The Public Interest Class Action

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Public interest lawyers often bring large-scale cases against government defendants for injunctive relief as class actions. Until recently, their class certification motions routinely succeeded, enabling plaintiffs to obtain sweeping remedies that have required fundamental reforms to government policies and practices. In recent years, however, the procedural law regulating the public interest class action has changed dramatically, with recurring doctrinal problems splitting the federal courts. Should a nascent trend against class certification continue, class action doctrine will soon present a formidable obstacle—possibly a barrier—to the successful prosecution of a sort of litigation that has produced innumerable changes to prisons, foster care systems, and other government agencies and services over the last fifty years.

Any path out of the present confusion must address a basic but neglected question: why do large-scale public interest cases so regularly proceed as class actions? The answer involves an underappreciated interaction between the law of class actions and other doctrines devised to limit standing and the scope of remedies. Class action procedure enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies without asking courts to usurp power from other branches or adjudicate ineptly. Without class certification, these policies would lie dormant because the other doctrines would unnecessarily derail litigation. This counterweight function can generate responses to the doctrinal problems that courts have struggled to answer in this new era for the public interest class action. If class action procedure evolves in a manner that is consistent with its function, large-scale public interest litigation will remain a viable means for the achievement of structural reform.

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INTRODUCTION

In May 1995, New York City police officers discovered a four-year-old girl lying under a urine-soaked sheet in her mother's apartment.[1] The girl, given the pseudonym "Marisol A.," had been locked in a closet for months and starved to the point that she had eaten a cardboard box and garbage bags out of desperation.[2] Marisol's mother had burned her with cigars and pulled much of her hair out.[3] To a physician treating the girl, her feet "looked cooked" from the boiling water her mother had poured on them.[4]

Marisol was ostensibly under the supervision of the city's Child Welfare Agency, long a tragically incompetent bureaucracy.[5] In December 1995, she became the named plaintiff in *Marisol A. ex rel. Forbes v. Giuliani*, a class action that a group of public interest lawyers filed on behalf of tens of thousands of children trapped in the city's foster care system.[6] The complaint, full of heartbreaking stories like Marisol's, alleged that the agency's administrative deficiencies subjected thousands of children to serious physical and psychological harm.[7] "[E]xamples of the defendants' systemic failure to fulfill their legal responsibilities"[8] included a failure to provide psychological, educational, and healthcare services to foster children; a failure to find permanent placements for children; a failure to investigate reports of harm to foster children; a failure to train caseworkers adequately; and a failure to track children and plan for their future.[9] These problems, the plaintiffs insisted, amounted to widespread, class-wide violations of the U.S. Constitution.[10]

Fast forward six years. In 2001, the agency administering Texas's long-term foster care system assumed responsibility for a six-year-old girl.[11] Over the next decade, the Texas agency changed the girl's residence more than thirty times.[12] She was sexually abused in several of these homes.[13] Separated from her sisters, the girl eventually lost all contact with them.[14] During her multiple hospitalizations for psychiatric illness, the girl, still quite young, took as many as six

1. Complaint for Declaratory & Injunctive Relief at 31, Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) (No. 95-Civ.-10533), 1995 WL 17770990.
2. *Id.* at 31–32.
3. *Id.* at 32.
4. *Id.*
5. *See, e.g.*, Daphne Eviatar, *Deep Impact*, LEGAL AFF., Jan.–Feb. 2004, at 51.
6. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 1, at 1.
7. *See id.* at 3.
8. *Id.* at 62.
9. *Id.* at 2–4.
10. *See id.* at 102 (alleging violations of the First, Ninth, and Fourteenth Amendments to the U.S. Constitution).
11. *See* Plaintiffs' Original Complaint for Injunctive & Declaratory Relief & Request for Class Action at 23–24, M.D. *ex rel.* Stukenberg v. Perry, No. 11CV00084-N (S.D. Tex. Mar. 29, 2011), 2011 WL 1134177.
12. *Id.* at 27.
13. *Id.* at 24–25.
14. *Id.* at 24.

psychotropic drugs concurrently.[15]

The Texas girl became a named plaintiff in a class action that the *Marisol A.* lawyers brought on behalf of 14,000 children in March 2011.[16] Also replete with disturbing accounts of child suffering, the *M.D. ex rel. Stukenberg v. Perry* complaint tells a story that differs little from *Marisol A.* The Texas agency and its officials failed to monitor children adequately; failed to investigate reports of abuse and neglect; failed to provide necessary psychological, health, and educational services to foster children; failed to ensure permanent placements; and failed to train caseworkers adequately.[17] These problems, the complaint maintains, "are part of a systemic pattern of conduct"[18] that violates the U.S. Constitution.[19]

If the similar complaints are any indication, the children's lawyers must not have thought that anything had changed for foster care reform litigation between 1995 and 2011. But surely they think so now. The *Marisol A.* district judge certified a class six months after the case began.[20] He took four pages, making no evidentiary findings, to explain why the class satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure.[21] Affirming the lower court, the Second Circuit observed that the only other appellate court to have decided a case like *Marisol A.* had "held that it was an abuse of discretion *not* to certify a class."[22] The *M.D.* district judge also certified the class only months after the case began,[23] but her decision foundered in the Fifth Circuit on interlocutory appeal.[24] On remand, more than two years after the plaintiffs had filed the complaint, the district judge again certified the class, this time in a sixty-one page order brimming with evidentiary findings.[25] Only an untimely notice of appeal saved the second class certification order from another round of stringent appellate scrutiny.[26]

This tale of two cases has many analogues.[27] Something is happening to class action procedure in public interest litigation, defined here as litigation brought

15. *Id.* at 26.

16. *See id.* at 23.

17. *Id.* at 3, 30–31, 42–43, 61.

18. *Id.* at 30.

19. *Id.* at 79–81 (alleging violations of the First, Ninth, and Fourteenth Amendments to the U.S. Constitution).

20. *See* Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 669 (S.D.N.Y. 1996).

21. *See id.* at 689–93.

22. Marisol A. *ex rel.* Forbes v. Guiliani, 126 F.3d 372, 377 (2d Cir. 1997) (citing Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48 (3d Cir. 1994)).

23. M.D. *ex rel.* Stukenberg v. Perry, No. C-11-84, 2011 WL 2173673 (S.D. Tex. June 2, 2011), *vacated*, 675 F.3d 832 (5th Cir. 2012).

24. *M.D.*, 675 F.3d at 843.

25. M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7, 36–38 (S.D. Tex. 2013).

26. The lawyers for the state filed their notice of appeal one day late—a jurisdictional error that the Fifth Circuit refused to excuse. *See* M.D. *ex rel.* Stukenberg v. Perry, 547 F. App'x 543 (5th Cir. 2013).

27. *Compare* DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013) (decertifying a class of students with disabilities suing for violations of the Individuals with Disabilities in Education Act (IDEA)), *and* Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481 (7th Cir. 2012) (same), *with* Mark C.

against government officials and agencies for injunctive relief.[28] Until recently, prisoners, foster children, students with disabilities, and other groups seeking structural remedies could count on a favorable judicial reception when they sought class certification. Today, litigation like *M.D.* and *Marisol A.* proceeds on uncertain, potentially hostile doctrinal terrain. As I describe in Part I, a new era for the public interest class action, beginning just a few years ago, has dawned. Significant public interest cases have recently run aground for failure to meet Rule 23's requirements in ways that would have been nearly unimaginable a decade ago.[29] Hard-fought trial victories and landmark structural injunctions have vanished as a result.[30] Present-day upheaval in class action procedure threatens to alter—perhaps to imperil—structural reform litigation in the federal courts. Without class certification, a lot of structural reform litigation will prove much more difficult to bring.

The dawn of this new, stricter era shines light on a remarkable situation. Although public interest plaintiffs have turned to Rule 23 innumerable times over the past fifty years, the role that class action procedure plays and how doctrine should regulate claim aggregation in this litigation remain mysterious. Old-era judges certified classes casually, even perfunctorily, and thus did not build a reservoir of doctrinal wisdom to guide Rule 23's application in these cases. Little of the huge corpus of class action scholarship helps.[31] The academic discourse chiefly addresses potential distortions that enormous monetary stakes create,[32] an inapposite focus when the plaintiffs want structural reform, not money; when ideological commitments, not fees, motivate the plaintiffs' lawyers; and when government defendants, backed by the public fisc, experi-

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Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471, 475–77 (2014) (discussing history of class actions in IDEA litigation).

28. The analysis in this Article works equally well for litigation for injunctive relief brought against private defendants. This type of litigation, however, is rare. Plaintiffs sue private employers and the like for injunctive relief all the time, but they invariably seek monetary relief as well. Because class actions for monetary relief produce a particular set of dynamics that differ from what I describe in this Article, I use structural reform litigation against government defendants as the relevant ideal type. More broadly, my definition of the public interest class action excludes any lawsuit seeking a monetary recovery. Suits for monetary relief pose an entirely different set of policy problems that the procedures regulating claim aggregation have to solve. A productive inquiry into the distinctive issues posed by injunctive relief suits against government defendants requires that litigation for monetary gain, no matter how public-spirited in motivation or socially valuable in effect, be treated as a separate field for study. All of this means that my analysis here does not honor the default commitment of the Federal Rules to transsubstantivity. The ship, in this respect, has sailed. Class action doctrine long ago splintered into substance-specific strains, with the procedural regulation of class certification dependent to a significant extent upon the type of remedy sought.

29. For a discussion of this development, see *infra* Part II.

30. For two examples, see *DL*, 713 F.3d 120, and *Jamie S.*, 668 F.3d 481.

31. For a discussion of the little relevant literature, see *infra* Part II.

32. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. (forthcoming 2016) (manuscript at 19–28) (on file with author); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 668–70 (2011) (observing that the American Law Institute's *Principles of the Law of Aggregate Litigation* pays little heed to suits for injunctive relief).

ence risk and internalize cost differently than private defendants do. Finally, this new era of heightened scrutiny did not arrive after thoroughgoing judicial engagement with supposed policy problems that public interest class actions create. Rather, much of the impetus for retrenchment comes from the 2011 U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*,[33] a case that differed considerably from litigation against government agencies for injunctive relief.

Judges, scholars, and lawyers could afford to neglect the theory and doctrine of the public interest class action during the old, permissive era. They can no longer do so in this new, more exacting one. Two sets of basic questions demand responses. First, what is the class action's function in public interest litigation, and why have public interest plaintiffs so abidingly preferred the class action form? As I suggest in Parts II and III, the answer has to do with the web of doctrinal governance designed to regulate litigation brought to remedy systemic bureaucratic harm. Without Rule 23, standing and scope-of-remedy doctrines—the other strands in this web—would undermine the choice in the substantive law to create liability for government defendants in a manner that best mirrors the scope of their misconduct. Rule 23 lends procedural support to this design of substantive liability policy, while ensuring that courts do not usurp power belonging to other branches or adjudicate ineptly. As such, Rule 23 functions as a counterweight, balancing out concerns that motivate these other doctrinal strands.

Second, how can courts properly administer Rule 23's requirements in this new, confused era for the public interest class action? The counterweight function I identify can generate answers to problems that the federal courts have struggled to resolve in any theoretically rigorous way. As I argue in Part IV, my functional account can explain when courts should certify proposed classes of foster children, inmates, and other vulnerable populations that often seek protection through structural reform litigation.

Two issues warrant mention before proceeding. First, I accept the basic contours of existing doctrine as fixed. I do not advocate for Rule 23's redesign or for the Court to reconsider *Wal-Mart*, for instance. I also take the policy concerns motivating the law that regulates public interest litigation on their own terms, as they are manifested in prevailing doctrine. For example, certain normative premises animate standing restrictions, a key strand in the web of doctrinal governance I analyze. I accept but do not endorse these premises, long the subject of intense debate. I hope that my guidance will prove immediately useful to judges trying to decide class certification motions as best they can.

Second, my analysis accepts the presumption that modern-day structural reform litigation does not create pathologies that require class action retrenchment as a necessary antidote. Some of the judges responsible for the most restrictive of the new-era decisions may indeed desire an end to structural reform litigation, although no obvious ideological variable explains recent

33. 131 S. Ct. 2541 (2011).

patterns of decision making. This Article may not speak to these judges. I ask how structural reform litigation can be best managed procedurally, not whether it should be destroyed. Those who think differently bear a burden of proof they have not yet satisfied. To my knowledge, no one—no judge, scholar, or lawyer—has explained why twenty-first century structural reform litigation routinely poses policy problems for which a stingy Rule 23 provides a necessary salve.

I. TWO ERAS OF THE PUBLIC INTEREST CLASS ACTION

The New York and Texas foster care reform cases represent different eras for the public interest class action. During the old era, which lasted until quite recently, the doctrinal terrain for injunctive relief class actions particularly favored plaintiffs. In its appeal from the *Marisol A.* class certification order, for example, New York City found only a single district court opinion to support its claim that the foster care class the district judge had certified exceeded what Rule 23 allowed.[34] This warm climate has cooled as a new era has begun. Particularly since the U.S. Supreme Court's decision in *Wal-Mart*, proposed classes in public law litigation have drawn unprecedented judicial scrutiny. But courts have turned up the heat on plaintiffs with no clear sense of why public interest classes deserve more exacting examination.

A. PUBLIC LAW LITIGATION AND THE CLASS ACTION

The class action and impact litigation are and always have been inseparable.[35] The importance of *Brown v. Board of Education*[36] as a progenitor of public law litigation is universally appreciated.[37] Less known but irrefutable is the link that connects *Brown* and subsequent efforts to implement it to the modern class action's emergence.[38] Rulemakers had desegregation litigation in mind as they revised Rule 23 in the early 1960s.[39] Class action procedure and public law litigation continued to evolve in lockstep through the 1970s. The two matured together during a time when lawyers for groups like the NAACP brought cutting-edge class actions, not only in civil rights cases but also to

34. Brief for Plaintiffs-Appellees at 19, Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372 (2d Cir. 1997) (No. 96-9132(L)), 1996 WL 34303199 (noting that the defendants cited only to *K.L. ex rel. Dixon v. Valdez*, 167 F.R.D. 688 (D.N.M. 1996), in support of their argument challenging certification).

35. *See* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2184–86 (1989); *see also* Abram Chayes, Foreword, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 576 (1997) (noting the "critical role" that class action procedure plays "in civil rights litigation"); Resnik, *supra* note 32, at 651.

36. 347 U.S. 483 (1954).

37. *See, e.g.*, Owen M. Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

38. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 678–91 (2011) (discussing the evolution of class action doctrine as courts tried to implement *Brown* in the Deep South).

39. *Id.* at 702–08 (describing the importance of school desegregation litigation to the drafters of the revised Rule 23).

pursue other types of claims as well.[40]

The class action remains a favored procedural form for impact litigation, as any sophisticated public interest litigator would assert. Recent prison class actions include lawsuits that have reformed Mississippi's system for juvenile detention,[41] confinement practices for HIV-positive inmates in Alabama,[42] and the totality of conditions in Maricopa County, Arizona jails.[43] Significant disability rights lawsuits invariably proceed as class actions.[44] Foster care reform class actions are many and significant; since 1995, class actions have brought child welfare agencies in dozens of states under judicial supervision.[45] Some scholars have questioned the continuing vitality of the public interest class action,[46] consistent with a larger claim about the demise of structural reform litigation.[47] This declensionist narrative is oversimplified. Empirically rich accounts of public law litigation document its ongoing vitality,[48] and Rule 23 continues to play a significant role. Black and Latino men in New York City,[49] prisoners in

40. The NAACP, the ACLU, and the National Organization for Women litigated or contributed importantly to almost all of the leading employment discrimination class actions of the 1970s and 1980s. *See, e.g.*, NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 86 (2006); Karen O'Connor & Lee Epstein, *The Importance of Interest Group Involvement in Employment Discrimination Litigation*, 25 HOW. L.J. 709, 717–18, 724–25 (1982); L. Joseph Mosnier, Crafting Law in the Second Reconstruction: Julius Chambers, the NAACP Legal Defense Fund, and Title VII, at iii (2004) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill). The NAACP also played an important role in seminal consumer protection lawsuits. *See, e.g.*, Ronald C. Hausmann, *Class Actions Under the Truth-in-Lending Act*, 1 CLASS ACTION REP. 26, 31 (1972).

41. Consent Decree, C.B. *ex rel.* DePriest v. Walnut Grove Corr. Auth., No. 3:10-cv-00663-CWR-FKB (S.D. Miss. Feb. 3, 2012).

42. Henderson v. Thomas, No. 2:11cv224-MHT, 2013 WL 5493197 (M.D. Ala. Sept. 30, 2013).

43. Graves v. Arpaio, 48 F. Supp. 3d 1318, *amended by* No. CV-77-00479-PHX-NVW, 2014 WL 6983316 (D. Ariz. 2014).

44. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 903–04 (2006); Weber, *supra* note 27, at 475–77.

45. CHILD WELFARE LEAGUE OF AM. & ABA CTR. ON CHILDREN & THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005). Between 2005 and the present, advocates have brought at least seven more class actions in seven different states challenging systemic deficiencies in the administration of foster care systems. (All but one of these cases challenged state-wide problems.) One can find a list of these cases on the websites of the two major organizations that bring them. *See generally Cases*, NAT'L CTR. FOR YOUTH L., http://youthlaw.org/cases/ (check "Foster Care") (last visited Dec. 15, 2015); *Class Actions*, CHILDREN'S RIGHTS, http://www.childrensrights.org/our-campaigns/class-actions/ (last visited Dec. 15, 2015).

46. *See, e.g.*, Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1195 (2009) (insisting that, "in the domain of class actions, the structural injunction is a dying breed").

47. *See, e.g.*, Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004).

48. *See* Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. 1435, 1444–48 (2013); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 626 (2006) (concluding at the end of a lengthy study of prison conditions that "[t]here is every reason to believe that public law litigation and structural reform are alive and well in many arenas, and that the story of the decline of public law litigation will frequently prove false on systematic inquiry, as it has in jails and prisons").

49. Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012).

California,[50] immigrants in Arizona,[51] and same-sex couples in Virginia[52] have all benefited recently from class action procedure used in public interest litigation.

B. DOCTRINAL TUMULT

1. The Old Era

A full understanding of the changing landscape for the public interest class action requires a brief survey of doctrinal basics. A proposed class must satisfy the provisions of Rule 23(a) and fit into one of the Rule 23(b) categories to win certification. Among other requirements,[53] Rule 23(a) insists upon "questions of law or fact common to the class."[54] This commonality requirement has no operative significance in suits for money damages because the proposed class must meet Rule 23(b)(3)'s predominance threshold.[55] Common questions in these cases must not only exist but also "predominate over any questions affecting only individual members."[56] But injunctive relief suits proceed pursuant to Rule 23(b)(2), a "remarkably different litigation device[]."[57] This provision eschews a predominance requirement. Instead, "the party opposing the class [must have] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole."[58]

Fairly read, Rule 23 posits two distinctive requirements—commonality and Rule 23(b)(2)—for the certification of injunctive relief classes of the sort universally proposed in public interest litigation. As applied until recently, both requirements unequivocally favored class certification. In the absence of a predominance requirement, commonality offered courts the best metric to test for the sort of similarities among class members' claims that efficient and productive aggregate adjudication requires. The requirement was "not a high bar," as the First Circuit maintained in 2004.[59] An influential test for commonal-

50. Brown v. Plata, 563 U.S. 493 (2011).

51. Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959 (D. Ariz. 2011).

52. Harris v. Rainey, 299 F.R.D. 486 (W.D. Va. 2014).

53. Rule 23(a) also posits numerosity, typicality, and adequacy of representation requirements. FED. R. CIV. P. 23(a). These requirements have not performed distinctive tasks in public interest class actions. Thus, they do not warrant an inquiry specific to the public interest context.

54. FED. R. CIV. P. 23(a)(2).

55. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); Sullivan v. DB Invs., Inc., 667 F.3d 273, 297 (3d Cir. 2011).

56. FED. R. CIV. P. 23(b)(3).

57. Shelton v. Bledsoe, 775 F.3d 554, 560–61 (3d Cir. 2015).

58. FED. R. CIV. P. 23(b)(2).

59. Chiang v. Veneman, 385 F.3d 256, 265 (1st Cir. 2004); *see also* Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (describing the commonality requirement as "easily met"); John Does I–IV v. City of Indianapolis, No. 1:06-cv-865-RLY-WTL, 2006 WL 3365672, at *3 (S.D. Ind. Nov. 20, 2006); People United for Children, Inc. v. City of New York, No. 99 Civ. 0648 RJWKTD, 2003 WL 22056930, at *2 (S.D.N.Y. Sept. 3, 2003); Nicholson v. Williams, 205 F.R.D. 92, 98 (E.D.N.Y. 2001); Doe *ex rel.* Doe v. L.A. Unified Sch. Dist., 48 F. Supp. 2d 1233, 1240 (C.D. Cal. 1999) (observing that a court "may relax the commonality requirement" in cases for injunctive relief);

ity the Third Circuit crafted in 1994 asked whether the "defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct."[60] Any serious effort at a public interest class action could meet this standard, for a competent public interest lawyer would have no reason to sue in the first instance unless she could plausibly allege some common thread linking the experiences of class members.

Commonality proved easy to satisfy in part because common questions couched at "high level[s] of abstraction" often sufficed.[61] Such questions, ostensibly central to each class member's claim, often amounted to nothing more than a restatement of the ultimate issue of the defendant's liability.[62] *D.G. v. Yarbrough*, a broad assault on the bureaucratic organization and provision of child welfare services on behalf of 10,000 foster children in Oklahoma, offers an example.[63] The plaintiffs first filed their class certification motion on the same day they filed their complaint,[64] a document filled with harrowing stories of fractured skulls and sexual abuse.[65] To satisfy the commonality requirement, the plaintiffs suggested the following: "whether [the state's] policies and practices violate Plaintiff Children's substantive due process rights to be reasonably free from harm and imminent risk of harm while in state custody."[66] The defendants insisted that a question posed at such a level of abstraction could mask dissimilarities among class members' claims that would preclude efficient

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A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 443 (2013) (describing the commonality requirement's administration before *Wal-Mart*).

60. *Baby Neal*, 43 F.3d at 57.

61. Marisol A. *ex rel.* Forbes v. Guiliani, 126 F.3d 372, 377 (2d Cir. 1997); *see also* Lovely H. v. Eggleston, 235 F.R.D. 248, 256 (S.D.N.Y. 2006).

62. *See, e.g.*, Dwayne B. *ex rel.* Stempfle v. Granholm, No. 2:06-cv-13548-NGE-DAS, slip op. at 6 (E.D. Mich. Feb. 15, 2007) (finding that the named plaintiffs seeking to represent all children in the Michigan foster care system satisfied the commonality requirement with the following question: Does the state provide "safe, appropriate and stable foster care placements as required by law and reasonable professional standards[?]"); Bzdawka v. Milwaukee Cty., 238 F.R.D. 469, 475 (E.D. Wis. 2006) (finding that a class of disabled residents suing to enjoin their removal from nursing home facilities in Wisconsin met the commonality requirement because they alleged that the "defendants' policies concerning the compensation of [healthcare] providers to Milwaukee County enrollees violates" several disabilities laws); Olivia Y. *ex rel.* Johnson v. Barbour, No. 3:04-cv-00251-TSL-FKB, slip op. at 6 (S.D. Miss. Mar. 11, 2005) (finding that the plaintiffs in a foster care reform case in Mississippi satisfied the commonality requirement with a similar question: "[W]hether defendants have failed to provide children in their custody with safe, licensed foster care placements . . . ").

63. Complaint for Injunctive & Declaratory Relief & Request for Class Action at 1, D.G. *ex rel.* Stricklin v. Henry, No. 4:08-cv-00074-GKF-FHM (N.D. Okla. Feb. 13, 2008).

64. Plaintiffs' Motion for Class Certification & Appointment of Class Counsel & Brief in Support Thereof at 25, *D.G.*, No. 4:08-cv-00074-GKF-FHM (N.D. Okla. Feb. 13, 2008).

65. Complaint for Injunctive & Declaratory Relief & Request for Class Action, *supra* note 63, at 5–9, 44–77.

66. Plaintiffs' Motion for Class Certification & Appointment of Class Counsel & Brief in Support Thereof, *supra* note 64, at 13. Another suggested common question was whether the state's "failure to operate a child welfare agency that can fulfill its basic constitutional, statutory and contractual obligations to foster children" amounted to a policy or practice that "subjects all Class members to irreparable harm and risk of harm." *Id.* at 11.

and fair aggregate adjudication.[67] The court, however, agreed that the plaintiffs' proposed common question met the commonality threshold.[68]

A second issue connected to commonality exemplifies the doctrinal solicitude public interest plaintiffs enjoyed during the old era. The question of whether a proposed class meets the commonality requirement often overlaps in public interest litigation with the question of whether the plaintiffs should prevail on the merits. Whether the New York City Police Department had a systemic custom or practice of stopping people of color outside residential buildings in the Bronx without reasonable suspicion, for instance, determines whether an injunction may justifiably issue. But it also determines whether tens of thousands of Fourth Amendment claims have the requisite similarity for commonality purposes.[69] Without such a custom or practice, nothing juridically significant would connect tens of thousands of stops, and class members could not productively or fairly litigate them all at once in a single proceeding.

Even the Third Circuit's vague "centrality" test for commonality could have proven restrictive if old-era plaintiffs had to prove that the defendants' conduct was in fact central to all class members' claims. Doing so would have effectively required plaintiffs to prevail on the merits. But they faced no such hurdle. For many courts, allegations of a classwide custom or practice in the complaint sufficed to establish commonality.[70] They flatly refused to peek into the merits at the class certification stage.[71] In the Oklahoma foster care case, for example, the state defendant disputed commonality on grounds that the plaintiffs lacked evidence to show that class members' injuries resulted from systemic bureaucratic dysfunction.[72] But the district court simply accepted the plaintiffs' allegation of common conduct as true for the sake of class certification.[73]

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67. *See* DHS Defendants' Response Brief in Opposition to Plaintiffs' Motion for Class Certification & Appointment of Counsel at 22, *D.G.*, No. 4:08-cv-00074-GKF-FHM (N.D. Okla. June 3, 2008).

68. The district judge agreed that the following question met the commonality requirement: "Whether DHS has a policy or practice of failing to adequately monitor the safety of plaintiff children causing significant harm and risk of harm to plaintiff children's safety, health and well-being." Reporter's Transcript of Proceedings Had on May 5, 2009 at 9, *D.G.*, 4:08-cv-00074-GKF-FHM (N.D. Okla. May 8, 2009). The question of law that satisfied commonality went as follows: "[W]hether the alleged policies or practices violate plaintiffs' right to be reasonably free from harm and imminent risk of harm while in state custody." *Id.* at 10. The Tenth Circuit affirmed the district court's commonality finding. DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1196 (10th Cir. 2010).

69. *See* Ligon v. City of New York, 288 F.R.D. 72, 82 (S.D.N.Y. 2013).

70. *See, e.g.*, Willits v. City of Los Angeles, No. CV 10–05782 CBM (RZx), 2011 WL 7767305, at *3 (C.D. Cal. Jan. 3, 2011); Shakhnes *ex rel.* Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 628 (S.D.N.Y. 2010), *aff'd in part and vacated in part*, 689 F.3d 244 (2d Cir. 2012); Staley v. Wilson Cty., No. 3:04-1127, 2006 WL 2401083, at *7 (M.D. Tenn. Aug. 18, 2006); L.V. v. N.Y.C. Bd. of Educ., No. 03 Civ. 9917(RJH), 2005 WL 2298173, at *2 (S.D.N.Y. Sept. 20, 2005); Raymond v. Rowland, 220 F.R.D. 173, 179 (D. Conn. 2004).

71. *See, e.g.*, Xiufang Situ v. Leavitt, 240 F.R.D. 551, 561 (N.D. Cal. 2007); *Staley*, 2006 WL 2401083, at *5; Thomas v. Baca, 231 F.R.D. 397, 400 (C.D. Cal. 2005).

72. *See, e.g.*, D.G. *ex rel.* Strickland v. Yarbrough, 278 F.R.D. 635, 636 (N.D. Okla. 2011).

73. *Id.* at 645. The Tenth Circuit agreed. *D.G.*, 594 F.3d at 1197–98.

Rule 23(b)(2)—"the party opposing the class [must have] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole"[74]—also proved an easy hurdle for old-era plaintiffs. Rule 23's authors wrote (b)(2) expressly for civil rights actions.[75] Invoking this history, some courts treated Rule 23(b)(2) as requiring almost nothing more than an allegation that civil rights plaintiffs are entitled to injunctive relief, without any sort of description of what this relief might entail.[76] No consensus emerged among those courts that tried to vest Rule 23(b)(2) with more meaning. One treatment rendered Rule 23(b)(2) entirely duplicative of the commonality requirement.[77] By another view, the named plaintiff could satisfy the requirement if she demonstrated that the proposed remedy would benefit all class members,[78] with no showing that all class members were injured in the same way or would have been entitled as individual litigants to the desired injunction.[79] Requests for nonspecific injunctions ordering defendants "to cease violating the plaintiffs' rights" sufficed by this metric in a number of instances.[80] The Oklahoma foster care plaintiffs, for example, suggested as a qualifying classwide injunction that the court "[p]ermanently enjoin Defendants from subjecting Plaintiff Children to practices that violate their rights," and "[o]rder appropriate remedial relief tailored to the evidence proven"[81] that "would have class-wide scope and effect."[82]

Another approach treated Rule 23(b)(2) as requiring class "cohesiveness," a test with no anchor in the text of the rule and that proved incoherent in

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74. FED. R. CIV. P. 23(b)(2).

75. *Shakhnes*, 740 F. Supp. 2d at 627; Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., 249 F.R.D. 334, 345–46 (N.D. Cal. 2008); *see also* Bumgarner v. NCDOC, 276 F.R.D. 452, 457 (E.D.N.C. 2011) ("Rule 23(b)(2) has been liberally applied in the area of civil rights . . . ."); Bowers v. City of Philadelphia, No. 06-CV-3229, 2006 WL 2818501, at *3 (E.D. Pa. Sept. 28, 2006) ("Courts have noted that Rule 23(b)(2) is 'an especially appropriate vehicle for civil rights actions seeking . . . declaratory relief . . . .'" (quoting Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980))).

76. *See* Chester Upland Sch. Dist. v. Pennsylvania, No. 12-132, 2012 WL 1473969, at *5 (E.D. Pa. Apr. 25, 2012); Williams v. City of Philadelphia, 270 F.R.D. 208, 222 (E.D. Pa. 2010); Bzdawka v. Milwaukee Cty., 238 F.R.D. 469, 476 (E.D. Wis. 2006); Caroline C. *ex rel.* Carter v. Johnson, 174 F.R.D. 452, 467 (D. Neb. 1996); Marisol A. *ex rel.* Forbes v. Guiliani, 929 F. Supp. 662, 692 (S.D.N.Y. 1996).

77. *See* R.P.-K. *ex rel.* C.K. v. Dep't of Educ., 272 F.R.D. 541, 551 (D. Haw. 2011).

78. *See* Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 59 (3d Cir. 1994); Connor B. *ex rel.* Vigurs v. Patrick, 272 F.R.D. 288, 297 (D. Mass. 2011).

79. *See, e.g.*, *Bzdawka*, 238 F.R.D. at 476.

80. Ceaser v. Pataki, No. 98CIV.8532(LMM), 2000 WL 1154318, at *2, *7 (S.D.N.Y. Aug. 14, 2000); *see also* Chambers v. City & Cty. of San Francisco, No. C 06-6346 WHA, slip op. at 8–9 (N.D. Cal. July 12, 2007); Matyasovszky v. Hous. Auth. of Bridgeport, 226 F.R.D. 35, 44 (D. Conn. 2005).

81. Complaint for Injunctive & Declaratory Relief & Request for Class Action, *supra* note 63, at 85.

82. Plaintiffs' Motion for Class Certification & Appointment of Class Counsel & Brief in Support Thereof, *supra* note 64, at 21. The district court rejected the defendants' insistence that the plaintiffs specify a more precise injunction that would benefit all class members. *Compare* OKDHS Defendants' Brief Addressing Plaintiffs' Proposed Remedies at 1–4, D.G. *ex rel.* Stricklin v. Henry, No. 4:08-CV-00074 (N.D. Okla. Mar. 13, 2009), *with* Reporter's Transcript of Proceedings Had on May 5, 2009, *supra* note 68, at 12–14.

application.[83] To some, cohesiveness amounted to a predominance inquiry, a puzzling reading of Rule 23(b)(2) that negated the distinctive procedural treatment that Rule 23 prescribes for injunctive relief suits.[84] To others, cohesiveness depended upon whether a court could craft an injunction in fairly specific terms that would not require individualized tailoring for each class member.[85] To still others, the cohesiveness inquiry assessed the harmony of interests among class members, thereby duplicating the inquiry that Rule 23(a)(4)'s adequacy of representation provision requires.[86]

2. The New Era

In a 2008 opinion, Judge Frank Easterbrook derided the district court's plaintiff-friendly application of Rule 23 as an outdated "relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible."[87] "That time is past," he insisted.[88] As a comment upon structural reform litigation's reality, Judge Easterbrook probably spoke too soon. The Oklahoma foster care case, brought in 2008, involved thousands of children as plaintiffs, injured in a wide variety of ways, and connected to each other only by their common link to a vast state bureaucracy. And yet the class action could proceed and generate relief requiring the systematic reconstruction of foster care in Oklahoma.[89] Contemporaneous litigation of similar ambition is not hard to find.[90]

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83. For a more general critique of the notion of cohesion as a meaningful requirement for class certification, see generally Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014).

84. *See, e.g.*, M.A. *ex rel.* E.S. v. Newark Pub. Sch., No. 01-3389 (SRC), 2009 WL 4799291, at *14 (D.N.J. Dec. 7, 2009); Winston v. Jefferson Cty., No. 2:05-CV-0497-RDP, 2006 WL 6916381, at *9 (N.D. Ala. June 26, 2006); Paige v. Phila. Hous. Auth., No. Civ.A. 99-0497, 2003 WL 22135961, at *4 & n.2 (E.D. Pa. Aug. 18, 2003).

85. *See* Shook v. Bd. of Cty. Comm'rs of El Paso, 543 F.3d 597, 604 (10th Cir. 2008).

86. *See* Williams v. City of Philadelphia, 270 F.R.D. 208, 222 (E.D. Pa. 2010); San Antonio Hispanic Police Officers' Org. v. City of San Antonio, 188 F.R.D. 433, 445 (W.D. Tex. 1999).

87. Rahman v. Chertoff, 530 F.3d 622, 626 (7th Cir. 2008).

88. *Id.*

89. The defendant agencies in the Oklahoma foster care reform case agreed to a settlement that will cost $100 million to fund over the five years planned for its implementation. Ginnie Graham, *Oklahoma Foster Care Reform Efforts Criticized*, TULSA WORLD (Apr. 30, 2014, 9:47 AM), http://www.tulsaworld.com/news/local/oklahoma-foster-care-reform-efforts-criticized/article_dd3970ce-3fa6-50cf-a5fb-7ff399212e18.html.

90. The New York Civil Liberties Union convinced a district judge to certify a class of 80,000 students of color, attending 150 different New York schools, by alleging (but not showing with any evidence) that one or more of a long list of alleged failures by state officials had a disparate impact on "high minority" schools. Ceaser v. Pataki, No. 98CIV.8532(LMM), 2000 WL 1154318, at *4 (S.D.N.Y. Aug. 14, 2000). When disability rights advocates sued on behalf of all people with disabilities who attempt to use facilities maintained by the California Department of Transportation, the district judge pronounced the case "a garden variety class action of the type routinely certified under Rule 23(b)(2)." Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., 249 F.R.D. 334, 346 (N.D. Cal. 2008). She agreed that allegations of innumerable structural barriers to access around the state described a systemic discriminatory policy suitable for class treatment. *Id.* Cases brought on behalf of enormous classes challenging police practices as racially discriminatory have succeeded at the class certification

But Judge Easterbrook's assessment may be more accurate today. Palpable and increasing judicial restiveness has greeted Rule 23's use in public interest litigation over the past decade.[91] With *Wal-Mart*, decided in 2011, this doctrinal chill has hardened.

Wal-Mart is significant because it entrenched several changes that have unsettled the procedural regulation of the public interest class action. This importance is ironic because the case had little to do with policy concerns that public interest litigation might raise. The named plaintiffs brought suit on behalf of 1.5 million former and current female employees of the superstore, alleging classwide gender discrimination in hiring and promotion practices.[92] The plaintiffs did not allege that Wal-Mart had any explicit policy of discrimination. Rather, they contended, the company delegated excessive discretion to store managers for personnel decisions, with the knowledge that managers' biases would taint employment decisions.[93] Along with injunctive relief, the plaintiffs requested back pay in an amount that one (probably hyperbolic) estimate pegged at $510 billion.[94] Whatever one might think of the motives that animated the case, *Wal-Mart* does not fit my definition of the public interest class action because of the huge financial stakes involved.[95] The district court certified the class,[96] and a sharply divided Ninth Circuit, ultimately sitting en banc,

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stage, notwithstanding defendants' objections that the lawfulness of any particular police encounter requires an individualized assessment. *See, e.g.*, Hodgers-Durgin v. Vina, 165 F.3d 667, *withdrawn*, 199 F.3d 1037 (9th Cir. 1999); Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012); Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959 (D. Ariz. 2011); Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001).

91. Class certification motions have failed with some frequency recently. *See, e.g.*, Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009); Shook v. Bd. of Cty. Comm'rs of El Paso, 543 F.3d 597 (10th Cir. 2008); Elizabeth M. v. Montenez, 458 F.3d 779 (8th Cir. 2006); Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006); *In re* Navy Chaplaincy, 306 F.R.D. 33 (D.D.C. 2014); Richardson v. Kane, No. 3:CV-11-2266, 2013 WL 1452962 (M.D. Pa. Apr. 9, 2013); Mothersell v. City of Syracuse, 289 F.R.D. 389 (N.D.N.Y. 2013); Valdez v. City of San Jose, No. C 09-0176 CW, 2013 WL 752498 (N.D. Cal. Feb. 27, 2013); M.R. v. Bd. of Sch. Comm'rs of Mobile Cty., 286 F.R.D. 510 (S.D. Ala. 2012); N.B. *ex rel.* Buchanan v. Hamos, No. 11 C 6866, 2012 WL 1953146 (N.D. Ill. May 30, 2012); Dykes v. Dudek, No. 4:11cv116/RS-WCS, 2011 WL 4904407 (N.D. Fla. Oct. 14, 2011); Martinez v. Brown, No. 08-CV-565 BEN (CAB), 2011 WL 1130458 (S.D. Cal. Mar. 25, 2011); Lightfoot *ex rel.* Estate of Lightfoot v. District of Columbia, 273 F.R.D. 314 (D.D.C. 2011); Jackson v. Se. Pa. Transp. Auth., 260 F.R.D. 168 (E.D. Pa. 2009); Blunt v. Lower Merion Sch. Dist., 262 F.R.D. 481 (E.D. Pa. 2009); Nelson *ex rel.* M.C. v. Bd. of Educ. of Albuquerque Pub. Sch., No. 07-1027 JH/RHS, 2009 WL 6055840 (D.N.M. Jan. 7, 2009); Turner v. Grant Cty. Det. Ctr., No. 05-148-DLB, 2008 WL 821895 (E.D. Ky. Mar. 26, 2008); Bill M. *ex rel.* William M. v. Neb. Dep't of Health & Human Servs. Fin. & Support, No. 4:03CV3189, 2007 WL 2068187 (D. Neb. July 17, 2007); Carson P. *ex rel.* Foreman v. Heineman, 240 F.R.D. 456 (D. Neb. 2007); McClendon v. Sch. Dist. of Phila., No. Civ.A. 04-1250, 2005 WL 549532 (E.D. Pa. Mar. 7, 2005).

92. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

93. *Id.*

94. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, REG., Summer 2007, at 50.

95. On the historical shift in employment discrimination litigation from a public interest model to a for-profit model, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1300–01 (2003).

96. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004).

affirmed.[97]

To judge from advocates' arguments, the policy concerns implicated by class certification in *Wal-Mart* had much to do with alleged distortions that the prospect of a huge monetary recovery created.[98] Since the mid-1990s, the requirements, such as predominance, that Rule 23(b)(3) imposes for the certification of a class seeking monetary remedies have evolved in response to these concerns.[99] But a quirk of procedural history routed *Wal-Mart* toward the distinctive requirements that class action procedure normally reserves for injunctive relief litigation, namely commonality and Rule 23(b)(2).[100] This mismatch between the huge sums at stake and the procedural pathway the case followed proved fateful. The Court could have scuttled the class without forging new doctrine had it been able to do so on Rule 23(b)(3) grounds. But the Court had only the commonality requirement and Rule 23(b)(2) to test for similarities among class members' claims.

The Court offered a novel interpretation of commonality to decertify the class. Rule 23 requires a basis to believe that all class members' claims "can productively be litigated at once."[101] The Court elaborated: "Their claims must depend upon a common contention," which in turn "must be of such a nature that it is capable of classwide resolution."[102] In other words, determination of this contention's "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[103] The Court concluded this aphoristic discussion:

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[104]

97. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

98. *E.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 694 n.256 (2013) (summarizing policy arguments made by amici).

99. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 610 (1997) (expressing concerns about agency cost problems related to the representation of class members); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (expressing concerns about how class certification can amplify the monetary risk of litigation and distort defendant behavior).

100. *See, e.g.*, David Marcus, *From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure*, 56 ST. LOUIS U. L.J. 1231, 1246–47 (2012) (describing the specious reasons courts in the early 1970s gave for routing employment discrimination suits seeking back pay through Rule 23(b)(2)).

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

102. *Id.*

103. *Id.*

104. *Id.* at 2552.

The *Wal-Mart* plaintiffs lacked "significant proof" of such glue. "Because [the plaintiffs] provide no convincing proof of a companywide discriminatory pay and promotion policy, . . . they [did] not establish[] the existence of any common question."[105]

The Court also held that the class failed on Rule 23(b)(2) grounds. "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted,'" the Court explained, or "the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[106] To meet Rule 23(b)(2), a proposed remedy must "benefit[] all its members at once" and thus cannot include back pay, an individualized remedy that requires claimant-by-claimant administration.[107]

Wal-Mart's elaborations on commonality, merits evaluation, and Rule 23(b)(2) have "changed the landscape" for the public interest class action,[108] even though nothing in the opinion or even in the copious merits filings with the Court exhibit the slightest concern with the sort of distinctive policy concerns that structural reform litigation triggers. Few doubt that the decision raises the bar for class certification.[109] Certainly lawyers for various stage agencies around the country think so, as evidenced by their efforts to get injunctive relief classes decertified in the decision's immediate wake.[110] The lawyers for Oklahoma's foster care agency moved for decertification three weeks after *Wal-Mart*, emphasizing the decision's "significant proof" language and arguing that the plaintiffs adduced no evidence to establish that common policies or practices caused all

105. *Id.* at 2556–57.

106. *Id.* at 2557 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

107. *Id.* at 2558.

108. DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013).

109. *See, e.g.*, M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012); Thorpe v. District of Columbia, 303 F.R.D. 120, 126 (D.D.C. 2014); N.B. v. Hamos, 26 F. Supp. 3d 756, 760 (N.D. Ill. 2014).

110. *See, e.g.*, Letter from James P. Sullivan, Assistant Solicitor Gen., Office of the Attorney Gen. of Tex., to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (June 23, 2011), M.D. *ex rel.* Stukenberg v. Perry, No. 11-90028 (5th Cir. June 23, 2011); Letter from Michael Aldana, Partner, Quarles & Brady LLP, to Gino J. Agnello, Clerk of Court, U.S. Court of Appeals for the Seventh Circuit (June 27, 2011), Jamie S. v. Milwaukee Pub. Sch., No. 09-2741 (7th Cir. June 27, 2011); OKDHS Defendants' Motion to Decertify the Class & Brief in Support Thereof at 8–21, D.G. *ex rel.* Strickland v. Yarbrough, 278 F.R.D. 635 (N.D. Okla. 2011) (No. 4:08-cv-00074-GKF-FHM); Defendants' Supplemental Memorandum of Law in Support of Their Motion to Decertify Class, DL v. District of Columbia, 277 F.R.D. 38 (D.D.C. 2011) (No. 1:05-cv-01437-RCL); Defendants' Memorandum of Law in Support of Their Motion to Decertify the Plaintiff Class at 1–2, Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D. 30 (D. Mass. 2011) (No. 1:10-cv-30073-MAP). Some of these efforts bordered on the ridiculous. Lawyers for Chicago's Board of Education tried to use *Wal-Mart* to erase a fourteen-year-old consent decree benefiting students with disabilities five months before the decree was set to expire and twenty-one years after the board had last complained about class certification. Corey H. *ex rel.* Shirley P. v. Bd. of Educ. of Chicago, No. 92 C 3409, 2012 WL 2953217, at *5 (N.D. Ill. July 19, 2012), *appeal dismissed as moot sub nom.* Corey H. v. Chicago Bd. of Educ., 528 F. App'x 666, 669 (7th Cir. 2013).

children to suffer harm.[111] Without proof of a common policy, these lawyers maintained, the plaintiffs could not show that all class members' claims of mistreatment could be resolved at once and satisfy commonality.[112] Although the district court rejected the argument, it felt the need to make extensive factual findings based on voluminous evidence and all but rule for the plaintiffs on the merits.[113] Previously the court had issued its class certification decision from the bench after a half-day of oral argument.[114]

Three post-*Wal-Mart* circuit decisions confirm the arrival of a new, more restrictive era. One case involves a decade-long challenge to the adequacy of education for children with disabilities in Milwaukee. In a 2012 opinion that cites *Wal-Mart* more than a dozen times, the Seventh Circuit eviscerated a class certification order five years after the plaintiffs prevailed at trial.[115] The defendants had ultimately conceded that the class satisfied the commonality and Rule 23(b)(2) requirements when the parties litigated class certification before the district court in 2003.[116] Nine years later, the class foundered on these very shoals.[117] A sweeping remedy issued to fix disabilities education in Milwaukee, estimated to cost the city $74 million to implement, disappeared when the Seventh Circuit issued its decision.[118] In 2013, the D.C. Circuit invalidated a class of students with disabilities in a similar decision, rendered seven years

111. *See* OKDHS Defendants' Motion to Decertify the Class & Brief in Support Thereof, *supra* note 110.

112. The state's lawyers did not couch their argument in terms of commonality and instead bluntly argued that the plaintiffs adduced no evidence of a common policy. *Id.* at 12.

113. *See* D.G. *ex rel.* Strickland v. Yarbrough, 278 F.R.D. 635, 638–46 (N.D. Okla. 2011). The court held that the plaintiffs established that Oklahoma "has a policy or practice of failing to adequately monitor the safety of plaintiff children causing significant harm and risk of harm to their safety." *Id.* at 644.

114. *See* Reporter's Transcript of Proceedings Had on May 5, 2009, *supra* note 68.

115. *See* Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481 (7th Cir. 2012), *vacating* 519 F. Supp. 2d 870 (E.D. Wis. 2007).

116. *See* Lamont A. *ex rel.* Maurice A. v. Milwaukee Pub. Sch., No. 01-C-928, slip op. at 7 (E.D. Wis. Nov. 14, 2003).

117. *See Jamie S.*, 668 F.3d at 497 (faulting the proposed class on commonality grounds); *id.* at 498 (reversing the class certification order for failing to meet Rule 23(b)(2)). At one point the defendants challenged class certification on commonality grounds, but they ultimately did not rely on this argument. *Compare* Milwaukee Bd. of Sch. Dirs., Milwaukee Pub. Schs. & William Andrekopoulos's Brief in Opposition to Plaintiffs' Motion for Class Certification at 19–22, Lamont A. *ex rel.* Maurice A. v. Milwaukee Bd. of Sch. Dirs., No. 01-C-0928 (E.D. Wis. Dec. 23, 2002) [hereinafter State Defendants' Brief in Opposition] (challenging class certification on commonality grounds), *with* Reply Brief in Support of Second Amended Motion for Class Certification at 8, *Lamont A.*, No. 01-C-0928 (E.D. Wis. Sept. 18, 2003) (correctly noting that neither defendant to the case ultimately challenged the proposed class on commonality grounds). Ironically, the defendants had initially argued against a merits inquiry at the class certification stage. State Defendants' Brief in Opposition, *supra*, at 3.

118. *See* Alan J. Borsuk, *The Complex Legacy of* Jamie S., MARQ. LAW., Fall 2013, at 19; Erin Richards, *MPS Wins Special-Needs Education Lawsuit*, MILWAUKEE J. SENTINEL, Feb. 4, 2012, http://www.jsonline.com/news/education/mps-wins-specialneeds-suit-4i42d1d-138692134.html. The defendants successfully moved for judgment on the pleadings based on the Seventh Circuit's class certification decision. *See* Jamie S. v. Milwaukee Bd. of Sch. Dirs., No. 01-C-928, 2012 WL 3600231, at *1–3 (E.D. Wis. Aug. 20, 2012).

after the district court certified the class and two years after a trial verdict in the plaintiffs' favor.[119] *M.D. ex rel. Stukenberg v. Perry*, the Texas foster care reform case, ran aground in 2012 in the Fifth Circuit, failing to satisfy what the appellate court described as the "heightened" standard for commonality and Rule 23(b)(2).[120]

A couple of additional examples illuminate how restrictively some courts have applied the requirements Rule 23 imposes for public interest cases after *Wal-Mart*. In a South Carolina jail conditions case, the district court denied class certification on commonality grounds, explaining in part that the proposed class could not meet Rule 23(a)(2)'s threshold because not all class members were injured by precisely the same unconstitutional conditions.[121] A class could not consist of some prisoners forced to eat inedible food and others suffering from inadequate healthcare.[122] All prisoners, in effect, must allege the same exact deprivation to join a single class. In fact, commonality would be lacking even if all class members were allegedly injured in the same way, as the court would have to adjudicate each one's circumstances to determine if a rights violation had occurred. Individual issues would outweigh common ones, the court insisted, treating commonality as predominance.[123] The class also failed the Rule 23(b)(2) test. Because some class members allegedly suffered from overcrowding and others from lack of recreation, the court reasoned, each class member would need an individually tailored injunction to remedy his particular injury.[124] Were other courts to embrace this decision's logic, prison conditions litigation would recede considerably, if not disappear altogether.[125]

Another prison conditions case, challenging practices associated with strip-searches of female inmates in Los Angeles County jails, suggests how heavy an evidentiary burden some judges think *Wal-Mart* imposes on plaintiffs at class certification.[126] The plaintiffs alleged a number of problems with the searches; officers allegedly conducted searches under filthy conditions, used demeaning language while women were searched, and so on.[127] Proceeding allegation by allegation, the court determined that the plaintiffs lacked "significant proof" to establish that each of the alleged practices existed and was common to the class.[128] For instance, the plaintiffs lacked sufficient evidence that officers

119. *See* DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013).

120. 675 F.3d 832, 839 (5th Cir. 2012).

121. Williams v. Jones, No. 9:14-cv-00787-RMG-BM, 2014 WL 2155251, at *7–8 (D.S.C. May 22, 2014).

122. *Id.* at *8.

123. *Id.*

124. *Id.* at *9.

125. *But see* Scott v. Clarke, 61 F. Supp. 3d 569, 587 (W.D. Va. 2014).

126. *See* Amador v. Baca, 299 F.R.D. 618, 626–28 (C.D. Cal. 2014). The district court ratified most of its class certification decision, and the parts discussed here, when the plaintiffs moved for reconsideration. *See* Amador v. Baca, No. CV-10-1649 SVW, 2014 WL 10044904 (C.D. Cal. Dec. 18, 2014).

127. *Amador*, 299 F.R.D. at 624–28.

128. *Id.* at 626–28.

subjected the class to demeaning language, the court held, because "significant variation" existed among the 168 declarations from class members on the issue.[129] Some class members declared that deputies used obscenity while giving otherwise appropriate commands, whereas others made obscene comments about inmates' bodies.[130] Against this evidence, the court gave controlling weight to the county's written policy that searches be conducted "in a respectful manner."[131] Without proof of perfect or near-perfect identity among class members' experiences, in other words, the court discredited scores of declarations describing similar treatment in favor of deference to the county's stated policy.

C. DIRECTIONLESS PROCEDURE

This new doctrinal tumult is remarkable because there is no obvious reason why it should exist. The prodefendant trajectory that class action procedure has followed since the mid-1990s[132] reflects worries that huge sums of money can distort litigant and lawyer decision making in unjust and inefficient ways. But fears about plaintiffs' lawyers enriching themselves at the expense of the class—one of these distortions—are inapposite in public interest litigation.[133] So are concerns that pressure generated by the amount of money at stake will push defendants toward settlements unwarranted by the facts and applicable substantive law.[134] An earlier generation of scholars did identify a set of policy

129. *Id.* at 627.

130. *Id.*

131. *Id.*

132. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing and critiquing that trajectory).

133. Courts have occasionally intimated that plaintiffs' counsel in impact litigation are motivated by attorney's fees, awardable in many instances under applicable fee-shifting statutes. *See, e.g.*, Clark K. *ex rel.* Anderson v. Willden, No. 2:06-cv-01068-RCJ-RJJ, slip op. at 7 (D. Nev. July 10, 2008). This is nonsense. It is difficult to get rich litigating public interest cases, especially those concerning prisoners' rights, when fees are capped by statute. *See* 42 U.S.C. § 1997e(d)(3) (2012); *see also* Cleveland v. Curry, No. 07-cv-02809-NJV, 2014 WL 789098, at *2 (N.D. Cal. Feb. 26, 2014); Leonard v. Louisiana, No. 07-813, 2013 WL 3558291, at *2 (W.D. La. July 10, 2013). The fee-shifting statutes that apply in many types of public interest cases do not permit a court to use a multiplier to enhance fees, as is common in money damages litigation. *E.g.*, Lee v. Keith, No. 04-3042, 2007 WL 2683804, at *3 (C.D. Ill. July 23, 2007).

An example of modest financial returns to public interest litigators is illustrative. In the Oklahoma foster care reform case, the court awarded the executive director of the New York-based public interest organization that spearheaded the case fees at a rate of $450 per hour. D.G. *ex rel.* Strickland v. Yarbrough, No. 08-CV-074-GKF-FHM, 2013 WL 1343151, at *2 (N.D. Okla. Mar. 31, 2013). All other lawyers, including a partner at Kaye Scholer, were compensated at a rate of $300 per hour. *Id.* According to a roughly contemporaneous survey, big law firms in New York billed out associate time at an average of $520 per hour, and the average Kaye Scholer partner billed her time at $860 per hour. Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore*, NAT'L L.J., Jan. 13, 2014, at 2, 4.

134. *E.g.*, *In re* Veneman, 309 F.3d 789, 794 (D.C. Cir. 2002) ("[W]e do not see how the certification of a class limited to injunctive and declaratory relief can create the sort of high-stakes situation that puts substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims." (citation omitted)); Prado-Steinman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1277 (11th Cir. 2000) ("[W]e do not believe the grant of class status here raises the stakes of litigation so substantially that the

problems specific to Rule 23's use in public interest litigation,[135] but decades have passed since they did so,[136] and none of the new-era decisions suggests any concern for the sorts of issues these commentators flagged.

Nor do new-era decisions ventilate worries about the propriety of structural reform litigation more generally. Of course, the reform of government structures, policies, and practices has prompted significant controversy for decades. Perceived excesses in judicial attempts to take over executive functions prompted a backlash here and there, manifested in the substance of various claims these cases present,[137] and trans-substantively in standing doctrine and doctrine limiting the scope and content of equitable remedies.[138] Judge Easterbrook may have hinted that class action procedure is the right lever to pull to reign in this litigation, but no one has developed this idea to any extent. To the contrary, the widespread perception is that the structural reform moment lapsed years ago, not that this litigation continues to pose significant difficulties that require a procedural solution couched in Rule 23's terms.[139] Certainly the timing of the new era's arrival is perplexing, if class action retrenchment is meant to bring necessary relief to government agencies overtaxed by usurpative impact litigation. If anything, modern-day structural reform litigation presently proceeds more legitimately, judged by metrics of separation of powers and institutional competence, than it did during Rule 23's old, permissive era.[140]

What we know, then, is that the doctrinal environment has changed dramatically as Rule 23 has entered a new era for public interest litigation and that the class certification stage is now a perilous one for structural reform plaintiffs. What we do not know is why this change has happened or how courts should administer class action doctrine going forward. The Why question lacks a good

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Defendants likely will feel irresistible pressure to settle. The certified Plaintiff class, while large, is only seeking declaratory and injunctive relief (not money damages)."). *But see* Elizabeth M. v. Montenez, 458 F.3d 779, 784 (8th Cir. 2006).

135. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 504–11 (1976); Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 508–17 (1982); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1188 (1982). These concerns mostly had to do with the adequacy of class member representation by ideologically motivated class counsel whose interests as organizations might have diverged from those of class members.

136. I could locate only one article on class action doctrine in public interest cases that postdates 1989. *See* Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487 (1999).

137. *E.g.*, Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 719–20 (1993).

138. *See, e.g.*, Chayes, *supra* note 35, at 8–27 (describing standing doctrine circa 1982); *id.* at 45–56 (describing remedies doctrine circa 1982).

139. *E.g.*, Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 144–45 (2003); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1410–11 (2007). Somewhat current expressions of judicial disquiet are striking for the dated sources they draw upon. *See, e.g.*, Horne v. Flores, 557 U.S. 433, 448–50 (2009) (critiquing aspects of structural reform litigation by citing to a number of sources, almost all of which date from the 1980s); Barcia v. Sitkin, 367 F.3d 87, 105 n.23 (2d Cir. 2004) (same).

140. Jeffries & Rutherglen, *supra* note 139, at 1411.

answer, or at least an answer that explains the emergence of a new era in terms of the particular policy problems that claim aggregation in public interest cases triggers. The rest of this Article attempts to answer the How question. I take as my presumption that no new pathologies or dysfunctions in structural reform litigation demand class action retrenchment, and instead that courts ought to use class action procedure for these cases in a manner that is most consistent with the function that Rule 23 plays.

II. THE FORMS OF THE PUBLIC INTEREST CLASS ACTION

Existing commentary offers some guidance for the administration of class action procedure in public interest litigation. Studies of the history of claim aggregation and the choices that Rule 23 makes for the governance of various types of lawsuits converge on versions of the same basic idea: courts can certify classes seeking injunctive relief when claims are interdependent and (more controversially[141]) remedies are indivisible.[142] I agree that existing doctrine requires Rule 23 to test for claim interdependence and remedial indivisibility, as I suggest in Part IV. But to identify these subtextual requirements in Rule 23 is not enough to guide its application when plaintiffs pursue structural remedies. Public interest cases differ in terms of the varieties of claim interdependence and remedial indivisibility that they present, and the hard questions for Rule 23's administration lie in these differences.

An examination of the various forms that public interest class actions assume highlights these questions. A typology organized around the varieties of claim interdependence and remedial indivisibility describes these forms. This typology, its representation of public interest litigation, and the analytical vocabulary it offers ultimately generate complete guidance for Rule 23's administration.

A. CLAIM INTERDEPENDENCE AND REMEDIAL INDIVISIBILITY

As noted, courts can certify injunctive relief class actions without any determination that common issues of law or fact predominate over individual ones. Also, whereas class members in suits for money damages are given notice and an opportunity to opt out of the class upon certification, their equivalents in suits for injunctive relief do not enjoy these rights. Why? Without a test for predominance, might not a court certify a class whose members' claims differ so much that a good deal of individualized litigation would remain after the conclusion of classwide adjudication, rendering the proceeding inefficient or

141. For criticism of the notion of indivisibility as it has been described in case law and scholarship, see Bone, *supra* note 83, at 703–04. *But cf.* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1117 (2013) (accepting indivisibility as a criterion if understood appropriately).

142. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (describing the prerequisites discussed here as "the crux of the rule in actual operation today").

pointless? Why should class members not enjoy the right to opt out, just because the named plaintiffs seek an injunction instead of money?

These questions have ready answers, if claim interdependence and remedial indivisibility are indeed implicit requirements for the certification of injunctive relief classes. Richard Nagareda defined interdependent claims as ones for which "it is not possible to ascertain the legality of the defendant's conduct as to one affected claimant without necessarily doing so as to all others."[143] Robert Bone gets at a similar idea: "The (b)(2) category applies when the defendant has acted toward a group qua group without singling out any individual for special treatment,"[144] and the lawsuit "adjudicat[es] an impersonal status that [class members] happen to occupy."[145] A facial challenge to a juvenile curfew law as invalid under the First Amendment, for example, asserts an interdependent claim. A court cannot possibly determine that the curfew violates a child's rights without effectively concluding that the curfew violates all children's rights because the curfew does not differentiate among children.

Remedial indivisibility exists where the court can legitimately issue only a single, undifferentiated remedy that necessarily benefits all victims of the defendant's conduct.[146] This prerequisite would seem to follow logically from the claim interdependence requirement.[147] Claim interdependence necessarily means that a commensurate remedy "affects individuals only as a result of their possessing the general attributes of group membership," and is not tailored to the particular circumstances of class members.[148] But one could imagine interdependent claims, at least as presently defined, that do not ineluctably generate indivisible remedies. A statute, for instance, might entitle all recipients of an unsolicited text message to a statutory penalty of $500, with no showing of actual damages necessary.[149] The claim against the sender is interdependent because a court could not adjudicate the text message's lawfulness without in

143. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 232 (2003).

144. Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 611 (2011).

145. *Id.* at 610. Samuel Issacharoff echoes this idea. Using school desegregation suits as a Rule 23(b)(2) prototype, Professor Issacharoff maintains that "no child ha[d] an individual stake in the outcome of that litigation separate from that of the other similarly situated children." Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059 (2002).

146. This description is different but faithful to existing scholarship. *See* Bone, *supra* note 141, at 1117 (defining remedial indivisibility as referring "to a situation where the judge does not single out any group member for individual treatment but instead acts on the class as a whole").

147. As Professor Issacharoff explains, using the school desegregation lawsuit as his example, "[a]ny declaration of unconstitutionality, or even more certainly an injunction against the continued operation of the segregated school system . . . could not possibly have been confined to [a single plaintiff's] claims alone." Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 373 (2012).

148. Bone, *supra* note 144, at 611.

149. *See* 47 U.S.C. § 227(b)(3)(B) (2012); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952–53 (9th Cir. 2009).

effect doing so for all recipients. But a court could readily order the defendant to pay a single plaintiff $500, without requiring that all recipients also recover.

Remedial indivisibility is thus more than just the remedial consequence of claim interdependence. As Professor Nagareda explained, an indivisible remedy "stand[s] as a practical matter to redound to the benefit of all those adversely affected by the disputed practice on the defendant's part, not merely to the particular plaintiff who happens to have sued."[150] An injunction in the juvenile curfew case would qualify. Any sensible, administrable remedy would have to enjoin the curfew *in toto* and thereby benefit all children at once. An injunction administered minor by minor—an order to issue a *laissez-passer* to a particular sixteen-year-old, for example—would be ridiculous.

Claim interdependence and remedial indivisibility arguably explain the distinctive procedural treatment that Rule 23 prescribes for injunctive relief cases. If a court cannot help but adjudicate all claims when deciding one, and if any remedy would necessarily inure to the benefit of all, then opt-out rights have no practical value.[151] A juvenile aggrieved by the curfew might opt out upon receiving notice of the class suit, but he would find his claim against the city adjudicated in fact, if not formally, once the injunction issues. Likewise, if all class members share in an undifferentiated claim for an indivisible remedy, then common issues not only predominate over individual ones—they are all the case involves. To the extent that the predominance inquiry ensures that the adjudication of claims all at once in a single case is both feasible and efficient, it would gild the lily when claims are interdependent and remedies indivisible.[152]

B. A TYPOLOGY OF THE PUBLIC INTEREST CLASS ACTION

Claim interdependence and remedial indivisibility are lacking as guides to Rule 23's administration, as a brief hypothetical illustrates.[153] When a school district badly administers its disability education program, the injured child's parents can bring an independent claim to obtain compensatory education funds and an adequate individualized education program (IEP) tailored to the specific child's needs.[154] The remedy is divisible because funds and an IEP for one child

150. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1118 (2010); *see also id.* at 1132 (suggesting that Rule 23(b)(2) class actions involve indivisible remedies).

151. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. h (AM. LAW INST. 2010); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 359–60 (1999). Professor Bone offers a different justification for the mandatory nature of the injunctive relief class, one that draws upon the history of representative litigation and theory about autonomy and legitimacy. Bone, *supra* note 144, at 610–11.

152. *See, e.g.*, Bone, *supra* note 83, at 651.

153. For another critique of remedial indivisibility as a guide to the administration of Rule 23, see *id.* at 703.

154. *E.g.*, Fullmore v. District of Columbia, 40 F. Supp. 3d 174, 179 (D.D.C. 2014) ("In remedying a violation of the IDEA, a court may 'grant such relief as [it] determines is appropriate.' 'Federal courts have interpreted "appropriate relief" to include compensatory education . . . .'" (alteration in original)

will not necessarily benefit anyone else. If past is prologue, however,[155] the parents can also sue on behalf of all children with disabilities in the district and seek systemic reform of the district's disability education program if they discover widespread problems. They would then allege an interdependent claim of systemic deficiencies and seek an indivisible remedy—a better policy for involving parents in the IEP process, for instance, or better recordkeeping to ensure that children with disabilities do not fall through the cracks. Can the parents simply opt to package their child's experience as a class action? Does certification depend upon something so malleable as litigant choice?

As I argue in Part IV, answers to these sorts of questions depend upon the varieties of claim interdependence and remedial indivisibility that public interest litigation presents. This argument requires a more nuanced description of the forms that public interest class actions assume than what existing commentary depicts. A three-part typology fills this lacuna.

Type I cases involve necessarily interdependent claims and necessarily indivisible remedies. Figure 1, based on a case challenging the enforcement of a California statute on Fourth Amendment grounds, is illustrative. The plaintiffs asked the court to enjoin California highway patrol officers from enforcing a state law that penalizes motorcyclists who wear helmets out of compliance with federal standards.[156] The plaintiffs alleged that officers could not tell whose helmets failed to meet federal standards before stopping motorcyclists, and thus the stops necessarily lacked reasonable suspicion.[157]

Type I cases concern policies that the central agency generates at what I call Level I, and that bureaucratic intermediaries administer at Level II without alteration. For this reason, all California motorcyclists—the enforcement targets—experience the Level I policy in exactly the same way. The highway patrol officer—the bureaucratic intermediary—simply directs the Level I conduct at the subject, pursuant to the central agency's directive. The identity between the Level I and Level II conduct makes any claim challenging the agency's behavior necessarily interdependent. A court could not determine the lawfulness of one motorcyclist's stop for a helmet law violation without adjudicating the constitutionality of all motorcyclists' stops.

The inability of the bureaucratic intermediaries to distinguish among the targets renders the remedy sought necessarily indivisible. An individualized injunction—"do not enforce the state helmet law against motorcyclist Leo Marcus"[158]—is implausible. An officer presumably could not know whether she was enforcing the helmet law against Leo until after she pulled him over, at which point she already would have stopped him without reasonable suspicion.

(first quoting 20 U.S.C. § 1415(i)(2)(C); then quoting Diatta v. District of Columbia, 319 F. Supp. 2d 57, 64 (D.D.C. 2004))).

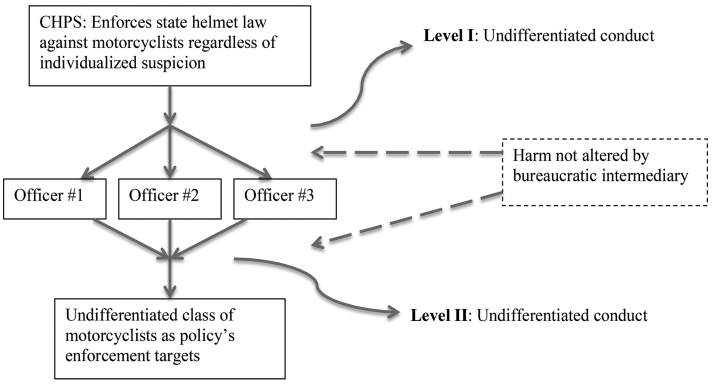
155. Weber, *supra* note 27, at 475–77 (discussing IDEA class actions before *Jamie S.*).

156. Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1490 (9th Cir. 1996).

157. *Id.* at 1490–91.

158. Leo Marcus is the author's son and is pleased to be referred to in this Article.

Figure 1: Type I Necessarily Interdependent Claim, Necessarily Indivisible Remedy



Any remedy necessary to protect against the injury would have to benefit all targets to protect any single one.

The Type II case also involves necessarily interdependent claims, but it generates plausibly indivisible remedies. Figure 2 represents a class action brought by several couples, before *Obergefell v. Hodges*,[159] challenging Virginia's refusal to allow same-sex couples to marry.[160] The plaintiffs sought an injunction enjoining enforcement of the state's laws against same-sex marriage and ordering responsible officials to permit the issuance of marriage licenses to same-sex couples.[161]

The three couples had necessarily interdependent claims. The State Registrar—the central agency—had adopted a policy against same-sex marriage at Level I that each circuit court clerk—the bureaucratic intermediary—enforced at Level II without any alteration or adjustment tailored to a particular couple. For this reason, a court could not have adjudicated the lawfulness of Couple 1's treatment without in effect deciding whether Couple 2 and Couple 3—the other targets of the Level I conduct—were treated unlawfully as well.

The remedy, however, is only plausibly indivisible. Because the bureaucratic intermediaries can differentiate among enforcement targets, a court could do so as well. It could require the state to grant a marriage license to Couple 1 and make Couples 2 and 3 sue on their own to obtain an equivalent remedy. This remedial parsimony may be hardhearted and inefficient, but it is not fanciful.[162] Indeed, scope-of-remedy doctrine typically counsels for individually tailored injunctions, even for interdependent claims, unless the case proceeds as a class

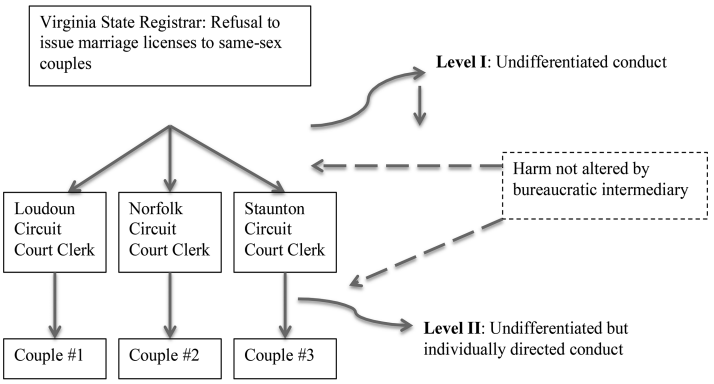
159. 135 S. Ct. 2584 (2015).

160. Harris v. Rainey, 299 F.R.D. 486 (W.D. Va. 2014).

161. *See id.* at 488–90.

162. In a case challenging Florida's law prohibiting same-sex marriage, the judge issued a preliminary injunction that benefited just the individual plaintiffs, even though he described the law as facially invalid. Brenner v. Scott, No. 4:14cv107-RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan. 1, 2015).

Figure 2: Type II Necessarily Interdependent Claim, Plausibly Indivisible Remedy



action.[163]

The Type III lawsuit involves plausibly interdependent claims and plausibly indivisible remedies. The plaintiffs do not attack some stated, explicitly promulgated policy that applies uniformly to all class members; facial challenges are the fodder of Type I and Type II cases. Rather, they target more informal, but systemic, customs or practices that cause widespread harm. *Parsons v. Ryan*, a case brought on behalf of all prisoners in the custody of the Arizona Department of Corrections (ADC), provides the illustrative example here.[164] The named plaintiffs allege a wide range of problems with healthcare delivery in the ten prison complexes the ADC operates.[165] Some plaintiffs have gone without necessary medications, other plaintiffs report significant delays in diagnoses and surgeries, and still others allege severe mental health problems arising from extended stays in solitary confinement.[166] The plaintiffs contend that the ADC's practice or custom of deliberate indifference to inmate health, manifested by

163. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 246 (3d ed. 2002) (asserting that "[p]ower to issue . . . an injunction ['on behalf of all persons similarly situated'] is in fact very doubtful" except in a class action). The case law on the scope of the remedy authorized in an individual action is unsettled. I discuss case law suggesting the limits I describe in Part III. *See infra* note 202 and accompanying text. For cases permitting broad relief in individual actions, see, for example, *Clement v. California Department of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004); *Soto-Lopez v. New York City Civil Service Commission*, 840 F.2d 162, 168–69 (2d Cir. 1988); *Davis v. Astrue*, 874 F. Supp. 2d 856, 868 (N.D. Cal. 2012). *See also* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2030–34 (2015). Given the opinion of the leading commentator on the law of remedies, and given the several appellate decisions insisting upon a limited scope of remedy in individual litigation, I believe I describe the majority rule in the text.

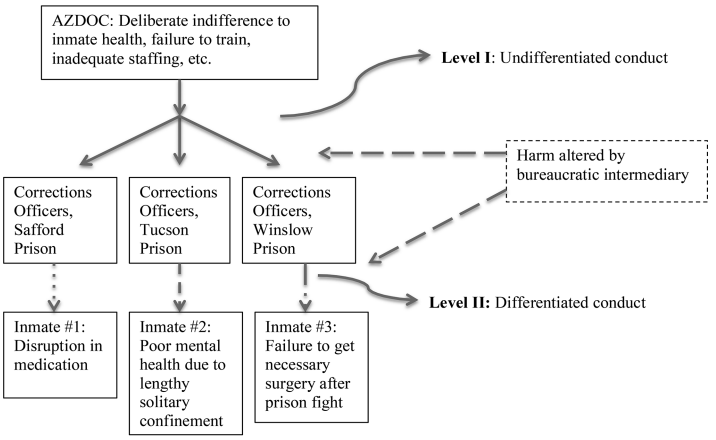
164. *See* 754 F.3d 657 (9th Cir. 2014).

165. *See* Parsons v. Ryan, 289 F.R.D. 513, 517-19 (D. Ariz. 2013).

166. *See* Third Amended Class Action Complaint for Injunctive & Declaratory Relief at 3–15, Gamez v. Ryan, No. CV-10-2070-PHX-FJM, 2012 BL 80622, at *1 (D. Ariz. Mar. 21, 2012) (No. CV 10-2070-PHX-JWS (MEA)).

inadequate training and insufficient staffing, causes these and many other injuries to thousands of prisoner class members.[167]

Figure 3: Type III Plausibly Interdependent Claims, Plausibly Indivisible Remedies



Type III claims are only plausibly interdependent, with the degree of connection among them determined by which level of conduct the plaintiffs challenge. Unless Inmate 1 has reason to think that the officials within the central agency were apprised of his particular distress, a court cannot limit its adjudication of the ADC's deliberate indifference, the alleged Level I conduct, only as it concerns a single enforcement target. A finding of deliberate indifference at Level I would be undifferentiated for and applicable to all inmates.

But bureaucratic intermediaries—here, the corrections officers at the different Arizona prisons—alter the Level I conduct. The ADC's custom can influence each officer differently. The Safford warden might implement a policy to provide for emergency medical care for inmates injured in prison fights. But his prison might neglect the medical care of inmates with diabetes, a failing made possible by the ADC's indifferent management. The Tucson prison might have an adequate insulin protocol in place but ignore mental health needs of inmates in solitary confinement. These different manifestations of Level I deliberate indifference at Level II mean that Inmate 1 could plausibly bring an independent claim to challenge the Safford Prison's failure to provide him with insulin. A court could adjudicate the lawfulness of this Level II conduct without any judicial comment, formal or otherwise, upon the legality of emergency healthcare in Winslow or mental healthcare in Tucson, or upon the central agency's behavior at Level I.

167. *See id.* at 18–34.

Likewise, the remedy in the Type III case is only plausibly indivisible. If a court finds the ADC liable for systemic deliberate indifference at Level I, it could issue an injunction requiring structural changes to the provision of healthcare in all ten Arizona prisons. The entire prison system, for instance, might have to implement an improved system for medical recordkeeping. Presumably the ADC would not use the new system only for some inmates and not others, and thus the remedy's benefits would flow to the undifferentiated group. But if the court wants to remedy only a Level II harm, it could do so with a divisible injunction. It could simply order, for instance, that Inmate 1 receive uninterrupted access to insulin or that Inmate 2 receive appropriate psychiatric care.

The three types,[168] summarized in Table 1 below, are necessarily simplifications from the messiness and diversity of real-world public interest litigation. But they helpfully clarify important questions that an account of the public interest class action needs to answer.

On the eve of the *Wal-Mart* argument in the Supreme Court, Professor Nagareda insisted that "the crucial question" for class certification "is whether the members of the proposed class are the victims of the same wrong . . . or whether they are the victims of differing, individualized wrongs."[169] For public interest litigation, this question is too crude, for it glosses over complexities in the bureaucratic distribution of government harm. Type III class members are both types of victims. Can they join together in a single lawsuit and seek a common injunction? Or are the distinctive procedural requirements Rule 23 provides for injunctive relief suits reserved for Type I and II cases? If Type III cases can qualify as class actions, under what circumstances? The function that class action procedure plays in public interest litigation can provide answers.

III. THE FUNCTION OF CLASS ACTION PROCEDURE IN PUBLIC INTEREST LITIGATION

The function of class action procedure in public interest litigation is not well understood, even though public interest cases have proceeded as class actions for decades. Indeed, confusion over this function has spawned an oft-raised defense to class certification—the "necessity" doctrine—that derides claim aggregation in public interest cases as unnecessary. An understanding of Rule 23's necessity doctrine requires looking beyond its text and history to the web of doctrinal governance for public law litigation. The intersection of class action procedure with standing and scope-of-remedy doctrines—two important levers

168. One other possible type are cases in which claims are plausibly interdependent, but remedies are necessarily indivisible. It is doubtful that such cases exist, or exist in significant numbers. If a claim is plausibly independent, it means that the court can adjudicate a version of it that requires individualized proof, specific to the plaintiff. In such instances, a remedy is almost assuredly going to be tailored to that particular individual. Requiring individualized proof means that something is happening in the world specific to that individual that can be addressed by a tailored remedy.

169. Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 150 (2010).

Table 1: Summary of Types of Public Interest Litigation Cases

Case Type	Claim Interdependence	Remedial Indivisibility
Type I: California Motorcycle	Necessarily interdependent: Level I and Level II conduct are identical, so a court cannot adjudicate the legality of the treatment of one target without doing so for all.	Necessarily indivisibible: A court cannot enjoin any Level II conduct without also enjoining the Level I conduct.
Type II: Virginia Same-Sex Marriage Case	Necessarily interdependent: Level I and Level II conduct are identical, so a court cannot adjudicate the legality of the treatment of one target without doing so for all.	Plausibly indivisble: A court can enjoin Level II conduct directed at a single target without enjoining the Level I conduct, but the adjudication of the interdependent claim also provides a sufficient basis to issue an indivisible injunction directed at the Level I conduct.
Type III: Arizona Prison Conditions Case	Plausibly interdependent: Depending upon the level of harm the plaintiff challenges, the claim is either uniform for all targets or individualized.	Plausibly indivisble: If the plaintiff challenges the Level I conduct, the remedy is indivisble. If the challenges the Level II conduct, it is divisble.

courts have pulled to regulate lawsuits seeking structural reform—gives the former its *raison d'être*. Class certification serves as a counterweight. It neutralizes these doctrines when they would otherwise unnecessarily prevent the full realization of substantive liability policies devised to govern central agency behavior and to be litigated as group claims.

This Part begins with a discussion of the necessity doctrine. I then turn to standing and scope-of-remedy doctrines to show how they can limit lawsuits challenging Level I conduct by government defendants. These limits can be pathological, I argue, when the substantive law explicitly and legitimately licenses groups to pursue such challenges. I conclude this Part by showing how class action doctrine remedies this pathology.

A. THE NECESSITY DOCTRINE

No one disputes Rule 23's core function in money damages suits. When claims are worth less than the cost of litigating them, aggregation renders them marketable and incentivizes a plaintiff's lawyer to bring suit.[170] In contrast,

170. *E.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

confusion persists as to exactly why injunctive relief classes get certified. In 2011, plaintiffs in Alabama sued the Mobile County Public School system to challenge its practice of suspending students for long periods without giving them notice and an opportunity to be heard.[171] The named plaintiffs included a boy who drew a months-long suspension after he was late for lunch, and another whose infraction involved a shirt he had failed to tuck in.[172] The plaintiffs requested an injunction affording students appropriate procedural safeguards before the imposition of such discipline.[173] The district court denied class certification as unnecessary.[174] The sought-after remedy, the district court reasoned, "would be identical whether this action is certified as a class action under Rule 23(b)(2) or not."[175] Hence, the judge asked, "what then would be the point of invoking the burdensome machinery of class certification in this case?"[176]

Class certification may seem all the more unnecessary, even counterproductive, from the plaintiff's perspective.[177] Consider the strategic choice a prisoners' rights lawyer faces if she wants to bring a case like *Parsons*, the illustrative Type III suit. The lawyer cannot justify spending her organization's scarce resources on a case that will improve jail conditions for a single inmate. Moreover, she has reason to think that the state's department of corrections ignores threats to the safety and health of all inmates, the Level I misconduct truly in the lawyer's sights. If the lawyer can challenge this misconduct in an individual action—this is the big if, for reasons soon to be made plain—she can recruit a second client and try again if her first suit fails. The undifferentiated conduct at Level I means that each prisoner's claim targeting it is interdependent and thus identical. But the general rule against nonparty preclusion protects the second plaintiff's claim against any res judicata defense a defendant might assert, relying on the first plaintiff's loss.[178] If the lawyer brings a class action and loses, in contrast, the judgment precludes all inmates from pursuing another Level I claim.[179] Any lawyer would be ill-advised to bring the class action, one

171. Complaint at 2, M.R. *ex rel.* Simmons v. Bd. of Sch. Comm'rs of Mobile Cty., No. 11-0245-WS-C, 2012 WL 2931263 (S.D. Ala. July 18, 2012) (No. CV-11-245).

172. *Id.* at 4–5.

173. M.R. v. Bd. of Sch. Comm'rs of Mobile Cty., 286 F.R.D. 510, 512 (S.D. Ala. 2012).

174. *Id.* at 521.

175. *Id.* at 520.

176. *Id.* at 520; *see also* Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1548 (10th Cir. 1994); Mills v. District of Columbia, 266 F.R.D. 20, 22 (D.D.C. 2010); Skinner v. Quarterman, No. 9:09cv130, 2010 WL 999633, at *2 (E.D. Tex. Feb. 10, 2010) (denying class certification on grounds that the plaintiff's injunction, if granted, will benefit everyone proposed to be included in the class).

177. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433–34 (2003) ("[W]e are at a loss to explain why plaintiffs seeking injunctions would even want to utilize the class action form.").

178. *See* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008).

179. Richard Nagareda identified the justification for mandatory class treatment in Rule 23(b)(2) cases in this ostensible asymmetry between the undifferentiated nature of the defendant's conduct and

would think, at least based on this superficial logic.[180]

Defendants in public interest lawsuits routinely defend against class certification on grounds that it is unnecessary.[181] In response, courts have fashioned a "necessity doctrine" that purports to explain Rule 23's role in these cases but in the end offers little enlightenment.[182] Class certification is necessary if a defendant agency will not promise to conform all of its conduct to an order issued in an individual case.[183] If class certification will somehow enrich the court's perspective on the scale of the problem at issue, then a necessity defense might fail.[184] Less specific to context is the concern that a claim may be rendered moot if an individual plaintiff ages out of foster care or is let out of prison before a court can rule on the merits.[185] A certified class can continue to litigate notwithstanding an end to the named plaintiff's injury.[186] But surely class certification, with all the procedural complexity it introduces, the due process concerns it spawns, and the preclusion power it generates, is a solution out of scale with the mootness problem.[187]

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preclusion doctrine. If an individual plaintiff brings an interdependent claim and wins, a second individual plaintiff can use offensive nonmutual collateral estoppel to preclude the defendant from relitigating issues decided in the first case. If the first individual plaintiff loses, however, the rule against nonparty preclusion prohibits the defendant from taking similar advantage of the judgment when the second plaintiff brings an identical claim. Class certification evens out the preclusion consequences of judgments involving interdependent claims. The defendant can bind all similarly situated people to the judgment, just as all similarly situated plaintiffs could bind the defendant to the judgment. Nagareda, *supra* note 143, at 232.

This analysis is unconvincing. Defendants in public interest litigation, as I have defined it, are government entities. Plaintiffs cannot use nonmutual collateral estoppel against federal defendants. United States v. Mendoza, 464 U.S. 154 (1984). Several circuits have extended this rule to benefit state governments as well. *See, e.g.*, Coeur d'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 690 (9th Cir. 2004); Hercules Carriers, Inc. v. Florida, Dep't of Transp., 768 F.2d 1558, 1579 (11th Cir. 1985). Other courts have further extended this rule against nonparty preclusion to benefit local governments. *See, e.g.*, Petchem, Inc. v. Canaveral Port Auth., No. 6:04-CV-1080ORL28KRS, 2005 WL 1862412, at *3 (M.D. Fla. Aug. 2, 2005). *But cf.* City of Seattle, Exec. Servs. Dep't v. Visio Corp., 31 P.3d 740, 744–46 (Wash. Ct. App. 2001) (discussing authority to the contrary). It would be curious indeed if Rule 23(b)(2) class certification were designed for an apparent asymmetry that, upon closer inspection, would almost never actually exist.

180. For a more nuanced discussion of strategic choices, see Carroll, *supra* note 163, at 2024–39.

181. *See, e.g.*, McMillon v. Hawaii, 261 F.R.D. 536, 547 (D. Haw. 2009); Reynolds v. Giuliani, 118 F. Supp. 2d 352, 391 (S.D.N.Y. 2000).

182. *See generally* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785.2 (3d ed. 2005) (discussing this necessity doctrine).

183. *See* Finch v. N.Y. State Office of Children & Family Servs., 252 F.R.D. 192, 198–99 (S.D.N.Y. 2008).

184. *See, e.g.*, CG v. Pa. Dep't of Educ., No. 1:06-CV-1523, 2009 WL 3182599, at *4 (M.D. Pa. Sept. 29, 2009).

185. *See, e.g.*, Clay v. Pelle, No. 10-cv-01840-WYD-BNB, 2011 WL 843920, at *7 (D. Colo. Mar. 8, 2011); Mental Disability Law Clinic v. Hogan, No. CV-06-6320 (CPS)(JO), 2008 WL 4104460, at *21 (E.D.N.Y. Aug. 29, 2008); *Reynolds*, 118 F. Supp. 2d at 391.

186. *See* Sosna v. Iowa, 419 U.S. 393, 401 (1975).

187. *See* Bronsteen & Fiss, *supra* note 177, at 1433. Another less cumbersome response to the mootness problem, involving the "capable of repetition, yet evading review" exception, has gained a foothold. The exception requires that the harmful action be capable of repetition to the particular plaintiff whose claim is otherwise mooted. DeFunis v. Odegaard, 416 U.S. 312, 318–20 (1974). Taking

The Alabama judge's question begins with the premise that an individual plaintiff can obtain the equivalent of classwide relief without all the procedural fuss. As I argue in Part IV, this is true in Type I cases, where claims are necessarily interdependent and remedies necessarily indivisible. But the operation of standing and scope-of-remedy doctrines renders the assumption unwarranted in Type III cases.[188]

B. THE RIGHT PLAINTIFF PRINCIPLE AND ITS EFFECTS

1. Standing and Scope-of-Remedy Doctrines

A complete understanding of Rule 23's function requires attention to standing and scope-of-remedy doctrines as they presently operate in the federal courts. These are two of the main levers the Supreme Court has pulled to regulate the sort of public law litigation often prosecuted as class actions.[189] Standing doctrine for public law litigation is a muddle, and this Article is hardly the place for the subject's comprehensive treatment.[190] The various tendrils relevant here all convey a basic message: the plaintiff who wants to enjoin a particular defendant must be the right person to seek the injunction. I call this idea the "right plaintiff principle," convenient shorthand for a set of limitations to justiciability and remedy. A plaintiff who tries to vindicate another's injury lacks standing to do so.[191] A plaintiff injured by one defendant cannot sue other defendants who have inflicted the same type of injury on similarly situated victims.[192] Likewise, a plaintiff who has endured a particular type of harm caused by the defendant lacks standing to sue for another related harm that the plaintiff has not personally endured.[193]

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their cues from the Supreme Court's relaxed application of this limit in *Honig v. Doe*, 484 U.S. 305, 318–22 (1988), courts of appeals have, in several instances, jettisoned the limit altogether in public law litigation. *See* United States v. Howard, 480 F.3d 1005, 1009–11 (9th Cir. 2007); Lawrence v. Blackwell, 430 F.3d 368, 372 (6th Cir. 2005); Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116–18 (9th Cir. 2003); Heldman v. Sobol, 962 F.2d 148, 157 & n.9 (2d Cir. 1992). These instances are few, perhaps because the doctrinal pressure to create them has been mostly nonexistent in light of the ready availability of class certification in public law litigation to date and with it the avoidance of mootness problems.

188. On occasion, courts have indicated an appreciation for this situation. *See, e.g.*, All. to End Repression v. Rochford, 565 F.2d 975, 980 (7th Cir. 1977); Van Meter v. Harvey, 272 F.R.D. 274, 283–84 (D. Me. 2011); Mills v. District of Columbia, 266 F.R.D. 20, 22 (D.D.C. 2010); Bacal v. Se. Pa. Transp. Auth., No. Civ. A. 94-6497, 1995 WL 299029, at *6 (E.D. Pa. May 16, 1995).

189. On the importance of standing jurisprudence to structural reform litigation, see Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 558–62 (2012). On remedies doctrine and the regulation of structural reform litigation, see, for example, Jeffries & Rutherglen, *supra* note 139, at 1408–12.

190. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 467 (2008).

191. Warth v. Seldin, 422 U.S. 490, 499 (1975).

192. Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 64 (2d Cir. 2012).

193. Blum v. Yaretsky, 457 U.S. 991, 999 (1982); Arevalo v. Bank of Am. Corp., 850 F. Supp. 2d 1008, 1018 (N.D. Cal. 2011).

The right plaintiff principle also imposes limits on what Richard Fallon calls "remedial standing."[194] The remedy sought determines a plaintiff's standing, not just the harm alleged. In *City of Los Angeles v. Lyons*, the Supreme Court held that a man choked by several police officers did not have standing to seek an injunction prohibiting chokeholds in the future.[195] The man undoubtedly could seek money damages for past brutality.[196] But he lacked standing to sue for an injunction because he failed to show a "real and immediate threat" that he would be choked again.[197]

Standing doctrine acts as a front-end control to ensure that the plaintiff pursuing the injunction against a particular defendant is the right person to do so. Scope-of-remedy doctrine vindicates similar concerns about the match among plaintiff, defendant, and remedy, and as such, it enforces the right plaintiff principle at the back end. Two restrictions are relevant. First, the remedy the plaintiff seeks must be tailored to the injury the plaintiff proves.[198] In *Lewis v. Casey*, the Supreme Court voided an injunction that required the ADC to make legal assistance available to all illiterate and non-English-speaking inmates.[199] The only plaintiff with standing to sue was an English speaker who had suffered difficulty with legal assistance at only one facility.[200] What he proved at trial, the Court concluded, offered "a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief."[201]

Some lower federal courts have added a second restriction on a remedy's scope, insisting that the injunction do no more than that necessary to correct the plaintiff's injury.[202] In one illustrative case, the Ninth Circuit invalidated a regulation that capped Medicare reimbursements to hospice care providers, but it also vacated the district court's nationwide injunction against the regulation's enforcement.[203] Nothing suggested that the U.S. Department of Health and Human Services enforced the regulation differently against different hospice care providers. For this reason, the Ninth Circuit's decision resolved an interde-

194. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 21 (1984).

195. 461 U.S. 95, 111 (1983).

196. *Id.* at 112–13.

197. *Id.* at 105.

198. *E.g.*, United States v. Virginia, 518 U.S. 515, 547 (1996); Missouri v. Jenkins, 515 U.S. 70, 92 (1995); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 418 (1977); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 33.1, at 293 (2d ed. 2006).

199. 518 U.S. 343, 348–49 (1996).

200. *Id.* at 358.

201. *Id.* at 359.

202. In addition to the case discussed in this paragraph, see, for example, *Warshak v. United States*, 532 F.3d 521, 531 (6th Cir. 2008); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Meinhold v. U.S. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994).

203. L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 649 (9th Cir. 2011).

pendent claim, shared equally by all providers, challenging the regulation's validity. By the terms of *Lewis*, a nationwide injunction could arguably issue because the legal and evidentiary showing the plaintiff made to prevail established a sufficient foundation for an order enjoining the regulation's enforcement everywhere. Nonetheless, the injunction could not benefit anyone other than the single individual plaintiff, given that the narrow order was sufficient to remedy its particular injury.[204]

2. The Right Plaintiff Principle's Effect

The right plaintiff principle significantly limits the capacity of plaintiffs bringing suits as individuals to pursue structural reform. To use the parlance of my typology, standing and scope-of-remedy barriers have particular force in Type III cases, where their operation will frequently prevent an individual plaintiff from challenging and remedying the entirety of the central agency's conduct at Level I.

Consider how these doctrines might have operated in *Parsons* had it proceeded as an individual lawsuit. *Parsons* is the prototypical Type III case, with plausibly interdependent claims and plausibly indivisible remedies, and is illustrated in Figure 3 above. Inmate 3, the victim of a lack of emergency services at the Winslow prison, would likely lack standing to challenge the entirety of the agency's deliberate indifference (the Level I conduct) and to seek an injunction to correct it. Perhaps he could sue the ADC for part of its Level I conduct if, for instance, the central agency knew of problems with emergency medical services in Winslow but did nothing to fix them.[205] But Inmate 3 almost assuredly would lack standing to challenge all of the ADC's Level I conduct or to target the Level II conduct resulting from this deliberate indifference experienced by inmates in the Safford and Tucson facilities.[206] The ADC's failure to ensure adequate access to insulin at the Safford facility did not injure Inmate 3. Nor did

204. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). *But see* Carroll, *supra* note 163, at 2030–34; *supra* note 163 (citing cases permitting broader injunctive relief without class certification).

205. *Cf.* Starr v. Baca, 652 F.3d 1202, 1204–05 (9th Cir. 2011) (reversing the dismissal of an inmate's claim that the Sheriff of Los Angeles County knew and was deliberately indifferent to dangers in the jail).

206. *E.g.*, Warth v. Seldin, 422 U.S. 490, 508 (1975); Newsom v. Norris, 888 F.2d 371, 381 (6th Cir. 1989) ("[A] prisoner who initiates a civil action challenging certain conditions at a prison facility in his individual capacity is limited to asserting alleged violations of his own constitutional rights and, absent a request for class certification, lacks standing to assert the constitutional rights of other prisoners."); Weaver v. Wilcox, 650 F.2d 22, 27 (3d Cir. 1981) ("Courts have held consistently that an inmate does not have standing to sue on behalf of his fellow prisoners."); *see also* McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997); Griggs v. Patterson, No. 12-0726-CG-N, 2014 WL 2993777, at *9 (S.D. Ala. July 2, 2014); Ivory v. Mullins, No. 2:11cv-953-WHA, 2014 WL 960989, at *6–7 (M.D. Ala. Mar. 12, 2014); Stile v. Cumberland Cty. Jail, No. 2:12-cv-00260-JAW, 2013 WL 1881300, at *4–5 (D. Me. Mar. 26, 2013); Bradley v. Mason, 833 F. Supp. 2d 763, 773 (N.D. Ohio 2011); Johnson v. Keaton, No. 2:05-CV-1238-WKW, 2008 WL 4493242, at *11 (M.D. Ala. Sept. 29, 2008); Kaufman v. Schneiter, 524 F. Supp. 2d 1101, 1111 (W.D. Wis. 2007); Mays v. Cuyahoga Cty., No. 1:07 CV 1171, 2007 WL 2177892, at *2 (N.D. Ohio July 27, 2007).

the ADC's blind eye to the mental health needs of Tucson inmates in solitary confinement. Indeed, *Lyons*'s "real and immediate threat" requirement may well deny Inmate 3 standing to seek an injunction to remedy the emergency medical care problem at Safford going forward.[207]

Likewise, under scope-of-remedy doctrine, Inmate 3 is the wrong plaintiff to seek the broad structural injunction to reform healthcare services throughout Arizona prisons. A showing of constitutional infirmities in Winslow's emergency healthcare services would provide inadequate evidentiary and legal support for a sweeping order requiring changes to insulin delivery and mental health services state-wide. Moreover, the sweeping order would go well beyond what Inmate 3 would need to correct his injury.[208]

C. GROUPS AND THE DORMANT SUBSTANTIVE LAW

1. Groups and the Substantive Law

The right plaintiff principle tells an individual plaintiff that she cannot challenge the broad sweep of an agency's Level I conduct and obtain a remedy to benefit others like her suffering under related, if different, circumstances. This incapacity would hardly matter if the substantive law did not impose liability at Level I, to encompass the entirety of the agency's behavior, or if it did not authorize remedies to benefit all of the agency's enforcement targets or regulatory beneficiaries together. But the substantive law that public interest plaintiffs invoke often vests claims in groups of targets or beneficiaries, authorizing the court to issue a remedy to benefit these groups and not particular members of them.[209] Such substantive law commonly imposes obligations at Level I, and as such, is directly thwarted by justiciability and scope-of-remedy barriers.

Versions of the assertion that the substantive law vests claims in groups have prompted significant normative disagreement.[210] As a descriptive matter, how-

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207. *E.g.*, Thomas v. Walton, 461 F. Supp. 2d 786, 799–800 (S.D. Ill. 2006) (dismissing claims for injunctive relief brought against prison officials who allegedly failed to provide medical care to an inmate after he was injured, on grounds that the inmate did not show a sufficient threat of the injury recurring in the future).

208. *See* Williams v. Owen, No. 90-5918, 1991 WL 128775, at *3 (6th Cir. July 16, 1991); *see also* Gomez v. Vernon, 255 F.3d 1118, 1130 (9th Cir. 2001) (holding that the district court properly limited injunctive relief to six individual inmates, prohibiting retaliation against them for pursuing grievances, after refusing to certify a class action).

209. For a more richly theorized and historically informed version of the assertion I offer here, see Bone, *supra* note 144, at 610–13.

210. *Compare* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–34 (1998) (defending the entity theory), *with* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 803–13 (2007) (challenging the entity theory). *See also* Bone, *supra* note 144, at 597 (commenting on the incomplete normative case made for the class as entity theory). As Mark Moller convincingly argues, one can say little about claim ownership as a general matter because lawmakers are often vague or inconclusive with respect to the issue. Mark Moller, Separation of Powers and the Class Action 27–31 (Aug. 13, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478953. But a more granular, claim-

ever, the assertion is accurate according to a number of indicators.

First, when courts certify classes in public interest cases, they often describe the substantive claims at issue in terms that make sense only if the claims treat plaintiffs as undifferentiated members of groups. These cases litigate "universal" claims.[211] "[I]n order to prove the existence of the forest," a class need not "individually prove the existence of each tree."[212] Class members' particular experiences are relevant not to flesh out individual claims, but as "evidence" to support a "comprehensive inquiry into [the defendant's] systems, patterns, and practices."[213] Injunctive relief class actions "define the relationship between defendants 'and the world at large,'" not the defendant's relationships with myriad individual plaintiffs.[214] The question is not whether the defendant has mistreated someone on an "individual level," but whether "repeated acts of misconduct" demonstrate harm "on an institutional level."[215]

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by-claim approach can examine the particular elements of a claim and the evidence necessary to establish them and thereby determine whether the substantive right protects groups or individuals. For an example of this sort of analysis, see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013).

211. Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., 239 F.R.D. 9, 26 (D.D.C. 2006); *cf.* Henke v. Arco Midcon, L.L.C., No. 4:10CV86 HEA, 2014 WL 982777, at *12 (E.D. Mo. Mar. 12, 2014) ("Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries . . . .").

212. Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., 249 F.R.D. 334, 345 (N.D. Cal. 2008); *see also* Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998).

213. *Disability Rights Council of Greater Wash.*, 239 F.R.D. at 27 (suggesting that "individual experiences with the [defendant's] service" will serve as "evidence" in a disabilities lawsuit to help decide "a comprehensive inquiry into [the defendant's] systems, patterns, and practices"); *see also* Armstrong v. Davis, 275 F.3d 849, 871 (9th Cir. 2001) (describing "individual items of evidence as representative of larger conditions or problems"); Gray v. Golden Gate Nat'l Recreational Area, 279 F.R.D. 501, 516–17 (N.D. Cal. 2011) (denying that an ADA class action will require the court to go "barrier-by-barrier" to determine compliance and instead pointing to "evidence of multiple people suffering the same injury" in support of a pattern-or-practice class claim).

214. Death Row Prisoners of Pa. v. Ridge, 169 F.R.D. 618, 623 (E.D. Pa. 1996) (quoting Weiss v. York Hosp., 745 F.2d 786, 811 (1984)); *see also* Daniels v. City of New York, 198 F.R.D. 409, 414 (S.D.N.Y. 2001). A prison reform case asks whether "conditions . . . objectively posed a serious risk to inmate health and safety," not whether the plaintiffs can prove that each individual prisoner suffered from a constitutional deprivation. Boyd v. Godinez, No. 3:12-cv-704-JPG-PMF, 2013 WL 5230238, at *3 (S.D. Ill. Sept. 16, 2013).

215. Flynn v. Doyle, No. 06-C-537, 2007 WL 805788, at *4 (E.D. Wis. Mar. 14, 2007); *see also* DL v. District of Columbia, No. 05-1437 (RCL), 2013 WL 6913117, at *8 (D.D.C. Nov. 8, 2013) ("The plaintiffs do not seek to litigate the merits of individual, fact-specific IDEA claims—whether a particular IEP was sufficient, for instance—but whether the [defendant] generally met its statutory obligations to *disabled children*." (emphasis added)); P.V. *ex rel.* Valentin v. Sch. Dist. of Phila., 289 FRD 227, 234 (E.D. Pa. 2013) (describing the alleged claim as involving "a systemic failure, not a failure of the policy as applied to each member individually"); Alexander A. *ex rel.* Barr v. Novello, 210 F.R.D. 27, 34 (E.D.N.Y. 2002) (describing the claim as about the "defendants' institutional failure to provide reasonably prompt placement in" residential treatment facilities, not as "merely a cumulation of individual cases"); Brown v. Giuliani, 158 F.R.D. 251, 269 (E.D.N.Y. 1994) (holding that "[p]laintiffs' complaint falls within Rule 23(b)(2)" because "[d]efendants' failure to act is said to be institutional[,] not merely a cumulation of individual cases"). *But see* Turner v. Grant Cty. Det. Ctr., No. 05-148-DLB, 2008 WL 821895, at *17 (E.D. Ky. Mar. 26, 2008) (suggesting an identity between an individual plaintiff's claim and the class claim in a prison conditions case).

Second, the merits analysis of claims litigated in some of these cases also treats them as if they are vested in groups. Two examples are illustrative, although one could multiply them.[216] In *Connor B. v. Patrick*, a class action in Massachusetts seeking systemic relief on behalf of that state's foster children, the parties described the applicable substantive liability standard without reference to individual children in their final pretrial filings.[217] Neither side suggested that the plaintiffs had to prove harm to individuals, much less the merits of individual claims, to prevail at trial. Indeed, the state agency defendants, who had the greatest interest in forcing the plaintiffs to prove individual issues and thereby derail collective adjudication, instead defined their adversaries as "the Plaintiff Class."[218] The court's findings after trial mirrored the parties' understanding of the claims. The opinion focused solely on the defendants' conduct, with statistics and other aggregate proof determining liability, and all but ignored the experiences of particular class members.[219]

Also illustrative is *Gray v. County of Riverside*, a case challenging the adequacy of healthcare provided to inmates in Riverside County, California.[220] The complaint alleges that "systemic inadequacies in the County's provision of medical and mental health care expose inmates . . . to a substantial risk of serious harm" in violation of the Eighth and Fourteenth Amendments.[221] The county moved to dismiss, arguing that what the class representative alleged about his own treatment does not describe constitutionally inadequate conditions.[222] The district court denied the motion, reasoning that "there is no 'claim' that may be dismissed based on the constitutional adequacy of [the class representative's] individual . . . experience."[223] Rather, the complaint "only includes [the class representative's] experience as evidence of . . . an allegedly deficient . . . policy that exposes inmates to a substantial risk of serious harm."[224]

The district court relied upon the Ninth Circuit's decision in *Parsons*, the prototypical Type III case, in which the panel rejected the idea that the class asserted "an aggregation of many claims of individual mistreatment."[225] The *Parsons* class members experienced different mistreatment, but each one functioned as an undifferentiated member of the group. As the Ninth Circuit put it, each prisoner "suffer[ed] exactly the same constitutional injury when he [was]

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216. *E.g.*, Shelton v. Bledsoe, 775 F.3d 554, 565 (3d Cir. 2015) (describing an Eighth Amendment prison conditions claim as focusing "more on the defendants' conduct and policies than on the individual identities or medical issues of each class member"); *see also infra* note 272 and accompanying text.

217. Joint Pretrial Memorandum at 14–17, Connor B. *ex rel.* Vigurs v. Patrick, No. 1:10-cv-30073-WGY (D. Mass. Jan. 16, 2013).

218. *Id.* at 15–17.

219. Connor B. *ex rel.* Vigurs v. Patrick, 985 F. Supp. 2d 129 (D. Mass. 2013).

220. No. EDCV 13-00444-VAP (OPx), 2014 WL 5304915 (C.D. Cal. Sept. 2, 2014).

221. *Id.* at *1.

222. *Id.* at *9.

223. *Id.*

224. *Id.*

225. 754 F.3d 657, 676 (9th Cir. 2014).

exposed to a single statewide . . . policy or practice that create[d] a substantial risk of serious harm."[226]

Finally, several procedural doctrines, when applied in class actions, operate in ways that would be puzzling but for group ownership of claims. Preclusion doctrine is the best of several examples.[227] Ordinarily, a class member is considered a party for res judicata purposes as if he or she had entered a personal appearance.[228] Under standard preclusion doctrine, a party to a case must litigate all claims arising from a particular transaction once she brings one claim, lest the case's judgment bar her from doing so going forward.[229] But a class action seeking indivisible, undifferentiated injunctive relief can produce a judgment that will not preclude class members from suing for money damages in individual follow-on suits.[230] This result makes sense doctrinally if the injunctive relief class members sue as a group and not in their individual capacities. Preclusion doctrine recognizes that a judgment will not bind some-

226. *Id.* at 678.

227. Another example is claim splitting doctrine, a close cousin of res judicata. Claim splitting doctrine allows a court to dismiss a case involving a particular transaction if the case duplicates another pending action in which the party litigates other claims arising out of the same transaction. *E.g.*, Katz v. Gerardi, 655 F.3d 1212, 1217 (10th Cir. 2011). The doctrine discourages a plaintiff from seeking damages in one suit and an equitable remedy in another. *See, e.g.*, Torres v. Rebarchak, 814 F.2d 1219, 1224 (7th Cir. 1987) (holding that plaintiff's cause of action was not impermissibly split only because her equitable claim, but not her damages claim, was dismissed with prejudice). But this is not so in certain class actions. A prisoner who seeks injunctive relief to remedy the inadequate medical care he has received, for instance, does not split his claims even if he is a class member in a pending case seeking systemic reform of healthcare for all prisons, including the prison in which he is incarcerated. Pride v. Correa, 719 F.3d 1130, 1137 (9th Cir. 2013); *cf.* T.G. *ex rel.* Ta.G. v. Hamos, No. 12-cv-3320, 2014 WL 1593159, at *3 (C.D. Ill. Apr. 21, 2014) (holding that class members seeking to enjoin further violations of their rights under federal health care laws may bring individual claims for damages). *But see* Hardney v. Virga, No. 2:13-cv-0754 JAM DAD P, 2014 WL 3956684, at *15 (E.D. Cal. Aug. 8, 2014) (suggesting that an individual action for injunctive relief cannot proceed if a pending class action seeks the same injunctive relief). In one case, he is an individual vested with a claim; in the other, he is an undifferentiated member of a group that owns the claim.

A third example is abstention doctrine. Defendants in foster care class actions commonly argue for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), arguing that the federal court's exercise of jurisdiction over constitutional claims for systemic relief would disrupt and duplicate the ongoing judicial supervision of every foster child by the state's family judges. *E.g.*, M.D. *ex rel.* Stukenberg v. Perry, 799 F. Supp. 2d 712, 723–26 (S.D. Tex. 2011) (discussing cases). The defense has succeeded when class plaintiffs seek to influence the course of individual supervisions. *E.g.*, Joseph A. *ex rel.* Wolfe v. Ingram, 275 F.3d 1253, 1268–69 (10th Cir. 2002). When, however, the federal class action "focuses on systemic problems and seeks systemic solutions," it does not "duplicate the individualized" proceedings, and *Younger* abstention is not appropriate. *M.D.*, 799 F. Supp. 2d at 720 (internal quotation marks omitted). The state proceedings do not involve the same interests as the federal class action, with the former centered on the individual child's concerns and the latter on the group's.

228. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 425 (5th Cir. 1998); Parker v. Roeckeman, No. 13-206-DRH, 2014 WL 3408828, at *4 (S.D. Ill. July 14, 2014).

229. *E.g.*, Lobo v. Celebrity Cruises, Inc., 704 F.3d 882, 892 (11th Cir. 2013).

230. *E.g.*, Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996); Thorpe v. District of Columbia, 303 F.R.D. 120, 150 (D.D.C. 2014); Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 991 (D. Ariz. 2011); *see also* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4455 n.19 (3d ed. 2005) (citing and discussing cases). *But see* Clark K. *ex rel.* Anderson v. Willden, No. 2:06-cv-01068-RCJ-RJJ, slip op. at 7–8 (D. Nev. July 10, 2008).

one if the person had litigated in a different capacity in the first case.[231]

The logic for this design choice in public interest litigation, to treat groups as claimholders, is straightforward. When the substantive law vests claims in groups, it conceives of an inmate, a foster child, or a person with disabilities not as a distinct and idiosyncratic juridical person, but as an undifferentiated group member. This treatment mirrors how the central agency itself views enforcement targets or regulatory beneficiaries at Level I. The agency administers an impersonal regime, relying on bureaucratic intermediaries to personalize the otherwise undifferentiated policies at Level II for the particular circumstances of specific targets or beneficiaries. If lawmakers want to regulate the central agency's Level I conduct through litigation, an impersonal group claim makes manifest sense.

2. An Unjustified Dormancy

In Type I and possibly Type II cases,[232] nothing depends on the distinction between group and individual claims. Due to her claim's necessary interdependence, the Type I plaintiff—the California motorcyclist in my example—can challenge and remedy the entirety of the agency's Level I conduct by suing on her own as an individual. Whereas the central agency treats all targets or beneficiaries in an undifferentiated way—that is, without regard to any individualized characteristics of these targets or beneficiaries—bureaucratic intermediaries do not alter or adjust the Level I conduct when they individualize it at Level II. For the purposes of the right plaintiff principle, this uninterrupted vector of harm enables the individual plaintiff to litigate as if the central agency singled her out when it acted at Level I.

More problematic are Type III cases, such as the Arizona prison conditions suit. The substantive law vests the group of inmates with a right to challenge and seek a remedy for the full scope of the ADC's deliberate indifference, the Level I conduct. But the right plaintiff principle thwarts this design choice for substantive liability policy, if individual litigation were the only avenue for claim prosecution. The group claim that permits the issuance of a systemic remedy lies dormant.

Much of the substantive law vesting claims in groups that public interest plaintiffs sue to vindicate is effectively judge-made.[233] If courts should not develop substantive liability policy with the group as the beneficiary, then the right plaintiff principle may produce a desirable dormancy. Whatever one thinks

231. Brooks v. Arthur, 626 F.3d 194, 200–03 (4th Cir. 2010); Andrews v. Daw, 201 F.3d 521, 525–26 (4th Cir. 2000); RESTATEMENT (THIRD) OF JUDGMENTS § 36 (AM. LAW INST. 1982).

232. *See infra* notes 264–65 and accompanying text.

233. The claim for municipal liability that the New York City stop-and-frisk plaintiffs litigated, for instance, was vested in a group, as I suggest in Part IV. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 564–65 (S.D.N.Y. 2013) (identifying the elements of a *Monell* claim for municipal liability based on deliberate indifference as framed by the Second Circuit); Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695 (1997).

about this normative premise, however, standing and scope-of-remedy doctrines are poor vehicles for its achievement. When an individual plaintiff is a member of a group vested with a claim, his incapacity to challenge and remediate the Level I conduct does not further a policy animating the right plaintiff principle, at least as it presently operates in the federal courts.

Although a wide range of justifications ostensibly support standing limitations, two policies have particularly driven the doctrine's development.[234] Heather Elliott aptly labels the first the "concrete-adversity function."[235] By insisting that a plaintiff litigate an injury-in-fact and not some generalized grievance, standing doctrine ensures that adjudication proceeds against a rich factual backdrop, prompted by a plaintiff motivated by a direct stake in the controversy.[236] Scope-of-remedy concerns differ somewhat but also stem from worries about the successful discharge of the judicial task. If a narrowly tailored remedy would be enough to redress the plaintiff's injury, a broad injunction would short-circuit related litigation in other courts. As courts determined how best to address the defendant's conduct, they would forego the benefit of repeated engagements with a policy's legality "in different factual contexts and in multiple decisions."[237]

These concerns can explain why Inmate 1, injured by a lack of insulin access, cannot sue to challenge the poor mental healthcare delivered to Inmate 2 at another facility, if no common policy or course of conduct relates the two harms. The factual context of Inmate 1's injury in Winslow has nothing to do with mental healthcare deficiencies in Tucson. Also, because Inmate 1 has not suffered from harm at the Tucson facility, his lack of any personal stake in the occurrences there triggers concerns about the quality of advocacy he might provide on Inmate 2's behalf.

But the Type III case is different. Inmate 1 alleges that his and Inmate 2's injuries are but different manifestations of the same Level I conduct. Inmate 1 does have a personal stake in challenging the Level I conduct, as he has been injured by it. His "ox has actually been gored," in other words, by the same conduct that harms Inmate 2.[238] Also, if Inmate 1 wants to establish the scope and quality of the agency's deliberate indifference at Level I, as the group-protecting substantive law requires him to do, then Inmate 2's experience is directly relevant to Inmate 1's claim.

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234. For summaries of justifications for standing restrictions, see, for example, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 56–57 (6th ed. 2012), and 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.3 (3d ed. 2005).

235. Elliott, *supra* note 190, at 468–74; *see also* Ernest A. Young, *In Praise of Judge Fletcher—and of General Standing Principles*, 65 ALA. L. REV. 473, 486 (2013) ("[S]tanding doctrine often expresses concern for . . . a concrete factual setting . . . .").

236. Young, *supra* note 235, at 486–87.

237. L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011); *see also* Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393 (4th Cir. 2001), *overruled by* The Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. 2012).

238. Young, *supra* note 235, at 486–87.

Separation of powers concerns give standing restrictions their second chief justification.[239] As the logic goes, someone with only a generalized grievance about government policy or administration is merely a concerned member of a generic public, and concerned citizens should pursue their preferences through politics, not law.[240] The judiciary's coercive power that litigation enlists in the aid of someone's preferences is extraordinary in a democracy and requires particular justification. Only an actual injury "can separate the plaintiff from all the rest of us who also claim benefit of the social contract, and . . . thus entitle him to some special protection from the democratic manner in which we ordinarily run our social-contractual affairs."[241] To defenders of standing limitations, public law litigation presents a particularly acute danger of institutional usurpation.[242] Standing doctrine requires a clear link among plaintiff, injury, and remedy to ensure that public law litigation most closely resembles private law litigation, the judiciary's traditional and manifestly legitimate preserve.

The right plaintiff principle fails to protect against the "overjudicialization of the process of self-governance"[243] if no common course of conduct connects Inmate 1 and his inadequate insulin with Inmate 2 and his poor mental health-care, but Inmate 1 can nonetheless vindicate Inmate 2's interests in litigation. Inmate 1 would have no more special claim to the litigation exemption from the political process than, say, an ordinary Arizonan concerned with the quality of her state's prison administration. Each, including the ordinary Arizonan, has some connection, however vague, to the ADC, but these connections do not share anything of juridical relevance.

In a Type III case, however, a common course of conduct does connect Inmate 1's injury with Inmate 2's. Inmate 1 is not just another concerned Arizonan for the purposes of challenging the entirety of the ADC's conduct at Level I. He alleges "an injury that is fairly traceable to the defendant's challenged conduct[;]" it is just that Inmate 2's injury is "fairly traceable" to this

239. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992); Allen v. Wright, 468 U.S. 737, 760 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895 (1983). Federalism concerns have also crept into standing analysis but to a much lesser extent, and they have not driven the contours of Article III standing doctrine. *Cf.* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing . . . is built on separation-of-powers principles . . . ."). To the extent that federalism concerns have animated prudential standing concerns, see, for example, O'Sullivan v. City of Chicago, 396 F.3d 843, 854 (7th Cir. 2005), their continuing centrality to standing inquiries is questionable in light of the marginalization of prudential standing. *See Lexmark Int'l, Inc.*, 134 S. Ct. at 1386–88 (questioning the concept of prudential standing and suggesting that standing limitations flow from Article III). Hence, the analysis here assumes that separation of powers concerns are the structural issue driving standing doctrine.

240. *Lujan*, 504 U.S. at 576 ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." (emphasis in original)); Scalia, *supra* note 239, at 894–95; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461 (1988).

241. Scalia, *supra* note 239, at 895.

242. Sunstein, *supra* note 240, at 1469.

243. Scalia, *supra* note 239, at 881.

same conduct.[244] Likewise, that Inmate 2 will benefit from a remedy does not mean that Inmate 1's injury is any less "likely to be redressed by the relief sought."[245] To allow Inmate 1 to use other prisoners' experiences as evidence to establish the illegality of the Level I conduct hardly opens the courthouse doors to ordinary members of the public and to preferences better vindicated in political arenas.

The substantive legal dormancy that the right plaintiff principle produces in Type III cases does not serve the concerns that animate standing or scope-of-remedy doctrines as this doctrine presently exists and applies.[246] The result—the inability of individual litigants to challenge and remedy an agency's systemic misconduct—may strike some as normatively desirable. Perhaps the judiciary should stick to a private law role, one committed to the vindication of individual interests, narrowly circumscribed.[247] As presently justified, however, the right plaintiff principle produces this result only incidentally, not to achieve one of its animating policies.

D. CLASS ACTION PROCEDURE AS COUNTERWEIGHT

Properly applied, class action procedure neutralizes the right plaintiff principle's effect in public law litigation. The requirements for class certification ensure that challenges to an agency's Level I conduct can proceed when the conditions are such that no valid policy concern justifies the barriers the principle would otherwise impose.[248]

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244. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993).

245. *Id.*

246. I reiterate that I intend the foregoing discussion of the right plaintiff principle's animating policies to reflect how its constituent doctrines presently operate in the federal courts. Influential proponents of standing limitations may believe that the limiting effect the principle would have in a Type III case brought as an individual action is not problematic but by design. They might support a stronger version of the principle, which would deny standing to a litigant to challenge and remedy any more of the defendant's conduct than that specifically targeting her. A weaker version requires a causal connection between the defendant's conduct and the plaintiff's injury, as well as some sense that the remedy sought would benefit the plaintiff. But it does not otherwise constrain the lawsuit's scope. The weaker version better describes the principle in operation today, especially in the lower courts. It is difficult to read the Supreme Court's most direct pronouncement on the sort of standing issue discussed here as an endorsement of the stronger version. *See* Gratz v. Bollinger, 539 U.S. 244, 263 (2003). The weaker version is consistent with an enormous body of lower court case law, a few examples of which I cite. *See infra* note 255. If it were otherwise—if the stronger version more accurately fit prevailing limits on justiciability and remedy—entire categories of public law litigation, including prison conditions and foster care reform cases, have trespassed constitutional limits on federal jurisdiction for decades.

247. *Cf.* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 75–76 (arguing that the various substantive laws enforced through class actions vest private rights to compensation in individuals, and any regulatory effect of this private, individually-focused litigation is "incidental").

248. In *Gratz*, Chief Justice Rehnquist hinted at this function for class action procedure in public law litigation. 539 U.S. at 263 (indicating that a challenge to the class representative's authority to represent class members with different experiences and injuries is better addressed to Rule 23(a) than to standing); *see also* Kondracke v. Hanover Direct, Inc., No. CV 12-5630-CAS (SSx), 2012 WL

The requirements for class certification ensure that the plaintiffs establish to the requisite degree of evidentiary sufficiency the existence of a common course of conduct at Level I, one that connects its victims as members of the same group. If satisfied, commonality determines that the class representative and the class members can plausibly link their injuries to the same Level I conduct that the substantive law proscribes. The class representative has a special claim to litigate the experiences of class members that sets her apart from the concerned member of a generic public. Commonality also ensures that litigation proceeds against a relevant factual backdrop. The conflation of unrelated experiences in a single lawsuit threatens to confuse decision makers. If the experiences of all class members share a common core, however, then their inclusion, in all of their varieties, will benefit the court as it determines the precise nature and effects of the central agency's Level I conduct. The adequacy of representation and typicality requirements mollify other of standing's concrete adversity concerns. Typicality and adequacy of representation both require an alignment of interests among the class members, addressing worries that the named plaintiff will poorly represent the interests of other members of the group.

The behavior of standing and scope-of-remedy doctrines in public interest class actions suggests that courts do indeed understand class certification requirements to counterbalance the right plaintiff principle.[249] Limitations on a remedy's scope entirely yield in certified class actions.[250] The Supreme Court has declared that a case's status as a class action "adds nothing to the question of standing,"[251] but this statement is too blunt.[252] Certainly a class representative must have suffered an injury of the sort that a proposed injunction would be

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5472967, at *3 (C.D. Cal. Nov. 5, 2012) (arguing for an approach to Rule 23(a) that supplants standing analysis); Sacora v. Thomas, No. CV 08-578-MA, 2009 WL 4639635, at *6 (D. Or. Dec. 3, 2009) (commenting on the interplay between standing and Rule 23(a)).

249. The Ninth Circuit recently used a version of the analysis offered here to deny an attempt to get a public interest class dismissed on standing grounds. *See* Melendres v. Arpaio, 784 F.3d 1254, 1261–64 (9th Cir. 2015).

250. *Lewis v. Casey*, 518 U.S. 343 (1996), has proven no obstacle to systemic remedies aimed at Level I conduct when class action plaintiffs demonstrate a systemic injury. Armstrong v. Davis, 275 F.3d 849, 870 (9th Cir. 2001); Thorpe v. District of Columbia, 303 F.R.D. 120, 143 (D.D.C. 2014) (suggesting that if the plaintiffs in a disability rights class action prove systemwide harms, they can obtain a systemwide remedy consistent with *Lewis*). The prudential rule that an injunction should benefit no one but the individual plaintiff, no matter how similar the circumstances between the plaintiff and others, does not apply in a class action. L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011); Warshak v. United States, 532 F.3d 521, 531 (6th Cir. 2008); Meinhold v. U.S. Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994).

251. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976); *see also Lewis*, 518 U.S. at 357.

252. The doctrinal regulation of standing in class actions is confused. *See* Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 769–71 (1st Cir. 2011) (discussing shifts in the law in various circuits). The Court's statement notwithstanding, however, the inclusion of class action allegations has changed the standing calculus, at least as far as the lower federal courts are concerned. *See, e.g.*, Payton v. Cty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002) ("[O]nce a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs.").

issued to remedy and cannot derive standing entirely from the injuries and experiences of absent class members.[253] But a class representative can attack more than what the defendant specifically directs toward her, if the defendant's various actions involve "the same set of concerns"[254] or if a "juridical link" connects the conduct directed at the named plaintiff with that targeting other class members.[255] A proper Type III class action involves precisely these circumstances.

Likewise, a class representative has remedial standing to seek an injunction, even if she as an individual is unlikely to experience the harm going forward, because the court can consider "the defendant's treatment of the class as a whole" to determine if standing to seek prospective relief exists.[256] The key here is that the plaintiff litigates as an undifferentiated representative of the group, not in her individual capacity. As such, she faces the same risk of future harm that the class as a whole faces.[257] In the Oklahoma foster care case, for example, the defendants submitted uncontested evidence that any particular foster child in Oklahoma had only a 1.2% chance of suffering a particular type of injury about which the plaintiffs were complaining.[258] If the class action were merely a collection of individual claims, with each individual claim as the relevant determinant of standing, then either the court erred in allowing the plaintiffs to seek injunctive relief, the imminence of harm threshold *Lyons* established is exceedingly permissive,[259] or standing doctrine requires a special exception for class suits. But the group—all foster children in Oklahoma

253. *E.g.*, Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999); Flynn v. Fairmont Hotels & Resorts, Inc., No. 10-00285 DAE-LEK, 2010 WL 5462475, at *3–4 (D. Haw. Dec. 29, 2010).

254. Gratz v. Bollinger, 539 U.S. 244, 267–68 (2003); *see also* NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 162 (2d Cir. 2012).

255. *Payton*, 308 F.3d at 678; Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998); Reyes v. Julia Place Condos. Homeowners Ass'n, Inc., No. 12-2043, 2013 WL 442524, at *3 (E.D. La. Feb. 5, 2013). Neither of these approaches to standing in class actions is entirely settled. The Second Circuit, for example, has rejected the "juridical link" doctrine, which entitles a class representative to sue all defendants involved in a cohesive course of conduct, even if some defendants had nothing to do with her. Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 64 (2d Cir. 2012). But the Second Circuit accepts the concept of "class standing," which is the linchpin for the juridical link doctrine in other circuits. *Compare NECA-IBEW*, 693 F.3d at 162, *with Payton*, 308 F.3d at 680. An older view required named plaintiffs to "establish imminent injury traceable to each separate . . . practice that they seek to enjoin" to have standing to challenge the totality of a defendant's conduct directed at the class. Stevens v. Harper, 213 F.R.D. 358, 369 (E.D. Cal. 2002). This view seems outdated. *See* Ang v. Bimbo Bakeries USA, Inc., No. 13-cv-01196-WHO, 2014 WL 1024182, at *4 (N.D. Cal. Mar. 13, 2014) (discussing evolution in class action standing doctrine).

256. Armstrong v. Davis, 275 F.3d 849, 864 (9th Cir. 2001); *see also* DeShawn E. *ex rel.* Charlotte E. v. Safir, 156 F.3d 340, 344–45 (2d Cir. 1998); Harris v. Las Vegas Sands L.L.C., No. CV 12-10858 DMG (FFMx), 2013 WL 5291142, at *4–5 (C.D. Cal. Aug. 16, 2013); Carr v. Wilson-Coker, 203 F.R.D. 66, 76 (D. Conn. 2001).

257. *Cf.* Parsons v. Ryan, 754 F.3d 657, 678–79 (9th Cir. 2014) (describing how to understand risk of harm claims in a class action).

258. DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010).

259. The threshold is uncertain. *See* Baur v. Veneman, 352 F.3d 625, 636–37 (2d Cir. 2003); Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 287 F.R.D. 240, 245 (S.D.N.Y. 2012); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 61–65 (2012).

considered together—was certain to suffer injury. Understood as an undifferentiated member of the group vested with the claim, the named plaintiff faced a certainty of harm, easily meeting whatever modicum of imminence *Lyons* requires.[260]

This doctrinal behavior does not mean that the right plaintiff principle's core commitments yield in class actions. It just acknowledges that the principle as presently deployed in the federal courts has no particular problem with group claims. If an inmate sues not as an individual but as an undifferentiated representative of a group of prisoners, and if the substantive law vests the group with a claim, then the right plaintiff principle should not impose a barrier to litigation. Were the substantive law to lie dormant, as the principle would require without class action procedure, the design of liability policy would be unnecessarily frustrated.

This, then, is the class action's chief function for public interest cases: to enable the vindication of claims the substantive law vests in groups when other strands in the web of doctrinal governance for public interest litigation would unnecessarily render them dormant. This counterweight function provides a good deal of guidance for Rule 23's administration in these cases.

IV. ADMINISTERING THE PUBLIC INTEREST CLASS ACTION

I return to where I left off at the end of Part I. The public interest class action is currently rudderless, a confusion underscored by uncertainty over the proper application of commonality and Rule 23(b)(2). Existing accounts helpfully identify claim interdependence and remedial indivisibility as requirements for class certification, but they leave key questions about Rule 23's administration unanswered. An appreciation for the counterweight function does the rest of the work. This function illuminates which of the three types of public interest cases presented in Part II that Rule 23 ought to privilege. I argue that this type is the Type III case, or the case involving plausibly interdependent claims and plausibly interdependent remedies. This case is precisely the one that has proven perilous for plaintiffs in the new era. I also explain how courts ought to administer the two distinctive requirements for the certification of public interest classes: commonality and Rule 23(b)(2). In so doing, I address the contested doctrinal issues courts have struggled to answer for the governance of new-era public interest cases.

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260. For this reason, *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), is inapposite. There, the Court denied that a group of lawyers and journalists had standing to challenge amendments to the Foreign Intelligence Surveillance Act based on the lawyers' and journalists' worry that the federal government might monitor their communications in the future. *Id.* at 1155. The Court stressed the "highly speculative" set of circumstances that would have to occur for an injury actually to occur in the future as a basis for denying standing but began its analysis insisting that the "threatened injury must be certainly impending to constitute injury in fact." *Id.* at 1141–43 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). The lawyers and journalists failed to make this showing. When a class representative litigates an undifferentiated group claim, and the group is certain to suffer the injury, then the class representative is as well and satisfies this imminence requirement.

A. THE TYPOLOGY REVISITED

The necessary interdependence of claims in Type I and Type II cases—in my examples, the California motorcycle helmet case and the Virginia same-sex marriage case, respectively—results from enforcement targets or regulatory beneficiaries experiencing the central agency's Level I conduct identically. Bureaucratic intermediaries tasked with on-the-ground policy implementation do not alter or adjust the conduct. If the Level I conduct injures targets or beneficiaries, it does so in precisely the same way for all of them, creating liability for the central agency with respect to each target or beneficiary for precisely the same reason. In contrast, in the Type III case—the Arizona prison conditions case, for instance—bureaucratic intermediaries tailor the central agency's Level I conduct to the circumstances of particular targets or beneficiaries. Because they suffer from the Level I conduct in different ways, these plaintiffs would need to establish different facts or prove different elements to prevail were they to sue on their own.

The stronger the similarity among claims, the more susceptible they are to collective adjudication.[261] For this reason, Type I and Type II classes may seem to be the paradigmatic candidates for certification, and Type III classes considerably more questionable. Recently, this idea has gained some traction in the federal courts,[262] and since *Wal-Mart*, lawyers for state agencies have argued for a limit on class certification that would altogether exclude Type III cases.[263]

Although seemingly intuitive, an administration of Rule 23 to favor Type I and Type II cases, and to treat Type III cases as more problematic, would err for failure to appreciate Rule 23's function. Class action procedure has much less of a role to play in a Type I case because the right plaintiff principle does not interfere with an individual plaintiff's capacity to challenge and remedy the entirety of the central agency's conduct.[264] Necessary interdependence means that the court in a Type I case cannot help but adjudicate all targets' or

261. *See, e.g.*, Nagareda, *supra* note 142, at 132.

262. *See* Lightfoot v. District of Columbia, 273 F.R.D. 314, 327 (D.D.C. 2011) (suggesting that a "uniform facial challenge" is "obviously susceptible to classwide treatment"); *see also* Preap v. Johnson, 303 F.R.D. 566, 587 (N.D. Cal. 2014); Johnson v. Shaffer, No. 2:12-cv-1059 KJM AC, 2013 WL 5934156, at *10 (E.D. Cal. Nov. 1, 2013); Mitchell v. Cate, No. 2:08-CV-01196, 2014 WL 3689287, at *6 (E.D. Cal. July 23, 2014). *But see* M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7, 26 (S.D. Tex. 2013) ("The policy or practice that a plaintiff identifies need not be formal or officially-adopted.").

263. *See* Appellants' Brief at 45–46, M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012) (No. 11-40789), 2011 WL 4735090 (arguing that the allegation of "pervasive operational failures" cannot pose questions common to all class members because their legal significance requires that each child's experience be individually adjudicated); Oral Argument at 4:12, 6:52, 7:19, 12:15, DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013) (No. 11-7153), https://www.cadc.uscourts.gov/recordings/recordings2013.nsf/95421C736BF702C285257BC900659EC3/$file/01101311-7153.mp3; *see also* Gray v. Golden Gate Nat'l Recreational Area, 279 F.R.D. 501, 516 (N.D. Cal. 2011) (summarizing the government's argument).

264. *See* Mills v. District of Columbia, 266 F.R.D. 20, 22 (D.D.C. 2010) (finding class certification unnecessary because the plaintiffs challenged the facial constitutionality of a municipal program).

beneficiaries' claims when it adjudicates the individual plaintiff's claims. The individual plaintiff's standing to litigate her own claim effectively gives her standing to litigate the experiences of all because they are one and the same. Necessary indivisibility means that, no matter how narrowly the court fashions the injunction, it will benefit all targets and beneficiaries. Regardless of how much remedial parsimony scope-of-remedy doctrine demands, an injunction devised to aid the individual plaintiff could not do otherwise than aid all.

Remedial divisibility gives class action procedure a stronger justification in a Type II case. A facial challenge to the Virginia same-sex marriage law effectively resolves its constitutionality for all couples. But a court can individualize the remedy and enjoin the ban to benefit just a single couple. In fact, scope-of-remedy doctrine counsels for this result, unless the case proceeds as a class action.

But a Type II limit on the certification of public interest classes would render the distinctive procedural treatment that Rule 23 affords cases for injunctive relief entirely unnecessary. The necessary interdependence of Type II claims means that a proposed class will always satisfy Rule 23(b)(3)'s requirements, particularly the predominance requirement, and thereby qualify for certification by an alternative route. The distinctive procedural treatment Rule 23 affords injunctive relief suits would be superfluous. In fact, the argument for class membership without opt-out rights in Type II cases is weak. Opt-out rights are not rendered pointless by remedial structure because the injunction's plausible divisibility means that an injunction does not have to benefit all class members. Why not let Type II class members remove themselves from the class if they want to?[265]

Only Type III cases need both class certification and Rule 23's distinctive procedural treatment. As argued, the right plaintiff principle will frustrate litigation challenging the central agency's Level I conduct absent class certification. The differences among targets or beneficiaries render their individual claims sufficiently distinctive that standing and scope-of-remedy limits would prevent an individual plaintiff from achieving what she might in a Type I or Type II case. A substantive legal regime that regulates Level I conduct through litigation will not lie dormant in a Type I or Type II case, regardless of class certification. It will in a Type III case.

Type III cases also require distinctive procedural regulation and cannot merely follow the Rule 23(b)(3) path. Necessary interdependence in Type I and Type II suits means that each alleged victim has an absolutely identical claim. Nothing turns on whether the plaintiff is better conceived of as an undifferentiated representative of the group or as a distinctive, claim-owning individual. The distinction between group ownership and individual ownership in Type III

265. In the Virginia same-sex marriage case, for instance, the district court excluded from the class definition a couple that had filed its own individual lawsuit in another court. Harris v. Rainey, 299 F.R.D. 486, 491 (W.D. Va. 2014).

cases, in contrast, is meaningful. Inmate 1 *qua* individual litigant owns and prosecutes a different claim altogether from Inmate 1 *qua* undifferentiated group member. One claim imposes liability on a bureaucratic intermediary for failure to provide insulin, mental healthcare, or emergency medical services. The other imposes liability on the central agency for undifferentiated deliberate indifference to all inmates' health. The idiosyncrasies of Inmate 1's particular treatment matter to the first claim; whether he can recover depends upon elements and facts specific to him. These individualized issues are not as directly relevant to the group claim for which individual inmates' experiences serve as evidence of systemic phenomena.

Rule 23(a)(2)'s commonality requirement disregards individual issues and instead asks whether groupwide phenomena exist. Rule 23(b)(3)'s predominance requirement makes individual issues relevant to the class certification decision. If Rule 23(b)(3) governed the class certification decision in Type III cases, it would effectively make the individualized experiences of particular inmates relevant to the class certification decision when the decision on the merits does not require their adjudication. At the very least, Rule 23(b)(3) is poorly designed for group claims because their certification does not need a predominance inquiry. At worst, Rule 23(b)(3) might mislead courts to mistake the group claim Inmate 1 wants to bring for a collection of disparate individual claims and deny class certification for reasons that have nothing to do with what the substantive law requires for the determination of the central agency's liability. As with the right plaintiff principle, Rule 23(b)(3) might condemn certain substantive liability policies to unnecessary dormancy.

B. COMMONALITY AND THE MERITS

As mentioned in Part I, Rule 23(a)(2)'s commonality requirement—there must be "questions of law or fact common to the class"[266]—has fallen into a state of confusion since the arrival of a new era for the public interest class action. Commonality is the "most difficult" requirement for a proposed public interest class to satisfy, one district court recently declared.[267] To others, it remains "highly permissive."[268] Surely some of the blame lies with the Supreme Court's aphoristic treatment of the requirement. But lower courts have done little better in *Wal-Mart*'s wake, employing vague verbal formulations in lieu of analytical development.[269]

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266. FED. R. CIV. P. 23(a)(2).

267. N.B. v. Hamos, 26 F. Supp. 3d 756, 771 (N.D. Ill. 2014).

268. Boyd v. Godinez, No. 3:12-cv-704-JPG-PMF, 2013 WL 5230238, at *3 (S.D. Ill. Sept. 16, 2013) (quoting Markham v. White, 171 F.R.D. 217, 222 (N.D. Ill. 1997)); *cf.* Ashker v. Governor of California, No. C 09-5796 CW, 2014 WL 2465191, at *5 (N.D. Cal. June 2, 2014) ("[T]o satisfy Rule 23(a)'s commonality requirement, a plaintiff need only show that his or her claims raise some questions that are amenable to classwide adjudication.").

269. *Godinez*, 2013 WL 5230238, at *2 (insisting that claims share some "common nucleus of operative fact" to satisfy commonality (quoting Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998)));

The distinctive function class certification plays in public law litigation ought to guide commonality's application. The requirement is most usefully deployed as a metric to determine the existence *vel non* of a Type III class. When can an enforcement target or a regulatory beneficiary link her idiosyncratic treatment to that of other targets or beneficiaries and sue on behalf of a group challenging an agency's Level I conduct? When is she compelled to sue as an individual targeting the Level II conduct specifically directed at her? The answer is straightforward: if the substantive law vests a claim in the group the plaintiff wants to represent, and if the sort of group the substantive law aims to benefit does in fact exist, then the court can certify a Type III class. The commonality query in injunctive relief class actions[270] can test for these two prerequisites.

1. Identifying Group Claims

The substantive law must recognize that the plaintiff's claim is vested in a group for the class to satisfy the commonality requirement. Otherwise, whatever putative class members have in common is incidental. The named plaintiff pleads an individual claim, and if the class she wants to represent does not meet the requirements of Rule 23(b)(3), then she stands in relation to the other enforcement targets or regulatory beneficiaries as just another member of a generic public would. To grant her standing to litigate on behalf of all would frustrate the policies animating the right plaintiff principle.

The substantive law vests claims in groups when the defendant's liability for a particular remedy does not require the adjudication of a part or the whole of any individual class member's legal status or right to recover a specific remedy. Under such circumstances, the substantive law is indifferent to the individual identities of the plaintiffs and treats them all as undifferentiated members of the same population targeted by the defendant in a particular and proscribed manner. This test's satisfaction means that an interdependent claim exists, justifying aggregate adjudication without the court first undertaking a predominance inquiry into the relative balance of common and individual issues.

This first step in commonality's administration requires a straightforward doctrinal analysis of the makeup of the plaintiff's claim, with an inquiry into what sort of proof each element demands. A couple of examples illustrate this task. The plaintiffs in the New York stop-and-frisk class action litigated a

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MacNamara v. City of New York, 275 F.R.D. 125, 138 (S.D.N.Y. 2011) (insisting that claims must have a "unifying thread" to satisfy commonality (quoting Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 156 (S.D.N.Y. 2008))).

270. I recognize that I am arguing for an approach to commonality in purely injunctive relief cases that will prove inapposite in money damages class actions. If my proposal were adopted, Rule 23(a)(2) would have different meanings depending upon the claims asserted and the remedies sought. The doctrinal reality, however, is that different versions of commonality already exist. The commonality in Rule 23(b)(3) cases is nonexistent, entirely subsumed by predominance. None of the extensive elaboration on Rule 23(a)(2) in *Wal-Mart* has significance for Rule 23(b)(3) cases, given the "even more demanding" predominance requirement. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623–24 (1997)).

municipal liability cause of action for deliberate indifference to the Fourth Amendment and Equal Protection rights of New Yorkers of color.[271] In the Second Circuit, this sort of claim has three elements:

> First, the plaintiff must show that a policymaker knows "to a moral certainty" that her employees will confront a given situation . . . . Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation . . . . Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.[272]

None of these elements requires the adjudication of individual class members' legal status or right to recover. To the contrary, the elements emphasize the experience of enforcement targets in general, requiring the plaintiff to show a "history" of harms and that violations of "a citizen's constitutional rights" "frequently" occur.[273] New York City made no argument that the plaintiffs had to prove that each class member as an individual had her rights violated or as an individual deserved injunctive relief.[274] Judge Scheindlin relied on statistics, the city's stated policies and positions with respect to stop-and-frisk, and illustrative individual examples—not evidence adduced to prove individual entitlement to relief—to find for the plaintiff class on the merits.[275]

A case brought by a putative class of employees with disabilities suing the United Parcel Service (UPS) offers a good counterexample.[276] The plaintiffs argued that UPS's treatment of injured employees trying to return to work amounted to a pattern or practice of discrimination in violation of the Americans with Disabilities Act (ADA).[277] They sought to use the framework an-

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271. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 590 (S.D.N.Y. 2013).

272. Walker v. City of New York, 974 F.2d 293, 297–98 (2d Cir. 1992) (citation omitted); *see also* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 440 (2d Cir. 2009); *Floyd*, 959 F. Supp. 2d at 564–65.

273. Floyd v. City of New York, 813 F. Supp. 2d 417, 441 (S.D.N.Y. 2011) (quoting Green v. City of New York, 465 F.3d 65, 81 (2d Cir. 2006)). Although the third element might be read to incorporate the elements of the underlying constitutional claim, and thus perhaps individualized elements, this is not how courts have administered it. Rather, keeping with the requirement that the plaintiff prove the frequency of rights violations—not their mere existence—statistical evidence, narrative evidence of various individuals' experiences, and evidence of the defendant's policies and practices suffice. *See id.* at 456; *id.* at 446–48 (summarizing evidence of "widespread" constitutional violations); *cf.* Davis v. City of New York, 959 F. Supp. 2d 324, 355–59 (S.D.N.Y. 2013) (identifying police department policies, manuals, and the like as evidence of deliberate indifference sufficient to meet the plaintiffs' burden of production).

274. Rather, the city argued that "at least one plaintiff" had to prove a constitutional violation. Defendant's Post-Trial Memorandum of Law at 2, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 1034 (SAS)).

275. *See Floyd*, 959 F. Supp. 2d at 658–60.

276. *See* Hohider v. UPS, Inc., 574 F.3d 169, 172 (3d Cir. 2009).

277. *Id.* at 171–72.

nounced for Title VII claims in *International Brotherhood of Teamsters v. United States* to establish UPS's liability for an injunction.[278] To obtain prospective injunctive relief under the *Teamsters* framework, a plaintiff must show that "unlawful discrimination has been a regular procedure or policy followed by an employer" but not that "each person for whom [the plaintiff] will ultimately seek relief was a victim of the employer's discriminatory policy."[279] Put differently, the plaintiff does not need to establish the right of any particular employee to particularized relief.[280] A Title VII pattern-or-practice claim for prospective relief, then, is a good example of a group claim,[281] provable with evidence addressed to the defendant's actions in the aggregate and not to the legal status of an individual employee.[282]

The Third Circuit did not allow the ADA plaintiffs to use the *Teamsters* framework. The ADA prohibits discrimination against "a *qualified* individual on the basis of disability,"[283] not against any person because of some immutable characteristic like race or gender, as under Title VII.[284] To the Third Circuit,[285] whether someone is "qualified" requires an individualized adjudication of that person's ability to do the job in question, with or without a reasonable accommodation.[286] In effect, the Third Circuit reasoned, a court cannot determine if discrimination actionable under the ADA has occurred without adjudicating the legal status of individual employees.[287]

In dicta, the *Wal-Mart* court suggested that "'[e]ven a single [common] question' will do" to establish commonality, indicating that a class can merit certification if it presents a mixture of common and individual issues needing adjudication.[288] My proposed approach may seem even more restrictive, and I do not intend it to apply in money damages suits.[289] But, if commonality operates as a minor league version of predominance, it fails to screen for group claims and thus does not ensure that class action procedure discharges its function in public interest litigation.

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278. 431 U.S. 324, 360–61 (1977); *Hohider*, 574 F.3d at 176.

279. *Teamsters*, 431 U.S. at 360.

280. *Id.*

281. *See, e.g.*, Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106 (10th Cir. 2001) (distinguishing "individual claims of discrimination" from pattern-or-practice claims).

282. *E.g.*, EEOC v. FAPS, Inc., No. 10-3095 (JAP) (DEA), 2014 WL 4798802, at *12–14 (D.N.J. Sept. 26, 2014) (describing how to prove Title VII pattern-or-practice claims).

283. 42 U.S.C. § 12112(a) (2012) (emphasis added).

284. Hohider v. UPS, Inc., 574 F.3d 169, 190 (3d Cir. 2009).

285. I do not intend any comment on whether the Third Circuit interpreted the ADA correctly. I only suggest that, if the Third Circuit were correct in its statutory interpretation, then it resolved the commonality issue correctly as well.

286. *Hohider*, 575 F.3d at 191.

287. *Id.* at 192; *id.* at 195 (concluding that the class needs to prove whether a "policy has been used to discriminate against individuals protected by the ADA from such discrimination").

288. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011) (alteration in original) (quoting *id.* at 2566 n.9 (Ginsburg, J., dissenting)).

289. There is no need for my analysis to apply in money damages suits, given that the predominance requirement subsumes commonality and is thought to be stricter.

2. Determining When Groups Exist: The Merits Issue

The counterweight function class action procedure plays requires commonality to do more than check that the applicable substantive law vests a claim in a group. It should also demand some reason to think that class members do in fact form the sort of group the substantive law benefits. The plaintiffs do so if they indeed suffer from a common course of proscribed conduct emanating from Level I. Without this common treatment, the proposed named plaintiff has no more meaningful connection to other class members than any concerned representative of a generic public. To allow the named plaintiff to litigate the experiences of unrelated victims would trigger the concrete adversity and separation of powers concerns that motivate the right plaintiff principle. Class certification would skew the balance too far in the other direction and enable litigation en masse when standing and scope-of-remedy restrictions might legitimately counsel otherwise.

Mine is a positivist account of group existence. The substantive law chooses which groups to recognize by defining a protected status and benefiting those who have this status—inmates, foster children, students with disabilities, and so forth—with proscriptions on central agency conduct. Thus, whether a group exists depends upon whether the central agency has in fact treated a set of enforcement targets or regulatory beneficiaries in an undifferentiated manner that the substantive law condemns. An attempt to answer this question in public interest litigation will invariably enmesh class certification with the merits. To determine if the class meets the commonality requirement, the court will have to determine, however preliminarily, whether the defendant has engaged in conduct that renders it liable for the systemic remedy.

All of this begs a question left unanswered after *Wal-Mart*: what is the plaintiff's evidentiary burden at class certification? The Court's admonition that the plaintiff must have "significant proof" to meet the commonality threshold[290] precludes the once-common view that mere allegations of common treatment suffice.[291] Different views on this burden have taken hold in the lower courts.[292]

Again, the counterweight function provides useful guidance. The evidentiary burden at class certification for public interest plaintiffs should equal the evidentiary burden a plaintiff would bear to establish standing because class certification functions to assuage concerns otherwise motivating restrictions on justiciability. For standing, the plaintiff's burden changes as a case progresses, but at no point before trial does it exceed the showing a nonmoving party must

290. *Id.* at 2553.

291. *See, e.g.*, Willits v. City of Los Angeles, No. CV 10-05782 CBM (RZx), 2011 WL 7767305, at *3 (C.D. Cal. Jan. 3, 2011); LV v. N.Y.C. Dep't of Educ., No. 03 Civ. 9917(RJH), 2005 WL 2298173, at *2 (S.D.N.Y. Sept. 20, 2005).

292. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 7:21 (5th ed. 2013), Westlaw (database updated Sept. 2015) (describing "divergent approaches" in the lower courts to the burden of proof issue).

make to defeat a summary judgment motion.[293] At most, the named plaintiff should support her contention that a group connected by a common course of injurious conduct exists with evidence and not just rely on allegations. But the court ought to draw all inferences from this evidence in her favor, and it should not resolve disputes of fact the defendant's evidence might create.[294]

This burden is considerably less than the preponderance of the evidence standard that several circuits have adopted for money damages class actions.[295] Applied in public interest litigation,[296] the burden in some instances has turned class certification into nothing short of a full-blown trial.[297] This premature merits adjudication serves no real purpose in public interest lawsuits. The chief justification for imposing this burden on plaintiffs derives from the settlement pressure that class certification ostensibly imposes on defendants in money damages suits.[298] If the prospect of a huge financial recovery for the class pressures a risk-sensitive defendant to settle, then the defendant will have no further opportunity, as it might at trial, to show that common issues do not in fact exist. But this settlement pressure claim is inapposite in public interest

293. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011).

294. For an example of this approach to issues of fact at class certification, see, for example, *Fields v. Maram*, No. 04 C 0174, 2004 WL 1879997, at *6–7 (N.D. Ill. Aug. 17, 2004). *See also* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 757 (2013) (advocating for a version of this approach).

295. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); Teamsters Local 445 Freight Div. Pension, Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.06(b) (AM. LAW INST. 2010).

296. *E.g.*, Amador v. Baca, 299 F.R.D. 618, 623–28 (C.D. Cal. 2014); M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7, 24–25 (S.D. Tex. 2013). In fact, a decent doctrinal case could be made for an approach to the fact side of the commonality question in public interest litigation that accepts mere allegations of group existence as true for the sake of class certification. If a question of law or fact is inherently common, then there is no factual dispute that needs to be resolved at the class certification stage and the plaintiffs' allegations as to commonality suffice. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1197 (2013). This is so when, upon the failure of proof common to the class to establish an element of the claim, individual class members have no other way to do so on their own. *Id.* at 1196. In a public interest class action, the plaintiffs bring a group claim, one that can only be established using common evidence. If the common evidence fails to convince the factfinder, the group claim also fails on the merits. There is no way to prove the group claim with individualized evidence. Hence, the simple allegation of a group's existence should be sufficient to meet Rule 23(a)(2) under existing doctrine, and only the policy concerns latent in the right plaintiff principle justify a higher evidentiary burden.

297. In a case challenging trespass stops made by police outside residential buildings in the Bronx, Judge Scheindlin supported her class certification order with findings made in her opinion resolving the plaintiffs' motion for a preliminary injunction. *See* Ligon v. City of New York, 288 F.R.D. 72, 77 (S.D.N.Y. 2013). Her preliminary injunction opinion contained thirty pages of findings of fact. *See* Ligon v. City of New York, 925 F. Supp. 2d 478, 492–522 (S.D.N.Y. 2013). The preliminary injunction hearing took place over eighteen days in late 2012. *See id.* at 485.

298. *Amgen Inc.*, 133 S. Ct. at 1199–1200; *Hydrogen Peroxide*, 552 F.3d at 310; Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 109 (2010); Nagareda, *supra* note 169, at 152.

cases.[299] Public interest class actions go to trial with comparative frequency,[300] suggesting the obvious: government agencies simply do not experience the risk that claim aggregation purportedly creates as private defendants in money damages suits do. The reasons for why this is so are many and complex, but to date no one has identified settlement pressure as a serious problem. An agency has a number of opportunities to litigate the sorts of factual issues that go into a class certification decision.[301]

C. RULE 23(B)(2)

Rule 23(b)(2) permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole."[302] As mentioned in Part I, this requirement rarely posed much of a hurdle before the new era. Rule 23(b)(2) poses a stricter test after *Wal-Mart*, but confusion dogs its application. Some courts continue to treat the Rule 23(b)(2) inquiry as a test for class "cohesion."[303] This befuddling trait resists a single definition,[304] and it renders Rule 23(b)(2) largely duplicative of other class certification requirements.[305] Others, citing to *Wal-Mart*'s invocation of remedial indivisibility,

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299. *See supra* note 134; *cf.* Bone, *supra* note 298, at 116 (making a version of this argument for a different but related context).

300. For some representative, recent examples, see, for example, *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 488 (7th Cir. 2012); *Ball v. LeBlanc*, 988 F. Supp. 2d 639 (M.D. La. 2013), *aff'd in part and vacated and remanded in part*, 792 F.3d 584 (5th Cir. 2015); *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013); *Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013); *Indiana Protection & Advocacy Services Commission v. Commissioner, Indiana Department of Corrections*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012); *Native American Council of Tribes v. Weber*, 897 F. Supp. 2d 828 (D.S.D. 2012); *CG v. Pennsylvania Department of Education*, 888 F. Supp. 2d 534 (M.D. Pa. 2012); *Chester Upland School District v. Pennsylvania*, 284 F.R.D. 305 (E.D. Pa. 2012); *R.P.-K. ex rel. C.K. v. Department of Education*, No. 10-00436 DAE-KSC, 2012 WL 1082250 (D. Haw. Mar. 30, 2012).

301. For an illustration, compare *Taylor v. Housing Authority of New Haven*, 267 F.R.D. 36, 62–66 (D. Conn. 2010), reversing grant of class certification after trial upon concluding that the evidence of a common course of conduct was insufficient, with *Taylor v. Housing Authority of New Haven*, 257 F.R.D. 23, 31–32 (D. Conn. 2009), granting class certification. *See also* Smentek v. Sheriff of Cook Cty., No. 09 C 529, 2014 WL 7330792, at *1 (N.D. Ill. Dec. 22, 2014) (decertifying a Rule 23(b)(2) class after trial).

302. FED. R. CIV. P. 23(b)(2).

303. *See, e.g.*, Shelton v. Bledsoe, 775 F.3d 554, 560–61 (3d Cir. 2015).

304. *Compare* Shook v. Bd. of Cty. Comm'rs of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) (identifying "two aspects" to class cohesiveness: "any classwide injunctive relief can satisfy the limitations of Federal Rule [of] Civil Procedure 65(d)," and (b)(2) class members seek relief that need not be "specifically tailored to each class member" (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.43(2)(b), at 23–195 (3d ed. 2000))), *with* Kenneth R. *ex rel.* Tri-Cty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 271 (D.N.H. 2013) ("A class is 'cohesive' where common questions predominate and there are 'few conflicting interests among its members.'" (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998))). *See generally* RUBENSTEIN, *supra* note 292, § 4:34.

305. On the apparent post-*Wal-Mart* redundancy between Rule 23(a)(2) and Rule 23(b)(2), see *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 30 (S.D. Tex. 2013); *Ligon v. City of New York*, 288 F.R.D. 72, 84 (S.D.N.Y. 2013); *Gray v. Golden Gate National Recreational Area*, 279 F.R.D. 501, 520 (N.D.

have emphasized the need for an injunction that does not need individually tailored administration for each class member.[306] At the extreme, some lawyers for state agency defendants have recommended an approach to Rule 23(b)(2) that would prohibit certification unless the plaintiffs can identify a classwide injunction that each member would be entitled to had she sued as an individual.[307]

Here again the counterweight function can guide Rule 23's proper administration. First, the suggestion that each class member must qualify for the proposed injunction as an individual litigant misperceives what class action procedure does in public interest litigation. The whole point is to enable the class to obtain a groupwide injunction for a groupwide claim, one the right plaintiff principle would render unavailable in individual litigation. The injunction should benefit the class of undifferentiated members, but it does not need to respond directly to each one's idiosyncratic needs as an individual.[308]

A second implication requires more explanation. A couple of concerns motivate remedial parsimony in scope-of-remedy doctrine. One involves pragmatic worries about the quality of judicial decision making. An injunction that addresses more than what the plaintiffs prove at trial may lack a sufficient basis in the evidence and arguments the parties adduced. It may produce poor results for this reason. Also, a mismatch between what the plaintiffs prove to establish the defendants' liability and the scope of the remedy risks separation of powers problems. The court might stray onto the territory of other branches if it enjoins more than what the liability findings authorize. These liability findings are a necessary predicate for the quasi-administrative or quasi-legislative role that the structural injunction requires the court to assume.

To take these concerns seriously, Rule 23(b)(2) ought to limit public interest plaintiffs to requests for injunctions for which administration requires no individualized determinations once the classwide allegations are proven. An injunction that depends upon individualized tailoring after its issuance, for example, would need more of an informational basis than what the evidence adduced at the liability phase can supply. The injunction would trigger the sort of competence and legitimacy concerns that scope-of-remedy doctrine tries to minimize.

The injunction issued by the district judge in the Milwaukee Public Schools litigation, mentioned in Part I,[309] is an example. To remedy the district's failure to find children with disabilities and afford them appropriate IEPs, the district

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Cal. 2011). *See also* RUBENSTEIN, *supra* note 292, § 4:34 (describing how some courts treat cohesion as a test for adequacy of representation, an inquiry provided for in Rule 23(a)(4)).

306. *See, e.g.*, Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012); Houser v. Pritzker, 28 F. Supp. 3d 222, 249–50 (S.D.N.Y. 2014).

307. *See, e.g.*, Brief for the District of Columbia Appellants (Final Version) at 42–43, D.L. v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013) (No. 11-7153). A version of this argument won the day in *Williams v. Jones*, No. 9:14-cv-00787-RMG-BM, 2014 WL 2155251, at *9 (D.S.C. May 22, 2014).

308. For reasoning to this effect, see *Gray v. Golden Gate National Recreational Area*, 279 F.R.D. 501, 521 (N.D. Cal. 2011).

309. *See supra* notes 115–18 and accompanying text.

judge ordered the creation of a "hybrid IEP team."[310] This team would examine the circumstances of various disabled children and determine what relief each would get—a particular IEP, perhaps, or compensatory education funds.[311] The Seventh Circuit denied that this injunction could qualify by Rule 23(b)(2)'s indivisibility metric because it "merely establishe[d] a system for eventually providing individualized relief" that would require "highly individualized determinations of liability and remedy" well beyond what the classwide findings entailed.[312] In contrast, an injunction devised to fix an inadequate system of disabilities education in the District of Columbia passed Rule 23(b)(2) muster when it required the District to increase its overall efforts to find children with disabilities, to lower the average time the District took to evaluate children for IEPs, and to publish better literature advising parents of their children's rights.[313] The classwide liability findings could support this injunction; no further individualized adjudication was necessary because the injunction targeted the District's Level I conduct alone and did not propose to differentiate among class members.

If applied as I propose, Rule 23(b)(2) should not set a difficult threshold for plaintiffs to meet. Only in the rare case targeting undifferentiated Level I conduct will the plaintiffs be unable to propose a groupwide injunction that does not require individualized administration.[314] More often, this recommendation might constrain remedial options. Foster care reform plaintiffs will have to eschew a proposed injunction ordering the establishment of special panels to administer tailored relief to each individual child,[315] but they can seek an injunction requiring that caseworkers' caseloads not exceed a set maximum.[316] Options analogous to the latter should be identifiable in most Type III cases. If injuries result from impersonal, undifferentiated conduct at Level I, effective remedies designed to fix these dysfunctions should likewise be impersonal and undifferentiated.

A final word about Rule 23(b)(2) is in order. In several instances, courts have denied class certification on Rule 23(b)(2) grounds because the plaintiffs do not

310. *Jamie S.*, 668 F.3d at 489.

311. *Id.*

312. *Id.* at 499; *see also* Lightfoot v. District of Columbia, 273 F.R.D. 314, 330 (D.D.C. 2011).

313. DL v. District of Columbia, 302 F.R.D. 1, 16 (D.D.C. 2013) (distinguishing this injunction from that issued in *Jamie S.* and finding that it satisfied the post-*Wal-Mart* Rule 23(b)(2)); DL v. District of Columbia, 845 F. Supp. 2d 1, 25–29 (D.D.C. 2011) (describing the injunction), *vacated and remanded*, 713 F.3d 120 (D.C. Cir. 2013).

314. For one such example, see *Smentek v. Sheriff of Cook County*, No. 09 C 529, 2014 WL 7330792, at *9–10 (N.D. Ill. Dec. 22, 2014).

315. M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 846–47 (5th Cir. 2012).

316. M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7, 46–47 (S.D. Tex. 2013); *cf.* Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut, 706 F. Supp. 2d 266, 289 (D. Conn. 2010) (distinguishing between injunctive relief requiring each Americans with Disabilities Act class member to be placed in the most integrated setting from injunctive relief improving the process by which the agency determined the most integrated setting for each class member, and suggesting that the latter satisfies Rule 23(b)(2)).

propose qualifying injunctive relief at the requisite degree of specificity.[317] A California district court, for example, refused to certify a class of Native American inmates challenging interference with their religious practices because the named plaintiffs were unable to specify the circumstances under which members should be granted access to sweat lodges and be allowed to congregate for worship.[318]

This specificity requirement is misguided. Structural reform litigation invariably proceeds in two phases: when the defendant's liability is established, an extensive remedial phase then follows. In present-day litigation, this remedial phase may proceed over a period of years, during which various stakeholders will negotiate a remedy under the court's supervision. The days of command and control, when judges cloistered alone in chambers issuing detailed injunctions, are mostly gone.[319] In other words, the plaintiffs may succeed in establishing the defendant's liability, and only over a course of years will the remedy then take shape.[320] To demand that the plaintiffs detail a proposed injunction in specific terms at the class certification stage, then, makes no sense. Doing so is an entirely academic exercise because the eventual remedy will only emerge after much more litigation and a complex, lengthy process of negotiation. Rule 23(b)(2) should require plaintiffs to do no more than sketch out remedial possibilities, even if vague, to show that meaningful indivisible relief is plausible.[321]

CONCLUSION

Administered in a manner that is consistent with its function, class action procedure should not threaten the ongoing viability of structural reform litigation. Unless and until detractors establish that this litigation—a staple of the federal courts' diet since at least the 1960s—is normatively undesirable, courts should not use class action doctrine to burden public interest plaintiffs. Instead, Rule 23 should be understood to counterbalance doctrines that, in its absence, would unnecessarily cripple efforts to win systemic remedies.

317. *See, e.g.*, Shook v. Bd. of Cty. Comm'rs of El Paso, 543 F.3d 597, 605–08 (10th Cir. 2008).

318. *See* Martinez v. Brown, No. 08-CV-565 BEN (CAB), 2011 WL 1130458, at *13–15 (S.D. Cal. Mar. 25, 2011).

319. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067–72 (2004) (describing the remedial process in modern-day structural reform litigation).

320. Jail conditions litigation in Maricopa County, Arizona, is a good example. *See* Graves v. Arpaio, 48 F. Supp. 3d 1318, 1327–32 (D. Ariz. 2014) (describing the case's history).

321. For reasoning to this effect, see, for example, *Houser v. Pritzker*, 28 F. Supp. 3d 222, 249 (S.D.N.Y. 2014), and *Butler v. Suffolk County*, 289 F.R.D. 80, 101 (E.D.N.Y. 2013).