPERT WITNESSES."[17] This chapter first explores the gateway question: "Does your case need an expert? It then offers insightful and invaluable information on finding and selecting the right expert for the right case.[18] The chapter also provides vital information on lawyers' roles in assisting the expert in preparing a report noting "significant

10. *Id.* at 182.
11. *Id.* at 208–21.
12. MELSHEIMER & SMITH, *supra* note 6, at 209.
13. *Id.* at 212–13.
14. *Id.* at 219–20.
15. *Id.* at 220.
16. *Id.* at 220–21.
17. *Id.* at 124–37.
18. MELSHEIMER & SMITH, *supra* note 6, at 126-129.

lawyer involvement in drafting the report makes for a clearer and more persuasive disclosure of the experts' opinions."[19] Additional tips for the experts' deposition and trial testimony are also included.[20] The chapter concludes with a five point EXPERT WITNESS CHECKLIST.[21]

Perhaps the most unique feature of *On The Jury Trial* is it is a short and easy read (I read it in one sitting). That's exactly what Thomas M. Melsheimer & Judge Craig Smith promised in their INTRODUCTION: "keep it short enough to be readable in one sitting yet informative enough to be reliably consulted again and again."[22] Plus, it's inexpensive. As I mentioned in the Introduction, *On The Jury Trial* is less than 250 pages, much shorter than most trial advocacy books. Professor Thomas A. Mauet's classic, TRIAL TECHNIQUES AND TRIALS (9th ed.), a very good text I use in teaching trial advocacy, is two and one-half times as long and nearly six times the cost.[23]

III. DISSECTING A TYPICAL CHAPTER

To illustrate the unique strengths of *On The Jury Trial*, let's look at one chapter as an exemplar - the one on OPENING STATEMENTS.[24] Like other chapters, it leads off with some insightful wisdom gems. Opening statements are the most important part of a jury trial,[25] and, I might add, usually the most ignored and underdeveloped.[26] The opening statement must tell a story[27], nothing shockingly new here. Tom Galbraith was written: "Storytelling, especially among lawyers, is a dying art."[28] I agree, and thus find it surprising how seldom an opening statement tells a persuasive story. Trial lawyers and wannabes are well advised to heed the advice of Nashville trial lawyer, Phillip Miller, who has written, "A story is not

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19. *Id.* at 130.
20. *Id.* at 131–36.
21. *Id.* at 136–37.
22. *Id.* at 2.
23. For the text's length and cost, see https://www.amazon.com/Trial-Techniques-Ninth-Aspen-Coursebooks/dp/1454822333.
24. MELSHEIMER & SMITH, *supra* note 6, at 36–71.
25. *Id.* at 37.
26. As I wrote in *Eight Traits of Great Trial Lawyers*, quoting George Bernard Shaw, the "single biggest problem in communication is the illusion that it has taken place." Bennett, *supra* note 3, at 1.
27. MELSHEIMER & SMITH, *supra* note 6, at 36.
28. Tom Galbraith, *Storytelling, The Anecdotal Antidote*, 28 Litig. 17, 17 (2002).

a collection of facts interspersed with proverbs, analogies, metaphors, biblical references, song titles, and anecdotes."[29]

Beyond storytelling, *On The Jury Trial* informs that opening statements "must invest the listener in the outcome of the case."[30] I have never seen that written anywhere else, but it is spot on. Melsheimer & Smith then explain exactly how this is done.[31] In doing so, they also introduce another wisdom gem for all opening statements—the art of reduction—reducing the gist of all opening statements to a single statement.[32]

The chapter then describes What Makes for a Poor Opening Statement, followed by How to Prepare and Deliver an Effective Opening.[33] The chapter then provides some more specific "Do's" and "Don'ts" from using a cast of characters and timelines to the hardest thing for many lawyers to do— concede bad facts.[34]

What follows in the chapter are five actual opening statements from real jury trials including: the defense opening in a patent case; the defense opening by Thomas Melsheimer in Mark Cuban's insider trading case; plaintiff's opening in a dram shop wrongful death case; the defense opening in a dram shop wrongful death case; and excerpts of an opening for the plaintiff in a business dispute.[35] Each opening statement includes insightful running commentary.

The chapter concludes with an OPENING STATEMENT CHECKLIST.[36] The checklist ensures, among other tips, that your opening statement starts with what I call a "grabber" and that you ensure your credibility by being your authentic self.[37] I have witnessed several opening statements flop by lawyers imitating Gerry Spence. I wanted to shout out: "I know Gerry Spence and you are no Gerry Spence."

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29. Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489 (2003).
30. MELSHEIMER & SMITH, *supra* note 6, at 38.
31. *Id.* at 38–41.
32. *Id.*
33. *Id.* at 41–45.
34. *Id.* at 45–49.
35. *Id.* at 49–70.
36. *Id.* at 70–71.
37. *Id.*

CONCLUSION

Speaking for trial judges—we love nothing more than to be in a jury trial with great trial lawyers. Unfortunately, all too often, the lawyers before us simply lack the know-how and skill to be great trial lawyers.

All trial lawyers, wannabe trial lawyers, and litigators who would rather have a reputation for actually going to trial, owe Thomas Melsheimer and Judge Craig Smith a wellspring of gratefulness for sharing their unsurpassed collective experiences and wisdom gems in *On The Jury Trial*. There are other excellent trial advocacy texts and articles out there on the topic generally and on the specific components of jury trials.[38] So, read these, too. They are longer, more expensive and cannot be read in one sitting, but they are valuable tools to becoming a great trial lawyer.

My advice is stone-cold simple: get it, read it, study it, and never, never go to trial without it. As I turned and told one of my law clerks after finishing *On The Jury Trial*: "You are foolish to try a jury trial without reading this book." That's the reason *On The Jury Trial* has a prominent place on the bookshelf in my chambers—it's the new bible for trial advocacy!

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38. THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS, (9th ed. 2013) (considered *the* classic text for teaching trial advocacy in law schools); FRANCIS LEWIS WELLMAN, THE ART OF CROSS-EXAMINATION, (4th ed. 1997) (the early, yet classic and exceptionally detailed, text on cross-examination); LARRY S. PONZER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (3rd ed. TBA) (this is an update from the 2nd ed., which I found to be the best "how to" cross examine book ever written).

Standing in the Way of Justice: How the Standing Doctrine Perpetuates Injustice in Civil Rights Cases

Douglas Coonfield

I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God. — The Federal Judge's Oath[1]

I. MANY CIVIL RIGHTS VIOLATIONS ARE NON-JUDICIABLE BECAUSE THE ONLY AVAILABLE LITIGANTS LACK STANDING

A boy is riding his bike.[2] It is a bright blue June day, and Sergio is going to play with his friends down under the bridge. With the river almost dry, there is plenty of room to ride bikes and skate, but Sergio's friends have another game in mind. They dare each other to see who is brave enough to run across the river and touch the big razor-wire fence. After a few moments of play, Sergio sees uniformed guards approaching, and the boys run. It is all part of the game. Sergio hides behind a pillar to catch his breath. One of Sergio's friends is nabbed and forced to the ground. Sergio peeks around the edge of the concrete pillar. The guard, Jesus Mesa Jr., fires off a shot at Sergio, striking him in the head.

Sergio's family seeks justice for their boy. They sue Agent Mesa in U.S. federal court, claiming that Mesa unlawfully violated Sergio's rights. Federal judges twice attempt to throw out Sergio's case.[3] Why?

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1. 28 U.S.C.A. § 453 (West 2017).

2. While the following hypotheticals are based on cases discussed below, liberty has been taken with the facts in this section for narrative purposes.

3. Maggie Penman, *High Court To Hear Case Of Mexican Boy Killed In Cross-Border Shooting*, NPR: THE TWO-WAY (Feb. 20, 2017, 3:43 PM),

An African-American couple nervously walks into a bank on a rainy Tuesday morning. The banker smiles and ushers them over to her desk. "There is nothing that can be done," she says. They were very late on the mortgage payments. So many people in the neighborhood were. Maybe if they had executed a different home loan, a better loan. Neighbor after neighbor leaves the community. Blight spreads.

The City of Miami has had enough. The banks need to pay for the damage they have caused. They have been issuing unfair loans to people of color and it has to end. The City of Miami sues for the harm caused to the community. Then, a federal judge tries to throw the City out of court.[4] Why?

The answers to both of these questions are the same. It is not that nothing wrong has happened. Rather, the judges claim that the plaintiffs cannot get what they need from court. They lack standing.

Standing jurisprudence can keep all manner of plaintiffs from seeking relief. *No standing* means a plaintiff has no right to sue in federal court. It means the law does not protect them from whatever harm they claim to have suffered. "Maybe some other form of relief in some other court would work better for you," the hypothetical judge says, "but not this court. *You don't have to go home, but you cannot sue here.*"

A federal judge should be a force for justice. The judicial branch, unfortunately, falls short of true justice more often than necessary. For justice to prevail, a case must be decided on its merits with the facts fairly considered, and the law fairly applied. For centuries, however, courts have succumbed to political and personal pressures resulting in cases of great import being decided unjustly—or not decided at all. One of the greatest tools at a judge's workbench that allows them to avoid issuing a controversial ruling on the merits is the standing doctrine.

This paper will explore the history of the standing doctrine and how its use has historically contributed to the denial of constitutionally-guaranteed rights. This paper will discuss how those decisions were or were not consistent with the purpose of the laws, and how the standing doctrine could change to better protect those rights.

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http://www.npr.org/sections/thetwo-way/2017/02/20/516275461/high-court-to-hear-arguments-in-case-of-mexican-boy-killed-in-cross-border-shoot.

4. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1298 (2017) ("The District Court dismissed the complaints . . . .").

II. THE STANDING DOCTRINE LIMITS THE PLAINTIFFS THAT CAN BRING A SUIT

The Judiciary is the ultimate safeguard for political and civil rights. Throughout history, however, judges facing politically controversial or inconvenient questions of law have used the standing doctrine to avoid making decisions that would protect those rights.[5] This potential for misuse is firmly implanted in the very concept of standing.

The standing doctrine is a combination of constitutional and prudential requirements that would-be-plaintiffs must meet in order to bring a suit in federal court.[6] According to Supreme Court precedent, constitutional standing requirements are: (1) injury-in-fact; (2) causation; and (3) redressability.[7]

A. An Alleged Injury Must Be Direct and Cognizable to Show Standing

An injury-in-fact assessment looks at: (a) the directness or actuality of the alleged injury; and (b) the judicial cognizability of the interest alleged to be injured.[8]

The directness and actuality requirement attempts to ensure that the plaintiff has a "personal stake" in the litigation.[9] To satisfy this requirement, one must have sustained or be at immediate risk of sustaining a direct, concrete injury, that is not conjectural or hypothetical.[10]

For example, in *City of Los Angeles v. Lyons*, Adolph Lyons, an African-American man, sued the City of Los Angeles and four police officers for unjustifiably applying a chokehold during a routine traffic stop, injuring Lyons's larynx and causing him to pass out.[11] Lyons requested the Court to declare Los Angeles Police

5. *See* discussion *infra* Part III (discussing the problematic history of the standing doctrine).

6. Joshua L. Sohn, *The Case For Prudential Standing*, 39 U. MEM. L. REV. 727, 729 (2009).

7. *Id.* at 730.

8. Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine*, 100 DICK. L. REV. 303, 323 (1996).

9. *Id.*

10. *Id.* at 323–24; Sohn, *supra* note 6, at 730.

11. Simard, *supra* note 8, at 324.

Department's (LAPD) practices unconstitutional and to prohibit chokeholds other than in response to threat of deadly force.[12] The Court held that Lyons had standing to seek damages for the injuries, but he did not have the necessary standing to seek an injunction against the LAPD's future chokehold use.[13] Lyons could not show LAPD's policy put him at immediate risk of sustaining a direct injury.[14]

A judicial cognizability analysis is the determination of whether the interest alleged to be injured merits the exercise of the federal judicial power. The Court has not yet explicitly described judicial cognizability as a factor in "injury-in-fact" analyses, but several Supreme Court decisions show a pattern of determining which interests are sufficient for judicial review and which are not. Cognizable interests can include "interest in observing an animal species[,] . . . bringing suit in the forum of one's choice[,] . . . achieving economic advantage[,] . . . [and] maintaining an undiluted vote."[15] Non-cognizable interests include the racial composition of voting districts and preventing government funding of discriminatory schools.[16] The Court has not deigned to provide the rationale relied upon to distinguish the cognizable from the non-cognizable.

B. The Alleged Injury Must Be Causally Traceable to the Alleged Conduct to Show Standing

The causation assessment looks to the traceability of the alleged injury to the alleged conduct.[17] The injury must have been a direct and foreseeable result of the act opposed. The Supreme Court has held that "an injury is not fairly traceable [when] the intervening, independent act of a third party has been a necessary condition of the harm's occurrence, or the challenged action has played a minor

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 325–26 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992); Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund, 500 U.S. 72, 77 (1991); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 156 (1970); Baker v. Carr, 369 U.S. 186, 208 (1962)) (compiling a list of cases that set precedents for cognizable claims).
16. Simard, *supra* note 8, at 326 (citing United States v. Hays, 515 U.S. 737, 746 (1995); Allen v. Wright, 468 U.S. 737, 755 (1984)).
17. F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 679 (2017).

role."[18] Standing theories that rest on speculation are generally insufficiently traceable.

C. *The Alleged Injury Must Be Redressable to Show Standing*

The redressability assessment is similar to a causation assessment.[19] A plaintiff claims a substantial likelihood that the requested judicial relief will remedy the alleged injury-in-fact.[20] The Court looks for a line of logic between the sought relief and the alleged injury.[21] Speculation is also insufficient to show redressability.

In sum, the Supreme Court pronounces that these requirements are constitutionally derived and are therefore mandatory limitations on the power of the Judiciary. All federal judges are required to demand them from all plaintiffs before allowing any case to proceed. Unlike other "prudential" standing requirements,[22] Congress has no power to modify or waive these requirements, short of amending the Constitution.[23] However, as the sole arbiter of these requirements and how they are weighed and distinguished, judges have extreme latitude in deciding who does or does not have standing. A court can dismiss a case for lack of standing based entirely on subjective interpretations of injury-in-fact, causation, and redressability, while bemoaning its tied hands.[24] The next section explains how this came to pass.

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18. Texas v. U.S, 787 F.3d 733, 752 (5th Cir. 2015).

19. Simard, *supra* note 8, at 328.

20. Sohn, *supra* note 6, at 730–31 (citing Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000)).

21. *Id.* at 730.

22. *Id.* at 731–32 ("These prudential requirements include 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances . . . and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'").

23. *Id.* at 731.

24. Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 110 (2002).

III. HISTORY DEMONSTRATES THE STANDING DOCTRINE IS INHERENTLY PROBLEMATIC

Modern legal historians typically trace the standing doctrine's origin to the twentieth century,[25] when the Court had need for a practical mechanism to quickly deal with meritless lawsuits. Notwithstanding, the concepts underlying the standing doctrine, if not the doctrine itself, emerged in the nineteenth century.[26] Prior to the current conceptualization of standing, a different set of doctrines guided actions by private plaintiffs protecting themselves against government misconduct.[27]

The Constitution establishes the Federal Judiciary in Article III and grants the court power over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between two or more [parties]."[28] Referred to as the Case or Controversy Clause, this is the only textual guidance the framers provide to frame the form and substance of the Judiciary.[29] Accounts of the drafting shed little light on the intended definitions of "case" or "controversy," other than a single comment by James Madison indicating the term "case" ought to be "limited to cases of a Judiciary nature."[30]

In government misconduct suits, especially, judges looked to the Constitution for guidance on how much the judiciary could act as a check on the other branches of government.[31] Thus, they attempted to limit their role to the kinds of disputes that the founders would have regarded as cases "of a Judiciary nature."[32] So, what was "of a Judiciary nature" in the colonial era? What cases made it to court?

As it turns out, most colonial courthouses had relatively wide-open doors.[33] For example, "a colonial-era New York statute required

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25. Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 Notre Dame L. Rev. 875, 889 (2008).

26. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064 (2015).

27. *Id.* at 1065.

28. U.S. CONST. art. III, § 2, cl. 1.

29. Handley, *supra* note 24, at 102.

30. Sohn, *supra* note 6, at 734–35.

31. Fallon, *supra* note 26, at 1065.

32. *Id.*

33. *See* Sohn, *supra* note 6, at 735 (providing examples of cases heard in American Framing-era courts "that would flunk the Supreme Court's modern standing requirements").

commissioned officers to kill and capture pirates within their jurisdiction."[34] New Yorkers, in essence, had a statutory right to live pirate-free. If and when any commissioned officer failed to protect that right, citizens could sue on behalf of the entire community in what were called informer suits.[35] Similar laws had existed for centuries in England, and Congress passed a number of comparable laws.[36] New York courts tried many such cases without consideration of modern conceits such as injury-in-fact or traceability.[37] These types of suits must have been within Madison's understanding of "a Judiciary nature" and were presumed constitutional.[38]

Historically, private-rights suits followed a pattern. The private citizen would allege the government agent "harmed an interest protected at common law."[39] The government agent would then claim the action was authorized by law.[40] Then, the plaintiff would reply that the authorizing law was itself unlawful and unconstitutional.[41]

At this point in these early trials, the federal judge's primary constitutional role was realized. The judiciary exists as a branch of government to act as a check on, and balance to, the other branches.[42] While the checks and balances system is not explicitly articulated in the Constitution, James Madison made it clear that it is as essential to understanding constitutional and governmental structure as the separation of powers doctrine.[43] Congress makes laws, the President administers those laws, and the judiciary ensures that those laws are constitutional.[44] When a law or a government actor runs contrary to the Constitution, an Article III judge's job is to declare the law unconstitutional. This was more straightforward in the aforementioned early private-rights suits.

In summary, the steps were as follows:[45]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 736.
39. Fallon, *supra* note 26, at 1065.
40. *Id.*
41. *Id.*
42. *Schoolhouse Rock: Three Ring Government* (McCaffrey & McCall 1979); THE FEDERALIST NO. 51 (John Madison).
43. THE FEDERALIST NO. 51 (John Madison).
44. *Id.*
45. Fallon, *supra* note 26, at 1065.

1. Plaintiff (the private party) claims Defendant (the government) is unlawfully doing X (or refusing to do Y).

2. Defendant claims Law Z permits them to do X (or not do Y).

3. Plaintiff claims Law Z violates their rights or does not apply in this situation.

4. Judge decides if Law Z is valid and applies to this situation.

    - If "Yes" to both, the Defendant wins the case.

    - If "No" to either, the case continues and is decided on the merits.

But, in the mid-nineteen century, judges began adding another step.[46] They asked whether the plaintiff had the right to come to court at all.

A. Lack of Standing was the Pretextual Basis of the Dred Scott Decision

The most reviled case in Supreme Court history, *Dred Scott v. Sanford*, is not typically articulated as part of the line of cases that contributed to the standing doctrine, but there are significant parallels.[47] At the time that Dred Scott, an enslaved person, sued for his freedom, "standing" had not yet been fully articulated as a concept.[48] While the word "standing" does not appear in Chief Justice Taney's opinion, the case demonstrates what can happen when a jurist

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46. *Id.*

47. Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT. L. REV. 3, 24 (2007); *see generally* Dred Scott v. Sanford, 60 U.S. 393 (1857) (holding that enslaved people and decedents thereof are not afforded any rights by the U.S. Constitution and cannot bring suit in federal court).

48. Finkelman, *supra* note 47, at 24; Fallon, *supra* note 26, at n.6 (citing Anne Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004)).

looks not just at the constitutionality of a law, but also the validity of the plaintiff's entry into court in the first place.

Scott relied on the Missouri Compromise Act and simple human decency, both of which were disregarded by the Supreme Court.[49] The Missouri Compromise Act made slavery illegal in certain territories.[50] Because he was forced to live for a time in a territory in which slavery was illegal, Scott reasoned that he must have become a freeman at that time and had a right to be free from that point forward.[51] Moreover, Scott's daughter was born where slavery was illegal; therefore, she could not have been born a slave and may have been born a free citizen.[52] Scott sued to enforce his family's rights to liberty.

Rather than consider the merits of Scott's claims at face value, which many expected to result in a victory for abolitionists and enslaved people across the nation, the Supreme Court considered whether Scott had a right to sue at all.[53] There was, at that time, a long history of enslaved peoples and free African-Americans suing in court for all manner of things.[54] Nonetheless, the Court, responding to extrajudicial pressures, delivered a devastating blow to all African-Americans, free and enslaved alike.

The Court's decision can be articulated in modern standing doctrine parlance as a failure to show injury-in-fact—there was no judicially cognizable interest because Scott and his family were not a category of persons protected by the Constitution.[55] The Constitution was written at a time when African-Americans were considered property. Therefore, African-Americans were not intended to receive any of its articulated or implied rights—including the right to sue or become citizens.[56] African-Americans, whether free or otherwise, could never sue in federal court, because they could never establish

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49. *Dred Scott*, 60 U.S. at 394; Finkelman, *supra* note 47, at 13.
50. Finkelman, *supra* note 47, at 4.
51. *Dred Scott*, 60 U.S. at 394.
52. *Id.* at 398.
53. *Id.* at 402.
54. Finkelman, *supra* note 47, at 18–19.
55. *Dred Scott*, 60 U.S. at 423.
56. *Id.* at 403–04 ("The question before us is, whether the class of persons described in the plea in abatement [freedmen and descendants of enslaved Africans] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

standing.[57] Nor could Congress pass a law giving African-Americans standing.[58]

Modern legal scholars almost universally despise the *Dred Scott* decision; however, its insidious logic has endured for more than a century and a half, and continues to be a reliable mechanism for modern judges to circumvent deciding controversial cases. While a constitutional amendment overturned Chief Justice Taney's flawed and bigoted decision, it overturned his reasoning only as it pertained to African-American citizens. [59] The legal mechanism inherent in Chief Justice Taney's decision has survived to have long-lasting and dangerous effects.

B. Prudential Standing Was Developed to Reign in "Activist" Judges

Beginning in the twentieth century, several factors strained the private-rights suit model, resulting in the origin of the modern standing doctrine.[60] One such factor was the exponential expansion of governmental regulations.[61] These various regulations created novel rights shared by most members of the public.[62] In the 1930s, President Franklin Roosevelt's progressive nominees to the Supreme Court drastically altered the Court's jurisprudence.[63] The modern standing doctrine may have developed as an attempt to keep the more-conservative lower federal courts in check.[64]

The doctrine's development was grounded in the revitalization and recognition of the separation of powers doctrine.[65] The Constitution gives Congress the authority to create laws and pass statutes that govern what cases the Supreme Court can or cannot

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57. *Id.*
58. *Id.* at 450.
59. U.S. CONST. amend. XIV, § 1.
60. Fallon, *supra* note 26, at 1065.
61. *Id.*
62. *Id.*
63. Stearns, *supra* note 25, 888–89.
64. *Id.* at 889–90 ("The New Deal standing doctrine limited the power of the [dominant conservative] lower federal courts to persistently challenge the Supreme Court's own rapidly changing set of substantive constitutional doctrines . . . ."); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595 (2010) (assessing the credibility of this widely shared account of the standing doctrine's origin).
65. Hessick, *supra* note 17, at 674.

hear.[66] This is the manner by which "prudential standing" arose, which could better be described as "statutory standing."[67] It derived from a tradition that the only causes of action judiciable in federal court are those derived from common law, equity, or statute.[68] When Congress passes a statute creating a cause of action, they are "waiv[ing] prudential standing."[69] This separation-of-powers understanding of standing recognizes that the Court cannot, on its own, invent a new cause of action.[70] This was done to prevent so-called "activist" judges from usurping the power of the politically-accountable branches of government.

But when Congress began creating causes of action the Court did not care for, it developed the more restrictive three-pronged standing doctrine.[71] Because the Court describes this particular version of standing as a constitutionally required understanding of the Case of Controversy Clause, Congress cannot waive it. No matter what statute Congress passes, the case is non-justiciable. By solidifying the standing doctrine around this structure, the Court could disregard otherwise constitutional statutes when the plaintiff failed to demonstrate constitutional standing.

C. Modern Standing Doctrine Permits the Court to Shirk Its Constitutional Duty

In developing the standing doctrine as a legal framework to yield political ends, the Court may have created a monster. While the Supreme Court was capable of distinguishing cases as it saw fit, each new case muddled the precedent until it was untenable.[72] Lower courts were put in an unfortunate position. Judges wishing to remain loyal to precedent were forced to balance several arbitrary distinctions concerning abstract concepts while judges with more deliberate intent could easily pick and choose precedent and craftily disguise it as a constitutional requirement.

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66. U.S. CONST. art. III, § 2, cl. 2.

67. Handley, *supra* note 24, at 106–07; Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1302 (2017).

68. *See* Handley, *supra* note 24, at 106 (discussing the similarities between the British doctrine, *damnum absque injuria*, and the 1930's standing doctrine).

69. Sohn, *supra* note 6, at 728.

70. *See* Hessick, *supra* note 17, at 688–89 (asserting individuals can only enforce public rights when Congress authorizes the action or a preexisting private-rights cause of action is applicable).

71. Fallon, *supra* note 26, at 1066–67.

72. *Id.* at 1062.

This became more and more common under the Rehnquist court. In 1992, the Court was faced with deciding a cause of action derived from the Endangered Species Act (ESA). In *Lujan v. Defenders of Wildlife*, a citizen group sued to strike down an amendment of the ESA that the group believed to be unconstitutional and to force the government to enforce the ESA on American dealings abroad.[73] Rather than deal with the case on its merits by determining whether the amendment was constitutional, the Court decided the citizen group had no standing.[74] Congress had specifically written into the ESA a provision permitting citizen groups to sue in order to protect endangered species.[75] However, the Court determined that no citizen group could show injury-in-fact resulting from the potential death of an endangered species abroad.[76] *Lujan* essentially destroyed the citizen suit provisions of several laws in one fell swoop.

This was again articulated as derived from separation of powers. Justice Scalia wrote:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action.[77]

Justice Scalia's reasoning is absolutely correct, of course. He is wrong, however, in concluding that the court is forbidden from acting as a check on the President when authorized by the Legislature. The checks and balances doctrine cannot exist only to permit each branch to limit another branch's action. It must permit one branch to force the others to act according to their constitutionally mandated duties. Without that understanding, the standing doctrine acts not as a

73. 504 U.S. 555, 577 (1992).
74. *Id.* at 606.
75. *Id.* at 571–72.
76. *Id.* at 588.
77. *Id.* at 577.

gateway to the court, but as a backdoor through which judges can escape their constitutional duty—to check and balance the actions and inactions of Congress and the President.

IV. UNDER THE ROBERTS COURT, THE STANDING DOCTRINE ALLOWS MANY POTENTIALLY UNCONSTITUTIONAL INJUSTICES TO GO UNCHECKED.

The most alarming changes to the standing doctrine have happened under the Roberts Court. Richard Fallon, Professor of Constitutional Law at Harvard University, extolls on this in greater detail than this paper shall, but his point can be summarized thusly: "[f]ar from becoming more elegant and unified, standing doctrine has grown more complex and variegated with nearly every recent Supreme Court Term."[78] Professor Fallon determines that, through the ever-increasing complexity of standing doctrine precedent, the doctrine has fragmented into a growing number of sub-doctrines that need to be individually addressed in order to understand them.[79]

While Professor Fallon recognizes that bias is inherently unavoidable within this current iteration of the standing doctrine, he prescribes a future where this is embraced. This fails the smell test. Bias within the court can be dangerous, especially to the politically vulnerable.

This is not to say that the Justices of the Supreme Court are inherently politically biased, or even that the Fifth Circuit or any lower court is inherently politically biased. Perhaps the standing doctrine's elements are so subjective, so arbitrary and capricious, that no judge could help but impute their personal beliefs on the case. Perhaps there is nothing so concrete within the precedent to permit a judge to decide an issue of standing solely by relying on the law.

It may very well be that the standing doctrine is so scattered, so full of divergent contrary opinions and noncommittal dicta, that it resembles less a legal guideline and more a Jackson Pollock piece. It means what the viewer brings to it.

But this does little to fix the damage done in the name of the standing doctrine. Sometimes, bias is harmful and must be pointed out in order for litigants to get a fair shake. The first step toward eliminating the problems caused by the doctrine is to recognize the doctrine is inherently flawed and untenable.

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78. Fallon, *supra* note 26, at 1068.
79. *Id.* at 1116–17.

A. *In U.S. v. Texas, Standing is Construed Liberally in Favor of State Interests*

When arguably partisan lower courts, like the conservative Fifth Circuit Court of Appeals, get to sit behind the wheel of the standing doctrine, things can go a little sideways for progressive interests.[80] In *U.S. v. Texas*, the State of Texas sued the federal government to prevent the implementation of President Obama's immigration executive order, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[81] The basis of the claimed injury-in-fact was the cost to the state to subsidize the cost of driver's licenses to DAPA beneficiaries.[82] Texas voluntarily subsidizes some non-citizens' licenses, and a case in Arizona determined that issuing licenses to some non-citizens, but not DAPA beneficiaries, would violate the equal protection clause.[83] Texas claimed it would be required to subsidize all DAPA recipients' licenses.[84] The U.S. countered that Texas could simply stop subsidizing non-citizens' licenses.[85]

And while the Fifth Circuit recognized that Texas could not claim an injury-in-fact that it voluntarily undertook, the Court did find standing.[86] The Court declared that being pressured to change state law alone constitutes an injury: "Texas's forced choice between incurring costs and changing its fee structure is itself an injury."[87] Extrapolating out from this point, *any* federal law that necessitates a choice between a minor expenditure and an adjustment in state law is injurious.

The Fifth Circuit was liberal in construing the standing doctrine when it found that the injury of potential cost was fairly traceable to DAPA. "Although Texas would not be directly regulated

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80. This phenomenon is, of course, not reserved for the Fifth Circuit or conservative courts. When any court has to interpret standing in its current amorphous, Rorschach-like form it is practically impossible to not apply external biases. This makes court decisions less predictable and throws precedent and consistency out the window.

81. U.S. v. Texas, 136 S. Ct. 2271 (2016) (mem.); Texas v. U.S., 787 F.3d 733, 743 (5th Cir. 2015).

82. *Texas*, 787 F.3d at 746.

83. *Id.* at 748–49, (citing Ariz. DREAM Act Coal. v. Brewer, 757 F.3d 1053, 1063, 1067 (9th Cir. 2014)).

84. *Texas*, 787 F.3d at 748–49.

85. *Id.* at 749.

86. *Id.*

87. *Id.*

by DAPA, the program would have a direct and predictable effect on the state's driver's license regime . . ."[88] The Court had no qualms with tracing this downstream effect to the program in question. No specific explanation is given to describe the directness; it is simply understood as unattenuated.

The Fifth Circuit's opinion in this case decimated DAPA and set back immigration reform, keeping many immigrant families at risk. The politicization of the understanding of standing in this situation is even more apparent in the next phase of the litigation. The Supreme Court took up the case in 2016, when only eight justices sat at the bench.[89] The decision was evenly split four-to-four along liberal-conservative lines.[90]

B. In Cases of Cross-Border Shootings, Standing Has Been Construed Narrowly to Prevent Non-Citizens From Seeking Relief

Consider the Court's liberal understanding of standing in *U.S. v. Texas* relative to the more recent *Hernandez v. U.S.*[91] As alluded to in the overview of this paper, *Hernandez* deals with a cross-border shooting of an unarmed Mexican child by an active duty border patrol agent.[92] Sergio Hernandez was playing with friends in a culvert on the U.S.-Mexico border when Agent Jesus Mesa Jr. arrived.[93] Agent Mesa fired on the child across the border, shooting him in the face and ending his life.[94] This is just one of many instances where Border Agents take "pot-shots" at Mexican citizens from the relative safety of U.S. soil.[95]

Hernandez's parents hoped justice could be served. Mexico attempted to file criminal charges against Mesa, but the State of Texas

88. *Id.* at 752.

89. *See* U.S. v. Texas, 136 S. Ct. 906 (2016) (granting certiorari).

90. U.S. v. Texas, 136 S. Ct. at 2271 (2016) (mem.).

91. Hernandez v. U.S., 785 F.3d 117 (5th Cir. 2015), *vacated*, Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

92. Hernandez v. U.S., 757 F.3d 249, 255 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

93. *Id.*

94. *Id.*

95. Oral Argument at 37:04, Hernandez v. Mesa, 137 S. Ct. 2003 (2017), https://www.oyez.org/cases/2016/15-118 [hereinafter Hernandez Oral]; *Hernandez*, 757 F.3d at 269.

declined to extradite; Texas prosecutors also declined to charge Mesa in U.S. court.[96]

Left with no other recourse, Hernandez's family sued in U.S. Federal Court on the grounds that Mesa denied Sergio's constitutional right to life as described in the Fourth Amendment.[97] The Fifth Circuit did not go for it. The Court does not use standing language in its decision, but asks the same question raised in *Dred Scott*: does Hernandez have any standing to sue under the Constitution or does he have no cognizable rights at all.[98] It judged he did not.[99] Because the boy's only interaction with the United States was being shot in the face by one of its officers, Hernandez was apparently insufficiently connected to the Constitution and could not claim its protections.[100] Never mind that the Constitution undeniably governed the actions of the actor, and that the actor clearly and deliberately violated the law.[101]

This illustrates the most severe problem with arbitrary distinctions on standing grounds when it comes to questions of Constitutional violations. The Fourth Amendment reads, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."[102] This has been consistently interpreted to mean that government actors cannot seize a person, including by shooting him dead, without reason.[103] The Constitution does not specify which people are protected by the Fourth Amendment. It governs the actions of the government, not the identity of the victim.

Agent Mesa had no right to shoot an unarmed child in the United States.[104] People on U.S. soil are undeniably protected by the Constitution.[105] However, through attenuated rationales, the Fifth Circuit managed to determine that Mesa's act of murder did not

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96. Hernandez Oral, *supra* note 95, at 26:50, 50:20.

97. *Hernandez*, 757 F.3d at 255.

98. *Id.* at 266. When litigants are bringing suit under a provision of the constitution rather than a statute or common law, courts seem to shy away from standing-doctrine language, but the analysis is roughly identical to amorphous considerations of cognizability. *See* discussion *supra* Sections II.A, III.A (discussing the cognizability element of standing and its problematic application in *Dred Scott*).

99. *Id.*

100. *Id.*

101. *Id.* at 269.

102. U.S. CONST. amend. IV.

103. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

104. Hernandez Oral, *supra* note 95, at 42:55.

105. *But see* discussion *infra* Section IV.D (discussing the denial of constitutional protections to non-citizens detained on U.S. soil).

infringe on anyone's Constitutional rights.[106] Furthermore, the Court did so while lamenting that it was "bound" to apply the law in that convoluted manner.[107]

When the Supreme Court reviewed the case, it punted—in a per curiam decision—on the question of Hernandez's standing to sue under the Fourth Amendment.[108] It is a shame that victims of cross-border government violence must continue waiting for justice.

C. *In RIL-R V. Johnson, ICE Attempted to Eliminate the Detainee-Plaintiffs' Standing to Prevent the Court From Declaring Its Actions Unconstitutional*

The above cases demonstrate that cases involving non-citizens can raise some serious standing doctrine complications. This is sometimes by design.

R.I.L-R v. Johnson concerns a group of mothers and their children that arrived in the United States seeking asylum from abuses in their home countries.[109] They asserted the United States government detained them as part of a blanket, no-release policy.[110] This was in stark contrast to the previous case-by-case bond-issuance policy that permitted asylum seekers to enter the community while they awaited a hearing if they demonstrated a credible fear of returning to their home country.[111] This is part of a pattern in which U.S. Immigration & Customs Enforcement (ICE) detains immigrants for as long as possible—sometimes for months or years without access to counsel—and then releases or deports the immigrant when a suit is finally filed.[112] In this manner, the government can assert that the litigant

106. *Hernandez*, 757 F.3d at 266.

107. *Id.* at 265–66 (asserting strict application of the *sufficient connections test* agreed upon by a mere plurality of the Supreme Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) was mandatory and outright rejecting the possibility of more applicable tests).

108. Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (per curiam) ("It would be imprudent for this Court to resolve that issue when ... doing so may be unnecessary to resolve this particular case."). Justice Breyer, joined by Justice Ginsburg, dissented in this case; he articulated the myriad logical reasons Hernandez should be protected by the Fourth Amendment and why deciding the standing issue would be appropriate. *Id.* at 2008–11 (BREYER, J. dissenting).

109. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 170 (2015).

110. *Id.* at 174–75.

111. *Id.* at 175.

112. Respondent's Brief at *6–8, Jennings v. Rodriguez, 2016 WL 6123731 case pending (U.S.) (No 15-1204).

already has what they are seeking—the end of a long detention without access to counsel—and thus no relief can redress the injury. If the immigrant lacks standing to sue, the court has no choice but to dismiss the case. This policy, coupled with *Lujan*'s elimination of citizen suits on behalf of another, effectively permits ICE to deny immigrants basic rights for years at a time without a chance to determine whether it is constitutional to do so.

In *R.I.L-R*, ICE managed to release eight of the ten plaintiffs, but the two remaining plaintiffs kept the case alive.[113] Even then, the standing dilemma continued. The government asserted that returning to the case-by-case bond hearings, rather than the arguably unconstitutional blanket policy, would only *speculatively* redress the injury because the plaintiffs might be denied bond even if offered a hearing.[114] The court, this time the D.C. Circuit, did not buy that logic. It determined that the plaintiffs' claims were likely rather than speculative.[115] The distinction was arbitrary, though. It came down to a matter of perspective.

The court ultimately found the plaintiffs had standing, but before a final decision on the merits could be made, the government changed the policy on detention and the case became moot.[116]

D. Castro v. Department of Homeland Security Demonstrates That Non-Citizens Are Especially Vulnerable to the Arbitrariness of Current Standing Doctrine Precedent.

Oh, what a difference a circuit makes! When plaintiffs similar to those in the *R.I.L-R* case filed habeas corpus petitions to challenge their detention and removal in *Castro v. Department of Homeland Security*, the Third Circuit Court of Appeals never got to a full standing assessment.[117] Again, similar to the questions underlying *Hernandez* and *Dred Scott*, the question in *Castro* was whether the claimed injury was justiciable under the constitution at all.

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113. *R.I.L-R*, 80 F. Supp. 3d at 177.

114. *Id.* at 178.

115. *Id.*

116. *RILR v. Johnson*, ACLU (July 31, 2015), https://www.aclu.org/cases/rilr-v-johnson.

117. *See generally* Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 428 (3d Cir. 2016), cert. denied sub nom. Castro v. Dep't of Homeland Sec., 137 S. Ct. 1581 (2017) (articulating decision as a determination of whether aliens could invoke the suspension clause).

In *Castro*, more than any other cases mentioned, the arbitrary distinctions are apparent. A group of Central American women and children fled their home countries to escape sexual violence, gang violence, and other dangers and entered the United States via the southern border.[118] They came into contact with U.S. law enforcement hours after entering the country and requested asylum.[119] The government performed a flawed cursory examination, denied asylum, and began deportation procedures.[120] After the A.C.L.U. filed habeas petitions, the government took the stance that these asylum seekers had no right to due process and judicial review.[121]

The Suspension Clause of the Constitution provides "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public safety may require it."[122] Precedent clearly indicates that non-citizens have a right to challenge detainment and deportations on habeas grounds.[123] The Constitution protects all people on U.S. soil. But the Third Circuit, in this case, determined that immigrants caught in the United States within hours of crossing had the same right to constitutional protections—which would be, in their view, none—as non-citizens who arrive at the border but never enter.[124]

The court said that a group of mothers fleeing violence and persecution that were arrested in the United States had no right to any constitutional protection. This decision upended precedent, endangered asylum seekers, and left hundreds of immigrants at risk based on arbitrary distinctions that could only have been informed by

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118. *Id.* at 427.

119. *Id.*

120. *See id.* at 428 n. 8 (describing the asylum seekers claims that the interviewers "applied a higher standard for evaluating the credibility of their fear of persecution than is called for in the statute" and failed to prepare a written record explaining the negative credible fear determinations); Castro v. Department of Homeland Security, ACLU (Apr. 17, 2017), https://www.aclu.org/cases/castro-v-department-homeland-security [hereinafter ACLU] ("These mothers and children never even had a full opportunity to present their claim to an immigration judge . . . .").

121. *See* ACLU, supra note 120 ("The government's position [is] that families cannot challenge their deportation in U.S. courts . . . .").

122. U.S. CONST. art. I, § 9, cl. 2.

123. *See generally* Brief of Scholars of Immigration Law as Amici Curiae in Support of Petitioners, Castro v. Department of Homeland Security, Petition Denied, 2017 WL 382961 (U.S.) (No. 16-812) (providing precedential cases from every circuit and the Supreme Court supporting the proposition that non-citizens can make such a challenge).

124. *Castro*, 835 F.3d at 445–46.

judicial bias. If the Constitution does not protect all people on American soil, what sort of future do those in need of those protections—specifically vulnerable immigrant families—face?

That question may not be answered any time soon. When *Castro* was appealed to the United States Supreme Court, the Court declined to hear the case.[125] The vulnerable are stuck waiting.

V. THE STANDING DOCTRINE MUST BE MODIFIED TO PROTECT THE VULNERABLE FROM MAJOR CIVIL RIGHTS VIOLATIONS

With the standing doctrine as it is—inconsistent and flawed—vulnerable groups have very little to celebrate. While traditional litigation strategies, such as trying to bring claims in a jurisdiction that may be more sympathetic to a client—like bringing immigration cases in the D.C. Circuit rather than the Fifth or the Third[126]—can be helpful in the short term, long term changes need to happen for the standing doctrine to cease being a blockade against the causes of action of vulnerable groups.

Some small shifts indicate that the Supreme Court may be open to minor precedential change in the not-too-distant future, but without a strong, policy-based change to the way the standing doctrine is applied, no justice can be guaranteed.

A. Bank of America v. City of Miami Stretched the Traceability Aspect of Standing in Statutory Citizen Suits

A recent Supreme Court decision, *Bank of America v. Miami*, could put the standing doctrine on the path to change.[127] The City of Miami alleged that two banks "intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino, customers" in violation of the Fair Housing Act (FHA).[128] This injured the City in

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125. Ariane de Vogue, *Supreme Court Won't Hear Case Challenging Government's Expedited Removal Of Undocumented Immigrants*, CNN POLITICS (April 17, 2017, 10:44 AM), http://www.cnn.com/2017/04/17/politics/supreme-court-castro-expedited-removal/index.html.

126. *Compare* discussion *supra* Section IV.C, *with* discussion *supra* Part IV.A, B, & D (demonstrating that different Circuits approach determinations of standing with different standards).

127. Bank of Am. Corp. v. City of Miami, Fla., , 137 S. Ct. 1296 (2017).

128. *Id.* at 1301.

several ways. It "adversely impacted the racial composition," "impaired the City's goals to assure racial integration and desegregation," "frustrate[d] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," and "cause[d] foreclosures and vacancies in minority communities in Miami."[129] All of this diminished property values, which in turn reduced the City's tax revenue, and forced the city to spend funds on services to remedy the resultant urban blight.[130]

The City of Miami's legal strategy was unorthodox. The FHA provides a cause of action for "aggrieved persons" harmed by the unfair housing practices, and also allows for the Department of Justice to sue on behalf of those affected after receiving a referral from the Department of Housing and Urban Development.[131] Of course, those most affected by unfair housing practices cannot pay their mortgage, much less the cost of a lengthy court proceeding against a big bank, and the government may have many reasons not to take a case even when sympathetic to the harmed individuals. The FHA does not provide a separate cause of action for municipalities, but, as it turns out, "aggrieved person" has been consistently interpreted to define standing as broadly as is permitted by Article III of the Constitution, which is to say it requires the standard three-part standing test.[132]

The banks insisted that the complicated nature of housing and mortgages necessitates the conclusion that the injury Miami claims is neither direct nor predictable.[133] The banks could not have possibly predicted the resulting blight and damage to both Miami's public image and its coffers, and even if they could, it was far too attenuated a line of occurrences.[134] But the Court disagreed, applying the broadest possible definition of standing to the FHA.[135]

This broad definition—that a third party financially harmed down the line by the discriminatory practices of another has

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129. *Id.* (alterations in original).

130. *Id.*

131. The Fair Housing Act, The United States Department of Justice, (Nov. 23, 2015), https://www.justice.gov/crt/fair-housing-act-1, (citing 42 U.S.C. 3601 *et seq.*).

132. *Bank of America*, 137 S. Ct. at 1298.

133. Oral Argument at 15:24, Bank of America v. City of Miami, 137 S. Ct. 1296 (2017) (No. 15-1111), https://www.oyez.org/cases/2016/15-1111.

134. *Id.*

135. *Bank of America*, 137 S. Ct. at 1303–1305; Mark Joseph Stern, *Will Fair Housing Stay Fair?*, SLATE (May 1, 2017, 5:36 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/05/in_bank_of_america_v_miami_the_supreme_court_strengthens_the_fair_housing.html.

standing—cannot be bound just to the FHA. While the FHA provides the cause of action, the relationship of the alleged harm to the discriminatory act came from the Court's interpretation of the Constitution's traceability requirements. Any defendant will have a hard time arguing a lack of traceability in future litigation. This may go as far as to put *Lujan*'s holding at risk, permitting a rise in statutorily created citizen suits.

Bringing sympathetic cases with unsympathetic defendants to the Supreme Court with logical arguments that point out the fallacy of certain aspects of the standing doctrine may eventually stretch the doctrine to cause less harm to the needy. But it does not do enough.

B. The Court Should Embrace a Policy of Deciding Cases on Their Merits and Eliminating Unconstitutional Injustices

Bank of America is a fine example of how to work within the fragmented system of standing when seeking relief for racial injustice, but it is not a permanent solution to this devastating problem. The Court must go back to its roots and stand up for constitutional rights. The Court is a coequal branch of government. It cannot quiver at the possibility of stepping on the other branches' toes. "Toe stepping" is what John Madison wanted from the government.[136]

When the President refuses to enforce a law and Congress refuses to pass them, it is the Court's prerogative to remind them of their duty by taking up the slack. This is as important as calling out Congress for passing unconstitutional statutes, and the President for signing unconstitutional executive orders.

The standing doctrine in its current iteration stands in stark opposition to this important tenet. The Court must return to an interpretation of the Case and Controversy clause more akin to that which was originally intended. Prudential standing as an interpretation of "cases of a judicial nature" fits with the spirit of the Constitution.

136. THE FEDERALIST NO. 51 (John Madison) ("Ambition must be made to counteract ambition.").

VI. CONCLUSION: THE COURT MUST BROADEN THE STANDING DOCTRINE TO BETTER ADMINISTER JUSTICE AND PERFORM ITS CONSTITUTIONAL DUTIES

From its inception, through *Dred Scott*, until today, the standing doctrine has been responsible for a pattern of injustice when disadvantaged plaintiffs come to court seeking relief.[137] Whether it provides a false pretense for politically or prejudicially derived judicial decisions or prohibits precedent-bound judges from deciding on the merits, the standing doctrine is an enemy to the federal judge's primary purpose: upholding justice and the Constitution.

As previously described, plainly unjust and unconstitutional acts are regularly deemed non-justiciable when courts rely on the standing doctrine. This cannot stand. The Constitution and the established system of checks and balances mandate the Court not to hold its tongue when an unconstitutional act comes before it.

To that end, it behooves the Court to reconsider current standing doctrine precedent. The first priority of the Court must be to protect and secure constitutionally guaranteed rights. Recognizing that, the Court should weigh standing requirements as non-mandatory when claims of constitutional protections are raised.

Recently, some federal courts and the Supreme Court have looked down this path, if not taken the first step. How far the doctrine can bend without breaking will be determined over the next few years, but it is a hopeful time for those who want the Court to finally undertake the task set out for it by the framers: protecting justice and the Constitution.

137. *See* discussion *supra* Parts III–IV (tracing this history).