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SEVENTH CIRCUIT REVIEW

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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. During each semester, students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and “defend” their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court’s recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PREFACE

It has been my honor and privilege to serve as the Executive Editor of the SEVENTH CIRCUIT REVIEW during the 2015–16 academic year. I will admit, however, that when I started my tenure as Executive Editor, I was a skeptic. I did not entirely appreciate the value of academic legal journals, which in recent years had taken a beating in the mainstream media. After a year editing the SEVENTH CIRCUIT REVIEW, I am happy to report that I am a convert. That is not to say that I entirely disagree with the criticisms levied by those who harbor a distaste for legal academic journals; I just now see the value for the individuals who write the articles, the students who edit them, and the larger legal community that hopefully reads them. There is, nevertheless, one criticism that I would like to highlight.

Critics of law reviews often argue that many of the articles have little to do with the actual practice of law. Chief Justice John G. Roberts, Jr., for instance, once voiced this criticism when he said, “Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.” While I do not entirely agree with Chief Justice Roberts about the lack of usefulness of such an article, I do understand the critique. For those in the profession looking to law reviews for practical assistance, legal articles that have no basis in practical reality are of little help. It is in response to criticisms such as this one that journals like the SEVENTH CIRCUIT REVIEW shine.

2 Id.
The self-proclaimed purpose of the SEVENTH CIRCUIT REVIEW is “to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence.” That goal, in and of itself, keeps the SEVENTH CIRCUIT REVIEW from falling prey to Chief Justice Roberts’ critique. Every semester talented students self-select cases recently decided by the Seventh Circuit. As a result, the topics of the student articles are directly relevant to the practice of law within the Seventh Circuit. But, the REVIEW goes further than topical relevancy. The REVIEW remains on the forefront of legal technology, assuring its place in the future. For example, the REVIEW was an early industry leader in its adoption of the online only format and remains among the few, if not the only, law review that publishes a podcast-type audio synopsis to accompany each article.

The continued success and relevance of the SEVENTH CIRCUIT REVIEW is due largely to one man: Professor Hal Morris. The REVIEW would not be what it is today without the stewardship of Professor Morris. I, and the student writers and editors of the REVIEW, appreciate his continued dedication. As I sign off as Executive Editor of the REVIEW, I have a final request: keep reading the SEVENTH CIRCUIT REVIEW and keep writing legal academic articles; critics be damned.

Respectfully,

Matthew Smart
Executive Editor, SEVENTH CIRCUIT REVIEW
TETZLAFF: HAS THE “UNDUE HARDSHIP” TEST BECOME UNDUE?

ALEXANDER J. BEEHLER*


INTRODUCTION

The graduating class of 2015 is estimated to have a total education debt—including federal and private education loans—of approximately $68 billion.1 Almost 71% of the 2015 graduating class graduated with some form of student loan debt.2 It seems like a major news outlet runs a student loan story every week.3 With indebtedness rising, and a stagnant wage market, many students will struggle to pay off their loans.4 Homeownership rates have plummeted, the birth rate

* J.D. candidate, May 2016, Chicago-Kent College of Law, Illinois Institute of Technology.


2 Id.


4 See Lawrence Mishel, Pay Is Stagnant for Vast Majority, Even When You Include Benefits, ECON. POL’Y INST. (July 15, 2015), http://www.epi.org/publication/pay-is-stagnant-for-vast-majority-even-when-you-include-benefits/.
is declining, and default rates are rising—all can be attributed to the indebtedness of twenty-somethings.\(^5\) Some of these debtors will unquestionably be forced into bankruptcy.

Generally, student loans cannot be discharged through bankruptcy.\(^6\) However, there is an exception in the bankruptcy code that allows debtors to discharge their student loans if they can prove that maintaining their student loan debts will impose an “undue hardship” on the debtor.\(^7\) Congress did not define what exactly undue hardship meant when drafting the bankruptcy code, so the burden of defining this provision has fallen on the bankruptcy courts.\(^8\) This Comment aims to explain the context of the undue hardship definition, and apply that definition in light of the Seventh Circuit’s recent opinion in \textit{Tetzlaff v. Educational Credit Management Corp.}\(^9\)

This Comment will: first, describe the genesis and the various definitions of “undue hardship” that the circuit courts currently apply; second, consider, through hypotheticals, whether the differences between the circuits’ definitions create an outcome determinative circuit split; third, explain the facts at issue in \textit{Tetzlaff}, the holding, and explain where the law regarding discharging student loans through bankruptcy in the Seventh Circuit rests; and fourth, conclude that the Seventh Circuit’s application is no longer consistent with the bankruptcy code, and call for legislative action. Ultimately, the Seventh Circuit no longer properly assesses undue hardship—the definition and application has now evolved into a test that is more difficult to pass than the already-exacting language of “undue hardship.”

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\(^7\) \textit{Id.}


\(^9\) \textit{Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II)}, 794 F. 3d 756 (7th Cir. 2015).
Background - What Does “Undue Hardship” Mean?

The United States bankruptcy system as a whole is designed to relieve the honest debtor from the “burden of hopeless insolvency.”\textsuperscript{10} In other words, bankruptcy can help achieve a “fresh start” for the debtor.\textsuperscript{11} Today, in the context of student loans, a debtor can receive a full or partial discharge of federal student loans through bankruptcy if the debtor can show that repaying the debt creates an “undue hardship” on the debtor and his or her dependents.\textsuperscript{12} This undue hardship adversary proceeding looks very much like a civil bench trial.\textsuperscript{13} The debtor presents evidence in front of a bankruptcy court, and the credit company contests the evidence presented.\textsuperscript{14} Appeals are heard at the United States District Court level, and further appeals move up the federal appellate chain.\textsuperscript{15} To date, the Supreme Court has not heard an appeal stemming from an undue hardship adversary proceeding. This section of the Comment will focus on the legislative history behind “undue hardship,” the various applications of the undue hardship definitions in the courts, and will conclude that these differences in definitions can, in rare circumstances, create outcome determinative results.

\textit{A. Legislative History}

Congress originally enacted section 523(a)(8) in 1978.\textsuperscript{16} The statute was enacted in response to the growing concern that college students would receive federal loans for their education and then

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\footnotesize
\textsuperscript{10} Neal v. Clark, 95 U.S. 704, 709 (1877).
\textsuperscript{14} FED. R. BANKR. P. 9017; FED. R. CIV. P. 43, 44.
\textsuperscript{15} FED. R. BANKR. P. 8003.
\end{flushleft}
discharge those loans through bankruptcy as soon as they could after graduation. For example, a New Jersey resident filed for bankruptcy fourteen days after graduating from Stanford Law School. He had already earned a business degree and a master’s degree in engineering, and he filed for bankruptcy for the sole purpose of having his loans discharged. Another instance involved a Massachusetts couple; the husband held a law degree, the wife held a graduate degree, and both had a total of $20,000 worth of student loans discharged immediately after graduation. Stories like these received widespread media attention and prompted congress into action.

At first, section 523(a)(8) provided that student loans were nondischargeable unless five years had passed since the loan first became due, or if an undue hardship would arise if the student was forced to repay the loan. This five-year provision was subsequently changed to seven years in 1990 for very much the same reasons it was instituted in the first place. Due to concern over potential debtor abuse, the seven-year provision was abolished in 1998. The only option for debtors to potentially discharge their federal student loan debt is now to show undue hardship.

19 Id.
21 Id.
25 In re Kuehn, 563 F.3d 289, 294 (7th Cir. 2009).
B. How Courts Define Undue Hardship

The United States Constitution requires uniform federal bankruptcy laws applied throughout the states. In theory, this uniformity requires debtors to be treated alike regardless of which bankruptcy court they appear in; however, in practice, when congress has remained silent in defining certain provisions of the bankruptcy code, different courts will interpret the provisions in different ways. Here, for example, congress failed to define “undue hardship,” and failed to provide any suggestion to courts on how to interpret that language. Because there is no legislative definition of “undue hardship,” various circuit courts define the term in different ways. For example, numerous circuit courts examine undue hardship with the Brunner test, a three-prong test that examines if: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. Conversely, the Eighth Circuit uses a totality of the circumstances test.

1. The Brunner Three-Prong Definition

The seminal undue hardship case is Brunner v. New York State Higher Education Services Corp. out of the Second Circuit. In

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26 U.S. CONST. art. I, § 8, cl. 4.
Brunner, the debtor received a Bachelor of Arts degree in 1979 and a Master’s degree in social work in 1982.\textsuperscript{31} Approximately nine months after receiving her master’s degree, the debtor filed to discharge her approximately $9,000 in student loans through bankruptcy.\textsuperscript{32} After a brief oral hearing where the debtor described her “shaky finances” and her unsuccessful attempt to find work, her loans were successfully discharged.\textsuperscript{33} On appeal, the district court took a harder look at the debtor’s actual ability to pay off her loans.\textsuperscript{34} Her greatest annual income was $9,000 in the decade prior to the hearing. At the time of the hearing, she was receiving $258 in public assistance, $49 per month in food stamps, and Medicaid.\textsuperscript{35} Her rent was $200 per month.\textsuperscript{36} The debtor further testified that she had sent out over a hundred resumes in search of employment, but was unsuccessful.\textsuperscript{37} The district court reversed the bankruptcy court—holding that while the debtor might have proved a current inability to pay off her loans, she did not show that she could not pay off her loans in the future, nor did she show that she had even tried to pay off her loans.\textsuperscript{38} This rationale was the foundation for the Brunner test.

On appeal, the Second Circuit affirmed the district court’s judgment.\textsuperscript{39} The Second Circuit further made the district court’s holding into a three-pronged rule to determine undue hardship.\textsuperscript{40} First, the debtor must show that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her

\begin{footnotes}
\footnote{31} In re Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985).
\footnote{32} Brunner, 46 B.R. at 753.
\footnote{33} Id.
\footnote{34} See id. at 756.
\footnote{35} Id. at 757.
\footnote{36} Id.
\footnote{37} Id.
\footnote{38} Id. at 757-58.
\footnote{40} Id.
\end{footnotes}
dependents if forced to repay the loans. This first prong has been applied as the bare minimum necessary to establish undue hardship. Second, the debtor must show that additional circumstances exist indicating that the debtor’s state of affairs is likely to persist for a significant portion of the repayment period of the student loans. The Second Circuit justified this second prong because of the “clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexempted debt.” Basically, proving a continuing inability to pay in the future is more likely to show that the hardship presented is undue. Third, the debtor must show that she made good faith efforts to repay the loans. This requirement was necessary for the Second Circuit to deter recent graduates from attempting to discharge their loans while looking for work, like the debtor in Brunner, and instead promote recent graduates unable to find work to request a deferment of payments on the loans.

2. The Totality of the Circumstances Definition

The Eighth Circuit decision of Long v. Educational Credit Management Corp. articulates the totality of the circumstances definition. In Long, the debtor was a thirty-nine-year-old single mother. She obtained her chiropractic degree by taking out substantial student loans. She passed her state exam, worked at various clinics, and eventually owned and operated her own practice

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41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 See id. at 397.
49 Id. at 551.
50 Id.
up until her mental circumstances changed.51 She began to experience extreme fatigue, depression, and severe short-term memory loss.52 These symptoms affected her work; her clientele dropped, and she eventually closed her practice down altogether.53 At one point in her downward spiral, she attempted suicide.54 After seeking professional help, she fortunately began a recovery process.55

At the time of the bankruptcy proceeding, the debtor in Long was making approximately $1,163 per month.56 She lived at home with her parents and paid them $500-$600 per month in return for them to subsidize her and her child’s rent, utilities, car payment, car insurance, health insurance, cellular phone bill, child care, and food.57 The remainder of her income went to her loans, and her pursuit of a four-year degree to get back on her feet.58 At the time of the bankruptcy proceeding, the debtor’s $35,322.81 in student loans had increased to over $61,000.59 The bankruptcy court granted the debtor an undue hardship discharge because loan repayment would essentially impose a twenty-five-year sentence in payments on an obligation that she could never realistically expect to retire or reduce.60

On appeal, the creditor urged the Eighth Circuit to adopt the Brunner test.61 The main reason behind this request was because the debtor made approximately ten years’ of payments towards her debt, but defaulted after she became ill.62 If Brunner were to apply, she would not be able to discharge her loans since she would not meet the

51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id. at 551-52.
58 Id. at 552.
59 Id.
60 Id.
61 Id. at 553.
62 Id. at 552.
third prong of the test—the good faith prong. The Eighth Circuit was not persuaded, however, because it specifically declined to apply Brunner. The Eighth Circuit took issue with the fact that “under a Brunner analysis, if the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends and the student loan is not dischargeable.”

The Eighth Circuit finally held that it preferred a “less restrictive approach” in defining undue hardship and decided that the totality-of-the-circumstances approach was best. The Eighth Circuit stated, “that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.” The court further held that the totality of the circumstances analysis considers: “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each bankruptcy case.” The Eighth Circuit believes in the simple premise that “if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”

3. How Other Circuits Define “Undue Hardship”

Unlike the Eighth Circuit, the majority of other circuit courts examine undue hardship using the Brunner test. The Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all have

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63 Id. at 553.
64 Id., at 554.
65 Id.
66 Id.
67 Id.
68 Id. at 554-555.
69 In re Hicks, 331 B.R. 18, 30 (Bankr. D. Mass. 2005).
adopted some version of this Brunner three-prong test. The First Circuit has declined to choose a specific test. The eight circuits that have adopted Brunner all seem to have different formulations of how these three general prongs are specifically defined. The courts agree on uniformly applying the first prong of Brunner—the debtor must show an inability to pay off the loans while still maintaining a minimal standard of living and while attempting to maximize income—but the application of the other two prongs has generated confusion.

Courts have differed on how to properly assess whether a debtor will likely have the same circumstances through most of the loan repayment period. The Seventh Circuit, along with three other circuits, has defined the second prong of Brunner to require that the debtor show a “certainty of hopelessness” before being allowed to discharge his/her loans. In these circuits, a present inability to fulfill financial commitments is not enough for the second prong to be satisfied. While no circuit has defined what this “certainty of hopelessness” truly means, the Fourth and Sixth Circuits have indicated that the debtor can demonstrate a certainty of hopelessness through “illness, disability, a lack of useable job skills, or the existence of a large number of dependents.” In the Sixth Circuit, proving the second prong of Brunner requires a showing of “hopelessness” that is outside of the debtor’s control, and showing that these circumstances will

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71 In re Nash, 446 F.3d 188, 190 (1st Cir. 2006).

72 See In re Bronsdon, 435 B.R. 791, 806 (B.A.P. 1st Cir. 2010).

73 Oyler, 397 F.3d at 386; Frushour, 433 F.3d at 396; O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn), 339 F.3d 559, 564 (7th Cir. 2003); Faish, 72 F.3d at 307.

74 O’Hearn, 339 F.3d at 564.

75 Frushour, 433 F.3d at 400; Oyler, 397 F.3d at 386.
continue to be hopeless for some period of time. The Third Circuit defined certainty of hopelessness as “total incapacity now and in the future to pay [her] debts for reasons not within her control.” The Fifth Circuit has not adopted the certainty of hopelessness standard, but it has nonetheless defined this prong of the Brunner test to require proving “total incapacity,” similar to the Third Circuit’s definition.

On the other hand, the Ninth Circuit does not require that certainty of hopelessness must be proven when evaluating “future hardship.” The Tenth Circuit has explicitly rejected a certainty of hopelessness standard, instead requiring courts to take a “realistic look” at the debtor’s ability to “provide for adequate shelter, nutrition, health care, and the like.” These two Brunner-applying circuits have a more lenient approach to the second prong of Brunner than the certainty of hopelessness circuits.

Courts disagree on the third prong of Brunner as well. Some courts have held that the failure to make any past payments on the precise student loan debt sought to be discharged is a per se bar to discharge because it does not meet the “good faith” requirement. In contrast, the Tenth and Eleventh Circuits have explicitly held that the failure to make student loan payments does not, standing alone, preclude a finding of prior good faith effort. These circuits view the good faith requirement as one that evaluates whether the debtor was attempting to abuse the student loan system—rather than one that

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76 Oyler, 397 F.3d at 386.
77 Faish, 72 F.3d at 307.
78 Gerhardt, 348 F.3d at 92 (quoting Faish, 72 F.3d at 307).
79 Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 882-83 (9th Cir. 2006) (holding that a debtor does not have a “separate burden” to show exceptional circumstances beyond the inability to pay presently or in the future).
82 See In re Mosley, 494 F.3d 1320, 1327 (11th Cir. 2007); Polleys, 356 F.3d at 1310.
evaluates whether the debtor was aggressively paying off the student loans under the circumstances.83

C. Are These Definitions Outcome Determinative?

Despite the different verbal formulations, both the Brunner test and the “totality-of-the-circumstances” test use similar information and typically will lead to similar results. As the Tenth Circuit put it, “the two tests will often consider similar information—the debtor’s current and prospective financial situation in relation to the educational debt and the debtor’s efforts at repayment.”84 The choice of “test” makes so little difference that the First Circuit refused even to choose between the two.85

Other circuit courts agree with the First Circuit. For instance, while adopting the Brunner test, the Tenth Circuit rejected arguments that the two tests diverged: “We do not read Brunner to rule out consideration of all the facts and circumstances. . . . [Brunner] necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor’s education and skill level.”86 Even the Eighth Circuit, the circuit known for applying the totality-of-the-circumstances test, acknowledged that whatever conflict exists between the two tests “[may not be that significant.”87 And this makes sense; both tests are designed to define “undue hardship,” after all. This section of the Comment will explain, through a hypothetical, how the Brunner and totality tests can be outcome determinative. This section will further explain how the different formulations of Brunner within the circuits look like they

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83 Polleys, 356 F.3d at 1312.
84 Id. at 1309.
85 In re Nash, 446 F.3d 188, 190 (1st Cir. 2006) (“We see no need in this case to pronounce our views of a preferred method of identifying a case of ‘undue hardship.’”).
86 Polleys, 356 F.3d at 1309.
87 Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 n.1 (8th Cir. 2009).
may produce different results, but do not actually do so when employed.

1. Brunner vs. Totality Tests

Even though both tests evaluate similar facts, there is no question that a debtor who fails to satisfy any single element of Brunner is automatically ineligible for discharge.88 By contrast, courts applying the totality test simply ask the statutory question whether there is “undue hardship.”89 These courts consider a broad range of factors, with no single dispositive consideration.90 The “totality” approach rejects “strict parameters,” allowing courts to exercise “the inherent discretion contained in § 523(a)(8)(B).”91

While, in many cases, both tests lead to the same result, the legal profession recognizes that there can be significant differences between the two tests. The “totality” test is “more flexible and often more beneficial to the debtor.”92 “The two tests often produce different results” because of the compulsory-checklist nature of the Brunner test.93 In many cases the Brunner test results in no discharge where “the likelihood of discharge would have been vastly improved” in a “totality” jurisdiction.94

90 Id.
91 Id. at 554.
One hypothetical can help show how these standards can be outcome determinative. Assume there is an individual, Deborah, whose debt is somewhat similar to the debtor in Long—she has an advanced degree, say, a Master’s in Education rather than Long’s chiropractic degree. But, Deborah cannot find full-time employment. Deborah has been searching for years; she has relocated cities just to look for jobs, but nothing is working out for her. She shares the cheapest apartment she can find with multiple roommates, she has not bought a new car, nor has she bought any extravagant items since receiving her diploma. She works as a part-time substitute teacher, works an additional part-time job, and is seeking employment in multiple job industries—but her efforts in securing employment are to no avail. Assume that she can spend only $100 of her monthly income on paying off her loans under her small salaries and high loans. Under these circumstances, she should be able to pass the first prong of the Brunner test. She has attempted to maximize her income while minimizing her expenses.

Now, let’s assume that Deborah gets ill. She loses her vision. Her circumstances are not likely to improve, nor will she realistically be able to utilize her advanced degree in the future. She will certainly meet the second prong of Brunner—her prospective circumstances are so dire that she will likely not be able to pay off her loans. Finally, assume that Deborah has both private and federal student loans, and she has only paid off part of her private loans because she has a higher interest rate on those loans. Further, let’s assume that she stopped payment on both her private and federal loans when she became ill. This is where the Brunner and totality tests are outcome determinative. Despite what clearly looks like “undue hardship,” Deborah may not be able to discharge her federal loans in a circuit applying the Brunner test because she did not pay off her federal loans.

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97 See id.
in “good faith.” Under a totality of circumstances jurisdiction, however, Deborah would likely be able to discharge her loans under the same fact pattern because a failure to satisfy one prong of Brunner is not dispositive.

While the Deborah analogy is severe and unlikely to occur often, if at all, it illustrates that the tests for undue hardship do not always work in the way that courts intend them to. Despite a debtor being in a hopeless situation, outside of her control, a court would still—strictly applying Brunner—conclude that she could not discharge her loans.

2. Are There Splits Within The Brunner Definition?

Brunner, in layman’s terms, held that someone could discharge their student loans through bankruptcy if they: (1) cannot repay their student loans based on their current circumstances; (2) will not be able to pay off their loans in the future based on prospective circumstances; and (3) have tried to pay off their loans. As discussed previously, the eight circuits that have adopted Brunner all seem to have different formulations of how to apply the latter two prongs. The courts seem to agree on uniformly applying the first prong of Brunner, but the other two prongs could potentially create more outcome determinative splits.

Some circuits, under the “future hardship” prong of Brunner, require a showing of a “total incapacity” to pay the loans in the future; others require a showing of a “certainty of hopelessness;” while others simply require a “realistic look” at the debtor’s circumstances.

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98 See In re Spence, 541 F.3d 538, 545 (4th Cir. 2008) (holding that a debtor’s choice to repay some of her loans does not demonstrate a good faith effort to pay all of the loans held by a creditor).
99 See Long, 332 F.3d at 554.
100 See Brunner, 831 F.2d at 396.
Despite the differences in language, the courts generally agree that student loans are mortgages on the future, so the debtor must prove that her future is so bleak as to warrant a discharge of the loans. Typically, this is shown to bankruptcy courts through testimony that the debtor has: an illness, some disability, a lack of useable job skills, or the existence of a large number of dependents. Because of the inherent discretion given to bankruptcy courts in weighing the facts and testimony presented to them, it is tough to come up with a hypothetical that would guarantee an outcome determinative circuit split.

Returning to the Deborah analogy, under the facts presented above—but also assuming she has attempted to pay her federal loans in good faith—she would be able to discharge her loans in any jurisdiction. Losing one’s eyesight due to circumstances outside the debtor’s control would meet any test adopted in the circuits. However, assuming that she did not fall ill, but was instead a single mother of two children; assuming that she had been fired and was looking for a steady job for five years while trying to make ends meet, the circuits would potentially disagree on whether the second prong of Brunner was satisfied. However, the disagreement would not be due to the test employed, but rather due to the discretion of the bankruptcy judge as to whether Deborah could definitely show that her situation was not likely to improve.

The third prong of Brunner could create outcome determinative splits if a jurisdiction holds that the failure to make any past payments on the precise student loan debt sought to be discharged is a per se bar. While the Tenth and Eleventh Circuits have explicitly held that the failure to make any student loan payments does not, standing alone, preclude a finding of prior good faith effort—no circuit court has held

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F.3d 1302, 1310 (10th Cir. 2004) (requiring courts to take a realistic look at debtor’s ability to repay).

102 See e.g., Polleys, 356 F.3d at 1311.

that the failure does create an absolute bar.\textsuperscript{104} In the cases where circuit courts have held that the good faith requirement is not met due to a debtor’s choice to pay some loans, but not others, the courts have also held that other prongs of \textit{Brunner} were not satisfied.\textsuperscript{105} This is because the circuits agree that there can be circumstances where a debtor can be attempting to repay the loans in good faith, but simply cannot do so.\textsuperscript{106} To conclude, while the language used by the various circuits to define the \textit{Brunner} test differs, the actual application is not outcome determinative because of the leeway the fact-finder is given to determine what testimony is persuasive.

**UNDUE HARDSHIP IN THE SEVENTH CIRCUIT**

This section of the Comment focuses on the state of undue hardship in the Seventh Circuit specifically. The Seventh Circuit now employs one of the strictest standards for discharging student loans through bankruptcy, and it is important to understand why.

\textit{A. Background}

While the Seventh Circuit has evaluated numerous undue hardship appeals, two cases stood out more than others in the formulation of the \textit{Tetzlaff} opinion: \textit{Matter of Roberson}, and \textit{Krieger v. Educational Credit Management Corp.}\textsuperscript{107} This section of the Comment explains both cases in light of how the holdings influenced the opinion in \textit{Tetzlaff}.

\begin{footnotesize}
\begin{enumerate}
\item[104] See In re Mosley, 494 F.3d 1320, 1327 (11th Cir. 2007); Polleys, 356 F.3d at 1311.
\item[105] See In re Spence, 541 F.3d 538, 545 (4th Cir. 2008); see also Tetzlaff v. Educ. Credit Mgmt. Corp. (\textit{Tetzlaff II}), 794 F. 3d 756, 761 (7th Cir. 2015).
\item[106] See \textit{e.g.}, Mosley, 494 F.3d at 1327.
\item[107] \textit{Tetzlaff II}, 794 F.3d at 758-59.
\end{enumerate}
\end{footnotesize}
1. Roberson

The Seventh Circuit first adopted the Brunner standard in Matter of Roberson. Roberson, the debtor, was still paying off his student loans for his Bachelor of Science degree when his life began to fall apart in 1990. His marriage failed, he lost his job, and he was no longer able to pay his creditors. Later that year, he filed for bankruptcy and attempted to discharge his loans. The bankruptcy court determined that Roberson’s loans were not dischargeable; Roberson appealed, and the district court reversed the bankruptcy court’s decision and discharged the loans. The creditor, Student Assistance Commission filed an appeal.

The Seventh Circuit reversed the district court and adopted the Brunner three-prong test. The Seventh Circuit explained its choice behind adopting Brunner, stating that the three requirements effectively weed out debtors filing for bankruptcy to primarily avoid loan repayment. The court continued:

The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student’s future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.

108 Matter of Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).
109 Id. at 1134.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id. at 1135.
115 Id. at 1136.
116 Id. at 1137.
The Seventh Circuit reasoned that the first prong of Brunner—the minimal standard of living prong—was the proper starting point for the undue hardship inquiry because this information is generally concrete and readily obtainable. The court continued by reasoning that the second prong of Brunner—the debtor’s condition is likely to persist for a significant portion of the repayment period—is necessary because student loans are effectively mortgages on the debtor’s future. The court next reasoned that the third prong of Brunner—the good faith effort to repay loans—would be measured by the debtor’s efforts to obtain employment, maximize income, and minimize expenses. Finally, the Seventh Circuit held that the Brunner test requires a debtor to prove a “certainty of hopelessness.”

2. Krieger

In 2013, the Seventh Circuit revisited the standard set by Roberson in Krieger v. Educational Credit Management Corp. The bankruptcy court held that the debtor in Krieger had adequately proven undue hardship. The creditor appealed, and the district court reversed; holding that the debtor could have searched harder for work, and that she failed the good faith prong because she had not enrolled in a twenty-five-year payment program. The Seventh Circuit reversed the district court and remanded to reinstate the discharge issued by the bankruptcy judge. While this holding had more to do with the district court misapplying the standard of review—a clear

117 Id. at 1135.
118 Id. at 1135-36.
119 Id. at 1136.
120 Id. at 1136; see O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn), 339 F.3d 559, 564 (7th Cir. 2003) (holding that the certainty of hopelessness requirement is part of the second prong of the Brunner test).
122 Id.
123 Id. at 883-84.
124 Id. at 885.
error standard for the factual findings of the bankruptcy judge—the Seventh Circuit further elaborated on the standard set in Roberson.\textsuperscript{125}

The Seventh Circuit first discussed the third prong of Roberson, and therefore Brunner.\textsuperscript{126} The court held that the good faith prong could not require a commitment to future efforts to repay—because that would create a situation where no educational loan could ever be discharged.\textsuperscript{127} As to the second prong of Brunner, the Seventh Circuit held that the debtor proved that her circumstances were likely to persist indefinitely.\textsuperscript{128} The court made specific note that the debtor—had she signed up for a twenty-five-year repayment period—would realistically not be able to pay anything towards her loans, and interest would accrue, until her loans would be forgiven pursuant to the plan.\textsuperscript{129} The Seventh Circuit criticized the “certainty of hopelessness” language in dicta, but ultimately held that Krieger was a scenario where there truly was no hope without a discharge of the loans.\textsuperscript{130}

\textbf{B. Facts of Tetzlaff}

Mark Warren Tetzlaff was fifty-four-years-old at the time he filed his bankruptcy and adversary complaint.\textsuperscript{131} His student loan debt was nearly $260,000 when he filed for Chapter 7 bankruptcy in 2012.\textsuperscript{132} Tetzlaff’s debt was guaranteed by Educational Credit Management Corporation.\textsuperscript{133} Tetzlaff also held $18,940 in private student loan debt

\begin{small}
\begin{enumerate}
\item Id. at 884-85.\textsuperscript{125}
\item Id. at 884.\textsuperscript{126}
\item Id.\textsuperscript{127}
\item Id.\textsuperscript{128}
\item Id. at 885-85.\textsuperscript{129}
\item Id. at 885 (“[Certainty of hopelessness] sounds more restrictive than the statutory ‘undue hardship,’ but at all events the bankruptcy judge found that Krieger’s situation is hopeless.”).\textsuperscript{130}
\item Petition for Writ of Certiorari at 3, Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S.Ct 803 (2016) (No. 15-485).\textsuperscript{131}
\item Tetzlaff v. Educ. Credit Mgmt. Corp. (\textit{Tetzlaff II}), 794 F. 3d 756, 757 (7th Cir. 2015).\textsuperscript{132}
\item Id.\textsuperscript{133}
\end{enumerate}
\end{small}
and $75,776.37 in private non-student loan debt.  

The mix of federal and private student loans was used to pay for Tetzlaff’s graduate education at Marquette University, 1992-1994 (MBA received); DePaul University College of Law, 1994-1998 (no degree received); and Florida Coastal School of Law, 1999-2005 (JD received). Tetzlaff also has a Master’s in Religion from Trinity International University, but those loans, if there are any, were not at issue in his bankruptcy case.

The original repayment period for Tetzlaff’s consolidated federal student loan debt was twenty years. Based on an interest rate of 4.125 percent and an eight-year amortization schedule through retirement at age sixty-five, Tetzlaff would need approximately $38,107 of excess annual cash flow per year to repay just his consolidated federal student loan debt.

Tetzlaff currently resides in Waukesha, Wisconsin, with his 86-year-old mother. They subsist together solely on his mother’s Social Security payments. Tetzlaff is divorced, currently unemployed, and has twice failed the bar exam. Prior to attending graduate school, Tetzlaff worked in the employee benefits industry, as a stockbroker, as an insurance salesman, and as a financial advisor. He has been unable to find work in these fields since completing law school. In addition, Tetzlaff is a recovering alcoholic and faces other challenges.
that contribute to his difficulties in obtaining employment, including several misdemeanor convictions.144

C. Procedural History

On May 1, 2014, the bankruptcy court issued an order holding the loans nondischargeable.145 The bankruptcy court found that with Tetzlaff’s current income, he was unable to pay his student loan debt and maintain a minimum standard of living—the first Brunner prong was met.146 The court turned next to Brunner’s second prong, and concluded that Tetzlaff failed to meet it; he failed to establish that he would be unable to pay back his student loan debt in the future.147 In doing so, the bankruptcy court noted that although “the ‘certainty of hopelessness’ standard . . . was criticized in dicta in Krieger, it was not explicitly overruled.”148 The bankruptcy court then clarified that “even if the lesser standard were applicable to this case, Mr. Tetzlaff has not met this test.”149

In analyzing Tetzlaff’s future ability to repay his student loans, the bankruptcy court’s conclusions were based on its credibility determinations of two competing experts, Dr. Ackerman (a forensic psychologist hired by the creditor) and Dr. Gurka (Tetzlaff’s treating psychologist).150 The court found Dr. Ackerman’s testimony more compelling as it was more complete and more current that Dr. Gurka’s.151 The court also noted that Dr. Ackerman tested forensically, not just clinically, and therefore her testimony was particularly

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144 Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II), 794 F. 3d 756, 758 (7th Cir. 2015).
147 Id.
148 Brief in Opposition to Certiorari at 6, Tetzlaff, 136 S.Ct. 803 (No. 15-485).
149 Id. at 6-7.
150 Id. at 7.
151 Id.
credible.152 Her tests results showed that Tetzlaff was likely malingering - he scored extremely high on the portion of the testing that indicated he was feigning at least some of his symptoms.153 As the trier of fact, the bankruptcy court weighed all testimony and concluded Tetzlaff did not establish he was unable to earn more money in the future.154 The bankruptcy court concluded that even if Tetzlaff was continually unable to pass a bar exam or practice law, he would still be able to find work if he put forth some effort.155 The bankruptcy court touted Tetzlaff’s educational accomplishments, intelligence, advanced degrees, and continued good health, stating:

Even if he is never able to pass a bar exam, he has an MBA, is a good writer, is intelligent, and family issues are largely over. While he has challenges with past alcohol abuse and interpersonal relationships, he is not mentally ill and is able to earn a living . . . Mr. Tetzlaff’s marital problems, personality problems, misdemeanor convictions, care-taking responsibilities, and failure of the bar exams do not meet the level of undue hardship necessary to discharge student loans. They are typical of many bankruptcy debtors.156

In its discussion of Brunner’s third prong—good faith efforts to repay—the bankruptcy court took note of both Tetzlaff’s failure to make any payments on the loans at issue as well as the fact that he made payments towards a “loan” directly to Florida Coastal.157 Tetzlaff argued that he made late tuition payments directly to Florida Coastal for his law school education, and that the tuition payments

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152 Id.
153 Id.
154 Id.
155 Id.
156 Id. at 7-8.
157 Id. at 8.
should be characterized as payments on a student loan. The bankruptcy court characterized Tetzlaff as a “malingering,” and held that this did not constitute making a good faith payment on his loans.

Tetzlaff appealed this decision to the district court, which affirmed the bankruptcy court. The district court concluded that the bankruptcy judge was entitled, as the trier of fact, to weigh and discount evidence. The district court held “[i]t could not] upset the bankruptcy judge’s finding of no undue hardship, which was reasonable given the evidence presented at trial concerning Tetzlaff’s effort to find employment.” The bankruptcy court’s decision turned on its factual findings that Tetzlaff was feigning psychological symptoms and not trying to work up to his abilities. The district court noted that “the bankruptcy court did not, as Tetzlaff claims, apply the ‘certainty of hopelessness’ test . . . [T]he bankruptcy judge concluded that Tetzlaff had failed to meet even the lesser standard that he advocated for.”

D. Holding

On further appeal, the Seventh Circuit again affirmed the bankruptcy court’s conclusion that Tetzlaff had failed to establish undue hardship. The Seventh Circuit specifically discussed the second and third prongs of the Brunner test—since the district and bankruptcy courts concluded that Tetzlaff could not maintain a

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159 Id. at 881-82.
160 Id. at 875.
161 Id. at 880.
162 Id. at 881.
163 Id.
164 Id.
165 Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II), 794 F. 3d 756, 761 (7th Cir. 2015).
minimal standard of living if forced to repay the loans. Since the
bankruptcy court’s findings were findings of facts, the standard of
review was therefore clear error.

When looking at the second prong of Brunner—that there are
additional circumstances showing a certainty of hopelessness—the
Seventh Circuit was not persuaded. Judge Flaum, writing for the
unanimous panel, noted that the evidence presented at trial indicated
that Tetzlaff did not suffer from clinical levels of anxiety or depression
and that he “may, in fact, be exaggerating his symptoms.” The
Seventh Circuit observed that Tetzlaff’s academic degrees, prior work
experience, age, and commendable pro se representation in the case,
all indicated he was fully capable of earning a living and that his
efforts to maximize his income were insufficient. The court justified
this rationale by stating that undue hardship encompasses a notion that
the debtor may not cause his own default. Instead, the debtor’s
condition must result from factors beyond his reasonable control.

As to the good faith prong of Brunner, Tetzlaff argued that his late
tuition payments directly to Florida Coastal should count as a good
faith effort to repay his loans. The Seventh Circuit disagreed. The
court criticized Tetzlaff’s argument, holding that the good faith prong
is centered on the debt subject to the discharge action itself. The
court further opined, “it seems that Tetzlaff repaid his debt to Florida
Coastal largely because he needed the school’s cooperation in
releasing his diploma and transcript. As a result, the court affirmed

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166 Id. at 759-61.
167 Id. at 759-60.
168 Id. at 760.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id. at 761.
174 Id.
175 Id.
176 Id.
the lower court’s holding that Tetzlaff did not make a good faith effort
to pay down his loan debt.177

E. State of the Law

After Tetzlaff, the Seventh Circuit is now one of the most exacting
circuits when it comes to the undue hardship analysis. Debtors in
Illinois, Indiana, and Wisconsin have to conform to the rigidity of the
Brunner prongs, and prove standards that have intensified since
Brunner was originally incorporated in Roberson.178 First, a debtor
must prove he cannot maintain a minimal standard of living if forced
to repay the loans.179 Second, a debtor must prove additional
circumstances exist, outside of the debtors control, that would lead to a
certainty of hopelessness if forced to pay the loans.180 Third, the
debtor must show good faith in attempting to obtain employment,
maximize income, minimize expenses, and pay off the loans at issue in
the adversary proceeding.181 If a debtor is unable to prove all three
prongs in the original bankruptcy proceeding, the debtor is extremely
unlikely to win on appeal because of the clear error standard of review
employed by the courts when reviewing factual findings.182

ANALYSIS

A. The Seventh Circuit Got Tetzlaff Right

The Seventh Circuit came to the correct conclusion under the
facts, that Mark Tetzlaff was a malingerer who could not prove that his
circumstances were outside his control. Now, part of this decision was
because Tetzlaff was not allowed to disclose expert witnesses who

177 Id.
178 See Matter of Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).
179 Tetzlaff II, 794 F.3d at 758-59.
180 Id. at 759-60.
181 Id. at 760-61.
182 See id. at 759.
would testify that he was suffering from memory problems that would likely prohibit him from ever passing a bar exam.183 Tetzlaff missed the thrice-extended deadline to disclose these experts by eight months.184 Under a clear error standard, the Tetzlaff judgment was fairly straightforward.

Tetzlaff’s case would have had the same result had it been decided in a totality of the circumstances jurisdiction. Courts applying the totality test in the handful of cases that do involve factual circumstances similar to this case have had the same result. The Eighth Circuit’s decision in Educational Credit Management Corp. v. Jesperson is a good example.185 The debtor in Jesperson had previous was highly educated, had a J.D., and had just as much debt as Tetzlaff.186 Just like Tetzlaff, the debtor in Jesperson was determined to be unmotivated to work to his potential, and was denied a discharge of his more than $300,000 debt.187 Tetzlaff is also similar to the debtor in In re Shadwick.188 Both Shadwick and Tetzlaff have J.D.s, and were unable to pass the bar exam.189 Shadwick, however, had three small, dependent children, including one with significant disabilities, and was still denied a discharge.190 Both Shadwick and Jesperson were decided in the Eighth Circuit—the circuit known for using the totality of the circumstances test rather than Brunner.

There is simply no reason to suppose that a circuit employing the totality test would find Tetzlaff’s evidence of an undue hardship any more persuasive. Tetzlaff was ultimately denied a discharge of his student debt because of his failure to work up to his abilities, his lack

183 Id. at 760.
184 Id.
185 Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775 (8th Cir. 2009).
186 Id. at 784-85.
187 Id. at 784-85; see also In re Lofton, 371 B.R. 402, 410-11 (N.D. Iowa 2007) (a 43-year-old debtor with three children and two graduate degrees was not sufficiently maximizing his income to warrant discharge of this $300,000 debt).
188 In re Shadwick, 341 B.R. 6 (W.D. Mo. 2006).
189 See id. at 9.
190 Id. at 12; see also In re Tyer, 384 B.R. 230 (Bankr. N.D. Iowa 2008) (discharge denied of more than $120,000 to 63-year-old debtor).
of significant health issues, his impressive educational achievements, the court’s credibility determinations, and the likelihood that he was feigning psychological symptoms. Precisely those considerations would have led a court using the slightly different verbal formulation applied in the Eighth Circuit to reach the same result.

B. The Seventh Circuit Got “Undue Hardship” Wrong

Where the Seventh Circuit erred in the Tetzlaff opinion was in the third prong of Brunner—the good faith test. It was not necessary for the Seventh Circuit to hold that Tetzlaff’s payments to Florida Coastal did not constitute good faith. As discussed above, the court could have easily affirmed on the additional circumstances prong alone. In fact, this is exactly what the district court did in affirming the bankruptcy court before the Seventh Circuit heard the appeal. What the court has now done is create a landscape where debtors may not be able to discharge their loans despite showing strong examples of “undue hardship.” The Deborah hypothetical from earlier in this Comment is an appropriate example.

To review, Deborah was the debtor who had: an advanced degree, difficulty finding employment, and significant loan debt. Deborah also had both private and federal loans, with the private loans at a much higher interest rate. Deborah is rational; she chose to use her limited income to pay off the loans with a higher interest rate first—similar to how Tetzlaff paid Florida Coastal for his diploma and transcript so he

191 See Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II), 794 F. 3d 756, 759-60 (7th Cir. 2015).
192 See Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff I), 521 B.R. 875, 881-82 (E.D. Wisc. 2014) (“[T]he appropriate characterization of his debt to Florida Coastal is irrelevant. . . . even if the bankruptcy judge had viewed the payments to Florida Coastal as payments on a student loan, she would have found that Tetzlaff had failed [to maximize his income].”).
193 See Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 551-52 (8th Cir. 2003) (where the debtor suffered undue hardship due to a mental breakdown, but stopped paying the loans she had been paying for ten years due to her illness).
could apply for jobs. If Deborah then became ill and lost her vision, or had a mental breakdown that an expert could testify was out of her control, Deborah would not be able to discharge her federal loans unless the Seventh Circuit decides to create an exception from its holding in *Tetzlaff*. While Deborah would be able to prove that her circumstances show a certainty of hopelessness, Deborah did not, in good faith, pay off the loans at issue in her adversarial proceeding. This is wrong.

The Seventh Circuit, in applying *Brunner* to the circumstances of *Tetzlaff*'s case, forgot why *Brunner* was even instituted. The good faith prong exists in the first place because Ms. Brunner attempted to discharge her loans ten months after graduating without making a single payment. Now, the Seventh Circuit is confusing the overall purpose of section 523(a)(8) with the nuances in applying a test designed to encapsulate that purpose. Debtors should not be able to discharge their student loans if they merely miscalculated their job prospects, or if they made a poor choice in what degree to obtain. Debtors *should* be able to discharge their student loans through bankruptcy if they can show that undue hardship will occur if they are forced to repay—bar none. That is the language of the bankruptcy code, and that is what the Seventh Circuit must apply. With the recent holding in *Tetzlaff*, the Seventh Circuit is now applying a stricter standard than the code defines. Multiple factors go into each prong of the *Brunner* analysis, so the holding that a failure to pay the loans at issue is now a dispositive factor does not comport with the history of the analysis. The Seventh Circuit did not consider the possibility that a debtor could have a valid reason for not paying the loan at issue—a reason that would still constitute good faith—and it should do so if that case appears on the docket.

194 See *Tetzlaff* II, 794 F.3d at 761.
CONCLUSION

While Mark Tetzlaff may not have been the “perfect plaintiff,” the rigidity of the Brunner standard—coupled with the stringent applications of Brunner within the Seventh Circuit—creates a situation in which people truly suffering from undue hardship will nonetheless be unable to partially or fully discharge their student loans. The easiest way to solve this in its entirety is for Congress to define what “undue hardship” means within the bankruptcy code. However, recognizing that this may not happen, the Seventh Circuit should consider stepping back from the application of Brunner articulated in Tetzlaff. The Seventh Circuit should instead adopt a less rigid standard; a standard that gives discretion to the courts to determine what constitutes undue hardship without forcing reliance on a single dispositive factor—such as a failure to make payments to the loan at issue.
IS THE INJURY REAL?: THE SEVENTH CIRCUIT EXTENDS ARTICLE III STANDING TO DATA BREACH VICTIMS

EMILY P. LINEHAN∗


INTRODUCTION

Data breaches are an increasingly common occurrence and a growing social issue. Several large corporations were hit with, or settled, large lawsuits related to data breaches, including Home Depot and Lamps Plus, Inc., in March 2016 alone. On March 8, 2016, Home Depot agreed to settle consumers’ class action claims from a 2014 data breach for $13 million, in addition to funding identity protection services and implementing new data security measures.1 Lamps Plus, Inc., was sued on March 29 for failure to protect the information of an estimated 1,300 workers following a recent target by hackers who


allegedly stole employee IRS information. As of April 26, 2016, there have been 315 data breaches in the United States, affecting over 11.3 million records.

In July 2015, the U.S. Court of Appeals for the Seventh Circuit addressed Article III standing of consumers who were harmed by a data breach. In that case, customers brought a lawsuit against Neiman Marcus in the U.S. District Court for the Northern District of Illinois, alleging present injuries and increased risk of future harm following a 2013 data breach by hackers. Plaintiffs alleged present injuries including loss of time and money related to resolving fraudulent charges and protecting against future risks, financial losses for purchases plaintiffs would not have otherwise made, and loss of control over private information.

The district court held that the Plaintiffs did not adequately allege injury sufficient to establish Article III standing and granted Defendant’s motion to dismiss for lack of standing. While the district court found that the threat of future harm was imminent, the injuries inflicted by unauthorized credit card charges did not “qualify as ‘concrete’ injuries.” The complaint did not contain allegations regarding the costs incurred to mitigate the risk of future fraudulent charges, and the court noted that the general responses to a fraudulent charge, including issuance of a new credit card and possibly a period

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4 Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).


6 Id.

7 Id. at *1, *5.

8 Id. at *3.
of time where one has to wait for the new card, are *de minimis* injuries and ultimately insufficient to confer standing.9

On appeal, the Seventh Circuit reversed the district court’s decision.10 The Seventh Circuit considered the injuries Plaintiffs alleged and found that the Supreme Court’s holding in *Clapper* did not “foreclose any use whatsoever of future injuries to support Article III standing.”11 Citing to a district court case with similar facts where the court found Article III standing,12 the *Remijas* court held that injuries associated with resolving fraudulent charges and protecting oneself against identity theft were sufficient to satisfy the injury in fact requirement for Article III standing.13 Thus, the Seventh Circuit held that the Plaintiffs’ alleged injuries were sufficient to establish standing.14

Part I of this article discusses data breaches and their costs to society. Part II provides a summary of Article III standing doctrine at the Supreme Court more generally and at the federal appellate court level in cases involving data breaches. Part III reviews the factual and procedural context of *Remijas v. Neiman Marcus Group, LLC*, as well as the district court and Seventh Circuit holdings. Finally, Part IV argues that the Seventh Circuit’s finding of Article III standing is proper and consistent with approaches both by the Supreme Court and those adopted by other federal courts of appeal.

**WHAT IS A DATA BREACH?**

According to the Congressional Research Service, “[a] data security breach occurs when there is a loss or theft of, or unauthorized access to, sensitive personally identifiable information that could result in the potential compromise of the confidentiality or integrity of

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9 *Id.* at *4.
10 *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 697 (7th Cir. 2015).
11 *Id.* at 693.
12 *Id.*
13 *Id.* at 696.
14 *Id.* at 697.
Data breach causes include: “computer hacking, malware, payment card fraud, employee insider breach, physical loss of non-electronic records and portable devices, and inadvertent exposure of confidential data on websites or in e-mail.” The most frequent cause of data breaches is malicious or criminal attack, accounting for 47% of data breaches globally in FY 2015.

Data breach costs also continue to increase. According to the Ponemon Institute, a research center dedicated to privacy and data protection, the average per capita cost of data breaches in the United States in FY 2015 was $217, the highest in the world, which was an increase from $207 in FY 2014 and $188 in FY 2013. The average total organizational cost of data breaches in FY 2015 was $6.5 million, an increase of over $1 million since FY 2013. The Institute calculates data breach costs from both direct and indirect expenses. “Direct expenses include engaging forensic experts, outsourcing hotline support and providing free credit monitoring subscriptions and discounts for future products and services. Indirect costs include in-house investigations and communication, as well as the extrapolated value of customer loss resulting from turnover or diminished customer acquisition rates.”

In 2013, the House Subcommittee on Commerce, Manufacturing, and Trade held a hearing on data breaches, entitled “Reporting Data

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16 Id.
17 2015 Cost of Data Breach Study: Global Analysis, PONEMON INST., 10 (May 2015). Malicious and criminal attacks account for negligent insiders, individuals who cause a breach because of carelessness, and malicious attacks caused by hackers or criminal insiders, attacks include malware infections, criminal insiders, phishing/social engineering, and SQL injection. Id.
18 Id. at 10.
19 Id. at 2–5.
20 Id. at 7.
21 Id. at 4.
Breaches: Is Federal Legislation Needed to Protect Consumers?"  
During the hearing, Representatives heard about data breach trends and the need for federal legislation to protect consumers.  
There currently exists a patchwork of state laws with no federally mandated notification regime, costing businesses more than an estimated $100 billion to comply.

Given the costs and frequency of data breaches, millions of Americans are at risk of having their personal information stolen. The question becomes, once a person’s personal information is compromised in a data breach, does the victim have any legal recourse? Varying judicial interpretation of Article III Section 2 Clause 1 of the U.S. Constitution provides an unclear answer to this question, as without Article III standing, data breach victims cannot have their claims heard in federal court.

**ARTICLE III STANDING**

Article III Section 2 Clause 1 outlines the jurisdiction of U.S. courts. Article III’s case-or-controversy doctrines, including standing, mootness, ripeness, and political question, concern “the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.” The Supreme Court has set forth that Article III standing is arguably the “most important” of the case-or-controversy doctrines. “[S]tanding is an essential and unchanging part of the case-or-controversy requirement.

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23 Id.
24 Id.
25 U.S. CONST. art. III.
27 Id.
of Article III.” The Court has always required that a litigant have “standing”, which “subsumes a blend of constitutional requirements and prudential considerations.” Until a court determines that a litigant has standing, “the court cannot proceed at all in any cause.”

For example, federal courts do not have jurisdiction to declare a statute void unless matters before them involve “litigants in actual controversies.”

The Supreme Court has established that in order to find that the “irreducible constitutional minimum of standing” has been met, the plaintiff must prove the three elements. The first element, injury, requires that the plaintiff have suffered “injury in fact”, which is “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’.” The second element, causation, requires a causal connection between the injury and the “conduct complained of.” The third element, redressability, requires that it must be likely, and not just speculative, that the court can redress the injury. The burden is on the party invoking jurisdiction to establish the three elements.

While the Court has not yet addressed Article III standing in connection to a data breach, several recent cases have had and will have an impact on current and future data breach cases. In Clapper v. Amnesty International USA, the Court found that plaintiffs lacked standing in a case involving the federal government’s wiretapping.

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33 *Lujan*, 504 U.S. at 560.
34 *Id.*
35 *Id.* at 561.
36 *Id.*
program. The Court held that “threatened injury must be certainly impending” in order to satisfy the injury in fact requirement. Most recently, in Spokeo, Inc. v. Robins, the Court held that the Ninth Circuit had not properly analyzed the concreteness of a consumer’s injury, one of the prongs of the injury in fact requirement, and otherwise urged that “bare procedural violation(s)” are likely not enough to constitute injury in fact. At the federal appellate court level, data privacy, an implicit concern involved in assessing injuries from a data breach, is currently up before the Sixth Circuit in a case involving inaccurate information a credit reporting agency released to a consumer’s potential employer.

The following sections will detail Supreme Court precedent on Article III standing more generally followed by Article III standing in lower court cases involving data breaches. The section on Supreme Court precedent includes an analysis of Spokeo, which, though it was decided after Remijas, did not substantively alter long-standing principles of Article III standing, and creates no conflict with the Seventh Circuit’s analysis and holding in Remijas.

A. Article III Standing and Supreme Court Precedent

In Lujan v. Defenders of Wildlife, the Supreme Court held that the “irreducible constitutional minimum of standing” contains the following three elements: (1) injury in fact, which is the invasion of a legally protected interest which is both concrete and particularized and actual or imminent; (2) “a causal connection between the injury and the conduct complained of”; and (3) likelihood that the injury can be

38 Id. at 1147.
40 Id. at 1544.
redressed through a favorable decision. For the purposes of establishing standing at the pleading stage, “general factual allegations of injury resulting from the defendant’s conduct may suffice.” The plaintiff bears the burden of proof, and “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.”

Plaintiffs in *Lujan* were wildlife conservation and environmental organizations who sued the Secretary of the Interior and requested the following: first, a declaratory judgment that an agency regulation was in error as to its geographic scope, and second, an injunction requiring that a new regulation be promulgated. While the district court granted the Secretary’s motion to dismiss for lack of standing, the Eighth Circuit reversed and remanded, holding that plaintiffs had adequately pled injury in fact.

Ultimately, the Supreme Court reversed the Eighth Circuit and held that plaintiffs had not sufficiently alleged an injury as a result of the defendant’s actions. Justice Scalia, writing for the majority, urged a higher threshold for standing and invalidated a congressional grant of standing for the first time because of the absence of sufficient injury in fact. Injury in fact required more than a cognizable interest; it required that the parties seeking review have themselves been injured. Plaintiffs argued that they had suffered injury in fact because agency-funded projects would eliminate endangered species in locations plaintiffs intended to visit, but these arguments “[did] not support a finding of ‘actual or imminent’ injury that [Supreme Court]...
cases require.” The Court held that standing requires “a factual showing of perceptible harm.” Lujan emphasized that concreteness is essential to the injury in fact requirement.

Shortly after Lujan was decided, the Supreme Court ruled unanimously against the government in a case involving the IRS’s allegedly illicit acquisition of tapes involving conversations between the Church of Scientology members and its attorneys. In that case, the Los Angeles County Court Clerk released the tapes to the IRS, which the IRS had requested in connection with an investigation into the tax returns of L. Ron Hubbard, the founder of the Church of Scientology. Given the physical delivery of the tapes, the United States argued that the Church had “lost its claim to avoid a threatened injury in fact.” The Court held that the taxpayer was still suffering injury as a result of the Government’s possession of the tapes in the form of an “affront to the taxpayer’s privacy.” Though the case was centered on the question of mootness under Article III, not standing, the case reveals that the Court found injury in fact where personal information is concerned. This suggests that conferring standing for a breach in which such information is stolen and subject to fraud, when there is a strong possibility for future fraudulent conduct, is not contrary to the Court’s holding.

More recently, in Clapper v. Amnesty International USA, the Court held that attorneys and human rights, labor, legal, and media organizations did not have standing because they alleged future harm that was not “certainly impending.” The plaintiffs challenged the Foreign Intelligence Surveillance Act (FISA) Amendments Act of

51 Id. at 564.
52 Id. at 566.
53 Id. at 578.
55 Id.
56 Kreimer, supra note 49, at 760 (citing Church of Scientology, 506 U.S. at 10).
57 Church of Scientology, 506 U.S. at 13.
58 133 S. Ct. 1138, 1143 (2013).
2008, 50 U.S.C. § 1881(a), which permitted the Government to target and surveil communications of non-U.S. citizens abroad. Plaintiffs regularly communicated with colleagues and clients abroad, and they alleged that the new law forced them to undertake costly measures to protect the confidentiality of their communications. The Court held that plaintiffs suffered self-inflicted injuries and “subjective fear of surveillance,” neither of which gave rise to standing. In its analysis, the Court also rejected an alternative argument that present measures taken to prevent future harm could constitute an injury sufficient to confer standing.

The Court focused on an injury’s imminence, conceding that it was “a somewhat elastic concept,” but that in order to satisfy the element of imminence, the injury must be “certainly impending.” Allegations of possible future injury are not sufficient to be considered “certainly impending.” The Court held that plaintiffs rested their theory of standing on a “highly attenuated chain of possibilities,” including: (1) the Government would imminently target their communications; (2) the Government would invoke its surveillance authority under § 1881a; (3) Article III judges would approve the Government’s surveillance plan; (4) the Government would intercept communications from respondents’ contacts; and (5) the Government would intercept respondents’ communications. This “speculative chain of possibilities” did not establish that injury based on future surveillance was “certainly impending” or fairly traceable to section 1881(a).

59 Id. at 1144; 50 USCA § 1881a.
60 Id. at 1144-45.
61 Id. 1152–53.
62 Id. at 1143.
63 Id. at 1147 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).
64 Id. (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).
65 Id. at 1148–50.
66 Id. at 1150.
Plaintiffs also argued in the alternative that they were suffering present injuries by taking measures to avoid section 1881(a) surveillance. The Court rejected this theory of standing as well, holding that the Second Circuit had improperly “water[ed] down the fundamental requirements of Article III” by allowing that the present costs incurred by taking protective measures were sufficient for standing as long as they were not “fanciful, paranoid, or otherwise unreasonable.”

Justice Breyer wrote for the dissent and argued that the harm alleged was not “speculative” and was “as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen.” Given that all agreed that interception of the phone calls or emails would qualify as “concrete and particularized” injury, and a favorable judgment by the Court would redress the injury by declaring the statute unconstitutional, the principle issue was whether the interception of the communications was an injury that was “actual or imminent.”

The dissent argued that the case law suggested that the Constitution did not require that injury be an absolute certainty, but rather a “reasonable” or “high probability.” Notwithstanding their disagreement, both the majority and dissent conceded that an actual interception would constitute an injury sufficient to confer standing.

Though the Court did not find injury in fact in Clapper, the Court has ruled in favor of plaintiffs whose “legitimate expectations of privacy” have been violated. Relevant cases involving intangible acquisition of private information have created a potential Fourth Amendment violation, including in cases involving thermal imaging,

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67 Id.
68 Id. at 1151.
69 Id. at 1155 (Breyer, J., dissenting).
70 Id. at 1155–56.
71 Id. at 1165.
72 Kreimer, supra note 49, at 758 (citing Katz v. United States, 389 U.S. 347, 353 (1967) (ruling that the “presence or absence of a physical intrusion” cannot be a meaningful distinction in Fourth Amendment cases)).
analysis of blood and urine samples, analysis of information in cell phones seized upon arrest, and GPS monitoring. Intangible intrusions on privacy are enough to create constitutional violations, and therefore, it is not unreasonable that the unquestioned theft of personal information in a data breach may qualify as injurious enough for the purposes of standing.

Finally, in its most recent term, the Court decided Spokeo, another case involving concreteness and the injury in fact requirement. In Spokeo, the case before the Court involved an action brought by a consumer under the Fair Credit Reporting Act (“FCRA”) against a website operator for publishing an inaccurate consumer report about him. In a 6–2 decision, the Court vacated the Ninth Circuit’s decision and remanded, holding that the lower court’s standing analysis was incomplete and had “failed to fully appreciate the distinction between concreteness and particularization.” The Court expressed no opinion as to whether Robins had standing and remanded the question of the concreteness of Robins’ injury to the Ninth Circuit.

Writing for the majority, Justice Alito stated that for an injury to be “concrete” it must “actually exist[,”] while also noting that an injury need not be tangible to exist. The Court permitted that procedural violations, such as a violation of the FCRA, might be sufficient to constitute an injury in fact, but a “bare procedural violation” such as “an incorrect zip code” would not cause concrete harm. The opinion has generated headlines, with both plaintiff and defense bars claiming that the opinion was a positive one for their

73 Id. at 758 (citing Kyllo v. United States, 389 U.S. 347, 353 (1967); Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001); Riley v. California, 134 S. Ct. 2473, 2489–90 n.1 (2014)).
75 Id. at 1550.
76 Id. at 1548.
77 Id. at 1549.
78 Id. at 1550.
respective sides of the aisle. \footnote{Allison Grande, Spokeo Ruling Helps Both Sides of the Privacy Bar, Attys Say, LAW360 (May 25, 2016), http://www.law360.com/articles/800443/spokeo-ruling-helps-both-sides-of-privacy-bar-attys-say.} Regardless of who benefited from Spokeo, it does not create conflict for the Remijas holding, in which the court adequately addressed both prongs of injury in fact, as the discussion infra will demonstrate. While Spokeo does not provide any additional guidance to cases with similar facts to Remijas, the cases discussed in the next section, which deal with data breaches, or data privacy, provide more insight into the correctness of the Remijas court’s ruling.

B. Article III Standing and Data Breaches

Though no federal appellate court prior to the Remijas court has ruled on any data breach cases which specifically involve fraudulent charges, courts have dealt with data breaches and varying allegations of injury. No case other than Remijas was decided after Clapper, however, and therefore, only the Seventh Circuit had occasion to interpret Clapper in a case involving a data breach. Other courts primarily relied on the Supreme Court’s enunciation of Article III standing in Lujan.

In 2012, the Eleventh Circuit addressed alleged injuries from identity theft that resulted from a data breach in a case of first impression. \footnote{Resnick v. Avmed, Inc., 693 F.3d 1317, 1323 (11th Cir. 2012).} The plaintiffs filed suit when a health care services corporation was burgled and two laptops containing sensitive and personal customer information was compromised. \footnote{Id. at 1322.} Resnick v. Avmed, Inc. was decided before Clapper, thus the court relied on Lujan, in which the Supreme Court held that “general factual allegations of injury resulting from the defendant’s conduct may suffice” to establish standing. \footnote{Id. at 1323 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).} Under that standard, the court quickly concluded that

\footnote{80 Allison Grande, Spokeo Ruling Helps Both Sides of the Privacy Bar, Attys Say, LAW360 (May 25, 2016), http://www.law360.com/articles/800443/spokeo-ruling-helps-both-sides-of-privacy-bar-attys-say.}

\footnote{81 Id. at 1322.}

\footnote{82 Id. at 1323 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).}
allegations of actual identity theft and monetary damages were injury in fact under the law.\footnote{Id.} Though the Seventh Circuit did not cite Resnick in Remijas,\footnote{See generally Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).} the Resnick court’s conclusion that identity theft and monetary damages constituted injury in fact lends strength to the idea that a data breach that results in fraudulent charges has similarly pled an increased likelihood of identity theft and therefore injury in fact.

In data breach cases before the Seventh and Ninth Circuits, both courts held that plaintiffs had sufficiently pled injury in fact to satisfy Article III standing. In \textit{Pisciotta v. Old National Bancorp}, plaintiffs alleged that hackers who gained access to bank customers’ personal information had caused injury in fact. The Seventh Circuit relied on the reasoning of sister circuit courts\footnote{Pisciotta v. Old Nat’l Bancorp, 499 F.3d 629, 634 n.3 (7th Cir. 2007) (citing to opinions in the Second, Sixth, Ninth and Fourth Circuits, in which the courts held that threats of future harm conferred standing).} and held that injury in fact “can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm[,]” even if plaintiffs provide no proof of data misuse.\footnote{Id.}

In \textit{Krottner v. Starbucks Corp.}, the Ninth Circuit relied on slightly different reasoning than the Seventh Circuit and held that if a plaintiff faces a credible threat of harm that is real and immediate, and not conjectural or hypothetical, then the plaintiff has met the injury in fact requirement for Article III standing.\footnote{Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).} To formulate this test, the court relied on Ninth Circuit precedent and a Supreme Court case, \textit{City of Los Angeles v. Lyons}.\footnote{Id. (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Cent. Delta Water Agency v. United States, 306 F.3d 947, 950 (9th Cir. 2002)).} In \textit{Krottner}, a laptop was stolen from Starbucks that contained the unencrypted personal information of 97,000 employees.\footnote{Krottner, 628 F.3d at 1141.} Following the theft, one of the plaintiffs was
notified by his bank that someone had tried to open an account in his name. Plaintiffs enrolled in free credit monitoring services and spent extra time monitoring their accounts. Given these facts, the court held that the theft created “real and immediate harm.”

In contrast, the Third Circuit ruled that data breach victims had not successfully pled injuries sufficient to find Article III standing. In Reilly v. Ceridian Corp., plaintiffs were employees of companies which were customers of a payroll processing firm (Ceridian Corporation). A hacker infiltrated the company’s payment system and “potentially gained access to personal and financial information” of the company’s customer businesses. Though there was a security breach, the plaintiffs did not provide the court any proof that the hacker “read, copied, or understood the data,” and the court held that the allegations of future injury were therefore too hypothetical. The injuries alleged were even more speculative than those in Lujan, which the Supreme Court held were insufficient to confer standing. The court also distinguished the facts from those in Krottner and Pisciotta, finding that those cases involved “harms [that] were significantly more ‘imminent’ and ‘certainly impending’ than the alleged harm here.”

With Remijas, the Seventh Circuit relied on more recent Supreme Court precedent, while adhering to the principles the cases above set out regarding the injury in fact requirement. Per the holdings above, in data breach cases, evidence that hackers have misused information clearly makes a stronger case for conferring Article III standing.

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90 Id.
91 Id.
92 Id. at 1143.
94 Id. at 40.
95 Id. (emphasis added).
96 Id.
97 Id. at 42.
98 Id. at 44.
REMIJAS V. NEIMAN MARCUS

A. Factual Background

Neiman Marcus, a luxury department store, was attacked by hackers who stole customers’ credit card numbers during the holiday season in 2013. In December 2013, Neiman Marcus determined that as a result of the hack, some customers had fraudulent charges on their credit cards. Once Neiman Marcus learned of the fraudulent charges, the company investigated and found potential malware in its computer systems, which had attempted to collect customer card data between July 16, 2013 and October 30, 2013. The company announced on January 10, 2014, that it had determined that approximately 350,000 credit cards had been exposed to the hackers’ malware. Neiman Marcus then publicly disclosed the data breach and revealed that of those 350,000, 9200 cards were known to have been used fraudulently. Not only were credit card numbers exposed, but also social security numbers and birth dates. Neiman Marcus was not the only company to suffer security breaches during that holiday season.

Neiman Marcus notified its customers who had shopped at its stores between January 2013 and January 2014 and offered them “one year of free credit monitoring and identify theft protection.”

Following this announcement, on February 4, 2014, Michael Kingston,

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99 Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 689 (7th Cir. 2015).
100 Id. at 689–90.
101 Id. at 690.
102 Id.
103 Id.
104 Id.
105 Target and Michael’s were also targeted. See Christopher Budd, *Information about recent retail data breaches in the United States: an FAQ*, TREND MICRO: SIMPLY SECURITY, (last visited April 19, 2016), http://blog.trendmicro.com/information-recent-retail-data-breaches-united-states-faq/.
106 Remijas, 794 F.3d at 690.
Senior Vice President and Chief Information Officer, testified before the United States Senate Judiciary Committee, representing that the information that appeared to have been compromised was credit card information, with no indication that social security numbers or other private information had been compromised.\textsuperscript{107} Several lawsuits were filed, and these were consolidated into the complaint that gave rise to this case, \textit{Remijas v. Neiman Marcus}.\textsuperscript{107}

In the complaint, Hilary Remijas alleged that she made purchases at the Neiman Marcus in Oak Brook, Illinois, in August 2013 and December 2013.\textsuperscript{108} Melissa Frank, another named plaintiff, alleged that she used a joint debit card to make purchases at the Neiman Marcus in Long Island, New York in December 2013.\textsuperscript{109} Frank further alleged that she was a target of a scam through her cell phone and that her husband had received a letter about the breach from Neiman Marcus.\textsuperscript{110} The final named plaintiff, Joanne Kao, alleged that she made purchases on ten separate occasions over the course of 2013 at a Neiman Marcus store location in San Francisco, and that she received notifications about the breach from both Neiman Marcus and her bank.\textsuperscript{111}

\textbf{B. Procedural Background}

Hilary Remijas joined several other plaintiffs to file a class-action complaint against Neiman Marcus on June 2, 2014, seeking to represent themselves and the 350,000 other customers whose personal information may have been hacked.\textsuperscript{112} The complaint relies on theories for relief that include “negligence, breach of implied contract, unjust enrichment, unfair and deceptive business practices, invasion of

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 691.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
privacy, and violation of multiple state data breach laws."113 Defendant, Neiman Marcus, moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim.114 The District Court granted the motion to dismiss on standing grounds.115

C. The District Court’s Decision

District Judge Zagel analyzed the plaintiffs’ alleged injuries and held that plaintiffs had failed to plead Article III standing sufficiently. He noted that Article III standing is not “a mere pleading requirement,” but rather must be supported “with the manner and degree of evidence required at the successive stages of the litigation.”116 Plaintiffs alleged four principle categories of injury, and Judge Zagel was unpersuaded that any sufficiently supported Article III standing.117

The first principle category of injury that Plaintiffs alleged was increased risk of future harm.118 Judge Zagel relied on three different cases where the court had previously addressed Article III standing in the context of cyber-attacks and analyzed how they interpreted the Supreme Court’s recent decision in Clapper.119 The courts in two previous cases, Strautins v. Trustwave Holdings, Inc.120 and In Re Barnes & Noble Pin Pad Litigation121 held that “the alleged increased risk of future harm was insufficient to establish standing.”122 The

113 Id. at 690–91.
114 Id. at 691.
115 Id.
117 Id. at *5.
118 Id. at *2.
119 Id.


*Strautins* and *Barnes & Noble* court both relied on *Clapper*, which required “certainly impending” analysis with regard to the injury in fact element of standing.\(^{123}\) The *Strautins* court also argued that *Clapper* overruled previous Seventh Circuit precedent, which held that the “the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant’s actions.”\(^{124}\)

In another case, the alleged increased risk of future harm was sufficient to establish Article III standing.\(^{125}\) In *Moyer v. Michael Stores, Inc.*, the court found that while *Clapper* established a heightened standard for standing analysis, such a standard was only appropriate for situations that called for more rigor—namely, national security and the Constitution.\(^{126}\) The court concluded that *Clapper* and *Pisciotta* could co-exist.\(^{127}\)

Judge Zagel noted that while a literal reading of *Pisciotta* might lead to the conclusion that any increase in risk of future harm would be sufficient to confer Article III standing, this was an improper reading.\(^{128}\) The standing threshold was therefore somewhere in the middle, requiring more than a mere increase of risk of harm, but less than *Clapper*’s heightened standard. Regarding the facts, Judge Zagel differentiated *Pisciotta* from *Strautins* and *Barnes & Noble*, as the plaintiffs’ data in *Pisciotta* was actually stolen, while the data in the latter two cases was only alleged to have possibly been stolen.\(^{129}\) Given that the data in *Pisciotta* was actually stolen, Judge Zagel argued that the *Pisciotta* court’s holding satisfied the “certainly

\(^{123}\) *Id.*

\(^{124}\) *Id.* (citing *Pisciotta v. Old Nat’l Bancorp*, 499 F.2d 629, 634 (7th Cir. 2007)).


\(^{126}\) *Id.*

\(^{127}\) *Id.* at *2* (citing *Moyer*, 2014 WL 3511500, at *6).

\(^{128}\) *Id.*

\(^{129}\) *Id.* at *3.*
impending” standard, while Strautins and Barnes & Noble, where data was only possible stolen, did not satisfy the standard.130

Applying this understanding to Remijas, Judge Zagel held that the majority of Plaintiffs were only alleging that their data may have been stolen, which made the case more like Strautins and Barnes & Noble.131 Though Plaintiffs also alleged that 9200 of the 350,000 customers had fraudulent charges appear on their credit cards, Judge Zagel held that this was not enough to prove an injury to confer standing.132 Judge Zagel determined that the fraudulent charges led to several inferences: (1) there was injury in fact, which could be inferred from the fact that 9200 customers had their data stolen, and (2) there was injury in fact that was “certainly impending” for the remaining customers among the 350,000, who might experience fraudulent charges in the future.133 Relying on Clapper, neither inference demonstrated injury that was “concrete, particularized, and, if not actual, at least imminent.”134 While Judge Zagel found that potential future fraudulent charges were sufficiently “imminent” for standing, the injuries were not sufficiently concrete.135 Plaintiffs who suffered fraudulent charges did not allege that they were unreimbursed, and therefore the charges for which plaintiffs were not financially responsible did not qualify as “concrete” injuries.136

Additionally, Judge Zagel was not persuaded that the customers were at a “certainly impending risk of identity theft.” The fact that 9200 Plaintiffs had incurred fraudulent charges on their credit cards only supported an inference that their credit card information was stolen.137 While this placed the remaining Plaintiffs at a “certainly impending” risk of incurring fraudulent charges themselves, Judge

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130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
Zagel held that this did not render Plaintiffs at “certainly impending” risk of suffering future identity theft.\textsuperscript{138}

Judge Zagel dispensed with the Plaintiffs’ other alleged injuries, finding none of them to be sufficient to confer standing.\textsuperscript{139} Plaintiffs alleged that time and money allegedly spent to mitigate risk of future fraudulent charges and identity theft constituted injury that conferred standing.\textsuperscript{140} Citing \textit{Moyer}, Judge Zagel noted that the costs of guarding against a risked future injury only confer standing when the underlying injury the plaintiff is trying to avoid “is itself a cognizable Article III injury.”\textsuperscript{141} Judge Zagel argued that the allegations regarding what was done to mitigate future risk were insufficient, and the steps normally taken when fraudulent charges appear (reimbursement and new card issuance) don’t rise above a \textit{de minimis} injury.\textsuperscript{142} Further, Judge Zagel reiterated that the complaint did not adequately allege the risk of identity theft that was sufficiently imminent, and therefore, the efforts to mitigate are not cognizable Article III injuries.\textsuperscript{143}

Plaintiffs also claimed that they suffered injury in that they paid a premium purchase price for retail goods at the Defendant’s stores, a portion of which the Defendant was required to use for data breach protection services.\textsuperscript{144} In other words, the Plaintiffs’ theory was because they overpaid, they suffered financial injuries.\textsuperscript{145} Judge Zagel held that Plaintiffs relied on case law that found injury when the value-reducing injury was “intrinsic to the product at issue.”\textsuperscript{146} Here,

\begin{itemize}
  \item \textsuperscript{138} \textit{Id.} at *3–4.
  \item \textsuperscript{139} \textit{Id.} at *4–5.
  \item \textsuperscript{140} \textit{Id.} at *4.
  \item \textsuperscript{141} \textit{Id.} (citing Moyer v. Michaels Stores, Inc., No. 14 C 561, 2014 WL 3511500, at *4 n.1 (N.D. Ill. July 14, 2014)).
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.}
\end{itemize}
however, “the deficiency complained of is extrinsic to the product” and therefore is a meaningless theory of injury. 147

Finally, Judge Zagel addressed Plaintiffs’ alleged injury due to “loss of control over and value of their private information.” 148 Citing Barnes & Noble, Judge Zagel held that the injury as pled was not sufficiently concrete. 149

D. The Seventh Circuit’s Decision

Chief Judge Wood, joined by Judge Kanne and Judge Tinder, reversed the District Court’s decision, finding that the plaintiffs had plausibly alleged Article III standing. 150 The case was reviewed de novo, consistent with the court’s precedent. 151 The court analyzed both the requirements of Article III standing and, more briefly, Neiman Marcus’s argument that the complaint should be dismissed for failure to state a claim. 152

The court addressed the Plaintiffs’ imminent and actual injuries as pled. 153 The two imminent injuries included: first, an increased risk of future fraudulent charges and second, greater susceptibility to identity theft. The four actual injuries included:

1) lost time and money resolving the fraudulent charges, 2) lost time and money protecting themselves against future identity theft, 3) the financial loss of buying items at Neiman Marcus that they would not have purchased had they known

147 Id. at *5.
148 Id.
149 Id. at *5 (citing In re Barnes & Noble Pin Pad Litigation, No. 12–cv–8617, 2013 WL 4759588, at *5 (N.D. Ill. Sept. 3, 2013) (finding no actual injury where plaintiffs did not allege that their personal information was sold or that the plaintiffs themselves could have sold it)).
150 Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 697 (7th Cir. 2015).
151 Id. at 691 (citing Reid L. v. Ill. State Bd. of Educ., 358 F.3d 511, 515 (7th Cir. 2004)).
152 Id. at 692.
153 Id.
of the store’s careless approach to cybersecurity, and 4) lost control over the value of their personal information.\textsuperscript{154}

With regard to Plaintiffs’ four alleged injuries, Chief Judge Wood noted that the allegations went “far beyond” allegations in \textit{Spokeo}, therefore differentiating the injuries alleged here from the injuries alleged to have resulted from the publication of inaccurate information on a website.\textsuperscript{155}

The Seventh Circuit, relying on Supreme Court precedent in \textit{Clapper}, noted that Article III standing requires that the injury have already occurred or be “certainly impending.”\textsuperscript{156} Chief Judge Wood summarized the injuries alleged: that each Plaintiff’s personal data had been stolen; that, of the 350,000 customers, 9200 incurred fraudulent charges and experienced harm; that the 9200 suffered the “aggravation and loss of value of the time needed to set things straight”; and that the remaining customers suffered a concrete risk of similar harm.\textsuperscript{157} Chief Judge Wood identified the question as whether one of the following conditions was met under \textit{Clapper}: either the harm had already occurred, or it was “certainly impending.”\textsuperscript{158}

Disagreeing with the district court’s interpretation of \textit{Clapper}’s precedent, Chief Judge Wood held that \textit{Clapper} did not “foreclose any use whatsoever of future injuries to support Article III standing.”\textsuperscript{159} With \textit{Clapper}, the Supreme Court held that the plaintiff human rights organizations did not have standing to challenge the Foreign Intelligence Surveillance Act because plaintiffs only suspected that interceptions of their communications with suspected terrorists \textit{might have occurred}, not that any such interceptions did occur.\textsuperscript{160} These suspicions were too speculative for the purposes of establishing Article

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 693.
\textsuperscript{160} Id.
III standing.\textsuperscript{161} Chief Judge Wood went on to quote \textit{Clapper}, clarifying that plaintiffs are not charged with demonstrating that they are “literally certain that the harms they identify will come about . . . [and] we have found standing based on a ‘substantial risk’ that harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.”\textsuperscript{162}

Chief Judge Wood cited to another district court that found that substantial risk sufficed for Article III standing in a data breach case in which that court held that “the risk that Plaintiffs’ personal data will be misused by the hackers who breached Adobe’s network is immediate and very real.”\textsuperscript{163} Unlike in \textit{Clapper}, where plaintiffs could only speculate as to whether their communications had been intercepted, here the plaintiffs’ information was stolen.\textsuperscript{164} Chief Judge Wood argued that Plaintiffs here should not have to wait for hackers to act on their personal information, either by running up fraudulent charges on their credit cards or by committing identity theft.\textsuperscript{165}

Chief Judge Wood further argued that the very fact of the hack made it plausible to infer that Plaintiffs had shown a substantial risk of harm, as it was reasonably assumed that the purpose of the hack was “to make fraudulent charges or assume those consumers’ identities.”\textsuperscript{166}

\textbf{THE SEVENTH CIRCUIT’S FINDING OF ARTICLE III STANDING COMPORTS WITH PRECEDENT AND CONSISTENCY}

The Seventh Circuit rested its opinion on a clear distinction between the facts in \textit{Remijas} and \textit{Clapper}. In \textit{Clapper}, the Supreme Court held that possible future injuries did not satisfy the “certainly

\begin{itemize}
  \item \textsuperscript{161} \textit{Id}.
  \item \textsuperscript{162} \textit{Id}. (citing Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1150 n.5 (2013)).
  \item \textsuperscript{163} \textit{Id}. (citing In re Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1214 (N.D. Cal. Sept. 4, 2014)).
  \item \textsuperscript{164} \textit{Id}.
  \item \textsuperscript{165} \textit{Id}.
  \item \textsuperscript{166} \textit{Id}.
\end{itemize}

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impending" standard required to insure that injuries are not too speculative for Article III purposes. The Seventh Circuit held that the district court had both misapplied *Clapper* and improperly read out the idea that "substantial risk" of future injury was also available to support standing. Indeed, just one year after *Clapper*, the Supreme Court held that an allegation of future injury could suffice if the threatened injury was "certainly impending" or there was a "substantial risk" that harm would occur in the future. Therefore, there is no question that the substantial risk standard that the Seventh Circuit used to assess injury in fact as alleged in *Remijas* was appropriate.

While multiple federal appellate courts have addressed data breaches, including the Eleventh, Ninth, Third, and First Circuits, only the Seventh Circuit has applied *Clapper* in a data breach case. The Seventh Circuit recently applied its own precedent in *Lewert v. P.F. Chang's China Bistro, Inc.* , a case in which the plaintiffs alleged future and present injuries following a computer system breach in which consumer credit card information was stolen. The Seventh Circuit held that increased risk of fraudulent charges and identity theft were plausible future injuries because the data had already been stolen. The plaintiffs also successfully alleged present injuries, including fraudulent charges, and time and effort mitigating charges and preventing future fraud.

In a recent data breach case at the district court level, the District Court of Maryland argued that courts generally find that the increased risk of identity theft without evidence of actual theft of personal

167 *Clapper*, 133 S. Ct. at 1147.
168 *Remijas*, 794 F.3d at 693.
170 No. 14–3700, 2016 WL 1459226 at *1 (7th Cir. 2016).
171 Id. at *3.
172 Id.
information does not confer standing.\textsuperscript{173} The court cited to Remijas and Kroittner as examples of cases in which the facts supported standing, because “allegations included either actual examples of the use of the fruits of the data breach for identity theft, even if involving victims other than the named plaintiffs, or a clear indication that the data breach was for the purpose of using the plaintiffs’ personal data to engage in identity fraud.”\textsuperscript{174} The majority of district courts have found no standing in the absence of specific incidents or evidence of intent to use stolen information.\textsuperscript{175} Remijas therefore fits well within the majority approach.

Future implications of the above-discussed approach are great as data breaches continue to occur, and more lawsuits follow. In March 2016, a student filed a class action lawsuit against the University of Central Florida, alleging negligence that allowed hackers to store personal information of more than 60,000 students and faculty.\textsuperscript{176} Had the plaintiffs alleged identity theft, per Eleventh Circuit precedent, the plaintiffs could have successfully alleged Article III standing.\textsuperscript{177} This case was voluntarily dismissed,\textsuperscript{178} but such cases are likely to continue to arise, as personally identifiable information is increasingly stored online by schools, employers, hospitals, and other goods and services providers with varying degrees of protection.

Remijas also fits well within Spokeo, which reiterated that concreteness is an essential element of the injury in fact requirement. Spokeo has raised numerous questions for litigants regarding how statutorily created harms interact with Article III standing, but the Court did not disturb precedent regarding concreteness. Per Spokeo, an

\begin{itemize}
\item \textsuperscript{174} Id. at *4.
\item \textsuperscript{175} In re Zappos.com, Inc., 108 F. Supp.3d 949, 955 (D. Nev. 2015) (listing post-Clapper cases).
\item \textsuperscript{176} Complaint, Heller v. Univ. of Cent. Fla. Bd. of Trs., No. 6:16-cv-396, 2016 WL 887470 (M.D. Fla. Mar. 6, 2016).
\item \textsuperscript{177} See Resnick v. Avmed Inc., 693 F.3d 1317, 1323 (11th Cir. 2012).
\item \textsuperscript{178} Notice of Voluntary Dismissal Without Prejudice, Heller v. Univ. of Cent. Fla. Bd. of Trs., No. 6:16-cv-396, 2016 WL 887470 (M.D. Fla. Mar. 6, 2016).
\end{itemize}
injury need not be tangible to be concrete,\textsuperscript{179} which is critical for data breach victims, whose injuries will generally be intangible.

Several federal appellate courts have dealt with \textit{Spokeo} in recent decisions, scrutinizing plaintiffs’ alleged harms more closely. In \textit{Hancock v. Urban Outfitters, Inc.}, the D.C. Circuit Court of Appeals drew a distinction between bare procedural harms and harms like those suffered by data breach victims and noted that the plaintiffs had asserted only “a bare violation of the requirements of D.C. law[,]” as opposed to “any invasion of privacy, increased risk of fraud or identity theft.”\textsuperscript{180} In a case involving alleged violations of disclosure requirements of the Fair Debt Collection Practices Act, the Eleventh Circuit held that the plaintiff had satisfied Article III standing requirements, as the harms she alleged were intangible but “real.”\textsuperscript{181} These opinions make clear that \textit{Remijas} did not overreach or overextend Article III standing and was correctly decided.

\textbf{CONCLUSION}

The Supreme Court has yet to rule on a case in which actual fraud has occurred in the wake of a data breach. Given the standards articulated for Article III standing, requiring that injuries be “certainly impending” and sufficiently concrete, the Seventh Circuit’s recent opinion in \textit{Remijas v. Neiman Marcus, LLC} was correctly reached. The Seventh Circuit followed Supreme Court reasoning on Article III standing to find that actual injury had been sufficiently alleged in \textit{Remijas}. When faced with similar facts, other federal courts of appeal should adopt this approach and find that fraudulent activity following a data breach constitutes injury in fact sufficient to confer Article III standing. In cases where data breaches do not result in any known


\textsuperscript{180} \textit{Hancock v. Urban Outfitters, Inc.}, No. 14-7047, 2016 WL 3996710, at *6-7 (D.C. Cir. July 26, 2016) (“The Supreme Court’s decision in \textit{Spokeo} thus closes the door on [plaintiffs’] claim that the Stores’ mere request for a zip code, standing alone, amounted to an Article III injury.”)

fraudulent activity, and where plaintiffs are unsure if the information was used at all, *Remijas* is likely to be less helpful for plaintiffs. With *Remijas*, the Seventh Circuit merely recognized that fraudulent activity makes identity theft and future fraudulent charges more likely, removing a single, but critical, barrier for plaintiffs seeking relief in court.
REMITTITUR IN CIVIL RIGHTS CASES: WHERE THE SEVENTH CIRCUIT WENT WRONG IN ADAMS V. CITY OF CHICAGO

KELSEY N. WEYHING*


INTRODUCTION

On September 14, 2004, brothers Seneca and Tari Adams endured vicious beatings by Chicago police officers outside of their home.¹ Seneca Adams was initially stopped by Chicago police officers while jogging through his apartment complex.² His neighbors looked on as he was kicked, handcuffed, and punched in the face.³ Later, he was driven to a secluded area where an officer continued to beat him.⁴ Having realized that the police car was driving in the opposite direction of the police station, Seneca’s brother, Tari, followed the vehicle.⁵ He too was beaten and handcuffed.⁶ The brothers were found

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¹ Adams v. City of Chicago, 798 F.3d 539, 541 (7th Cir. 2015).
² Adams v. City of Chicago, 62 F. Supp. 3d 771, 773-74 (N.D. Ill. 2014), vacated and remanded, 798 F.3d 539 (7th Cir. 2015).
³ Adams, 62 F. Supp. 3d at 773-74.
⁴ Id.
⁵ Id. at 774.
⁶ Id. at 775.
guilty of misdemeanors and remained in custody at the Cook County Jail for 204, and 46 days, respectively.\(^7\)

In 2006, the brothers sued.\(^8\) The City of Chicago admitted liability as to false arrest, use of excessive force, discrimination on the basis of race, and malicious prosecution.\(^9\) Although the jury awarded Seneca and Tari compensatory damages at trial, the brothers were denied the actual amount of damages that the jury intended.\(^10\) Through a procedure called “remittitur,” the trial judge’s determination that the damages amounts were “grossly excessive” caused the award to be reduced by over half.\(^11\) The brothers never agreed to the reduction in damages and were not offered the option of a new trial.\(^12\) Under these circumstances, the brothers were denied justice. Years later in 2015, the trial judge’s order of remittitur was vacated by the Seventh Circuit in *Adams v. City of Chicago*.\(^13\)

The Adams’ story is one of many instances of brutality and targeting of minorities by law enforcement officers. This nation is currently engaged in vigorous discussion about whether the courts may be seen as a true avenue for justice in police brutality cases. Over the last few years, failure to prosecute law enforcement officers for racially motivated violence has caused public outcry. However, the lesser-known procedural obstacle of remittitur has become a vehicle through which civil rights plaintiffs may be denied fairness in court.

In some cases, even where liability is admitted as to racially-targeted policing, a court may significantly reduce the amount of damages awarded by a jury to victims of police brutality. Although the Seventh Amendment provides that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States,”\(^14\) courts have

\(^7\) *Id.*
\(^8\) *Id.* at 776.
\(^9\) *Id.* at 776-77.
\(^10\) *Adams*, 798 F.3d at 541.
\(^11\) *Id.*
\(^12\) *Id.*
\(^13\) *Id.* at 546.
\(^14\) U.S. CONST. amend. VII.
insisted that remittitur is applied only where a jury verdict is excessive as a matter of law. This distinction is tenuous in a civil rights context. Damages awarded by a jury to compensate for pain and suffering or emotional distress involve a subjective determination of fact. Due to the nature of such damages, the trial judge’s conclusion that a damages award is excessive will necessarily involve some reexamination of fact. Thus, this paper argues that in civil rights cases, the judge has no constitutional or public policy basis for supplanting the jury’s determination with a subjective conclusion about damages of his or her own.

Further, although a “true remittitur” must be accompanied by the alternative option of submitting the case to a new trial, recent scholarship suggests that this option is illusory due to the increased cost, delay, and risk associated with a new trial. \footnote{See Suja A. Thomas, Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment, 64 OHIO ST. L.J. 731 (2003).} While the Seventh Circuit reinstated the jury damages in the Adams brothers’ case, it failed to take seriously the brothers’ argument that even a “true” order of remittitur violates the plaintiff’s rights under the Seventh Amendment. \footnote{Adams, 798 F.3d at 546.} Through an analysis of the trial option and the process by which a judge determines that a jury award is excessive in civil cases, this paper argues that the practice of remittitur serves no constitutional or public policy interest when a plaintiff sues for violation of his or her civil rights.

**Remittitur In Federal Jurisprudence**

**A. What is Remittitur?**

Remittitur is defined as “the procedure by which a trial judge gives a plaintiff who has received an excessively favorable jury verdict the option of accepting a specified reduction in the jury verdict or
submitting to a new trial.” An order for remittitur most often occurs after a losing defendant moves for a new trial on the ground that the damages awarded by the jury were excessive. Thus, the first step is an initial determination by the trial judge that the jury verdict was excessive. On this question, jurisdictions have adopted differing standards, resulting in confusion and lack of uniformity.

If the judge concludes that the jury verdict is excessive, he or she may enter an order for remittitur that entitles the defendant to a new trial only if the plaintiff refuses to accept a reduction in the jury verdict. A “true remittitur” is always accompanied by the alternative option of a submitting the case to a new trial. Specifically in a civil rights context, there are few clear guidelines as to deciding how much a jury verdict should be remitted. “There are no standard awards for items such as pain and suffering or damage to reputation, and in determining the amount to be remitted, the trial judge must adhere to the vague standards required by the court of appeals for his circuit.” Most circuits employ a “reasonable jury” standard that seeks to determine the amount that would have been awarded by a reasonable jury. In making such a determination, the trial judge must balance the interests of the plaintiff, the interests of the defendant, public policy arguments, and constitutional law under the Seventh Amendment.

If a plaintiff accepts the reduction in his or her damages, final judgment is entered on the reduced amount. In this circumstance,

18 Id.
19 Id.
20 Id. at 303.
21 Id. at 304.
22 Dimick v. Scheidt, 293 U.S. 474, 482-83 (1934).
23 Sann, supra note 18, at 307.
24 Id. at 307.
25 Id. at 309, 312.
26 Id. at 311.
although a defendant may appeal the trial court’s judgment, a plaintiff has “traditionally been precluded from appeal on the theory that, by choice, he has acquiesced in the final judgment on remittitur.”27 If the plaintiff chooses the alternative option of submitting to a new trial, he or she must wait until final judgment has been entered on the second trial before obtaining the right to appeal.28 However, the judicial system does not look favorably upon plaintiffs who refuse to remit.29 As explained by Irene Johnson in her 1976 article “Remittitur Practice in Federal Courts”:

[A]ppellate courts… seem quite hostile to plaintiffs who refuse to remit. A court will hold that a remittitur from, for example, $50,000 to $30,000 was not an abuse of discretion since a reasonable jury might find that amount. In the next breath the appellate court will decide that it was not an abuse of discretion for the judge at the second trial to affirm a verdict of $5,000 and deny plaintiff's motion for a new trial.30

Thus, in most cases remittitur presents a no-win situation for plaintiffs. As discussed infra, a lack of clear and uniform standards for determining that a jury verdict is excessive, accompanied by the illusoriness of the option for a new trial, cause an order for remittitur to coerce a plaintiff into accepting reduced damages, even in situations where a reasonable jury might have awarded the initial amount.

B. History of Remittitur in Federal Courts

The Seventh Amendment provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according

27 Id.
28 Id. at 312.
29 Id.
30 Id.
to the rules of the common law.\textsuperscript{31} The United States Supreme Court has never directly addressed the question of whether remittitur violates the Seventh Amendment. However, dicta found in the 1935 case \textit{Dimick v. Scheidt}, combined with long-term practice of remittitur in federal courts, has allowed the procedure to occur largely without question.\textsuperscript{32}

In \textit{Dimick}, the Court considered the constitutionality of additur, a procedure by which the trial judge increases the size of the jury award.\textsuperscript{33} Parallels between additur and remittitur caused the Court to also discuss the constitutionality of remittitur against the Seventh Amendment.\textsuperscript{34} The action in that case involved negligent operation of an automobile on a public highway.\textsuperscript{35} At trial, the jury awarded the respondent $500 in damages.\textsuperscript{36} The respondent moved for a new trial on the grounds that the damages were inadequate.\textsuperscript{37} In response, the trial court conditioned a new trial upon the petitioner’s refusal to consent to an increase of the damages to $1,500.\textsuperscript{38} The petitioner consented to the increase and the respondent’s motion was denied.\textsuperscript{39} The respondent appealed, and the court of appeals reversed the judgment, holding that that the trial court’s order violated the petitioner’s Seventh Amendment right to a jury trial.\textsuperscript{40} The Supreme Court granted certiorari in order to determine whether an order of additur, which conditions a new trial upon a party’s refusal to consent to increased damages, violated the Seventh Amendment.\textsuperscript{41}

\textsuperscript{31} U.S. CONST. amend. VII.
\textsuperscript{32} \textit{Dimick}, 293 U.S. 482.
\textsuperscript{33} \textit{Id.} at 476.
\textsuperscript{34} \textit{Id.} at 482.
\textsuperscript{35} \textit{Id.} at 475-76.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.} at 475-476
The Court found that “[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.” The Court concluded that at English Common Law in 1971, there was “some practice . . . in respect of decreasing damages,” but there was no similar practice of increasing the amount of damages awarded by a jury. Thus, the Court held that trial court’s order of additur violated the respondent’s right to a trial by jury as guaranteed by the Seventh Amendment.

Dicta in the majority opinion grudgingly found that the practice of remittitur was constitutional under the Seventh Amendment. Writing for the majority, Justice Sutherland reviewed the history of remittitur in the American judicial system. Remittitur first appeared in the 1822 circuit court decision Blunt v. Little. There, a jury awarded the plaintiff $2,000 in damages for malicious prosecution. Finding the damages excessive, Justice Story offered the plaintiff an option to remit $500 of the damages or submit to a new trial. His decision rested upon a conclusion that remittitur was commonly practiced at the time that the Seventh Amendment was adopted.

Commenting on Blunt and subsequent cases, the Dimick Court noted it was “remarkable that in none of these cases was there any real attempt to ascertain the common-law rule on the subject.” In its brief analysis of remittitur at English common law, the Dimick Court found

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42 Id. at 476 (citing Thompson v. State of Utah, 170 U.S. 343, 350 (1898); Patton v. United States, 281 U.S. 276, 288 (1930)).
43 Dimick, 293 U.S. at 482.
44 Id.
45 Id.
46 Id. at 484.
47 Id. at 482-83.
48 Id.
49 Id.
50 Id.
51 Id. at 483.
very little evidence to support Justice Story’s proposition that remittitur was commonly performed at the time that the Seventh Amendment was adoption.\textsuperscript{52} Rather, the Court stated:

\begin{quote}
[T]he sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every reasoned English decision, both before and after the adoption of the Federal Constitution, which [the Court has] been able to find.\textsuperscript{53}
\end{quote}

Therefore, the Court recognized that the constitutional basis for the practice of remittitur was, at best, tenuous.\textsuperscript{54} Justice Sutherland wrote, “it . . . may be that, if the question of remittitur were now before us for the first time, it would be decided otherwise.”\textsuperscript{55} Without the requisite historical evidence to support use of remittitur in the American judicial system, it seems that the Court’s reasoning in \textit{Dimick} invites an inference that remittitur does not comport with the Seventh Amendment.

Such reasoning conflicts with the court’s ultimate conclusion that remittitur is constitutional.\textsuperscript{56} Despite Justice Sutherland’s hesitance, the Court found a basis for the practice of remittitur due to its common use in federal courts.\textsuperscript{57} This conclusion is inconsistent with the Court’s emphasis on the importance of the jury as a fact-finding body. It is curious that the Court endorsed the practice of remittitur in the same decision as it declared trial by jury to be the “normal and preferable

\begin{footnotes}
\item[52] \textit{Id.}
\item[53] \textit{Id.} at 484.
\item[54] \textit{Id.} at 484-85
\item[55] \textit{Id.}
\item[56] \textit{Id.} at 482.
\item[57] \textit{Id.} at 484-85.
\end{footnotes}
mode of disposing of issues of fact.” Thus, the Dimick opinion does not preclude discussion about the constitutionality of remittitur in the federal judicial system. On the contrary, the opinion involved conflicting perspectives on the practice of remittitur in federal courts.

Years later, in Gasperini v. Center for Humanities, Inc., the Supreme Court considered whether an appellate court’s review of the size of a jury verdict violated the Seventh Amendment. In that case, the petitioner, a journalist, sued the respondent for losing the petitioner’s photographic work. The petitioner had supplied 300 slide transparencies to the respondent for use in an educational videotape. The respondent used 110 of the petitioner’s transparencies but failed to return the transparencies after completion of its videotape project. The respondent conceded liability for the lost transparencies, and the issue of damages was tried before a jury. At trial, the jury awarded the petitioner $45,000 in compensatory damages.

On appeal, the United States Court of Appeals for the Second Circuit concluded that the jury award was excessive because it “deviat[ed] materially from what would be reasonable compensation.” Relying on a New York statute that empowered appellate courts to review the size of jury verdicts, the Second Circuit vacated the $45,000 verdict and ordered a new trial, unless the petitioner agreed to an award of $100,000. The Supreme Court granted certiorari to consider whether the Seventh Amendment

58 Id. at 485-86 (“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”).
60 Id. at 419.
61 Id.
62 Id.
63 Id.
64 Id. at 420.
65 Id.
67 Gasperini, 518 U.S. at 421.
prohibited a federal appellate court from reviewing the size of a jury verdict.  

In its consideration of the Seventh Amendment’s re-examination clause, the Court adopted an evolving interpretation of common law. The Court upheld the appellate court’s use of the “deviates materially” standard. In so doing, the Court rejected the petitioner’s argument that allowing an appellate court to determine excessiveness of damages was incompatible with the Seventh Amendment.  

_Dimick_ and _Gasperini_ make clear that a proper analysis of the constitutionality of remittitur under the Seventh Amendment must look to the English common law in 1791. _Dimick_ and _Gasperini_ diverge, however, in the respective approaches taken by the Court towards interpreting the common law for the purpose of evaluating an excessive damages practice today. In _Dimick_, the Court adopted a static interpretation of the Seventh Amendment that determined its scope as within the common law practice of 1791. Four dissenting justices in _Gasperini_ also maintained this approach. However, the majority in _Gasperini_ adopted a view of the common law as evolving. An evolving approach focuses the inquiry on whether an excessive damages practice “maintain[s] the role of the jury as fact-finder, at minimum, as it functioned at English common law in 1791.”  

Even under an evolving interpretation of the Seventh Amendment adopted by the Court in _Gasperini_, remittitur does not comport with the Seventh Amendment because it “effectively eliminates the

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68 Id. at 422.
69 Suja A. Thomas, _Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment_, 64 OHIO ST. L.J. 731, 761 (2003).
70 _Gasperini_, 518 U.S. at 417.
71 Id.
72 _See id._ at 446; _Dimick_ v. Schiedt, 293 U.S. 474 (1935).
73 Thomas, _supra_ note 15, at 751.
74 Id.
75 Id.
76 Id.
plaintiff’s right to have damages determined by a jury.”\(^7\) As discussed \textit{infra}, because the trial option does not present a meaningful choice, an order for remittitur forces the plaintiff to “take the judge-remitted verdict or settle the case based on the judge’s determination.”\(^8\) On the question of constitutionality, remittitur fares even worse under a static approach to the Seventh Amendment, as adopted by the Court in \textit{Dimick}.\(^9\) Lack of historical evidence that remittitur was a common English practice in 1791 suggests that remittitur does not comport with public policy or a plaintiff’s constitutional guarantee that the “right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”\(^{10}\)

\textbf{SEVENTH CIRCUIT STANDARDS FOR REMITTITUR}

\textit{A. Considerations for Determining Whether a Jury Verdict is Excessive}

The Seventh Circuit determines the appropriateness of remittitur based upon several considerations outlined in \textit{Thompson v. Memorial Hospital of Carbondale}.\(^{81}\) In that case, a plaintiff employee sued his employer, a hospital, for alleged racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C.S. § 1981.\(^{82}\) The jury ruled in the plaintiff’s favor, and awarded him $500,000.\(^{83}\) On appeal, the Seventh Circuit reviewed the district court’s decision not to grant a remittitur.\(^{84}\) The court stated that in determining whether a verdict for compensatory damages warrants remittitur, a court should

\(^{7}\) \textit{Id.} at 736.\(^{7}\)
\(^{8}\) \textit{Id.}\(^{8}\)
\(^{9}\) \textit{Id.} at 751.\(^{9}\)
\(^{10}\) \textit{Id.}\(^{10}\)
\(^{81}\) \textit{Thompson v. Meml. Hosp. of Carbondale}, 625 F.3d 394 (7th Cir. 2010).\(^{81}\)
\(^{82}\) \textit{Id.} at 401.\(^{82}\)
\(^{83}\) \textit{Id.}\(^{83}\)
\(^{84}\) \textit{Id.} at 408.\(^{84}\)
look to several factors, including: (1) whether the award is “monstrously excessive”; (2) whether there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases.\(^{85}\) “A monstrously excessive verdict is one that is a ‘product of passion and prejudice.’”\(^{86}\) The Seventh Circuit has determined that the “monstrously excessive” and “rational connection” factors are “really just two ways of describing the same inquiry: whether the jury verdict was irrational.”\(^{87}\)

This standard is problematic because it necessarily involves a judge’s subjective determination concerning what it means for a damages award to be “monstrously excessive.”\(^{88}\) Issues also arise when a judge compares damages in cases that are in fact dissimilar.\(^{89}\) In a civil rights context, compensatory damages are often awarded for categories that are difficult to quantify, such as pain and suffering or emotional distress. Through the process of remittitur, a trial judge “necessarily reexamines facts to determine whether the particular sum awarded by the jury in damages is excessive,” thereby violating the Seventh Amendment.\(^{90}\)

\(^{85}\) *Id.* (citing Marion County Coroner's Office v. E.E.O.C., 612 F.3d 924, 931 (7th Cir. 2010)).

\(^{86}\) *Adams v. City of Chicago*, 798 F.3d 539, 543 (7th Cir. 2015) (citing *Fleming v. Cty. Of Kane*, 898 F. 2d 553, 561 (7th Cir. 2010)).

\(^{87}\) *Adams*, 798 F.3d at 543; *Harvey v. Office of Banks & Real Estate*, 377 F. 3d 698, 713-14 (7th Cir. 2004); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1285 (7th Cir. 1995).

\(^{88}\) *Thomas*, *supra* note 15, at 738.

\(^{89}\) *Id.*

B. Is the New Trial Option Illusory?

An order for remittitur is constitutional only if accompanied by the alternative choice of submitting to a new trial. 91 This general principle governs remittitur in both state and federal courts. 92 However, in many cases the trial option is not viable due to increased cost, delay, and risk. 93 In her article, Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment, Suja A. Thomas reports her finding that the trial option is illusory because it does not present plaintiffs with a meaningful choice. 94

Thomas conducted a study of the 168 federal district court cases reported on Westlaw in which a judge granted remittitur as an alternative to a new trial, as of 2003. 95 Her findings indicate that a plaintiff accepted remittitur in 71% of the cases, and settlement occurred in 27% of the cases. 96 A plaintiff took the new trial in only 2% of the cases studied. 97 The findings were even more dramatic when the pool of cases was narrowed to those that involved “uncertain damages,” such as civil rights or emotional distress cases. 98 The plaintiff accepted the remittitur or settled in 100% of these cases. 99

Thomas’s findings demonstrate that for many plaintiffs, exercising the option to a new trial is simply not realistic. She argues that even if a second jury awards damages that are similar or higher than the first, a plaintiff has “every reason . . . to believe that the judge will reduce the damages again,”100 because “[t]he judge who presides over the second trial will be the same judge who previously

91 Dimick v. Scheidt, 293 U.S. 474, 482-83 (1934).
92 Id.
93 Thomas, supra note 15, at 741-42.
94 Id. at 740.
95 Id. at 744
96 Id.
97 Id.
98 Id. at 745.
99 Id.
100 Id. at 740.
determined the remitted amount was the maximum award under the facts.\textsuperscript{101}

Further, if a plaintiff refuses to accept damages, he or she is unable to appeal the trial court’s order for a new trial after the second trial is completed.\textsuperscript{102} At this point, the plaintiff is likely to have incurred significant expenses in costs and attorney’s fees.\textsuperscript{103} Thus, the plaintiff is forced to accept a reduced damages award or settle with significantly less bargaining power as a result of the judge’s order for remittitur.

Because an appellate court may be hostile towards a plaintiff who refuses to remit his or her damages, remittitur may be seen as a “coercive device.”\textsuperscript{104} “The plaintiff would like to keep his entire verdict, but the risk and expense of a new trial are too high . . . the plaintiff may reluctantly decide to remit rather than take the chance of losing some or all of the remainder in the second trial.”\textsuperscript{105} Without meaningful choice, Thomas’ study makes a strong argument that the trial option is illusory.\textsuperscript{106} Thus, even where present, an order for remittitur does not comport with the Seventh Amendment.

**THE SEVENTH CIRCUIT’S DECISION IN ADAMS V. CITY OF CHICAGO**

In April 2015, the Seventh Circuit decided *Adams v. City of Chicago*.\textsuperscript{107} Although the Seventh Circuit has a longstanding history of support for the remittitur procedure, the plaintiffs in *Adams* directly challenged the constitutionality of remittitur as a violation of their rights to a jury trial under the Seventh Amendment.\textsuperscript{108} The Seventh Circuit declined to address this facet of the plaintiffs’ claim, stating, “it

\begin{footnotes}
\footnote{\textsuperscript{101} Id.}
\footnote{\textsuperscript{102} Sann, supra note 18, at 311.}
\footnote{\textsuperscript{103} Thomas, supra note 15, at 741-42.}
\footnote{\textsuperscript{104} Sann, supra note 18, at 312.}
\footnote{\textsuperscript{105} Id.}
\footnote{\textsuperscript{106} Thomas, supra note 15, at 744.}
\footnote{\textsuperscript{107} Adams v. City of Chicago, 798 F.3d 539 (7th Cir. 2015).}
\footnote{\textsuperscript{108} Id. at 546.}
\end{footnotes}
would be bold indeed for a court of appeals to come to such a conclusion, given what the Supreme Court has said on the topic.\textsuperscript{109} The Seventh Circuit’s decision presents an opportunity to re-examine Supreme Court doctrine regarding remittitur, and specifically to address the ramifications of remittitur in civil rights cases.

A. Facts

At approximately 8:00 p.m. on September 14, 2004, Seneca Adams was arrested by Chicago police officers.\textsuperscript{110} Seneca was stopped while jogging through the apartment complex where he lived with his twin sister, Sicara Adams.\textsuperscript{111} The officers shouted racial slurs at Seneca, pointed their pistols at him, and punched him in the face several times in front of Seneca’s family and other spectators.\textsuperscript{112} When the officers drove Seneca away from the apartment complex, Seneca’s sister, Sicara, and brother, Tari Adams, decided to follow in Tari’s car.\textsuperscript{113}

At a secluded location, the police officers continued to beat Seneca.\textsuperscript{114} When the officers realized that they had been followed, a police officer punched Tari in the face.\textsuperscript{115} Sicara and Tari attempted to leave the scene but were followed by a police car that slammed into the driver’s side of Tari’s car.\textsuperscript{116} Tari was arrested and beaten as he tried to exit his car.\textsuperscript{117}

\textsuperscript{109}Id.
\textsuperscript{110}Adams v. City of Chicago, 62 F. Supp. 3d 771, 773-74 (N.D. Ill. 2014), vacated and remanded, 798 F.3d 539 (7th Cir. 2015).
\textsuperscript{111}Id.
\textsuperscript{112}Id.
\textsuperscript{113}Id. at 774.
\textsuperscript{114}Id.
\textsuperscript{115}Id.
\textsuperscript{116}Id. at 775
\textsuperscript{117}Id.
Eventually, both brothers were taken to a local hospital. Seneca was charged with four counts of aggravated battery and unlawful use of a deadly weapon. Tari was charged with four counts of aggravated assault and two counts of aggravated battery. Both were found guilty of misdemeanors at a bench trial in the Circuit Court of Cook County. The brothers remained in the custody of the Cook County Jail for 204 days, and 46 days, respectively. However, on December 19, 2006, the charges against Seneca and Tari were vacated and their records were expunged.

The brothers sued the City of Chicago and individual police officers as a result of the vicious beatings and prolonged detentions that they were forced to endure. They filed a complaint in federal court, invoking federal question jurisdiction for their claims under 42 U.S.C. §§ 1983 and 1985 and supplemental jurisdiction for their state law claims. The City agreed to admit liability to both Seneca and Tari Adams for (1) false arrest, in violation of the Fourth Amendment; (2) excessive force, in violation of the Fourth Amendment; (3) discrimination on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment; and (4) malicious prosecution, in violation of Illinois state law. In exchange, the brothers dropped their claims against the individual officers.

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118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 Id. at 776.
124 Id.
125 Id.
126 Id. at 776-77.
127 Id. at 777.
B. The District Court’s Holding

The case proceeded to a jury trial on compensatory damages against the City on February 18, 2014, wherein the jury awarded Seneca $2,400,000 and Tari $1,000,000 in damages.128 At this point, however, something unexpected happened; the district court entered an order for remittitur, reducing each award to $1,170,000 and $350,000, respectively.129 The brothers were forced to accept this reduction, as they were not offered the option of a new trial.130 They appealed this order to the Seventh Circuit.131

C. The Seventh Circuit’s Holding

Seneca and Tari argued that the district court’s order of remittitur should be vacated because it violated their Seventh Amendment right to a jury trial.132 They relied heavily upon the scholarship of Suja A. Thomas, in which she proposes that the United States Supreme Court has never directly addressed the constitutionality of remittitur, and that in fact its interpretation of the Seventh Amendment as related to the unconstitutionality of additur disfavors use of remittitur as well.133 Although the Seventh Circuit held in the Adams brothers’ favor, it dismissed this argument based upon the Supreme Court’s decision in Dimick and others.134

In its opinion, the Seventh Circuit first addressed why the plaintiffs had appellate jurisdiction in this case. The court recognized that generally, “a plaintiff who accepts a reduced award may not appeal from the court’s decision to cut back on the jury’s verdict.”135

128 Adams v. City of Chicago, 798 F.3d 539, 541 (7th Cir. 2015).
129 Id.
130 Id. at 542.
131 Id. at 541.
132 Id.
133 Thomas, supra note 15, at 738.
134 Adams, 798 F.3d at 546.
135 Id. at 541.
Based upon this rule, the City argued that because the Adams brothers accepted their reduced damages, they could not appeal the district court’s order of remittitur. However, the Seventh Circuit recognized that appellate jurisdiction was secure because the Adams brothers were never offered the option of a new trial, as a “true remittitur order” requires.136 Once jurisdiction was decided, the question in the case became what to do about the district court’s failure to provide the Adams brothers with this option.137

The Adams brothers asked the Court to reinstate the jury verdict, while the City argued that the Adams brothers should not be allowed to skip the step of having to choose between reduced damages and a new trial.138 Thus, the Seventh Circuit turned to an excessive damages test. The test involves three factors, including: “whether (1) the award is monstrously excessive; (2) there is no rational connection between the award and the evidence, indicating that it is merely a product of the jury's fevered imaginings or personal vendettas; and (3) whether the award is roughly comparable to awards made in similar cases.”139

The Seventh Circuit’s application of this test demonstrates the level to which an order for remittitur is a subjective determination, particularly in civil rights cases: “We have observed that the ‘monstrously excessive’ standard and the ‘rational connection’ standard are really just two ways of describing the same inquiry: whether the jury verdict was irrational.”140 In deciding a matter of fact, remittitur effectively allows a judge’s subjective determination to replace that of the jury’s, even where, as here, it cannot be demonstrated that the judge is better equipped to make such a determination. The Seventh Circuit further analogized the jury verdict to the damages awards in past decisions, finding that the original

136 Id.
137 Id. at 542.
138 Id.
139 Id. at 543 (citing G.G. v. Grindle, 665 F.3d 795, 798 (7th Cir. 2011)).
140 Id. (citing Harvey v. Office of Banks & Real Estate, 377 F.3d 698, 713–14 (7th Cir. 2004)); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1285 n. 13 (7th Cir. 1995).
$2,400,000 awarded to Seneca and $1,000,000 awarded to Tari did not deviate greatly from other similar cases. In doing so, the Seventh Circuit again represented why this type of standard may cause inaccuracies: “The problem, well illustrated by the briefs in this case, is that one can always find excessive force cases with verdicts at different levels.” In discussing previous cases, the Seventh Circuit admitted that this type of evidence is “anecdotal . . . at best.”

Despite its recognition of the problems associated with the “monstrously excessive” standard, the Seventh Circuit declined to consider Plaintiffs’ argument that the practice of remittitur itself violates the Seventh Amendment. The Seventh Circuit’s opinion inaccurately interpreted Justice Steven’s opinion in *Gebser v. Lago Vista Independent School District* and the majority opinion in *Dimick* as directly addressing, and affirming, the constitutionality of remittitur.

### D. The Adams Brothers’ Seventh Amendment Argument

In addition to arguments more specific to their case, the Adams brothers asserted that the order of remittitur was unconstitutional because it violated their right to a jury trial under the Seventh Amendment. Relying on the scholarship of Suja A. Thomas, the brothers argued that damages are a question of fact, properly determined by the jury, which cannot be supplanted by a judge’s personal opinion. Their argument called into question current

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141 Id.
142 Id. at 545.
143 Id.
144 Id. at 546 (“We cannot resist observing, however, that it would be bold indeed for a court of appeals to come to such a conclusion, given what the Supreme Court has said on the topic”).
147 *Adams*, 798 F.3d at 546.
148 Id.
standards for determining whether remittitur is unconstitutional as inapplicable and inappropriate to cases that involve determination of “uncertain damages,” such as civil rights cases.\textsuperscript{149} For example, the reasoning advanced by the Adams brothers involved the ancillary assumption that remittitur is unconstitutional because in most cases the option for a new trial is illusory.\textsuperscript{150} Thus, even if this option had been provided to them, the remittitur order would not have been sufficient to pass constitutional muster under the Seventh Amendment.

At common law, review of judgments was limited to questions of law, not fact.\textsuperscript{151} The Adams brothers advanced a simple and straightforward argument: the trial judge should not have been permitted to supplant the jury verdict with his own opinion.\textsuperscript{152} They asked that the Seventh Circuit vacate the district court’s remittitur and order it to reinstate the initial jury verdict.\textsuperscript{153}

In \textit{Gasperini}, the Supreme Court cited a Second Circuit opinion: “We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.”\textsuperscript{154} This principle served as the foundation of the City of Chicago’s case. The City claimed that the district court did not err in its order of remittitur because the damages awarded to Seneca and Tari were so excessive as to present a question of law for the district court judge.\textsuperscript{155}

However, counsel for the Adams brothers disputed the application of the same principle here, and to other civil rights cases involving

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} \textit{Gasperini} v. Ctr. for Humanities, Inc., 518 U.S. 415, 452 (1996) (“The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it”) (internal citations omitted).
\textsuperscript{152} Reply Brief for Plaintiffs-Appellants at 13, Adams v. City of Chicago, 798 F.3d 593 (7th Cir. 2015) (No. 14-2862), 2015 WL 1020418.
\textsuperscript{153} Adams v. City of Chicago, 798 F.3d 539, 542 (7th Cir. 2015).
\textsuperscript{154} \textit{Gasperini}, 518 U.S. at 435 (quoting Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (2d Cir., 1961)).
\textsuperscript{155} Reply Brief for Plaintiffs-Appellants, \textit{supra} note 157, at 14.
“uncertain damages” in general.\textsuperscript{156} The reply brief for Seneca and Tari Adams distinguishes \textit{Gasperini} as a case in which the Supreme Court “was analyzing hard numbers, an excess of which could arguably been seen as unlawfully excessive.”\textsuperscript{157} In \textit{Gasperini}, the Supreme Court considered a breach of contract case.\textsuperscript{158} There, the defendant-appellee lost transparency slides belonging to a photographer and was thus unable to follow through on his agreement that the slides would be given back to the photographer upon completion of the project for which they were needed.\textsuperscript{159} Unlike the emotional and psychological damages involved in \textit{Adams}, \textit{Gasperini} considered only measurable damages related to the value of the lost transparencies.\textsuperscript{160}

Justice Scalia’s dissenting opinion in \textit{Gasperini} touches upon the injustice that results from the failure to make such a distinction.\textsuperscript{161} Concerned that the \textit{Gasperini} holding would allow courts to reduce jury verdicts without tangible evidence of the jury’s unlawfulness, Justice Scalia turned to the purpose of the Seventh Amendment.\textsuperscript{162} He stated:

> There is no small irony in the Court's declaration today that appellate review of refusals to grant new trials for error of fact is ‘a control necessary and proper to the fair administration of justice.’ It is objections to \textit{precisely} that sort of “control” by federal appellate judges that gave birth to the Reexamination Clause of the Seventh Amendment.\textsuperscript{163}

Within the spirit of Justice Scalia’s argument is the Adams brothers’ argument that reduction of jury damages in a civil rights case without

\begin{itemize}
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} \textit{Gasperini}, 518 U.S. at 419.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 448-49 (Scalia, J., dissenting).
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\end{itemize}
tangible evidence of the jury’s unlawfulness subverts the meaning and purpose of the Seventh Amendment.

Additionally, the Seventh Circuit in Adams lamented the imperfect application of the excessive damages standard to “uncertain” damages cases, in which a subjective determination must be made regarding damages as opposed to a number that may be generated by a formula. The Seventh Circuit stated that comparisons “amount to anecdotal evidence at best.” Nevertheless, the court compared Adams to other excessive force cases in which compensatory damages were awarded.

Therefore, the Seventh Circuit’s decision in Adams brings to the fore concerns about whether a judge may determine that a damages award in any civil rights case is truly excessive and thus warrants a remittitur order. It seems that Justice Scalia’s concern that a jury verdict should not be remitted without sufficient evidence of the jury’s unlawfulness has manifested itself in this case. The Seventh Circuit’s opinion describes no evidence of legal error, mistake in jury instruction, or statutory cap on the damages permitted at the trial court level in this case. Indeed, current standards for remittitur that ask a court to determine whether a damages award is “monstrously excessive” by observing whether it is roughly comparable to other, “similar” cases necessarily permit a judge to supplant the jury’s determination with a subjective, “uncertain,” determination of his or her own. This simply cannot be supported, as it goes against the rights and privileges afforded a plaintiff by the Seventh Amendment.

Finally, Justice Scalia’s dissenting opinion in Gasperini is instructive as to the Court’s error in finding a basis for the practice of remittitur solely in its longterm practice by federal courts. Critiquing the majority decision that permitted an appellate court to review the size of jury verdicts, Justice Scalia stated:

164 Adams v. City of Chicago, 798 F.3d 539, 545 (7th Cir. 2015).
165 Id.
166 Id.
167 See Gasperini, 518 U.S. at 448-49 (Scalia, J., dissenting).
168 Gasperini, 518 U.S. at 448-49 (Scalia, J., dissenting).
Today, the Court overrules a longstanding and well-reasoned line of precedent . . . One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights— the Seventh Amendment’s prohibition on appellate reexamination of civil jury awards—is wrong.\textsuperscript{169}

Although the facts of \textit{Gasperini} differ from use of remittitur in \textit{Adams}, Justice Scalia’s assertion is equally applicable to reductions in damages ordered by trial judges. A court should not be permitted to circumvent the requirements of the Seventh Amendment simply because courts have done so before. This harm is likely to occur in “uncertain” damages situations, including cases that involve damages incurred by police brutality. In this context especially, an order of remittitur is unconstitutional unless substantiated by concrete evidence related to mistake in jury instruction, a damages award that exceeds some statutory cap on damages, or other legal error.

\textbf{CONCLUSION}

In order to provide a true legal remedy to victims of police brutality, courts must abandon the procedural obstacles that prohibit civil rights plaintiffs from obtaining justice. While dicta found in the Supreme Court’s decision \textit{Dimick} suggests that a constitutional basis for remittitur may be found in its long-term practice by federal courts, the Court’s reasoning failed to analyze remittitur in depth.\textsuperscript{170} In light of the fact that little evidence can be found of a historical practice of remittitur in English common law in 1871, remittitur falls beyond the scope of the Seventh Amendment’s guarantee of a jury trial.\textsuperscript{171} Although the Seventh Circuit reversed the order of remittitur in

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Dimick v. Schiedt}, 293 U.S. 474, 484 (1935).

\textsuperscript{171} \textit{Id.}
Adams, by neglecting to consider the plaintiff’s Seventh Amendment argument, the Seventh Circuit failed to issue a decision that would prevent similar harm to future victims of police brutality. The Adams decision illustrates the tension between remittitur orders and the Seventh Amendment.

Specifically in the context of cases involving “uncertain” damages such as compensation for pain and suffering, a trial judge’s determination that these damages are “excessive” as a matter of law necessarily involves his or her reexamination of the facts. The “monstrously excessive” standard in use by the Seventh Circuit to determine whether a jury verdict is excessive is unclear, and invites the trial judge’s subjective determination about the size of an acceptable damages award to supplant the determination of the jury. Further, the trial option presented to plaintiffs as an alternative to reduced damages is illusory. Due to the increased cost, delay, and risk of loss associated with a new trial, plaintiffs rarely exercise the trial option when presented with an order for remittitur. In addition, an appellate court may look unfavorably upon a plaintiff who refuses to remit his or her damages. Therefore, the trial option does not present a meaningful choice, but, rather, coerces a plaintiff to accept reduced damages lest he or she lose the full sum at a new trial.

While the procedure of remittitur has thus far escaped public attention, it provides a significant obstacle for victims of police brutality and other “uncertain” damages that seek justice in court. Remittitur serves no constitutional or public policy interest in civil rights cases. Therefore, in cases in which a plaintiff sues for violation of his or her civil rights, courts must abandon the practice of remittitur in order to facilitate justice.

172 Adams v. City of Chicago, 798 F.3d 546 (7th Cir. 2015).
173 Wagner, supra note 89, at 643.
174 Thomas, supra note 15, at 741-42.
175 Id.
176 Sann, supra note 18, at 312.
IMPUNITY FOR SNAKE OIL MERCHANTS?: THE SEVENTH CIRCUIT UPHOLDS THE CLASS ACTION AS A VEHICLE FOR CONSUMER PROTECTION

STEPHEN PIGOZZI*

INTRODUCTION

Each year Americans spend billions on dietary supplements that promise to do everything from treating colds and enhancing memory to curbing hot flashes.¹ However, in spite of the lofty promises made by the manufacturers of such products, a recent study of herbal supplements by the journal BNC MEDICINE found that most of the products tested were of poor quality and contained considerable ingredient substitution.² In November 2015, the Justice Department announced that it was bringing criminal and civil cases against over

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100 makers of dietary supplements. The complaints alleged, *inter alia*, the sale of products that make health or disease treatment claims unsupported by adequate scientific evidence.

What legal remedy does the injured consumer of a low cost product like a dietary supplement have? One option is the class action. Guided by Federal Rule of Civil Procedure 23, a class action is a form of representative litigation: one or more named class representatives bring a claim on behalf of many absent class members, and those class members are bound by the outcome of the representatives’ litigation. The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only. The core policy behind the class action, as stated by the United States Supreme Court, is “to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”

Procedurally, after a class claim has been filed, a court must determine by order whether to certify the suit as a class action. Rule 23 provides express requirements for the certification of class actions in federal court. In addition to Rule 23’s express requirements, courts have developed additional criteria, known as the “implicit requirements,” for a class to be certifiable. One of these judicially created rules is that the proposed class be “ascertainable.” To meet the ascertainability requirement, a plaintiff must show that the

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4 *Id.*
5 WILLIAM RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2015).
8 *FED. R. CIV. P. 23.*
10 *Id.*
11 *Id.*
proposed class is defined in reference to objective criteria. This view has been adopted in the Seventh Circuit, where courts have held that “a class must be sufficiently definite that its members are ascertainable.” Put another way, a court must be able know or readily ascertain who will be a member of the class.

In recent years, the issue of class ascertainability has split the circuit courts. Some courts have expanded the ascertainability test beyond the definition described above. These courts have held that it is not enough that the proposed class is objectively defined; the plaintiff must also show a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.” This requirement, which the Seventh Circuit has labeled “heightened ascertainability,” has been used to defeat class certification in several consumer fraud cases involving low-cost products, including several against makers of dietary supplements.

In Mullins v. Direct Digital, LLC, the Seventh Circuit addressed whether Rule 23 imposed a heightened ascertainability requirement in granting class certification. The plaintiff in Mullins sought to certify a class of all people who purchased the defendant’s allegedly fraudulently marketed dietary supplement – Instaflex Joint Support. The court held that nothing in Rule 23 mentioned or implied the

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12 Id. at § 3:3.
14 Id. at 495.
16 Hayes, 725 F.3d at 355.
17 Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015).
19 Mullins, 795 F.3d at 657.
20 Id. at 658.
heightened ascertainability requirement. Further, the court ruled that this requirement had the effect of denying class certification in cases involving low-cost goods or services. In such cases, the court explained, a class action is the only viable way to pursue valid but small individual claims.

This article will explore the Seventh Circuit’s position on class ascertainability, through an analysis of Mullins v. Direct Digital, LLC, and will contrast this approach with the heightened ascertainability requirement adopted by other federal circuit courts of appeal. Specifically, this article argues that the Seventh Circuit was right to reject the heightened ascertainability requirement. Part I provides an outline of the requirements of Rule 23 and examines the traditional standards that courts have used to certify class actions. Part II explores the development of the heightened ascertainability requirement and the policy concerns behind its creation. Part III examines the facts and holding in Mullins and details the Seventh Circuit’s point-by-point rebuttal to the justifications other federal circuit courts have used for applying heightened ascertainability. Part IV argues that the heightened ascertainability requirement is superfluous, has deleterious effects on class plaintiffs and should be abandoned. Finally, Part V proposes changes to Rule 23 that the Judicial Conference’s Committee on Rules of Practice and Procedure could adopt in order to codify the Seventh Circuit’s approach to class certification.

I. RULE 23, TRADITIONAL ASCERTAINABILITY AND SUPREME COURT HOLDINGS ON CLASS CERTIFICATION

Rule 23 took its current form in a 1966 revision to the Federal Rules of Civil Procedure. According to its principal drafter, Benjamin Kaplan, the Rule is intended to “rebuild the law on functional lines responsive to . . . recurrent life patterns which call for

21 Id.
22 Id. at 668.
23 Id. at 662.
mass litigation through representative parties.”\textsuperscript{25} The Rule has two primary purposes. First, it permits the vindication of the rights of groups of people who individually would not have effective strength to bring their opponents into court.\textsuperscript{26} Second, by permitting a representative to sue on behalf of a large group of people, it provides an efficient method of litigation.\textsuperscript{27}

In class action suits filed pursuant to Rule 23, a court’s ruling on certification is the threshold question and often the most important decision in the litigation.\textsuperscript{28} As the Third Circuit noted, “orders granting class certification may expose defendants to enormous liability while orders denying certification may effectively eviscerate the plaintiffs' ability to recover.”\textsuperscript{29} Rule 23 sets forth the express requirements the plaintiff seeking certification must meet.\textsuperscript{30} First, class plaintiffs must show all the prerequisites of Rule 23(a).\textsuperscript{31} Then, a court must consider whether the class fits within one of the three categories set forth in Rule 23(b).\textsuperscript{32} In addition to Rule 23, plaintiffs must also meet the judicially created ascertainability requirement.\textsuperscript{33} Rule 23 does not specify a particular burden of proof, nor has the Supreme Court weighed in on the matter.\textsuperscript{34} Currently, some federal circuit courts, including the Seventh Circuit,\textsuperscript{35} have moved towards a “preponderance of the evidence” standard, while others have


\textsuperscript{26} Amchem, 521 U.S. at 617.


\textsuperscript{29} In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 93 F. App’x 345, 350 (3d Cir. 2004).

\textsuperscript{30} Amchem, 521 U.S. at 614.

\textsuperscript{31} FED. R. CIV. P. 23.


\textsuperscript{33} Rubenstein, supra note 5, at § 3:1.

\textsuperscript{34} Id. at § 7:21.

\textsuperscript{35} Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012).
articulated a lower standard.\textsuperscript{36} The following section describes each of the certification elements in detail.

\textit{A. Rule 23(a)’s Express Requirements}

1. Rule 23(a): Required Characteristics of a Class Action

The named class representative must meet each of the below elements in order to certify her class. Rule 23(a) establishes the four necessary components of a class action:

(1) the class is so numerous that joinder of all members is impracticable (numerosity);
(2) there are questions of law or fact common to the class (commonality);
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and
(4) the representative parties will fairly and adequately protect the interests of the class (adequacy).\textsuperscript{37}

The first two prerequisites, numerosity and commonality, are aimed at absent class members, while the latter two tests, typicality and adequacy, focus on the desired qualifications of the named class representative.\textsuperscript{38}

Rule 23(a)(1), the numerosity requirement, is intended to improve judicial economy and social efficiency.\textsuperscript{39} This rule does not articulate a minimum number of members for a class to exist, but instead addresses whether joinder would be impractical.\textsuperscript{40} Rule 23(a)(1) solves the problem of courts being overrun by a large number of individuals with similar claims.\textsuperscript{41} In addition, it allows people who are

\textsuperscript{36} \textit{Id.}
\textsuperscript{37} Rubenstein, \textit{supra} note 5, at § 1:2 (citing Fed. R. Civ. P. 23).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at § 3.1.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
unable to fund litigation themselves to join the claim of a class plaintiff.\textsuperscript{42}

Rule 23(a)(2)’s commonality requirement is “easily met in most cases.”\textsuperscript{43} To constitute commonality, the plaintiff must demonstrate that the class members “have suffered the same injury.”\textsuperscript{44} Put differently, the plaintiff must show there is a single issue of law or fact that is common across all class members.\textsuperscript{45} Like the numerosity requirement, commonality serves both efficiency and fairness goals.\textsuperscript{46} Adjudicating a question once, rather than repeatedly, is more efficient and avoids the unfairness that could result from inconsistent outcomes.\textsuperscript{47} Moreover, if a common issue of law or fact is not shared among class members, there is no basis upon which to bind one party to the outcome of another’s litigation.\textsuperscript{48}

A plaintiff satisfies the Rule 23(a)(3) typicality requirement if “her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory.”\textsuperscript{49} The heart of the typicality requirement is that plaintiff and the class members have an interest in prevailing on similar legal claims.\textsuperscript{50} Thus, similar to numerosity and commonality, typicality achieves judicial economy because the named plaintiff, by litigating her own case, simultaneously advances the interests of the absent class members.\textsuperscript{51} Class member’s claims need not be completely factually similar; however, they must

\textsuperscript{42} Id.
\textsuperscript{45} Rubenstein, supra note 5, at § 3:18.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Singer v. AT&T Corp., 185 F.R.D. 681, 689 (S.D. Fla. 1998).
\textsuperscript{51} JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:16 (12th ed. 2015).
be similar enough so that the interests of the class members will be fairly and adequately protected in their absence.\footnote{In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 598 (3d Cir. 2009).}

Lastly, Rule 23(a)(4) establishes the adequacy requirement. This inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent.\footnote{Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997).} It ensures that named plaintiffs and their counsel understand that they are acting in a representative capacity on behalf of all class members and will prosecute the action fairly, vigorously, and competently.\footnote{McLaughlin, supra note 51, at § 4:26.} Distinctions between the named plaintiff and absent class members are permitted; only affirmative antagonism between the named representative and the class will defeat certification under Rule 23(a)(4).\footnote{Rubenstein, supra note 5, at § 3:58.} This requirement is well illustrated by \textit{Amchem Products, Inc. v. Windsor}.\footnote{Amchem, 521 U.S. at 594.} There, the Supreme Court held that a group of plaintiffs who had suffered injuries from exposure to asbestos could not adequately represent a class of persons who had merely been exposed to asbestos and might develop injuries later.\footnote{Rubenstein, supra note 5, at § 3:58.} The Court found a conflict of interest between the named class representatives and the absent members because the former had an interest maximizing immediate payouts, while the latter had an interest in preserving settlement funds for future claims.\footnote{Id. at § 3:50.} Thus, due process and fairness form the core policy behind Rule 24(a)(4); the requirement ensures that the named plaintiff will pursue her interests adequately in order to produce a judgment that will justly bind the absent class members.\footnote{Id.} Though the above requirements are distinct, they are interrelated and tend to overlap.\footnote{McLaughlin, supra note 51, at § 4:1.} For example, commonality and typicality each serve as markers for whether the named plaintiff’s claim and the absent member’s claims are sufficiently intertwined so that the interests of the
class members will be fairly protected in their absence.\textsuperscript{61} In this manner, commonality and typicality also tend to merge with the adequacy-of-representation requirement.\textsuperscript{62} Nevertheless, each of the four requirements retains independent significance and all must be present for a class to be certified.\textsuperscript{63}

2. Rule 23(b): Types of Class Actions

If the class representative satisfies each of the requirements of Rule 23(a), she then must show that that a class action is maintainable under any one of the three categories set forth in Rule 23(b).\textsuperscript{64} The Rule 23(b)(1) class action addresses cases where the defendant is bound to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims.\textsuperscript{65} The Rule 23(b)(2) class action is relevant for cases where broad, class-wide injunctive or declaratory relief is necessary.\textsuperscript{66} Because issues of class ascertainability overwhelmingly pertain to Rule 23(b)(3) class actions, discussed \textit{infra}, this Comment article provides only the above brief descriptions of the first two types of Rule 23(b) actions. Rule 23(b)(3) states:

A class action may be maintained if Rule 23(a) is satisfied and if . . .
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

\textsuperscript{61} Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158 (1982).
\textsuperscript{62} Id.
\textsuperscript{63} Rubenstein, supra note 5, at § 1:2.
\textsuperscript{64} McLaughlin, supra note 51, at § 5:1.
\textsuperscript{65} Id. (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998)).
\textsuperscript{66} Id.
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action. 67

Put simply, a Rule 23(b)(3) class action permits judgments for money that bind all class members, except those who opt out.68 This is the most common category for small claims class actions, and is commonly referred to as the “money damage” class action.69 Courts have aggregated money damages suits into Rule 23(b)(3) class actions when many individuals have small damage claims.70 In these situations, aggregation is efficient because it forces wrongdoers to internalize the cost of their wrongdoing and captures the positive externalities associated with litigation.71 The Supreme Court articulated this concept by noting, “the aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”72

There are two elements at play in Rule 23(b)(3): predominance, (common questions must predominate over any questions affecting only individual members); and superiority, (class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy).73 The predominance requirement, while similar to Rule 23(a), is even more demanding.74 The Supreme Court has held that it is a court's duty to take a “close look” at whether

67 FED. R. CIV. P. 23.
69 Rubenstein, supra note 5, at § 4:1.
70 Id. at § 4:47.
71 Id.
73 Amchem, 521 U.S. at 615 (quoting FED. R. CIV. P. 23) (emphasis added).
common questions among class members predominate over individual ones. Thus, a court may not assume that because common issues may be implicated in the trial of every class member's claim, these issues are significant enough to support certification. At the same time, common issues must only predominate; they do not have to be dispositive of the litigation.

In considering whether a plaintiff meets the superiority requirement, courts consider the factors in Rule 23(b)(3)(A)-(D), listed above. These factors are not exhaustive. In essence, superiority analysis is composed of three considerations. First, whether alternative methods of adjudication are available. Second, a comparison of fairness between alternative methods and the class action. And third, a comparison of efficiency of each method of adjudicating the claims. For example, courts have denied certification for lack of superiority in consumer class actions where the defendant instituted a refund program to compensate purchasers of a defective product. In this situation, one court held, “it makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress.”

Lastly, an important distinction between Rule 23(b)(3) actions and Rule 23(b)(1) and (2) actions is the absent class members’ opportunity to opt out of the litigation. Rule 23(c)(2)(B) requires a court that has certified a Rule 23(b)(3) class to notify members “that the court will exclude from the class any member who requests exclusion.”

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75 Id. (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615 (1997)).
76 McLaughlin, supra note 51, at § 5:23.
77 Id.
78 Id. at § 5:63.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id. (citing Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 649 (C.D. Cal. 2014)).
85 Turcios, 296 F.R.D. at 649.
The ascertainability prerequisite is an “implicit” requirement of Rule 23. Its central inquiry is whether the proposed class can be defined in reference to objective criteria. For example, classes that are defined by subjective criteria, such as by a person's state of mind, fail the ascertainability requirement. Courts generally regard ascertainability as a precursor to Rule 23, and have held that the plaintiff bears the burden of pleading an ascertainable class before the court proceeds to a Rule 23 inquiry. As previously noted, the ascertainability requirement is judicially created and is often legitimized by courts as being inherent to the structure of Rule 23 and, therefore, an “axiomatic” part of class certification.

Courts have employed the traditional ascertainability precondition since the late 1960’s, shortly after Rule 23’s revision in 1966. For example, in 1970, the Fifth Circuit denied certification of a proposed class of “residents . . . active in the ‘peace movement’ who have been harassed and intimidated” by police.” The court held that the

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88 Rubenstein, supra note 5, at § 3:3.
89 Id.
90 Mullins v. Direct Digital, LLC, 795 F.3d 654, 660 (7th Cir. 2015).
91 Id.
92 Id. (quoting Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981)).
94 DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).
proposed class did not “constitute an adequately defined or clearly ascertainable class contemplated by Rule 23.” While the objective definition requirement is necessary for ascertainability, a court does not have to know the identity of each class member before certification.96 Evidence that the court will be able to identify class members at some stage of the proceeding is sufficient.97 One district court noted that a rule requiring knowledge of all class members at the certification stage would be particularly problematic for consumer class actions, where the named plaintiff would have no capability of identifying others who purchased a similar defective or deceptive product.98 “If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action.”99

There are two primary policy goals that justify traditional ascertainability. First, it protects plaintiffs by enabling notice to be provided and by defining who is entitled to relief.100 Second, it protects defendants by enabling a final judgment that clearly identifies who is bound by it.101 Judge Hamilton articulated these justifications in Mullins, explaining that vague classes pose a problem because “a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment.”102

II. THE JUDICIAL DEVELOPMENT OF HEIGHTENED ASCERTAINABILITY

The Third Circuit first articulated the heightened ascertainability requirement in the federal appellate courts in Marcus v. BMW of North America, LLC.103 There, the plaintiff sought to certify a class of current and former owners and lessees of BMW vehicles equipped

95 Id.
96 Rubenstein, supra note 5, at § 3:3.
97 Id.
99 Id.
100 Rubenstein, supra note 5, at § 3:3
101 Id.
102 Mullins v. Direct Digital, LLC, 795 F.3d 654, 660 (7th Cir. 2015).
103 Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012).
with allegedly defective tires over a four-year period.\textsuperscript{104} Defendant BMW kept no records of the vehicles it sold that were outfitted with the tires in question.\textsuperscript{105} Thus, potential class members could only identify themselves via affidavits.\textsuperscript{106} The court disapproved of this, stating that ascertaining a class by potential class member’s “say so” would have serious due process implications.\textsuperscript{107} In overturning the district court’s certification order, the Third Circuit found that Marcus’ class definition raised “serious ascertainability issues” because Marcus failed to present a “reliable, administratively feasible” way to identify class members.\textsuperscript{108} The court held that if class members are impossible to identify without extensive and individualized fact-finding or “mini-trials,” then a class action is inappropriate.\textsuperscript{109}

Marcus diverged from the established ascertainability test by adding a second prong: in addition to proving that the class can be defined by objective criteria, a plaintiff must also prove that there is an administratively feasible mechanism for identifying class members.\textsuperscript{110} The court identified three policy reasons for its new rule.\textsuperscript{111} First, it eliminates “serious administrative burdens” by requiring that class members be easily identifiable.\textsuperscript{112} Second, it protects absent class members by ensuring the “best notice practicable” under Rule 23(c)(2) in a Rule 23(b)(3) action.\textsuperscript{113} Third, it protects defendants by providing clarity as to who will be bound by the litigation.\textsuperscript{114}

One year later, the Third Circuit decided \textit{Carrera v. Bayer Corp.}, a case widely cited to support the heightened ascertainability

\textsuperscript{104} Id. at 592.  
\textsuperscript{105} Id. at 593-94.  
\textsuperscript{106} Id. at 594.  
\textsuperscript{107} Id.  
\textsuperscript{108} Id. at 593-94.  
\textsuperscript{109} Id. at 593.  
\textsuperscript{110} Daniel Luks, \textit{Ascertainability in the Third Circuit: Name That Class Member}, 82 Fordham L. Rev. 2359, 2380 (2014).  
\textsuperscript{111} Marcus, 687 F.3d at 593.  
\textsuperscript{112} Id.  
\textsuperscript{113} Id.  
\textsuperscript{114} Id.
requirement.115 In Carrera, plaintiff alleged that defendant falsely and
deceptively advertised its dietary supplement, WeightSmart, by
claiming it enhanced metabolism.116 Carrera’s class of “all persons
who had purchased WeightSmart in Florida” was certified by the
district court.117 The Third Circuit vacated the certification order,
holding that Carrera had failed to provide a reliable, administratively
feasible mechanism for identifying the class.118 Like the plaintiff in
Marcus, Carrera sought to ascertain his class via affidavits of class
members.119 However, Carrera also proposed to identify class
members through retailer sales records.120 To support this, Carrera
presented a declaration from a settlement claims processor, which
stated there are ways to verify the types of affidavits at issue and
screen out fraudulent claims.121

The Third Circuit rejected Carrera’s proposed model to identify
class members, stating that he had presented no evidence that retailers
actually possessed the relevant sales records.122 The court held that a
plaintiff cannot merely propose a method of ascertaining a class
without any evidentiary support that the method will be successful.123
The court articulated three reasons for its holding. First, allowing a
plaintiff to ascertain class members by affidavit or via another method
not proven to be effective would “eviscerate” a defendant’s due
process right to raise individual challenges and defenses to claims.124
The court explained that due process requires that a defendant be able
to test the reliability of the evidence submitted to prove class

115 Karhu v. Vital Pharm., Inc., 621 F. App’x 945, 948 (11th Cir. 2015); Byrd v.
Aaron’s Inc., 784 F.3d 154, 163 (3d Cir. 2015); Sethavanish v. ZonePerfect Nutrition
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id. at 309.
123 Id. at 306.
124 Id. at 307.
Second the court posited that a poorly ascertained class would lead to mini-trials to determine class membership. This would diminish efficiency, a benefit expected in a class action. Third, a poorly ascertained class could lead to the distribution of fraudulent or inaccurate claims. The court averred that it would be unfair to absent class members to have their recovery diluted by such claims. Moreover, it would be unfair to defendants if claim dilution resulted in absent class members bringing new claims. The court hypothesized that this could occur if the absent class members argued that the plaintiff did not adequately represent them because he had proceeded with the ligation with the understanding that the absent class members could get less than full relief.

After Carrera, the Eleventh Circuit Court of Appeals and several district courts adopted the Third Circuit’s heightened ascertainability approach to their class certification analysis. This has resulted in the denial of certification where the plaintiff has failed to show a reliable, administratively feasible way to identify class members. For example, in Karhu v. Vital Pharmaceuticals, Inc., a case factually similar to Mullins, a proposed class of purchasers of the defendant’s allegedly deceptively advertised dietary supplement was denied certification. The Eleventh Circuit held that a plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes,

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125 Id.
126 Id.
127 Id.
128 Id. at 310.
129 Id.
130 Id.
131 Id.
133 Warnick, 301 F.R.D. at 557.
134 Karhu, 621 F. App’x at 948.
and that identification will be administratively feasible. As the below discussion will show, heightened ascertainability has been very detrimental to class plaintiffs. However, with its holding in Mullins, the Seventh Circuit has provided an important counterweight to this approach.

III. MULLINS V. DIRECT DIGITAL, LLC

A. Background and District Court Decision

On March 8, 2013, Vince Mullins filed a multi-state class action complaint against Direct Digital, LLC (“Direct Digital”), alleging violations of the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. 502/1, et seq. and similar laws in other states. Mullins claimed that the statements on the label of defendant’s product, Instaflex Joint Support (Instaflex), were false and misleading, and as a result, Mullins and members of his proposed class purchased a product that did not perform as advertised. The statements at issue included claims that Instaflex would “relieve discomfort,” “improve flexibility,” and “increase mobility.” The label also made claims that Instaflex was “scientifically formulated,” and “clinically tested.” To support his assertions that the statements were false and misleading, Mullins cited several studies, including one by the National Institute of Health, which concluded that the Instaflex’s primary active ingredient in Instaflex, glucosamine, does not possess joint health benefits.

Defendant Direct Digital did not contest Mullins’ consumer fraud allegations but instead moved to defeat Mullins’ complaint on class

135 Id.
136 Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015).
137 Complaint, supra note 135, at 2.
ascertainability grounds. Citing Carrera, Direct Digital argued that the court should apply the heightened ascertainability standard to its class certification analysis. Direct Digital averred that neither Mullins nor any proposed class member could prove that they purchased or used Instaflex. Further, Direct Digital contended that the studies Mullins cited to show that Instaflex did not work were “widely circulated and publicized.” Direct Digital posited that, unlike Mullins, consumers who were aware of these studies but nonetheless purchased Instaflex could not be class members because they were not defrauded by Direct Digital’s false claims. Thus, the inquiries into whether Mullins and members of his proposed class had actually used Instaflex and whether they had seen the studies would likely lead to individualized fact finding and mini trials. This would result in Mullins failing the heightened ascertainability test, under which the party seeking certification must show an administratively feasible means of identifying class members.

The District Court rejected Direct Digital’s arguments and granted Mullins’ motion to certify a multi-state class. The court did not address the heightened ascertainability question, instead confining its analysis to whether Mullins’ proposed class met the express requirements of Rule 23. First, the court explained that Rule 23(a)’s requirements of commonality and typicality were satisfied as Mullins’ proposed class was confined to the questions of whether Instaflex provided any health benefits to a person’s joints and whether the product labeling deceived the consumer. These questions were

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143 Id. at 5.
144 Id. at 6.
145 Id. at 2.
146 Id.
147 Id.
148 Id. at 5.
150 Id. at 2.
common to all class members, and Mullins’ claims were typical of all class members because he relied on the false advertising before purchasing the product. Because these questions were “objectively contained” to Instaflex purchasers, the court held the class was ascertainable.

Second, the court held that Mullins had satisfied Rule 23(b)(3)’s requirements of predominance and superiority. Predominance was satisfied because the question of Instaflex’s efficacy were common to all class members; therefore, proceeding to trial as a class would produce a common answer as to whether the advertisements on Instaflex’s label were false. Turning to superiority, the court reasoned that the sheer size of the class would “achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” Direct Digital appealed to the Seventh Circuit.

B. The Seventh Circuit’s Decision

In a unanimous opinion authored by Judge David Frank Hamilton, sitting on a panel with Judge Michael Stephen Kanne and Judge William Joseph Bauer, the Seventh Circuit declined to follow other circuits in adopting the heightened ascertainability requirement to its class certification analysis. The court explained that, when deciding whether to certify a class, Rule 23 requires a court to balance the likely difficulties in managing a class against whether a class is superior to other available methods for fairly and efficiently adjudicating the controversy. The court stated that the heightened ascertainability requirement upsets this balance by giving class manageability

151 *Id.*
152 *Id.*
153 *Id.* at 3.
154 *Id.*
155 *Mullins v. Direct Digital, LLC, 795 F.3d 654, 660 (7th Cir. 2015).*
156 *Id.*
concerns absolute priority over superiority considerations.\textsuperscript{157} Hence, heightened ascertainability effectively bars any class action concerning goods where consumers are unlikely to have documentary proof of purchase.\textsuperscript{158}

1. The Established Meaning of Ascertainability in the Seventh Circuit

The court made clear that it had long defined ascertainability as the requirement that a class be clearly defined based on objective criteria.\textsuperscript{159} Never, the court noted, had its analysis focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class.\textsuperscript{160} In order to provide clarity to the Seventh Circuit’s settled ascertainability doctrine, Judge Hamilton listed and described three ways that a plaintiff can “flunk” the requirement.\textsuperscript{161}

First, classes that are defined too vaguely fail to satisfy the “clear definition” component. To overcome this requirement, classes must identify a particular group, harmed during a particular time frame, in a particular location, in a particular way.\textsuperscript{162} Second, classes cannot be defined using subjective criteria, such as a person’s state of mind.\textsuperscript{163} As support for this proposition, the court cited \textit{Harris v. General Development Corp.}\textsuperscript{164} There, a proposed class of “all black persons who were discouraged or excluded from” applying for sales jobs at defendant’s corporation during a defined time period was held to be “too imprecise and speculative” to be certified.\textsuperscript{165} Third, so-called “fail safe cases,” where class membership depends on the liability of the

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 359.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 660 (citing McLaughlin, \textit{supra} note 51, at § 4:2).
\textsuperscript{164} Id.
\textsuperscript{165} Id.
defendant, are also not properly defined.\textsuperscript{166} Such classes raise basic fairness problems for the defendant: “the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation.”\textsuperscript{167}

2. The Court Addresses the Policy Concerns Behind the Heightened Ascertainability Requirement

Direct Digital’s argument to the Seventh Circuit boiled down to the notion that it would be inefficient, unfair to Direct Digital, and unfair to absent and bona-fide class members should the court allow class members to self-identify by affidavit.\textsuperscript{168} Judge Hamilton responded to each of these policy concerns and detailed how they could be addressed under Rule 23’s express requirements and under the Seventh Circuit’s settled understanding of class ascertainability.\textsuperscript{169}

First, the court addressed the efficiency concerns articulated in \textit{Carrera}. The court responded to the argument that heightened ascertainability “eliminates serious administrative burdens” by ensuring easy identification of class members.\textsuperscript{170} This is accomplished by eliminating “extensive and individualized fact-finding or mini-trials”.\textsuperscript{171} The court provided two reasons against applying heightened ascertainability on these grounds: 1) heightened ascertainability is superfluous because Rule 23(b)(3) already addresses case manageability;\textsuperscript{172} and 2) the requirement conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns.\textsuperscript{173} Judge Hamilton noted that

\textsuperscript{166} \textit{Mullins}, 795 F.3d at 660.
\textsuperscript{167} \textit{Id}.
\textsuperscript{168} \textit{Id}. at 662.
\textsuperscript{169} \textit{Id}. at 663-672.
\textsuperscript{170} \textit{Id}. at 663 (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)).
\textsuperscript{171} \textit{Id}. (quoting Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013)).
\textsuperscript{172} \textit{Id}. (citing Luks, \textit{supra} note 110, at 2395).
\textsuperscript{173} \textit{Id}. (citing Byrd v. Aaron's Inc., 784 F.3d 154, 175 (3d Cir. 2015) (Rendell, J., concurring)).
Rule 23(b)(3)’s superiority requirement is comparative; the rule requires a court to balance possible efficiencies with an eye toward other available methods to resolve the dispute. By imposing heightened ascertainability without considering superiority, a court may deny justice in a case where the requirement is difficult to satisfy but there is no realistic alternative to class treatment.

In addition, the court pointed out that serious administrative problems related to identifying class members typically arise after settlement or judgment, when much more is known about available records and response rates. The court advised that district judges should wait until this stage of litigation to consider such matters, and if a problem is truly insoluble, the court may decertify the class. Therefore, the court held that, “refusing to certify on manageability grounds alone should be the last resort.”

Second, the court addressed the notice concerns put forth in Carrera. Judge Hamilton rebutted the argument that the heightened ascertainability requirement is needed to protect absent class members. In sum, this argument states that if absent members do not receive actual notice of the action because they could not be ascertained, they lose their opt out rights and thus are unfairly bound by the judicial proceeding. Judge Hamilton noted that this premise is erroneous because Rule 23(c)(2)(B) requires the “best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,” not actual notice. Therefore, Rule 23 recognizes that some members may be impossible to identify. The court also noted the unlikelihood that someone with a claim in a low value consumer case would wish to opt

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174 Id. at 664 (quoting FED.R.CIV.P. 23(b)(3)).
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id. at 665 (quoting Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013)).
181 Id.
182 Id. (quoting Shaw, supra note 25, at 2367–69).
out and litigate a claim individually. Accordingly, the court ruled, “due process simply does not require the ability to identify all members of the class at the certification stage.”

Third, the court addressed the concern that individuals without valid claims would submit fraudulent affidavits, receive a payment, and as a consequence dilute the share of recovery for true class members. Judge Hamilton held that Direct Digital had presented no evidence for this proposition, and the likelihood of that scenario seemed low, “perhaps to the point of being negligible,” especially when one considers that it is not unusual to have participation rates in class action cases of 10 to 15 percent and in recent cases rates lower than five percent. Moreover, the court noted that if fraudulent or inaccurate claims actually caused dilution, then deserving class members would still receive something. However, if certification were denied in case like Mullins, then the class would receive nothing. The court ruled that to accept this argument in a case like this would lead to the absurd result of depriving bona fide class members of any recovery at all as a means to ensure they do not recover too little.

Fourth, the court responded to the argument that the heightened ascertainability requirement is needed to protect a defendant’s due process rights. The court summarized this argument with a quote from the Third Circuit: “[F]orcing [the defendant] to accept as true absent persons’ declarations that they are members of the class, without further indicia of reliability, would have serious due process

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183 Id.
184 Id.
185 Id. at 666.
187 Id. at 668.
188 Id.
189 Id.
190 Id. at 669.
implications.”

Judge Hamilton agreed that a defendant has a due process right to challenge plaintiffs’ evidence at any stage of the case, to not pay a plaintiff in excess of its liability and to present individualized defenses if those defenses affect its liability. However, this right does not translate into the right to ascertain the identity of class members with perfect accuracy at the certification stage. So long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, the defendant’s due process rights have been protected.

Lastly, the court discussed one of the core policy reasons for Rule 23 and the class action device: deterring and punishing corporate wrongdoing. The court posited that the heightened ascertainability requirement effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions. To summarize this point, under heightened ascertainability, if the defendant has kept no records concerning the harmful product and a class member can produce none, class certification is denied and the defendant escapes liability. Judge Hamilton argued that such a regime would immunize significant corporate misconduct; therefore, a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.

IV. THE CASE FOR ABANDONING HEIGHTENED ASCERTAINABILITY

In the aftermath of Carrera, the Third Circuit decided Byrd v. Aaron’s, Inc., where it attempted to respond to critiques of the

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191 Id. (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012)).
192 Id. (quoting Wal–Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560–61 (2011)).
193 Id. at 670–671.
194 Id. (emphasis added).
195 Id. at 668.
196 Id.
197 Id. at 669.
heightened ascertainability requirement and clarify its application. 198 This section responds to the Third Circuit’s attempts to save heightened ascertainability as a mechanism to demonstrate the practical difficulties in applying the requirement, its logical fallacies, and its tendency to promote opaque business practices and poor record keeping as a means to avoid liability. In addition, this section argues that heightened ascertainability should ultimately be abandoned as the policy concerns it purports to address are sufficiently resolved by the Seventh Circuit’s approach.

A. Heightened Ascertainability Imposes a Records Requirement that Creates an Unnecessary Burden on Class Plaintiffs

Byrd involved an invasion of privacy claim against a company that leased laptop computers. 199 The defendant installed spyware on the computers that was capable of collecting screenshots, keystrokes, and webcam images. 200 The Third Circuit certified the class, ruling that it was ascertainable because of the existence of objective records that contained full identity of the customers who leased or purchased the computers. 201 The Byrd court declared that heightened ascertainability only requires a plaintiff to show a way that class members can be identified; it does not require her to actually identify the class members nor does it impose a records requirement. 202 However, it is difficult to see how a class plaintiff could surmount heightened ascertainability’s requirement that class members be identified in an “administratively feasible” manner absent a record that actually identifies every class member. In cases involving low cost products, consumers would need to keep a receipt or a can, bottle, tube, or wrapper of the offending item in order to succeed in bringing a class action. 203

198 Byrd v. Aaron's Inc., 784 F.3d 154, 161 (3d Cir. 2015).
199 Id. at 159.
200 Id.
201 Id. at 169.
202 Id. at 164.
203 Id. at 174-75 (Rendell, J., concurring).
Even in cases where defendants have kept records, heightened ascertainability imposes a substantial burden to certification. Indeed, in two other Third Circuit cases post-Marcus, class certification was denied when the defendants kept records of the allegedly fraudulent transactions and plaintiffs presented methods of identifying class members based on those records.\(^{204}\) In *Hayes v. Wal-Mart Stores, Inc.*, the plaintiff brought consumer fraud claims against Wal-Mart Stores ("Wal-Mart") for allegedly selling him a service plan on an "as-is" item not covered by the plan.\(^{205}\) Wal-Mart maintained the sales records at issue, but argued it had no way of determining which transactions were for "as-is" items.\(^{206}\) The court declared, "the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden," and de-certified the class.\(^{207}\) In doing so, the court cautioned the plaintiff that in order to prevail on remand, he must "offer some reliable and administratively feasible" method for the court to determine whether an "as-is" item was purchased.\(^{208}\)

As *Hayes* demonstrates, heightened ascertainability's administrative feasibility requirement presents class plaintiffs with a nearly impossible burden. It narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended.\(^{209}\) It is easy to see how; the requirement bars certification not only in cases where the defendant lacks records, but also in cases where the defendant possesses records but their consultation would not be administratively feasible in the opinion of the court. Comparing *Byrd* and *Hayes* illustrates this point. In *Byrd*, the plaintiff was able to certify his class by pointing to a clean list of names that easily identified class members.\(^{210}\) In *Hayes*, certification was denied because the names of


\(^{205}\) *Hayes*, 725 F.3d at 352.

\(^{206}\) *Id.* at 355.

\(^{207}\) *Id.* at 356.

\(^{208}\) *Id.*

\(^{209}\) *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring).

\(^{210}\) *Id.* at 169.
class members were mixed with names of other purchasers and separating them was held to be administratively infeasible.\(^{211}\) As these cases demonstrate, unless ideal records exist, class certification in consumer cases will likely fail under heightened ascertainability.

Further, as the \textit{Mullins} court noted, heightened ascertainability conflicts with the settled proposition that courts should not deny certification merely on the basis of concerns over the manageability of identifying class members.\(^{212}\) Such concerns are appropriately addressed at the claims administration stage.\(^{213}\) There, courts can rely on a claim administrator’s various auditing processes and other techniques to make empirical assessment of the likelihood of fraud or inaccuracy.\(^{214}\) Thus, it is inappropriate for a court to erect hypothetical roadblocks to identifying class members when deciding whether to certify a class.\(^{215}\)

\textit{B. The Administratively Feasible Requirement is Vague and Inconsistently Applied}

The administratively feasible requirement speaks to a central concern of courts applying heightened ascertainability: the elimination of so-called “mini-trials” to identify class members.\(^{216}\) Such mini-trials are necessary to protect a defendant’s due process rights by enabling him to test the reliability of the evidence submitted to prove class membership.\(^{217}\) However, mini-trials result in “serious administrative burdens that are incongruous with the efficiencies expected in a class action.”\(^{218}\) Yet, courts applying heightened ascertainability have failed to define when an inquiry into identifying class members results in a mini-trial or at what point a defendant’s due process rights have been

\(^{211}\) Hayes, 725 F.3d at 356.
\(^{212}\) Mullins v. Direct Digital, LLC, 795 F.3d 654, 663 (7th Cir. 2015).
\(^{213}\) \textit{Id.} at 667.
\(^{214}\) \textit{Id.}
\(^{215}\) \textit{Id.}
\(^{216}\) Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012).
\(^{218}\) \textit{Id.}
violated. The *Byrd* court declared, “*Carrera* does not suggest that no level of inquiry as to the identity of class members can ever be undertaken . . . [T]he size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.”\(^{219}\) Still, the Third Circuit denied certification in *Marcus*, *Hayes*, and *Carrera* for precisely these reasons.\(^{220}\) Moreover, the Third Circuit has been remarkably inconsistent in its rulings as to whether the consultation of records results in a mini-trial. For example, in *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, the Third Circuit certified a class where member identification required consulting the defendant’s business records and then “follow[ing] a few steps to determine whether the borrower is the real party in interest.”\(^{221}\) Why such an approach was not sufficient in *Marcus* and *Hayes* is not clear.

Further, in *Byrd*, the court ruled that household members of the computer lessee plaintiffs could be included in the class.\(^{222}\) This was because household members could be “easily objectively verified through personal and public records. And their usage of the owner/lessee's computers can also be easily objectively established.”\(^{223}\) This reasoning is unsound. To see how, consider a scenario where a sibling of a class member in *Byrd* moved into the household from another state. Say this sibling began paying rent and living in the home but did not establish other public records to indicate residency. It is impossible to tell how the court could determine whether the sibling used the class member’s computer without individualized fact finding and a mini-trial. As this hypothetical demonstrates, applying the administratively feasible requirement is problematic and invites inconsistency because it is poorly defined.

\(^{219}\) *Byrd* v. Aaron's Inc., 784 F.3d 154, 171 (3d Cir. 2015).
\(^{220}\) *Carrera*, 727 F.3d at 306; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356 (2011); *Marcus*, 687 F.3d at 593.
\(^{222}\) *Byrd*, 784 F.3d at 169.
\(^{223}\) *Id.*
What is more, class actions inherently involve administrative burdens, individual inquiry, and some uncertainty.\textsuperscript{224} The \textit{Byrd} court noted, “There will always be some level of inquiry required to verify that a person is a member of a class.”\textsuperscript{225} Heightened ascertainability imposes an unnecessary burden on plaintiffs because reviewing the files of persons seeking to join a class is an intrinsic part of class action litigation. Denying certification on these grounds is unjustified where the plaintiff has presented an objectively verifiable class.

\textbf{C. Heightened Ascertainability Incentivizes Poor Record Keeping and Immunizes Corporate Misconduct}

As the \textit{Mullins} court noted, heightened ascertainability bars low-value consumer class actions where plaintiffs do not have documentary proof of purchases and, sometimes, even when they do.\textsuperscript{226} Thus, heightened ascertainability effectively immunizes defendants from liability and encourages poor or no record keeping.\textsuperscript{227} An unscrupulous corporation could market and sell a low cost dietary supplement it knows to be ineffective and potentially avoid civil liability in the Third Circuit. To do so, it would simply need to sell such a product to third party distributors and destroy all records of the transactions. The individual purchaser’s monetary claim would be so low that the case would never be brought except as a class action.\textsuperscript{228} Under heightened ascertainability, a potential class could never be certified; affidavits are not an acceptable means to identify class members and there would be no records that could possibly provide a plaintiff with an “administratively feasible” way to identify purchasers. In this manner, heightened ascertainability can become a tool for businesses to defraud.

\textsuperscript{224} Shaw, \textit{supra} note 25, at 2397.
\textsuperscript{225} \textit{Byrd}, 784 F.3d at 170.
\textsuperscript{226} \textit{Mullins v. Direct Digital}, LLC, 795 F.3d 654, 662 (7th Cir. 2015).
\textsuperscript{227} \textit{Id.} at 668.
\textsuperscript{228} Shaw, \textit{supra} note 25, at 2359.
D. Rule 23’s Express Requirements Sufficiently Address the Policy Concerns Motivating Heightened Ascertainability

This subsection summarizes four core points made in Mullins to demonstrate that heightened ascertainability is a superfluous requirement. First, Rule 23(b) (3) already addresses concerns about administrative inconvenience. Rule 23(b)(3)'s superiority clause requires that a class action be superior to other available methods for fairly and efficiently adjudicating the controversy. The likely difficulties in managing a class action are one factor in this determination. Thus, Rule 23(b)(3) requires a court to balance efficiency against other available methods of resolving the dispute. The heightened ascertainability approach upends this balance. It makes one factor unconditional and overlooks the reality that without certification, class members with valid small claims would receive nothing. Thus, when the realistic alternative to a class action is no litigation at all, a court should not deny certification based on efficiency considerations.

Second, the concern that absent class members will not receive notice of the suit and be denied their right to opt out of the litigation is addressed under Rule 23(c)(2)(B). This rule states that a “court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Thus, actual notice is not required under Rule 23 nor is it required to satisfy constitutional due process. If actual notice is not possible, courts may use alternative

229 Mullins, 795 F.3d at 663.
230 FED. R. CIV. P. 23.
231 Id.
232 Mullins, 795 F.3d at 658.
233 Id. at 558.
234 Id. at 558, 666 (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).
236 FED. R. CIV. P. 23.
means such as paid advertising without offending due process.\textsuperscript{238} Therefore, as long as notice satisfies the standard of Rule 23(b)(3), there is no due process violation.\textsuperscript{239} By insisting on the identification of class members via an administratively feasible process, heightened ascertainability comes close to requiring actual notice.\textsuperscript{240} This runs contrary to settled law and Rule 23. Moreover, the argument that lack of notice would result in an absent class member being deprived of her right to opt out of the class action because she desired to litigate a low value claim like the one in \textit{Mullins} is unconvincing. As Judge Posner noted, “only a lunatic or a fanatic sues for $30.”\textsuperscript{241} Thus, the concern that absent class members may not receive notice is not a rational justification for heightened ascertainability.

Third, courts have posited that heightened ascertainability protects absent class members from unfairness where there is a “significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”\textsuperscript{242} The \textit{Mullins} court held that there was no empirical evidence that this risk existed.\textsuperscript{243} Moreover, if a class definition is overbroad and there is a risk that a defendant would have to pay illegitimate claims, such a class would likely be blocked by Rule 23(a)’s commonality and typicality requirements.\textsuperscript{244} Hence, the claims dilution argument is based on nonexistent dangers that would be addressed by Rule 23’s express requirements, if the dangers actually materialized.

Fourth, heightened ascertainability is offered as a means to protect a defendant’s due process right to challenge the evidence presented to prove class membership.\textsuperscript{245} This argument too, is without merit. Using

\begin{itemize}
\item \textsuperscript{238} \textit{Mullins}, 795 F.3d at 665 (citing Hughes v. Kore of Indiana Enterprise, Inc., 731 F.3d 672, 676–77 (7th Cir.2013)).
\item \textsuperscript{239} \textit{Id}.
\item \textsuperscript{240} \textit{Id} at 666.
\item \textsuperscript{241} Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).
\item \textsuperscript{243} \textit{Mullins}, 795 F.3d at 667.
\item \textsuperscript{244} Shaw, supra note 25, at 2402 (2015).
\item \textsuperscript{245} Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).
\end{itemize}

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the heightened ascertainability requirement to deny class certification is not the only means, or even the best means, to protect a defendant's due process rights. As long as the defendant is given the opportunity to challenge a class member's claim during the damages phase, the defendant's due process rights are protected.

V. PROPOSED SOLUTIONS

As the above analysis indicates, a return to the text of Rule 23 is likely the simplest solution to resolve the concerns that heightened ascertainability attempts to address. By strictly applying Rule 23, the rights of all parties in a class action will be adequately protected and courts will have no justification for creating new rules. However, courts have long accepted the doctrine of traditional ascertainability. In order to limit the recent expansion of this doctrine, it is necessary to amend Rule 23 to clarify its application and limit its scope.

There are several amendments the Judicial Conference's Committee on Rules of Practice and Procedure could consider to achieve this end. First, the Committee could codify ascertainability as an additional prerequisite to Rule 23(a). For example:

23(a)(5): the class is adequately defined by objectively specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way.

This proposed prerequisite provides a precise definition of ascertainability and address concerns relating to overbroad or poorly defined classes. Moreover, it speaks to the concern over administrative inefficiency. The efficiency of identifying class members is maximized if the class is objectively defined. Second, a limiting sentence could be

\[\text{Mullins, 795 F.3d at 657.}\]
\[\text{McLaughlin, supra note 51, at § 4:2.}\]
added to Rule 23(b) to reign in the ascertainability doctrine’s scope. For example:

23(b)(3): the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. When making this determination, a court should not consider the administrative feasibility or efficiency of identifying class members in its analysis (proposed amendment in italics).

This proposed amendment would bar courts from denying certification due to the defendant’s lack or records, the defendant’s poor record keeping or hypothetical difficulties in consulting the defendant’s records. The above amendments deserve consideration. The current state of the law puts class plaintiffs in some circuits at a significant disadvantage because they are unable to certify a class without documentary evidence that actually identifies every potential class member. This effectively bars consumer class actions and severely limits any class action where the defendant has kept complex records. Such judicially created restrictions on class certification attack the core purposes of Rule 23 and should be abandoned. Only then will all class plaintiffs have the ability to seek relief in the courts and will companies engaged in deceitful practices be held accountable.

251 FED. R. CIV. P.23.
DEFERENCE TO THE LOWER COURT: HOW THE SEVENTH CIRCUIT IMPROPERLY GRANTED HABEAS CORPUS RELIEF IN JENSEN V. CLEMENTS

DAVID J. WELCH*


INTRODUCTION

States have the sovereign power to punish criminal offenders as long as the constitutional rights of the accused are respected.1 But what happens when federal courts liberally disturb states’ interests in the finality of verdicts and punishing those that commit crimes?

On December 3, 1998 Julie Jensen was discovered dead in her home she shared with her husband, Mark, and her two sons.2 Weeks before Julie’s death she gave a handwritten letter to her neighbors to give to the police in the event she died.3 In the letter Julie detailed her belief that her husband wanted her dead and would frame her death to

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2 Jensen v. Clements (“Jensen”), 800 F.3d 892, 896 (7th Cir. 2015).

3 Id. at 895.
look like a suicide. After a police investigation, Mark Jensen was charged with her murder.

Mark Jensen’s lawyers were unsuccessful in challenging the admission of Julie’s letter, both before and during the trial, and her letter took center stage. At the end of the trial, Mark Jensen was convicted of her murder and sentenced to life in prison. Mark Jensen appealed his conviction and the Wisconsin Appellate Court held the admission of Julie’s letter, while violative of his right to confrontation, was harmless error. On writ of habeas corpus to the federal district court, Mark Jensen gained relief, and the United States Court of Appeals for the Seventh Circuit affirmed the district court’s decision.

Errors in a criminal trial can be costly for both the defense and the State. If the State makes an error in trial and a defendant is found not guilty, the State cannot appeal the acquittal. More seriously, if a defendant is found guilty of a serious crime she did not commit, the consequences can be horrific: the loss of freedom, the loss of eligibility for public benefits such as food stamps, assisted housing, federal student aid, the loss of opportunities to serve in the military or jury service, and for non-citizens, deportation. Nowhere else in the law are the stakes higher. With these high stakes, constitutional

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4 Id.
5 Id.
6 Id.
10 U.S. CONST. amend. V (prohibition for government appeal on acquittal) (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”).
protections exist at both the state and federal level to protect criminal defendants from unjust and constitutionally violative practices. However, when far-removed appellate courts make determinations of fact with little or no deference to the state court decisions under review, state court determinations may lose the finality and legality of their convictions, undermining states’ sovereign rights and interests in punishing those that break their laws.

One such protection for criminal defendants is the writ of habeas corpus. Known as the “great and efficacious writ,” it was once referred to by William Blackstone as “another Magna Carta.” Justice Anthony Kennedy also once said that “[t]he writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.” Currently, habeas corpus is codified under the amended Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter referred to as “AEDPA” or 28 U.S.C. § 2254). Federal courts may entertain a habeas corpus petition of a state prisoner only if the convicted defendant is in custody in violation of “the Constitution or

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13 See generally Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment right against unreasonable search and seizure and the exclusionary rule); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment right against double jeopardy); Griffin v. California, 380 U.S. 609 (1965) (incorporating the Fifth Amendment right against self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the right to assistance of counsel under the Eighth Amendment for all cases in which a jail sentence can be imposed).


laws or treaties of the United States.” The relevant portion of the AEDPA states:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Once an application for writ of habeas corpus is granted, the federal court will conduct a *de novo* review of the state court’s rulings on questions of law and mixed legal-factual questions. On the other hand, reviewing purely factual judgments requires the federal court to: (1) adhere to the chain of “prior” courts whose fact-finding the court of appeals must defer to unless those facts are “clearly erroneous[,]” resulting in deprivation of constitutional rights; and (2) examine whether the federal district court, in adhering to the first premise,

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19 § 2254(a).
20 § 2254(d).
21 Elder v. Holloway, 510 U.S. 510, 516 (1994) (“The question of law, like the generality of such questions must be resolved *de novo* on appeal.”); *see also* Ellsworth v. Levenhagen, 248 F.3d 634, 638 (7th Cir. 2001).
22 Strickland v. Washington, 466 U.S. 668, 686, 698 (1984); *see also* Andersen v. Thieret, 903 F.2d 526, 529 (7th Cir. 1990) (relying on a “*de novo* appellate review of the district court’s decision on voluntariness [of confession]”); Pruitt v. Neal, 788 F.3d 248, 264 (7th Cir. 2015).
23 Mosley v. Butler, 762 F.3d 579, 585 (7th Cir. 2014) (“*[W]e review factual finding by the district court for clear error [. . . ] reversing only if the district court’s findings are “implausible in light of the record viewed in its entirety”.”)

[Parentheticals that are using full quote need to start with capital letter].
properly applied the correct standard of review to the applicable state court fact findings. Additionally, for a review of a state court decision, federal courts of appeals review the last state court that addressed the merits of the claim, such as the Wisconsin Appellate Court in the instant case.

Part I of this Article discusses the history of harmless error analysis within habeas corpus reviews, specifically with regard to how much deference is given to state courts under the current standard. Part II discusses the Seventh Circuit’s majority decision and dissent in Jensen v. Clements, where the court examined whether the Wisconsin Appellate Court misapplied the harmless error standard in affirming the trial court’s decision that admission of evidence that violated the Confrontation Clause was harmless error in the jury’s guilty verdict. Finally, this Article examines the majority and dissenting opinions in Jensen—arguing that the Seventh Circuit incorrectly decided Jensen based on harmless error standards and that the majority’s failure to grant deference to the state court’s decision that erroneously admitted evidence was harmless error.

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24 The majority of circuits hold that in instances where a district court reviewed mixed questions of fact and law solely on the basis of the state court record without an evidentiary hearing, the standard appellate review on district court factual findings should be “plenary” or “de novo” rather than the deferential “clearly erroneous” standard of review for district court findings of fact. See, e.g., Barnett v. Hargett, 174 F.3d 1128, 1131 (10th Cir. 1999); Hakeem v. Beyer, 990 F.2d 750, 758 (3rd Cir. 1993); Schlup v. Armontrout, 941 F.2d 631, 637-38 (8th Cir. 1991). However, the 7th Circuit suggested, without deciding, that the “clearly erroneous” standard may be appropriate even for mixed questions of fact and law when the finding is based purely on documentary evidence. Stewart v. Peters, 958 F.2d 1379, 1381-82 (7th Cir. 1992), cert. denied, 506 U.S. 883 (1992).

25 Id.

26 This article will not discuss the confrontation clause issues in Jensen v. Clements because there is little doubt the admitted evidence at issue violated the Petitioner’s Sixth Amendment right to confrontation.
BACKGROUND

This section provides an overview of the relevant law concerning habeas corpus review and the harmless error analysis. It begins with the history of harmless error analysis and the standard’s development through *Chapman v. California*, which established the basic standard, and *Brecht v. Abrahamson*, which further clarified the standard when applied in state courts. Finally, this section examines *Davis v. Ayala*, which further refined the harmless error standard when state courts rule that an error in admission of evidence is harmless, clarifying *Chapman* and *Brecht*’s standards. In order to prevail based on these standards, Petitioner must have shown that the Wisconsin Appellate Court’s decision that the admitted evidence constituted harmless error was “lacking in justification . . . beyond any possibility for fairminded disagreement.”

A. Standard of Harmless Error.

Harmless error means “[a]ny error, defect, irregularity, or variance that does not affect substantial rights.” Because *Jensen* involves a violation of Confrontation Clause protections, it is important to note that a mere violation does not merit automatic reversal but is subject to a harmless error analysis. The standard for a Confrontation Clause error to be held harmless is that “the court must be able to declare a belief that it was harmless beyond a reasonable

29 *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (holding that on “direct appeal, the harmlessness standard is the one prescribed in *Chapman* [. . . but] in a collateral proceeding, the test is different).
30 *Chapman*, 386 U.S. at 24; *Brecht*, 507 U.S. at 619.
32 FED. R. CRIM. P. 52(a).
doubt.\textsuperscript{34} Errors are truly harmless if the error does not influence the jury in their verdict.\textsuperscript{35} The Supreme Court outlined various factors in \textit{Delaware v. Van Arsdall} that help assess whether an error was truly harmless.\textsuperscript{36} The factors include: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case.\textsuperscript{37}

The harmless error inquiry cannot merely ask “whether there was enough to support the result, apart from the phrase affected by the error.”\textsuperscript{38} Instead, the determination, using the factors in \textit{Van Arsdall}, is whether the error had no or a slight influence on the jury.\textsuperscript{39} If there was no or little influence then “the verdict and the judgment should stand.”\textsuperscript{40} However, if untainted evidence in a case is so overwhelming and “the prejudicial effect [of tainted evidence is] so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error,” then the error had no or only a slight influence on the jury and does not subject the aggrieved to relief.\textsuperscript{41}

The Supreme Court in \textit{Chapman v. California} outlined, in part, that federal law rather than state law should determine what constituted harmless error in habeas petitions and that when courts

\textsuperscript{34} \textit{Chapman}, 386 U.S. at 24.
\textsuperscript{35} \textit{Id.} (stating that harmless error is harmless if it “did not contribute to the verdict obtained.”).
\textsuperscript{36} \textit{Van Arsdall}, 475 U.S. at 684.
\textsuperscript{37} \textit{Id.} (“these factors . . . [include] of course, the overall strength of the prosecution’s case.”); \textit{cf. Schneble v. Florida}, 405 U.S. 427, 432 (1972) (stating that the “minds of the average jury would not have found the State’s case significantly less persuasive had the [improper evidence] been excluded.”)(internal quotations omitted).
\textsuperscript{38} \textit{Kotteakos v. United States}, 328 U.S. 750, 765 (1946).
\textsuperscript{39} \textit{Id.} at 764.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Schneble}, 405 U.S. at 430.
review errors involving constitutional rights, the court must be satisfied beyond a reasonable doubt that the error was harmless. After Chapman, Congress enacted the AEDPA. The AEDPA provides that a writ of habeas corpus may not be granted unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law.” The Supreme Court incorporated the “unreasonable application” language into the Chapman standard in subsequent cases, making the AEDPA and Chapman essentially analogous.

The Supreme Court defined a separate standard of review in Brecht v. Abrahamson. The Court held that a petitioner is “not entitled to relief based on trial error unless [she] can establish that it resulted in ‘actual prejudice.’” This Brecht standard distinguished itself from the Chapman standard based on the procedural posture of the case. On a direct appeal, the Chapman standard applies. On a collateral proceeding, the Brecht standard applies.

42 Chapman v. California, 386 U.S. 18, 21, 24 (1967) (holding that prosecutors’ repeated comments about defendant’s refusal to testify, pursuant to the Fifth Amendment, as evidence of guilt, were not harmless error beyond a reasonable doubt).
44 Jensen v. Clements (“Jensen”), 800 F.3d 892, 899 (7th Cir. 2015) (quoting 28 U.S.C. § 2254(d)(1)).
45 Mitchell v. Esparza, 540 U.S. 12, 18 (2003) (“[W]e may not grant respondent’s habeas petition, however, if the state court simply erred in concluding that the State’s errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an ‘objectively unreasonable’ manner.”); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (An “unreasonable application of federal law is different from an incorrect application of federal law.”).
47 Id.
The *Brecht* standard dictates that habeas relief under AEDPA can be granted only if the federal court has “grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict.” The Court held there must be more than a “reasonable possibility” that an error was harmful in determining the jury’s verdict. *Brecht* also takes into account the concerns of finality and legality that occur when a conviction is overturned on direct review. Policy-wise, states have public safety interest in ensuring criminals are punished, and re-litigation of trials encounters significant difficulties when cases become stale—namely, witnesses die or forget.

Confusion over which standard applied on review was diffused by the Supreme Court’s recent decision in *Davis v. Ayala*. In *Davis*, the Court held that a state court’s harmlessness determination under AEDPA, 28 U.S.C. §2254(d) (*Chapman*), is “subsumed” by the *Brecht* 49

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49 Chapman v. California, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

50 *Brecht*, 507 U.S. at 637 (“[Habeas petitioners] are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice’.”) (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).


52 *Brecht*, 507 U.S. at 637.

53 Calderon v. Coleman, 525 U.S. 141, 145-46 (1998); see also Brecht, 507 U.S. at 635 (liberal allowance of habeas corpus damages the importance of trials and “encourages habeas petitioners to relitigate their claims on collateral review”).

54 *Brecht*, 507 U.S. at 635; see also Calderon, 525 U.S. at 145-46 (“[T]he State is not to be put to th[e] arduous task of [a retrial] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.”).


56 See Benn v. Greiner, 402 F.3d 100, 105 (2d Cir. 2005) (stating there is an “open question” of which standard to apply, *Chapman* or *Brecht*, declining to resolve this issue since both standards “produce the same result”).

standard when a “federal habeas petitioner contests a state court’s determination that a constitutional error was harmless under *Chapman.*” 58

Clarifying this holding, the Court stated that while a federal court reviewing habeas corpus petitions does not need to “formal[ly] apply both Brecht and ‘AEDPA/*Chapman,’ AEDPA nevertheless ‘sets forth a precondition to the grant of habeas relief.’” 59

If an inquiry has been “adjudicated on the merits” in state court, then AEDPA/*Chapman’s* highly deferential standard is guiding. 60

Once it is determined that the state court made an adjudication on merits (such as a harmless error analysis), then in order to grant relief, the federal court must determine whether the state court’s rejection was “(1) contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts.” 61 A state court’s decision that something was harmless error *cannot* be overturned unless the state court applied *Chapman’s* harmlessness analysis “in an ‘objectively unreasonable’ manner.” 62 Thus, habeas relief may not be awarded unless “the harmlessness determination itself was unreasonable.” 63

The Supreme Court spelled out the definition of “unreasonable” in *Harrington v. Richter.* 64 In *Harrington,* the Court reversed the Ninth Circuit’s grant of habeas relief for a defendant convicted of murder and other charges. 65 The Supreme Court held that while a habeas examination must look at the arguments or theories that supported, or could have supported, the state court’s decision, the reviewing court must also ask “whether it is possible fairminded jurists could disagree

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58 Id. (citing Fry v. Pliler, 551 U.S. 112, 120 (2007)).
59 *Ayala,* 135 S. Ct. at 2198 (quoting Fry, 551 U.S. at 119).
60 Id. (citing Harrington v. Richter, 551 U.S. 112, 120 (2007)).
61 *Ayala,* 135 S. Ct. at 2198.
63 Fry, 551 U.S. at 119 (emphasis in original); *Ayala,* 135 S. Ct. at 2199.
64 *Harrington,* 562 U.S. at 102.
65 Id. at 92.
that those arguments or theories are inconsistent with the holding in a prior decision of this Court.”

B. Deference to State Courts.

On questions of whether a harmless error determination was indeed harmless, 28 U.S.C. § 2254(d) spells out that the review is “highly deferential” and any review of error hinges on whether the harmlessness determination itself was unreasonable. State fact-finding in the context of federal claims is of paramount importance and often determines whether a petitioner obtains habeas relief. Section 2254(e)(1) of the AEDPA provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Seventh Circuit recognizes this deferential treatment to state court decisions in other determinations. In fact, the Seventh Circuit

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66 Id. at 102; see also Felkner v. Jackson, 562 U.S. 594, 598 (2011) (holding that the state appellate court’s decision on a Batson challenging prosecutors’ race-neutral explanations for striking jurors was not unreasonable because of evidence the California Court of Appeals “carefully reviewed the record at some length in upholding the trial court’s findings” and because of this the state appellate court’s decision was “plainly not unreasonable”).


68 Harrington, 562 U.S. at 102; Ayala, 135 S. Ct. at 2199.


71 See McElvaney v. Pollard, 735 F.3d 528, 532 (7th Cir. 2013) (deference in applying 28 U.S.C. § 2254 review to a Strickland ineffective assistance of counsel claim).
has followed Supreme Court precedent, calling the AEDPA’s presumption on state court factual decisions “difficult to [overcome because of 28 U.S.C. § 2254’s] highly deferential standard.”

Courts presume that the state court’s factual determinations are correct unless a petitioner can show that the state court relied on “fact-finding that ignores the clear and convincing weight of the evidence.”

Much like *McElvany v. Polland*, where the Seventh Circuit stated that the state court’s decision that trial counsel was effective must receive “the benefit of the doubt,” and in other cases where there is a high deferential standard, a tie should go the state court’s determination.

With the combination of AEDPA’s requirements for state court factual finding deference and the Seventh Circuit’s own precedents, a federal court simply disagreeing with a state court’s decision is not enough for habeas relief, even if it finds constitutional error under § 2254(d).

As the Supreme Court has previously stated, “the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.”

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72 Wood v. Allen, 558 U.S. 290, 301 (2010) (holding that even if there is disagreement during review about the findings in a record that alone does not invalidate the trial court’s decision); *see also* Rice v. Collins, 546 U.S. 333, 335 (2006) (“Reasonable minds reviewing the record might disagree . . . but on habeas review that does not suffice to supersed the trial court’s credibility determination.”).


74 Newman v. Harrington, 726 F.3d 921, 928 (7th Cir. 2013) (“This standard is demanding, but not insurmountable.” (internal quotations omitted) (quoting Taylor v. Grounds, 721 F.3d 809, 817 (7th Cir. 2013))).

75 McElvaney, 735 F.3d at 532 (quoting Cullen, 563 U.S. at 181 and holding that the state appellate court’s determination was not so lacking in justification beyond any possibility for fairminded disagreement).


JENSEN v. CLEMENTS

In *Jensen v. Clements*, the Seventh Circuit determined that the harmless error analysis applied by the Wisconsin Supreme Court violated the rules set forth in *Chapman v. California* and *Brecht v. Abrahamson*. This section begins with the factual history of *Jensen*, followed by a discussion of the procedural history of the case. This section then outlines the Seventh Circuit’s majority opinion and ends with an examination of Judge Daniel Tinder’s dissent.

### A. Factual History

On December 3, 1998 Julie Jensen was discovered deceased in her home in Pleasant Prairie, Wisconsin. Two weeks prior to her death, Julie gave her neighbors a handwritten, signed letter, telling them that if “anything happened to her, they should give the envelope to the police.” Learning of her death, the neighbors gave Julie’s letter to the police. The letter read:

> Pleasant Prairie Police Department, Ron Kosman or Detective Ratzburg,
> I took this picture [and] am writing this on Saturday 11-21-98 at 7 AM. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet

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78 Jensen v. Clements (“Jensen”), 800 F.3d 892, 896 (7th Cir. 2015).
81 Jensen v. Clements (“Jensen”), 800 F.3d 892, 896 (7th Cir. 2015).
82 *Id.* at 895.
83 *Id.*
Anyway, I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don’t. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol [and] multivitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I. I pray I’m wrong [and] nothing happens ... but I am suspicious of Mark’s behaviors [and] fear for my early demise. However, I will not leave David [and] Douglas. My life’s greatest love, accomplishment and wish: “My 3 D’s”—Daddy (Mark), David, Douglas.  

The letter echoed prior statements Julie made to the police in the weeks leading up to her death. Two voicemails left for the police stated that she thought her husband, Mark Jensen (the Petitioner), was trying to kill her. When officers met with Julie about her voicemails, she attempted to give them a roll of film she claimed was taken from the Petitioner’s day planner. Julie also repeated the statements in her letter, saying that if she died her husband should be the first suspect. However, police were unable to connect any of the film’s images to the case.  

After Julie’s death, police seized the Petitioner’s personal computer and discovered a history of Internet searches concerning suicide and poison, including an Internet search on the morning of Julie’s death at 7:40 a.m. for “ethylene glycol poisoning,” commonly

84 Id.
85 Id.
86 Id.
87 Id.
88 Id. at 896.
89 Id.
referred to as antifreeze. 90 Also recovered from Petitioner’s computer were emails between the Petitioner and a woman with whom he was having an affair. 91 Evidence showed that the home computer’s Internet history was “double-deleted.” 92 Petitioner’s work computer was not seized because it had “‘been fried and [Petitioner had] to get a new one.’” 93

A medical examiner ruled Julie’s death a suicide after the first autopsy was inconclusive. 94 However, toxicology reports from Dr. Christopher Long stated there was a “large concentration of ethylene glycol” in Julie’s system. 95 According to Dr. Long, Julie’s system contained so much ethylene glycol that he concluded her death could not have been a suicide as her body would have been too weak to drink the amount of ethylene glycol outlined in his report. 96 Three years later, in 2002, after an extensive investigation, Julie’s husband, Petitioner Mark Jensen, was charged with first-degree intentional homicide. 97

1. Pre-trial Issues Regarding the Admissibility of Julie’s Voicemails and Letter.

The admissibility of Julie’s letter and statements to the police before her death were a source of contention from the beginning of the case. 98 Eventually, the State conceded that the voicemails Julie made to the police were inadmissible hearsay, but the letter, in its entirety,

90 Id. (stating that there was 3,940 micrograms per milliliter of ethylene glycol in the 660 ml of Julie’s stomach contents).
91 Id.
92 Id. at 910 (Tinder, J., dissenting). “Double-deleted” means someone deleted the Internet history twice in quick succession.
93 Id.
94 Id. at 896 (majority opinion).
95 Id.
96 Id.
97 Id. Petitioner was charged in March 2002.
98 Id.
was ruled admissible hearsay. While awaiting trial in 2004, Petitioner moved for reconsideration of the trial court’s decision to allow admission of the letter after the United States Supreme Court decided *Crawford v. Washington*. The trial court granted the motion and ultimately ruled that Julie’s letter and statements to the police were testimonial and barred under *Crawford*.

In an effort to resurrect their case, the State argued that the letter and statements were admissible under an exception to the hearsay rule: the doctrine of forfeiture by wrongdoing. The trial court rejected the State’s arguments. As a result, the State appealed the trial court’s order and filed an interlocutory appeal and petition to bypass directly to the Wisconsin Supreme Court. In February 2007, the Wisconsin Supreme Court determined that Julie’s statements to the police and handwritten letter were testimonial, but also that the trial court failed to properly analyze whether the statements and letter were admissible under the forfeiture by wrongdoing doctrine.

On remand from the Wisconsin Supreme Court, the trial court found by a preponderance of the evidence that Petitioner killed Julie, causing her absence from the trial and therefore satisfying the

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99 *Id.*

100 *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that testimonial statements require confrontation to satisfy the constitutional demand of reliability); *Jensen*, 800 F.3d at 896.

101 *Crawford*, 541 U.S. at 36 (trial court holding that the letter and voicemails were testimonial because the declarant was unable to testify at trial and there was no prior opportunity for cross-examination).

102 *Id.*

103 *Id.*

104 *State v. Jensen (“Jensen I”), 2007 WI 26, ¶ 2, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 521.*

105 *Jensen*, 800 F.3d at 897 (citing Jensen I, 2007 WI at ¶ 57 where the Wisconsin Supreme Court ultimately adopted a broad forfeiture by wrongdoing doctrine—if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, then testimonial evidence is admissible).
forfeiture by wrongdoing doctrine, paving the way for the admission of Julie’s statements to police and her letter.\footnote{Jensen, 800 F.3d at 897 (citing Jensen I, 2007 WI at ¶ 57).}

2. Petitioner’s Trial for First-Degree Intentional Homicide in Julie’s Death.

More than nine years after Julie’s death, Petitioner’s case went to trial.\footnote{Jensen, 800 F.3d at 897.} During the six-week jury trial the State presented evidence of the actions of Julie and Petitioner in the months leading up to Julie’s death.\footnote{Id.} During the State’s case, the neighbor that Julie gave the letter to testified that three weeks prior to her death, Julie said she was “scared she was going to die” and concerned that Petitioner was trying to poison her by “put[ting] something in the wine” and insisting Julie drink it.\footnote{Id. at 909 (Tinder, J., dissenting).} The neighbor also testified that Julie told him she believed she would “not make it through one particular weekend because she had found suspicious notes” and a computer page left open on their home computer revealing how to poison someone.\footnote{Id.} Additionally, the neighbor discussed how Julie repeatedly told him about marital problems between her and Petitioner.\footnote{Id.}

Another witness, Julie’s son’s teacher, testified that approximately a week before her death, Julie told the teacher that Julie thought her husband was trying to kill her and “was going to make it look like a suicide” by putting something in her food or drink.\footnote{Id.} Julie told the teacher that the Petitioner “never forgave her” for an affair she had eight years prior.\footnote{Id.} The teacher also testified that Julie knew very little about computers because a few months prior to Julie’s death the

\footnote{Id.}
teacher asked Julie to help in the computer lab.\textsuperscript{114} Julie responded to the teacher’s request by saying, “I don’t even know how to turn one on.”\textsuperscript{115}

The State presented additional witnesses: Julie’s physician, Petitioner’s friend, and one of Petitioner’s co-workers.\textsuperscript{116} Julie’s physician testified that he saw her two days before her death and she denied being suicidal because she “loved her children more than anything.”\textsuperscript{117} The physician also testified that Julie talked about an affair she had in the past and that Petitioner had “‘never really forgiven’ her for it.”\textsuperscript{118} Both Petitioner’s friend and co-worker testified that they were told about an affair Julie had and even after eight years the “[Petitioner’s] anger had not diminished” for as long as they knew him.\textsuperscript{119}

Additionally, the friend testified that Petitioner told him that he was trying to get Julie to relax at night by giving her wine.\textsuperscript{120} While being questioned by the State, the friend also described Petitioner’s computer skills as “above average” and that in the month of Julie’s death, Petitioner was searching for drug interactions on the Internet “on a very frequent basis.”\textsuperscript{121} One of the State’s main witnesses was the Petitioner’s former cellblock mate, Aaron Dillard.\textsuperscript{122} Dillard, who was awaiting sentencing on his own case, testified that Petitioner admitted to him in prison that he “had poisoned Julie and later suffocated her by pushing her face into a pillow.”\textsuperscript{123}

\textsuperscript{114} Id.
\textsuperscript{115} Id. (refuting defense notion that Julie could have used the computer herself to look for ways to commit suicide).
\textsuperscript{116} Id. at 910.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 897 (majority opinion).
\textsuperscript{123} Id. at 907.
Additional evidence presented at trial indicated that Petitioner would repeatedly place pornographic photographs around the residence for Julie to find.\textsuperscript{124} Petitioner told investigators that he knew Julie believed the man she had an affair with was planting the images.\textsuperscript{125} While Petitioner denied placing the photographs, he did admit that he would save the photos and use them to upset Julie when he was “pissed off.”\textsuperscript{126} Petitioner also told investigators that he would leave the photos out for Julie to find, or bring them out to show Julie.\textsuperscript{127} The lead investigator testified that Petitioner had admitted that his marriage with Julie was “never the same” after Julie’s affair.\textsuperscript{128}

On the morning of Julie’s death, Petitioner told the investigator that Julie could not get up and was unable to get out of bed.\textsuperscript{129} Petitioner also said that he did not leave that day for work until 8:00 or 9:00 a.m.\textsuperscript{130} That fact is especially significant because the time of the search for antifreeze poisoning occurred on the same day at 7:40 a.m.\textsuperscript{131} Furthermore, evidence showed that on the same day, two months before Julie’s death, the Petitioner’s computer was used to search for methods of poisoning as well as to exchange emails with Petitioner’s paramour about their future life together.\textsuperscript{132}

The State’s case concluded with testimony from expert witnesses: the toxicologist, a doctor who conducted an autopsy, and a medical examiner.\textsuperscript{133} The toxicologist, Dr. Long, outlined his findings that there was a “large concentration of ethylene glycol” in Julie’s system at the time of her death.\textsuperscript{134} However, during Dr. Long’s cross-

\textsuperscript{124} Id. at 910 (Tinder, J., dissenting).
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 896 (majority opinion).
\textsuperscript{132} Id. at 910 (Tinder, J., dissenting).
\textsuperscript{133} Id. at 896 (majority opinion).
\textsuperscript{134} Id.
examination, it was revealed that the 660 ml of Julie’s stomach contents contained only a half-teaspoon of ethylene glycol, or .083 ounces.\textsuperscript{135} This revelation disclosed on cross-examination, “destroy[ed] the foundation of [Dr. Long’s] opinion that Julie’s death was not a suicide.”\textsuperscript{136}

The doctor that conducted one of the autopsies concluded that Julie’s cause of death was asphyxia by smothering and the medical examiner concluded her cause of death was “ethylene glycol poisoning with probable terminal asphyxia.”\textsuperscript{137} The testimony that one cause of Julie’s death was consistent with smothering arose during the doctor’s redirect examination.\textsuperscript{138} The doctor examined photographs from the scene that appeared to show Julie “with an unnaturally bent nose” indicating something was pushed hard into Julie’s face.\textsuperscript{139}

During the defense’s case-in-chief, evidence included testimony from Julie’s family doctor.\textsuperscript{140} The family doctor testified that at an appointment two days before Julie’s death, she “seemed depressed and distraught and almost frantic, actually.”\textsuperscript{141} Additionally, the defense presented testimony from Julie’s neighbor.\textsuperscript{142} The day before Julie’s death, she had a fifteen minute conversation with her neighbor telling her “not to worry if she did not see Julie outside that day because she was not feeling well due to her medication.”\textsuperscript{143} Three days prior to the statements made to her neighbor, Julie made similar statements to her sister-in-law.\textsuperscript{144} She told her sister-in-law that she would be ill on

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 897 (“Surprisingly, this suffocation theory arose for the very first time at the trial more than nine years after Julie’s death.”).
\textsuperscript{139} \textit{Id.} Much of the expert witness testimony on the cause of death suffocation theory was based on statements from Aaron Dillard, Petitioner’s cellblock mate.
\textsuperscript{140} \textit{Id.} at 898.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
December 2, 1998 (one day prior to being discovered dead) because she expected to be placed on medication by her family doctor.\footnote{145}

Additionally, a defense expert witness, Dr. Spiro, told the jury that he examined Julie’s medical records and mental health records and interviewed those close to her.\footnote{146} Dr. Spiro’s assessment was that Julie was suffering from a “major depressive disorder that was complicated by anxiety and agitation with possible delusional features, and he concluded that she posed a significant suicide risk.”\footnote{147} Dr. Spiro’s expert opinion was that Julie’s ingestion of antifreeze was suicidal, not an accident or homicide.\footnote{148} Lastly, and key to the defense’s case, although Julie made multiple statements to others about how she thought her husband was trying to kill her via poison, she made no attempt to seek help when she started feeling ill.\footnote{149}

At argument, the State postulated that Petitioner murdered his wife so he could be with his mistress.\footnote{150} Framing Julie’s death like a suicide would avoid a messy divorce, and the State argued that Petitioner searched the Internet to look for ways to make Julie’s death look like a suicide.\footnote{151} The defense responded that Julie was unhappy, depressed, and committed suicide to make it look like Petitioner killed her.\footnote{152} In rebuttal, the State responded that Julie was a devoted mother, who cared about her kids and would not leave them willingly.\footnote{153} The State also argued that Julie could not have ingested the antifreeze herself and Petitioner suffocated her after he realized the poison was not having the intended effect.\footnote{154}
Julie’s handwritten letter was highlighted throughout the trial. The letter was discussed at length during the State’s opening statements. The defense also talked about the letter in its opening, even presenting it as a large exhibit for the Jury. In closing, the State’s last words to the jury on rebuttal stressed the letter, saying, “[s]o here was her unexpressed thoughts. [Julie] wrote them down, and she hid them away . . . Hid them away until she could resolve this terrible dilemma she was in.” The jury deliberated for nearly thirty hours and came back with a verdict that the Petitioner was guilty of first-degree intentional homicide.

3. Post-Petitioner’s Conviction.

Four months after Petitioner’s guilty verdict at the hands of a jury, *Giles v. California* decisively narrowed the interpretation of the forfeiture by wrongdoing statute relied on by the Wisconsin Supreme Court in its decision prior to Petitioner’s conviction. Based on *Giles*, the Petitioner appealed his conviction because of the state court’s error in admitting Julie’s letter under the hearsay exception of forfeiture by wrongdoing, directly in opposition to *Giles*’ decision that for the exception to apply there must be an intention to prevent the witness from testifying, not merely causing death. The Wisconsin Appellate

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155 *Id.*

156 *Id.* at 904-05. The letter was used to “underscore [the State’s] themes of Petitioner’s motive, Julie’s fear, and the absence of her intent to take her own life.”

157 *Id.* Defense counsel described the letter to the jury, saying “[w]e’ll come back to the letter many times during this case, and you’ll have to decide whether it’s a blueprint for framing her husband or legitimate.”

158 *Id.*

159 *Id.* at 898.

160 *See generally* Giles v. California, 554 U.S. 353 (2008) (reversing a Petitioner’s conviction for first-degree murder after the victim’s out-of-court statements were admitted under California’s forfeiture by wrongdoing statute. The Court held that forfeiture by wrongdoing requires that the defendant intended to prevent a witness from testifying and was not merely absent from the case).

161 *State v. Jensen (“Jensen I”), 2007 WI 26, ¶ 57, 727 N.W.2d 518, 536.*

162 *Jensen, 800 F.3d at 897.*
Court subsequently found that “the disputed testimonial evidence [, Julie’s letter and statements to police, were] erroneously admitted” but that any error was harmless—affirming Petitioner’s conviction. Jensen petitioned the Wisconsin Supreme Court for review of the Wisconsin Appellate Court’s decision, but that petition was denied. As a result of the denial, Petitioner filed a petition for writ of habeas corpus in federal court.

In reviewing Petitioner’s habeas corpus assertions, the Eastern District of Wisconsin held that the Wisconsin Court of Appeals unreasonably applied the Chapman standard of review, stating, “having reviewed the voluminous trial record, the court concludes that the erroneously admitted testimonial statements had a ‘substantial and injurious effect’ on the jury’s verdict.” Making this determination, the district court examined the “host of factors” applicable to harmless error review and found that Julie’s “letter from the grave” cannot be harmless when viewed in the entire context of the trial. Ultimately, the United States District Court for the Eastern District of Wisconsin granted Petitioner’s habeas corpus petition, and the prison warden appealed.

B. Seventh Circuit’s Majority Opinion.

The United States Court of Appeals for the Seventh Circuit affirmed the district court’s decision to grant Petitioner’s writ of habeas corpus on the basis that the Wisconsin Appellate Court’s harmless error determination reflected an unreasonable application of

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164 Jensen, 800 F.3d at 898.
166 Id. at *31.
167 Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 622 (1993)).
169 Jensen, 800 F.3d at 898.
Judge Ann Claire Williams, joined by Judge David Hamilton, outlined the Seventh Circuit’s majority opinion detailing why admitting Julie’s letter and out-of-court statements had substantial and injurious effect on the jury verdict.171

The majority first examined whether the Chapman or Brecht standard applied, noting confusion prior to Ayala.172 The majority concluded that Petitioner needed to meet the Brecht standard that incorporates Chapman’s state court decision of whether the error was harmless.173 In meeting the prevailing standard for review, the Seventh Circuit questioned whether the Seventh Circuit was in “grave doubt” about whether the confrontation error had “substantial and injurious effect or influence in determining the jury’s verdict” in the Petitioner’s case.174 Next, the Seventh Circuit applied their own harmless error analysis, noting that the harmless error inquiry is “not the same as a review for whether there was sufficient evidence at trial to support a verdict.”175 Finally, the Seventh Circuit concluded that the Wisconsin State Court’s determination that the error was harmless was unreasonable.176

170 Id. at 895 (holding in part that Giles v. California, 554 U.S. 353 (2008) was decided before Petitioner’s claim was adjudicated on the merits by the Wisconsin state courts).
171 Jensen, 800 F.3d at 901.
173 Jensen, 800 F.3d at 901; Chapman, 386 U.S. at 18; Brecht, 507 U.S. at 619; Ayala, 135 S. Ct. at 2187.
174 Jensen, 800 F.3d at 904 (emphasis in original) (quoting Ayala, 135 S. Ct. at 2198 (2015)).
175 Jensen, 800 F.3d at 902 (citing Supreme Court cases supporting the principle that harmless error analysis is not just about sufficiency of evidence).
176 Jensen, 800 F.3d at 895.
1. The Seventh Circuit’s Issue with the Wisconsin Appellate Court’s Reasoning.

The Seventh Circuit took issue with the Wisconsin Appellate Court’s reasoning, stating, “[the opinion] reads as though [the appellate court] is conducting an evaluation of whether there was sufficient evidence to support the verdict, not whether the error in admitting Julie’s letter and statements to the police affected the jury’s verdict.” The majority reinforced this criticism by illustrating the Wisconsin Appellate Court’s analysis of duplicative evidence.

The Wisconsin Appellate Court’s opinion stated how “[t]he rest of the record reflects that the jury had overwhelming evidence of murder, and upon [that] record [the jury] could rationally have concluded beyond a reasonable doubt that [Petitioner] murdered Julie.” The Seventh Circuit pointed to this statement by the Wisconsin Appellate Court as demonstrating “that it is conducting a review for whether there is sufficient evidence to support a verdict” rather than the harmless error examination required in the present case.

Additionally, the Seventh Circuit noted how the sufficiency of the evidence statements by the Wisconsin Appellate Court are not just “slips of the pen.” What was lacking, the Seventh Circuit noted, was any discussion by the Wisconsin Appellate Court about what defense evidence rebutted the State’s, such as defense expert witnesses and cross examination testimony. To the majority, this lack of in-depth analysis bolstered their view that the state appellate court’s opinion was insufficient, noting that the Supreme Court has held that when only one party’s evidence is evaluated, “no logical conclusion can be

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177 Id. at 903.
178 Id.
180 Jensen, 800 F.3d at 903-04 (noting that under direct appeal the evidence is viewed in the light most favorable to the conviction).
181 Id. at 904.
182 Id.
reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.”

2. The Seventh Circuit’s Examination of Van Arsdall’s Harmless Error Factors.

In light of the factors outlined by the Supreme Court in Delaware v. Van Arsdall, the Seventh Circuit then examined what influence Julie’s letter and statements to the police had on the jury verdict. The majority highlighted the first Van Arsdall factor—the importance of the witness’ testimony in the State’s case. The court pointed out that the letter is unlike any other evidence presented in the trial; it is Julie’s words from a time close to her death. The court noted that the letter was emotional and dramatic, used by the State in openings, closings, and as the last words in their rebuttal argument. The court stated, “damaging evidence stands impregnable—irretrievably lodged in the jurors’ minds.”

The Seventh Circuit also stressed the importance of the letter to witnesses, the Petitioner, and the State’s case. The letter was published to the jury; twelve of the witnesses testified about the letter, including some expert witnesses that stated the letter influenced their opinions; and the State published Petitioner’s reaction to the letter in a

\[183\] Id. (quoting Homes v. South Carolina, 547 U.S. 319, 331 (2006)).
\[184\] Jensen, 800 F.3d at 904 ("[W]e look to 'a host of factors,' such as 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'") (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).
\[185\] Jensen, 800 F.3d at 904.
\[186\] Id.
\[187\] Id. at 904-05. Petitioner also used the letter but only as means to rebut the State’s assertions.
\[188\] Id. at 905 (citing United States v. Brown, 490 F.2d 758, 781 (D.C. Cir. 1973)).
\[189\] Jensen, 800 F.3d at 905.
videotaped interview with police.\textsuperscript{190} Bolstering its viewpoint, the majority highlighted statements made by the State during pre-trial motions, calling the letter “essential,” “highly relevant,” and “extraordinarily valuable.”\textsuperscript{191} According to the Seventh Circuit, the Wisconsin Appellate Court’s finding that the letter and statements were harmless was unreasonable because of the amount of times the State’s case referenced or relied on the letter.\textsuperscript{192}

The Seventh Circuit then addressed the last factor under \textit{Van Arsdall}—the overall strength of the State’s case.\textsuperscript{193} The Seventh Circuit derided the state appellate court for not engaging with the defense evidence, using language from the district court that, “[a] reader of the court of appeals’ finding would conclude that Jensen called no witnesses, introduced no evidence, [and] never questioned the credibility of any witness.”\textsuperscript{194}

In examining the strength of the State’s case, particularly addressing the State’s computer evidence, the majority discussed testimony from the son’s teacher about Julie’s computer usage, and lack of computer usage, from times that Petitioner was not at home.\textsuperscript{195} The majority also responded to the Wisconsin Appellate Court’s opinion that the State’s computer evidence was “untainted and undisputed,” stating the evidence was far from undisputed: “[N]o evidence precluded a jury from finding that Julie did at least some of the Internet searches.”\textsuperscript{196} The Seventh Circuit also highlighted defense

\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} at 905-06 (quoting State v. Jensen (“Jensen II”), 2011 WI App 3, ¶ 73, 331 Wis. 2d 440, 474, 794 N.W.2d 482, 499) (“[The State] also called the letter’s admissibility ‘a make or break issue’ from the State’s perspective. While the Wisconsin appellate court found the improperly admitted evidence added ‘nothing significant beyond the properly admitted nontestimonial statements’”).
\textsuperscript{192} Jensen, 800 F.3d at 906.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
witnesses that refuted Julie’s computer illiteracy claims, as well as the lack of searches for poison on Petitioner’s work computer. 197

Next, the court addressed the appellate court’s failure to engage the defense’s evidence regarding Julie’s state of mind. 198 Both the family doctor and a defense expert testified Julie was depressed and when the defense expert reviewed Julie’s mental health history, determined that Julie was a significant suicide risk and her death was likely the result of suicide. 199 Additionally, the Seventh Circuit took issue with the amount of time it took one of the State’s witnesses to come forward and testify. 200

Lastly, the Seventh Circuit opined that the State’s case was “no slam dunk. The evidence was all circumstantial.” 201 In the Seventh Circuit’s majority opinion, because the Wisconsin Appellate Court did not formally engage any of the defense evidence and the defense had a lot of evidence, the erroneously admitted letter and statements resulted in actual prejudice. 202 Because of this, the majority held that the state appellate court’s ruling was “not simply incorrect” and that “[t]he error in admission had a substantial and injurious effect or influence in determining the jury’s verdict . . . [and the result here goes] beyond any possibility for fair-minded disagreement.” 203 As such, the Seventh Circuit granted Petitioner’s habeas corpus petition, holding that because Petitioner satisfied the Brecht standard, he also satisfied “the AEDPA standard of an unreasonable application of the Chapman

197 Id. Evidence from the trial indicates that Petitioner’s work computer was destroyed before police were able to gain access to it as part of their investigation.
198 Id. at 906-07.
199 Id. at 907.
200 Id. The witness was a friend of the Petitioner that stated Petitioner made inculpatory statements to him about how if the Petitioner wanted to kill his wife then there are websites showing how to poison people and he could use those.
201 Id. at 906.
202 Id. at 908.
203 Id. (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
harmless error standard.” Currently, Petitioner is awaiting retrial of his wife’s murder.

C. Judge Tinder’s Dissent

Judge Tinder penned the dissent in the case. Judge Tinder agreed with the majority holding that Julie’s letter and statements to the police were admitted in violation of Petitioner’s Confrontation Clause rights. However, Judge Tinder also stated that the majority opinion improperly decided whether admitting the letter and statements were in fact harmful. The dissent outlined the determination that fairminded jurists could agree with the Wisconsin Court of Appeals. Because of this possibility for disagreement, coupled with the requirement that there must be deference to the state court’s decision, Judge Tinder would uphold the decision of the Wisconsin Court of Appeals as a reasonable application of Chapman.

Judge Tinder also highlighted the standard that Petitioner must meet to prevail on his habeas petition: “[T]o prevail, a petitioner must show that the state court’s decision to reject his claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Judge Tinder asserted that the Wisconsin decision

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204 Jensen, 800 F.3d at 908.
206 Jensen, 800 F.3d at 908 (Tinder, J., dissenting).
207 Id.
208 Id. (“[W]e are not in a position to choose between two fairminded alternatives.”).
209 Id. at 909.
210 Id.
211 Id. at 910 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
was not so lacking. In support of this contention, Judge Tinder pointed to the Van Arsdall factors.

Judge Tinder addressed additional State evidence corroborating Julie’s letter and statements to police, such as the computer evidence and statements Julie made to other witnesses, and he pointed out that there were multiple sources of admissible evidence “duplicating (or corroborating) every relevant aspect of Julie’s erroneously admitted testimonial statements.” All of this evidence, the dissent stated, contributed to the state appellate court’s characterization of the “staggering weight of the untainted evidence and cumulatively sound evidence presented by the State.”

Judge Tinder noted that the Wisconsin Court of Appeals recognized the defense theories, even noting that “[t]his case was not a classic whodunit,” but rather “the jury was asked to choose between two dark and premeditated alternatives—either [Petitioner] murdered Julie and framed it to look like suicide, or Julie committed suicide and framed [Petitioner] for murder.” Judge Tinder went on to say that each of Julie’s testimonial statements, as well as the other corroborating evidence, could support either theory.

Referencing the majority’s rejection of the Wisconsin Court of Appeals’ decision, the dissent also pointed out that the state appellate court did say that it “review[ed] the extensive record”—but even if the state appellate court had just said “affirmed,” that is enough that the federal appellate court should give the “full deference that the habeas corpus statute demands” of state court determinations. Additionally, the dissent highlighted that the Supreme Court’s own precedent

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212 Jensen, 800 F.3d at 908 (Tinder, J., dissenting).
213 Id. at 909.
214 Id.
215 Id. (quoting State v. Jensen (“Jensen II”), 2011 WI App 3, ¶ 94, 331 Wis. 2d 440, 483-84, 794 N.W.2d 482, 504).
216 Jensen, 800 F.3d at 911 (Tinder, J., dissenting) (quoting Jensen III, 2011 WI App at ¶ 37).
217 Jensen, 800 F.3d at 911 (Tinder, J., dissenting).
218 Id. (citing Harrington v. Richter, 562 U.S. 86, 98-99 (2011)).
prohibits federal courts from inferring error from a state court’s failure to address particular evidence.  

Even though the state appellate court decision includes statements that appear to employ a sufficiency-of-the-evidence test, there is enough reiteration of its “finding of harmlessness based on ‘the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State’” that lends itself to a harmlessness inquiry. Most telling to the dissent was the state appellate court conclusion that “the State has proven beyond a reasonable doubt that any error complained of did not contribute to the verdict obtained.” These statements and the evidence itself leave Judge Tinder “[u]nconvinced that the state court’s decision ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”

ANALYSIS

The Seventh Circuit incorrectly decided Jensen v. Clements because it misapplied the harmless error standard and failed to provide enough deference to the state court’s decision. Merely having a constitutional error is not enough to grant habeas relief. Instead, the habeas standard Petitioner must meet is that the error had substantial and injurious effect or influence in determining the jury’s verdict and that there was actual prejudice.

Here, the Wisconsin Appellate Court examined the record of Petitioner’s case and determined that any effect of the erroneously

219 Jensen, 800 F.3d at 911 (Tinder, J., dissenting) (quoting Price v. Thurmer, 637 F.3d 831, 839 (7th Cir. 2001) (citing Harrington, 562 U.S. at 98-99)).
220 Jensen, 800 F.3d at 911-12 (Tinder, J., dissenting).
221 Id.
222 Id. at 911 (quoting Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015)).
admitted letter and statements was harmless.\(^{225}\) Thus, in order to prevail, the Petitioner “must [have] show[n] that the state court’s decision to reject his claim ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”\(^{226}\)

The Wisconsin Appellate Court’s decision may not have been perfectly reasoned, but their decision certainly is subject to fairminded disagreement. As such, Petitioner should fail on this standard because fairminded jurists did disagree on the Wisconsin Appellate Court’s determination.\(^{227}\) More than that, while this outcome may not sit well with Petitioner, it is the correct determination when all of the \textit{Van Arsdall} factors are examined and proper deference is granted to the state court’s determination.

\textbf{A. The Seventh Circuit Incorrectly Decided Jensen v. Clements by Misapplying the Harmless Error Standard.}

As stated above, the factors for a harmless error analysis under \textit{Van Arsdall} include: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case.\(^{228}\) While the Seventh Circuit’s majority opinion touched upon some of these factors, they failed to adequately address each of them.

The majority highlighted at length the first \textit{Van Arsdall} factor, the importance of the inadmissible evidence, as the key to showing the

\(^{225}\) State v. Jensen (“\textit{Jensen II}”), 2011 WI App 3, ¶ 73, 331 Wis. 2d 440, 473, 794 N.W.2d 482, 499.

\(^{226}\) \textit{Ayala}, 135 S. Ct. at 2199 (emphasis added) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

\(^{227}\) See \textit{Jensen}, 800 F.3d at 911; Jensen II, 2011 WI App at ¶ 73.

unreasonable nature of the Wisconsin Appellate Court’s decision. However, the majority failed to emphasize the next three factors Van Arsdall factors that inform and minimize whatever harm was found by the Seventh Circuit’s majority. All of the inadmissible evidence is corroborated or duplicated by admissible evidence. This is why the cumulative factors are so important; it is not an all or nothing analysis hinging on just the importance of the inadmissible evidence. If the examination did hinge on just one of the factors, then the Seventh Circuit would not have reiterated the Supreme Court’s decision that all the factors guide this analysis and play an important role. To be clear, this Article does not argue that the letter was unimportant or non-violative of Petitioner’s Confrontation right. However, the mere fact that witnesses discussed Julie’s letter and the State highlighted their testimony in argument is only one factor in the overall analysis of whether admitting the letter was ultimately injurious and had an effect on the jury’s verdict.

Illustrating factors two and three of Van Arsdall’s holding, the Wisconsin Appellate Court went through each and every line in Julie’s letter—all three paragraphs—and examined how the inadmissible evidence was corroborated or duplicated by admissible evidence. Family, friends, neighbors, acquaintances, and police officers all testified to statements Julie made to them that corroborated information in the letter. The corroboration did not stop with live testimony; even physical evidence recovered from Petitioner’s home computer echoed Julie’s statements to friends about Petitioner searching for ways to poison someone on the internet.

Furthermore, factor four is satisfied because the defense had an opportunity to cross-examine each and every one of the corroborating witnesses and rebut any physical evidence through their own experts

229 Jensen, 800 F.3d at 905-06.
230 Id. at 906.
231 Id. at 904.
233 Id.
234 Jensen, 800 F.3d at 910 (Tinder, J., dissenting).
or argument. “Cross examination is ‘the greatest legal engine ever
invented for the discovery of truth’,”235 and Petitioner cross-examined
the State’s witnesses. There were even questions at trial about the
authenticity of the letter itself.236 Yet, any impeachment was
apparently unpersuasive to the jury.237

Finally, the Seventh Circuit’s majority extensively examined the
final Van Arsdall factor, the overall strength of the prosecution’s
case.238 The majority repeatedly remarked about statements made by
the Wisconsin Appellate Court regarding the sufficiency of the
evidence to support the verdict.239 The Seventh Circuit worried the
state appellate court was unconcerned with the Brecht harmless error
analysis, instead focusing on an incorrect sufficiency of the evidence
test.240 However, the statements by the Wisconsin Appellate Court
regarding the strength of the evidence of guilt are illustrative of the
last Van Arsdall factor, rather than a superficial examination of the
sufficiency of guilt as the Seventh Circuit contends.241

The majority cited to Holmes v. South Carolina, stating that if
only one side is evaluated on review, “no logical conclusion can be
reached regarding the strength of contrary evidence offered by the
other side to rebut or cast doubt.”242 However, the Wisconsin Court of
Appeals did “review the extensive record” and examined “the
voluminous corroborating evidence, the duplicative untainted

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(quoting California v. Green, 399 U.S. 149, 158 (1970)).
236 Jensen, 800 F.3d at 911 (Tinder, J., dissenting).
237 Id. at 898 (majority opinion); see also Jensen II, 2011 WI App at ¶ 88. One
of the detectives was impeached on his testimony that Petitioner admitted he was the
principle computer user in the house and that Julie rarely used the computer.
238 Jensen, 800 F.3d at 906.
239 Id. at 903-04.
240 Id.
242 Jensen, 800 F.3d at 904 (quoting Homes v. South Carolina, 547 U.S. 319,
331 (2006)).
evidence, *the nature of the defense*, the nature of the State’s case, and the overall strength of the State’s case.”

The First Circuit was faced with a similar issue in *Barbosa v. Mitchell*, in January of 2016. In *Barbosa*, an inmate petitioned for a writ of habeas corpus because a DNA expert’s testimony included a DNA “results table” that was clearly in violation of established law under the Confrontation Clause. Relying almost entirely on factor four of *Van Arsdall*, the First Circuit found that there was an “abundance of other evidence indicating [petitioner’s] guilt.” Based on the “force of this [cumulative] evidence as a whole” the First Circuit determined the inadmissible DNA table was “largely cumulative evidence” and could not conclude that the violative evidence had “a substantial and injurious effect on the verdict.”

As in *Barbosa*, the Seventh Circuit here was obliged to give great weight to the *Van Arsdall* factors that the evidence was cumulative, there was corroborating testimony, and the strength of the prosecution’s case. The Wisconsin Appellate Court went further than the state court on review in *Barbosa*, discussing how they reviewed the “extensive record” and conducting a meticulous evaluation of the evidence.

Lastly, the Seventh Circuit opined that the evidence in the case was all circumstantial and subject to more than one interpretation, but this statement cuts both ways. Circumstantial evidence can be just as reliable as direct evidence, as the Supreme Court has held, “[t]he adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in

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244 *Barbosa v. Mitchell*, 812 F.3d 62, 68 (1st Cir. 2016).
245 *Id.*
246 *Id.* at 69.
247 State v. Jensen (“*Jensen II*”), 2011 WI App 3, ¶ 97, 331 Wis. 2d 440, 485, 794 N.W.2d 482, 504 (emphasis added).
249 *Jensen v. Clements* (“*Jensen*”), 800 F.3d 892, 906 (7th Cir. 2015).
support of a criminal conviction.” 250 In fact, there are no instances where the Supreme Court has said that circumstantial evidence is weaker than direct evidence. 251 Just because Petitioner’s verdict relied on evidence that may be circumstantial or subject to more than one interpretation does not eviscerate or weaken that verdict. 252 The only question relevant in the instant case is if the Wisconsin State Court’s decision was so lacking in justification that there is no possibility for fair-minded disagreement on the harmless error analysis. 253 The answer is no; there is the possibility for fair-minded disagreement in that fair-minds could conclude that the Wisconsin State Court’s decision to admit the handwritten letter constituted harmless error.

B. The Seventh Circuit Failed to Show Enough Deference to the Wisconsin Appellate Court’s Decision that Any Error was Harmless.

In addition to the Seventh Circuit’s tilted application of the harmless error analysis, the Seventh Circuit should have deferred to the Wisconsin Appellate Court’s findings that the admission of Julie’s letters and statements were harmless error. The “highly deferential” review under § 2254(d) defers to state court decisions of fact unless those determinations were unreasonable. 254 Here, the Wisconsin appellate court determined that the wrongly admitted evidence did not have a substantial and injurious effect on the Petitioner. Merely because the Seventh Circuit could have reached a different conclusion does not overcome § 2254(d)(2)’s requirement for state court deference.

250 Holland v. United States, 348 U.S. 121, 140 (1954) (circumstantial evidence is “intrinsically no different from testimonial evidence”).
252 The majority also makes mention that nothing was found on Petitioner’s work computer, but the computer was “fried” prior to being seized by the police; see Jensen, 800 F.3d at 910 (Tinder, J., dissenting).
254 Harrington, 562 U.S. at 102; Ayala, 135 S. Ct. at 2199.
substantial deference. Even under a de novo review of the record, there is ample evidence that the Wisconsin Appellate Court applied the Van Arsdall factors. Since the above sections of this Article establish that the Seventh Circuit erred in deciding that the Wisconsin Appellate Court’s determination was unreasonable, the state court’s decision must stand.

As Judge Posner stated in Price v. Thurmer, where a habeas Petitioner asked for relief on an ineffective assistance of counsel claim, the Wisconsin Court of Appeal’s opinion, which “ignored a good deal of the evidence on which his claim for relief was based,” still had to be given full deference. After the Supreme Court’s ruling in Harrington, Judge Posner stated, “a state court ‘opinion’ consisting of a single word ‘affirmed’ is entitled to the full deference that the habeas corpus statute demands.” Because of the Supreme Court ruling in Harrington, the Seventh Circuit held in Price that they could not infer error from the Wisconsin court’s failure to address particular evidence.

Other circuits have come to a similar conclusion regarding interpretation of Harrington. For example, in 2015 the Fourth Circuit in Christian v. Ballard decided that a petitioner’s ineffective assistance of counsel claim during a guilty plea was not an unreasonable application of the “clearly established” principles of the

255 Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (holding that the state court erroneously found that a prisoner was improperly denied a hearing to determine whether he was intellectually disabled and precluded from his death sentence).
256 See supra Part(A).
257 Price v. Thurmer, 637 F.3d 831, 839 (7th Cir. 2011).
258 Harrington, 562 U.S. at 102.
259 Price, 637 F.3d at 839; contra Contreras v. Artus, 778 F.3d 97, 106 (2d Cir. 2015) (holding that a petitioner’s denial of habeas relief was not unreasonable because the state court did a long summation of the facts, including the defense evidence).
260 Price, 637 F.3d at 839.
Strickland v. Washington standard of effective assistance of counsel.\textsuperscript{262} The Fourth Circuit stated that the requirement of a petitioner’s showing that the claim “resulted from an unreasonable legal or factual conclusion” beyond any fair-minded disagreement “does not require that there be an opinion from the state court explaining the state court’s reasoning.”\textsuperscript{263}

As a result, even when a state court’s decision is “unaccompanied by an explanation, the habeas petitioner’s burden must still be met” by showing that there was no reasonable basis and that it is impossible for fair-minded jurists to agree on arguments or theories.\textsuperscript{264} That same wisdom espoused by the Seventh Circuit in Price should also apply to the instant case. While the Wisconsin Appellate Court could have done a better job of addressing all the evidence, the length of the trial and “extensive record” dictated that the state court’s opinion only address information they believed relevant to the Van Arsdall harmless error factors.\textsuperscript{265}

The Wisconsin Appellate Court went beyond merely saying “affirmed,” and instead examined the “voluminous [evidence,] . . . the nature of the defense . . . [and] the overall strength of the State’s case.”\textsuperscript{266} Given that there is no requirement that fair-minded jurists must all agree with the state court decision, the Wisconsin Appellate Court’s determination that any error from the inadmissible evidence was harmless and should stand.

The Supreme Court stated in Harrington that the habeas standard is “difficult to meet . . . because it was meant to be.”\textsuperscript{267} Federal habeas jurisdiction is designed so that state courts are the “principal forum for

\textsuperscript{263} Id. at 444-45 (internal quotations omitted) (citing Harrington, 562 U.S. at 102).
\textsuperscript{264} Christian, 792 F.3d at 445; see also McKinney v. Ryan, 813 F.3d 798, 838-39 (Bea, J., dissenting).
\textsuperscript{265} State v. Jensen (“Jensen II”), 2011 WI App 3, ¶ 35, 331 Wis. 2d 440, 462, 794 N.W.2d 482, 493.
\textsuperscript{266} Id. at ¶ 35 (emphasis added).
\textsuperscript{267} Harrington, 562 U.S. at 102.
asserting constitutional challenges to state convictions.” This is because federal habeas petitions “frustrate[] both States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights” and “disturb[] the State’s significant interest in repose for concluding litigation, deny[ing] society the right to punish admitted offenders, and intrud[ing] on state sovereignty to a degree matched by few exercises of judicial authority.” Much like Harrington, the Seventh Circuit’s opinion in Jensen, “illustrates a lack of deference to the state court’s determination and an improper intervention in state criminal processes, contrary to the . . . well-settled meaning and function of habeas corpus in the federal system.”

CONCLUSION

In Jensen v. Clements, the Seventh Circuit held that the Wisconsin Appellate Court unreasonably applied federal law when it determined that the admission of Julie’s letter and statements was harmless error. The majority’s application of the harmless error analysis fails to properly examine all of the relevant factors and evidence and fails to adequately grant deference to the state court, as required by the habeas statute itself. The Seventh Circuit’s fact-intensive analysis of Jensen, and Judge Tinder’s dissent, shows that the state court’s decision should be granted a high level of deference and was not “so lacking in justification that there -was an error well- understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Holding otherwise undermines the meaning of

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268 Id. at 109.
269 Id. (internal quotation marks omitted) (quoting Calderon v. Thompson, 523 U.S. 538, 555-556 (1998) and Harris v. Reed, 489 U.S. 255, 265 (1989) (Kennedy, J., dissenting)).
270 Harrington, 562 U.S. at 102.
271 Jensen, 800 F.3d at 911 (Tinder, J., dissenting) (citing Harrington v. Richter, 562 U.S. 86, 98-99 (2011)).
habeas review and States’ sovereign rights and interests in punishing criminals, which ultimately serves to weaken the finality and legality that attaches to convictions after all review is exhausted.\textsuperscript{273}

“EQUITY WILL NOT ENJOIN A LIBEL”: WELL, ACTUALLY, YES, IT WILL

ANN C. MOTTO *


INTRODUCTION

“If there is one amendment, that is literally first among equals, then it is truly the First Amendment.”¹ The First Amendment prohibits prior restraints on speech, i.e., judicial suppression of material that would be published or broadcast, on the grounds that it is libelous, defamatory, or harmful.² However, the imposition of subsequent liability for defamation does not abridge the freedom of speech protected by the First Amendment.³ It is this important distinction drawn by the United States Supreme Court—subsequent punishment vs. prior restraint—that denotes the permissible remedies and punishments in a court of law for defamation. One question remains unanswered by the Supreme Court: while the First Amendment allows for after-the-fact punishment for defamation in the form of money damages, or even imprisonment, does the First Amendment permit

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* J.D., Chicago-Kent College of Law, May 2016.
2 There are a few exceptions to the prohibition on prior restraint discussed infra Part I.
permanent injunctions against published or spoken speech that has been found to be defamatory by a judge or jury?

Permanently enjoining defamatory speech is preventing speech before it happens. Traditionally, courts have consistently held that “equity will not enjoin a libel.”4 Put simply, money damages were the only remedy available in a defamation lawsuit. The prevalence of social media and Internet usage has changed the way our society voices opinions. Defamatory comments, opinions, and articles can be permanently placed in the virtual world with the click of a button. As a result of this instantaneous communication platform, the number of defamation lawsuits filed in the United States and around the world has significantly increased.5 In 2004, the Supreme Court granted certiorari in Tory v. Cochran to decide whether a permanent injunction is a constitutionally permissible remedy in a defamation case, “at least

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4 Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001); Kramer v. Thompson, 947 F.2d 666, 677 (3d Cir. 1991) (“[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law.”); Oakley, Inc. v. McWilliams, 879 F. Supp. 2d 1087, 1092 (C.D. Cal. 2012) (noting that “never in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case . . . .”).

when the plaintiff is a public figure."6 Unfortunately, the Court never reached the merits, as the plaintiff died after oral arguments.7

In the 2015 case McCarthy v. Fuller, the Seventh Circuit Court of Appeals became the second circuit court8 to permit a lower court to issue a permanent injunction in a defamation case.9 In her concurring opinion, Judge Diane Sykes recognized “[a]n emerging modern trend” that acknowledges the general rule that equity does not enjoin libel, but allows for the possibility of narrowly tailored permanent injunctive relief as a remedy for defamation as long as the injunction prohibits only the repetition of the specific statements found at trial to be false and defamatory.10 Judge Sykes sharply questioned this modern trend because a defamatory statement in one circumstance, time, or place,

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6 Tory v. Cochran, 544 U.S. 734, 736–38 (2005) (“ . . . Johnnie Cochran’s death makes it unnecessary, indeed unwarranted, for us to explore petitioners’ basic claims, namely, (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case . . . .”). The Supreme Court did, however, vacate the injunction as an overbroad, prior restraint on speech. Id. at 738.

7 Id. at 734.

8 In a 2-1 decision, the Sixth Circuit—with very terse reasoning—reversed a district court’s decision not to issue an injunction against defamation. Lothschuetz v. Carpenter, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (Wellford, J. and Hull, J., dissenting).

9 McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015). Both the First and Second Circuits have declined to address the First Amendment arguments on the merits. Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Empls. & Rest. Empls. Int’l Union, 239 F.3d 172, 174 (2d Cir. 2001) (striking down injunction as impermissibly vague, but declining to address First Amendment arguments); Auburn Police Union v. Carpenter, 8 F.3d 886, 904 (1st Cir. 1993) (leaving for another day the determination whether a specific injunction constitutes an unlawful prior restraint). The Fifth Circuit in Brown v. Petrolite Corp. allowed a lower district court to enjoin an oil service company from further disseminating information related to tests and samples that were the subject of a defamatory report about plaintiff’s products. 965 F.2d 38, 51 (5th Cir. 1992). However, the Fifth Circuit held that the lower court could not enjoin “independent, reliable information that Petrolite may acquire in the future,” so it is unclear exactly how the Fifth Circuit views permanent injunctions against defamation. Id. The Fourth Circuit has held that injunctions on future speech are impermissible prior restraints. Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967).

10 McCarthy, 810 F.3d at 464 (Sykes, J., concurring).
might not be defamatory in another circumstance, time, or place.11 She reiterated that permanently enjoining defamation does not account for “constantly changing contextual facts that affect whether the speech is punishable or protected.”12

Supreme Court precedent appears to support the conclusion that a permanent injunction against defamation violates the First Amendment. The Court in Alexander v. U.S. stated, “Permanent injunctions . . . that actually forbid speech activities[] are classic examples of prior restraints” because they impose a “true restraint on future speech.”13 The First Amendment right to free speech is not absolute; it “does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”14 In any given case, “courts must balance free speech rights against other strong social interests, including society's interest in preventing and redressing attacks on reputation.”15 This balance becomes particularly delicate in the context of defamation suits because, at its core, “the first amendment prohibits the state from interfering with the expression of unpopular, indeed offensive, views.”16

The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution, there is no such thing as a false idea.

11 Id. at 465.
12 Id.
However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.\(^{17}\)

This Comment examines the modern trend allowing the issuance of permanent injunctions in defamation suits, despite the longstanding maxim prohibiting such. Parts I and II will discuss the Supreme Court’s First Amendment jurisprudence as it relates to impermissible prior restraints and injunctions. Part II will discuss Supreme Court decisions that struck down attempts by lower courts and States to restrain speech. Part III analyzes recent state and federal court decisions allowing narrow, permanent injunctions in defamation cases, and argues that these decisions are erroneous and cannot be reconciled with Supreme Court precedent. Next, parts IV and V critically examine the Seventh Circuit’s decision in \textit{McCartney v. Fuller} in which Judge Posner permitted an Indiana District Court to issue a narrow, permanent injunction as a remedy in a defamation lawsuit. Part V focuses on Judge Sykes’ concurring opinion, and contends that her understanding of First Amendment jurisprudence— as opposed to the majority’s— is correct. Lastly, part VI discusses policy considerations that buttress the argument that injunctive relief should not be available in defamation cases—mainly, that money damages are an adequate remedy and permanent injunctions chill the exercise of free speech.

I. \textsc{Historical Context of the First Amendment and Prior Restraints on Speech}

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”\(^{18}\) It is “no longer open to doubt that the liberty of the press and of speech[] is within the liberty safeguarded by the due process clause of the


\(^{18}\) U.S. \textsc{Const. art. I.}
Fourteenth Amendment from invasion by state action. The Supreme Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of speech that impose a “previous” or “prior” restraint on speech. A prior restraint on speech is an administrative or judicial order forbidding certain communications, publications, or other speech issued in advance of the time that such communications, publications, or other speech are to occur. Prior restraints are “the most serious and the least tolerable infringement on the First Amendment rights.” When a court enters a permanent injunction in a defamation action, such a remedy is unquestionably a prior restraint on speech because it prevents speech before it occurs.

However, the First Amendment’s prohibition on prior restraints is not absolute. In 1931, the Supreme Court narrated three exceptions to the prohibition on prior restraint: (1) the primary requirements of decency may be enforced against obscene publications; (2) the security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government; and (3) some overriding countervailing interest, such as when a nation is at war and such speech is hindering the peace effort. Prior restraints, even within a recognized exception, will be extremely difficult to justify, but “the purpose for which a prior restraint is sought to be imposed ‘must fit within one of the narrowly defined exceptions.”

23 Alexander v. United States, 509 U.S. 544, 550 (1993) (stating “permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints” because they impose a “true restraint in future speech.”); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996) (holding that the district court’s entering of three injunctive orders on planned publication was a “classic case of a prior restraint.”).
24 Near, 283 U.S. at 716.
exceptions to the prohibition against prior restraints.”25 These exceptions are intended to be very narrow in light of the fact that “it has been generally, if not universally, considered that it is the chief purpose of the First Amendment’s guaranty to prevent previous restraints upon publication.”26

Thus, the First Amendment strongly disfavors injunctions that impose a prior restraint on speech.27 Any prior restraint on expression comes to a court with a heavy presumption against its constitutional validity, and advocates have a weighty burden of showing justification for the imposition of such a restraint.28 Against this backdrop, the Supreme Court has consistently refused to enjoin speech, finding that after-the-fact punishment in the form of criminal imprisonment, fines, or money damages is acceptable,29 while prior suppression of speech by injunction is not.30

II. THE TRADITIONAL RULE: PERMANENT INJUNCTIONS IN DEFAMATION CASES ARE UNCONSTITUTIONAL PRIOR RESTRAINTS ON SPEECH

Starting in 1800’s and continuing through the 20th century, courts held firm in their conviction that injunctions in equity could never restrain the publishing of defamatory speech, “however great the

25 Stuart, 427 U.S. at 592.
26 Id. at 588.
27 Metro. Opera Ass’n, 239 F.3d at 178.
29 Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 386 (1973) (citing N.Y. Times v. Sullivan, 376 U.S. 254 (1964)) (“[T]his Court has held that the First Amendment does not shield a newspaper from punishment for libel when with actual malice it publishes a falsely defamatory advertisement.”).
30 Near v. Minnesota ex rel. Olson, 283 U.S. 697, 715 (1931) (“In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. . . . As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court’s order, but for suppression and injunction—that is, for restraint upon publication.”).
injury”\textsuperscript{31} and “even though such publications are calculated to injure the credit, business, or character of the person aggrieved . . . he will be left to pursue his remedy at law.”\textsuperscript{32} Injunctions against speech were not permitted in defamation cases under early English and American common law, and the Supreme Court has never departed from this precedent.\textsuperscript{33}

As early as 1839, the New York Court of Chancery (an equity court) refused to stop the publication of a pamphlet that would have defamed the plaintiff, holding that the publication of a libel could not be enjoined “without infringing upon the liberty of the press, and attempting to exercise a power of preventative justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.”\textsuperscript{34} The Chancery court alluded to the ancient Court of Star Chamber in England\textsuperscript{35} that had a habit of restraining speech by injunction.\textsuperscript{36} Since the Star Chamber had been abolished, the Chancery court noted that only one court had issued an injunction in anticipation of libelous speech, and “no judge or chancellor . . . has attempted to follow that precedent.”\textsuperscript{37} The court reasoned that, if the defendants persisted in defaming the plaintiffs, the victims were required to seek their remedies by a civil suit.\textsuperscript{38}

\textsuperscript{31} Am. Malting Co. v. Keitel, 209 F. 351, 354 (2d Cir. 1913).
\textsuperscript{32} Id.
\textsuperscript{34} Brandreth v. Lance, 1839 WL 3231 (N.Y. Ch. 1839).
\textsuperscript{35} The Court of Star Chamber was an English court made up of judges and councilors that arose out of the medieval king’s council and supplemented the regular justice of the common law courts. It was used by Charles I to enforce unpopular political policies, and became a symbol of oppression to the parliamentary and Puritan opponents of Charles. It was abolished in 1641. Court of Star Chamber, BRITANNICA.COM, http://www.britannica.com/topic/Court-of-Star-Chamber (last visited Feb. 17, 2016).
\textsuperscript{36} Brandreth, 1839 WL 3231, at *26.
\textsuperscript{37} Id. at *27.
\textsuperscript{38} Id. at *28-29.
The United States Supreme Court has time and time again struck down injunctions against defamation. The seminal case is *Near v. Minnesota ex rel Olson*, where a newspaper appealed a permanent injunction issued by the lower court after it determined that the newspaper was “chiefly devoted to malicious, scandalous, and defamatory articles” concerning certain individuals.\(^{39}\) Minnesota law deemed a “nuisance” any malicious, scandalous or defamatory speech published by newspapers and other periodicals, and the Attorney General could sue for suppression by way of an injunction any newspaper it believed violated the law.\(^{40}\) Because the suppression was accomplished by enjoining future publication, the Court reasoned that it “put the publisher under an effective censorship,” and was thus unconstitutional.\(^{41}\)

This principle was echoed in *Organization for a Better Austin v. Keefe*, in which a group of pamphleteers was enjoined from protesting a real estate developer’s business practices.\(^{42}\) Pertinently, the Court held that, “the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights.”\(^{43}\) Further, the Court noted, “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.”\(^{44}\)

Similarly, in *Vance v. Universal Amusement Co.*, the Court invalidated a Texas nuisance statute that authorized courts, upon finding that the defendant had shown obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future, including motion pictures that had not been finally adjudicated to be obscene.\(^{45}\) Absent “any

\(^{39}\) Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 706 (1931)

\(^{40}\) *Id.* at 701–02.

\(^{41}\) *Id.* at 712.


\(^{43}\) *Id.* at 418.

\(^{44}\) *Id.* at 419.

safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed,” such an injunction could not be upheld.46

Many constitutional law scholars have gleaned from the aforementioned Supreme Court holdings that injunctions on future speech, even if preceded by the publication of defamatory material, are unconstitutional.47 Indeed, it would seem that this was the Court’s firm conclusion in Near: even though the newspaper’s speech was chiefly devoted to malicious, scandalous and defamatory material, permanently enjoining future speech—even under those circumstances—was unconstitutional.48 The Seventh Circuit adhered to this long-standing tradition as recently as 2007 in e360 Insight v. The Spamhaus Project.49 Concluding that the district court abused its discretion in entering a permanent injunction against defamation, the Seventh Circuit stated, “[W]e note that there are sensitive First Amendment issues presented in the context of permanent injunctions in defamation actions. ‘Permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints.’”50 Without reaching an opinion on the injunction’s constitutional validity, the e360 court firmly reiterated that the only remedy in defamation lawsuits is an action in damages.51 Yet, many trial courts are starting a new trend, issuing permanent injunctions against specific statements that have been found to be defamatory by a judge or jury.

46 Id. at 317.
47 See Brief of Amici Curiae Professors Erwin Chemerinsky et al. in Support of Defendants-Appellants and Reversal, McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015) (Nos. 14-3308, 15-1839), 2015 WL 4264749 [hereinafter Chemerinsky & Lidsky Brief].
49 e360 Insight v. The Spamhaus Project, 500 F.3d 594 (7th Cir. 2007).
50 Id. at 605–06 (quoting Alexander v. United States, 509 U.S. 544, 550 (1993). The Court ultimately “expressed no opinion on the constitutional validity” of narrow, injunctive relief, but instead vacated the injunction as overbroad. Id. at 606.
51 Id.
III. THE MODERN TREND AWAY FROM THE TRADITIONAL RULE: COURTS (ERRONEOUSLY) BEGIN TO ALLOW NARROW, PERMANENT INJUNCTIONS IN DEFAMATION CASES

The traditional rule that equity will never enjoin a libel is quickly becoming a maxim of the past. Today, some state and federal courts are willing to enter narrow, permanent injunctions in defamation cases where there has been a jury determination of the libelous nature of certain statements.\(^{52}\) In 1991, the Third Circuit determined that a permanent injunction in a defamation case was impermissible under Pennsylvania law, and noted that Missouri was the only state to allow such a remedy for “the better part of this century.”\(^ {53}\) However, since then, several state supreme courts and federal courts have followed Missouri’s lead.

In *Balboa Island Village Inn, Inc. v. Lemen*, a California trial court issued a permanent injunction prohibiting the defendant from making defamatory statements about plaintiff’s business.\(^ {54}\) The Supreme Court of California, on appeal, held that the injunction issued by the trial court was overly broad “but that defendant’s right to free speech would not be infringed by a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory.”\(^ {55}\)

In *O’Brien v. University Community Tenants Union*, a landlord secured a jury determination that certain statements made by a blacklisted tenants’ group were libelous, and then sought and obtained an injunction against further libel.\(^ {56}\) The Supreme Court of Ohio


\(^{53}\) Kramer v. Thompson, 947 F.2d 666, 678 (3d Cir. 1991).

\(^{54}\) Lemen, 156 P.3d at 341.

\(^{55}\) Id.

\(^{56}\) O’Brien, 327 N.E.2d at 753.
affirmed the injunction, categorically finding that “[o]nce speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper.”

In Retail Credit Co. v. Russell, the Georgia Supreme Court affirmed a permanent injunction prohibiting the defendant from republishing libelous statements. The court reasoned that the injunction was not a prior restraint because, before the lower court issued the injunction, it was adequately determined that the speech at issue was not protected by the First Amendment.

Lastly, in Wagner Equipment Co. v. Wood, the District of New Mexico upheld an injunction prohibiting Defendant buyers from further defaming the Plaintiff’s logging operations business. Defendants “undertook an email campaign to slander Plaintiff’s name in the business community, making ‘several false and defamatory statements’” injuring Plaintiff’s business reputation. The district judge reasoned that because defamation is unprotected speech, the “‘special vice’ of a prior restraint is non-existent where an injunction is granted only as to statements previously adjudicated to be false.”

The reasoning in all four of these cases is erroneous. The Balboa and O’Brien courts incorrectly relied on the Supreme Court’s holding in Kingsley Books, Inc. v. Brown as a basis for concluding that a permanent injunction in a defamation case does not violate the First Amendment. In Kingsley, pamphleteers challenged a New York criminal statute allowing the authorization of an injunction pendente

57 Id. at 755.
58 Retail Credit Co. v. Russell, 234 Ga. 765 (Ga. 1975).
59 Id. at 778–79.
61 Id. at 1159.
62 Id. at 1161.
While the matter at issue was being tried and adjudicated. The Supreme Court upheld the statute as constitutional. Pendente lite is Latin for “while the action is pending,” and such an injunction remains in force—to preserve the status quo—only until the associated case is decided. An injunction pendente lite is, by definition, extinguished when the associated case is decided, and functions similar to a temporary restraining order or a preliminary injunction. Additionally, Kingsley fits within one of the narrow exceptions to the First Amendment’s ban on prior restraints: “the primary requirements of decency may be enforced against obscene publications.” Thus, Kingsley’s reasoning is arguably inapplicable to cases involving permanent injunctions on future publication of defamatory (non-pornographic) statements.

The Wagner and Retail Credit decisions were also flawed. First, both courts justified entering a permanent injunction by, in part, concluding that defamation is “unprotected speech.” This is incorrect. True, the Supreme Court has held that certain categories of expression receive less protection under the First Amendment—including obscenity, defamation, and fighting words. But the Supreme Court in R.A.V. v. City of St. Paul, Minnesota noted that, “Our decisions since the 1960’s have narrowed the scope of the

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65 Id. at 443.
67 Kingsley, 354 U.S. at 439.
68 The Court itself in Kingsley referred to the injunction as “temporary.” Id. at 443 (“In the one case [the bookseller] may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction.”).
69 Id. at 440.
traditional categorical exceptions for defamation . . . and for obscenity.”

Significantly, the Court said,

We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity ‘as not being speech at all.’ What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution . . . .

Thus, the reasoning in Wagner and Retail Credit that defamation is entirely unprotected is wrong. Defamation is not entirely unprotected by the First Amendment. Defamation does not, by its definition, ipso facto allow courts to suppress future speech by way of injunction.

The Wagner and Retail Credit courts also inaccurately relied on the Supreme Court’s decision in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations to conclude that injunctions against defamation are permissible. The ordinance at issue in Pittsburgh forbade newspapers from publishing help-wanted advertisements in sex-designated columns. The purpose of the ordinance was to

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75 Id. at 383–84 (1992) (emphasis in original) (citations omitted).
proscribe discrimination in employment on the basis of sex and other classes. The Pittsburgh Commission issued a decision and order finding that the Pittsburgh Press violated the ordinance, and required Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex. The Court held that the Pittsburgh Commission’s order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, did not infringe the First Amendment.

First, it should be noted that Pittsburgh Press was not dealing with an injunction at all, suggesting, like Kingsley, that its facts are inapplicable in answering the question of whether permanently enjoining defamatory speech is permissible. Second, the Supreme Court upheld the Commission’s order entirely because the speech at issue was commercial in nature. It is well known that purely commercial speech receives less protection under the First Amendment than noncommercial speech, and regulations restricting advertising about illegal products or services, or that is deceptive, can be freely regulated. Third, the ordinance at issue in Pittsburgh Press can correctly be characterized as a “regulation” of harmful speech and, as discussed supra, the Supreme Court has held that regulating harmful speech is acceptable in many circumstances. The Pittsburgh Press court noted that discrimination in employment is illegal

79 Id. at 378.
80 Id. at 379.
81 Id. at 391.
82 Id. at 382 (“Our inquiry must therefore be whether the challenged order falls within any of these exceptions.”).

As the press has evolved from an assortment of small printers into a diverse aggregation including large publishing empires as well, the parallel growth and complexity of the economy have led to extensive regulatory legislation from which the publisher of a newspaper has no special immunity. Accordingly, this Court has upheld application to the press of the National Labor Relations Act, the Fair Labor Standards Act, and the Sherman Antitrust Act. Pittsburgh Press, 413 U.S. at 382–83 (citations omitted).
commercial activity under the ordinance and stated, “We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”  

The ordinance merely affected the “make up” of the help-wanted section. In contrast, issuing a permanent injunction against defamatory speech is not a regulation; it is a blanket prohibition in perpetuity under all contexts. Lastly, the Court pointed out that no suggestion was made that “the Ordinance was passed with any purpose of muzzling or curbing” speech, and the Pittsburgh Press was still free to publish the advertisements in a non-discriminatory manner. Conversely, a permanent injunction is issued with the overt purpose of “muzzling or curbing” speech, and it prohibits publishing such speech under any circumstance.

The pitfalls of these four decisions underscore that the modern trend to allow narrow, permanent injunctions in defamation cases cannot be based in Supreme Court precedent or accurate interpretations of such. Fortunately, most courts have resisted the trend, standing by the wisdom of precedent and by the age-old maxim that equity will not enjoin a libel. However, in December 2015, the Seventh Circuit became the second federal circuit to join the modern movement in allowing narrow, permanent injunctions in defamation cases.

85 Id. at 388.
86 Id. at 383.
87 Id.
88 Lan Sang v. Ming Hai, 951 F. Supp. 2d 504, 531 (S.D.N.Y. 2013) (“For almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases . . . . Accordingly, while Plaintiff may continue to seek money damages, the Court will not entertain her request for a permanent injunction.”) (citations omitted); Oakley, Inc. v. McWilliams, 879 F. Supp. 2d 1087 (C.D. Cal. 2012); Kramer v. Thompson, 947 F.2d 666, 679 (3d Cir. 1991) (concluding that the “jury determination exception” in defamation cases was impermissible under Pennsylvania law); Kinney v. Barnes, 443 S.W. 3d 87,91–92, 94–99 (Tex. 2014) (holding that a permanent injunction as a remedy in a defamation case is an impermissible prior restraint on speech under the Texas constitution, which the court noted is governed by First Amendment standards).
IV. *McCarthy v. Fuller*: The Seventh Circuit Becomes the Second Circuit to Allow Narrow, Permanent Injunctions in Defamation Cases

In 1956, Catholic Sister Mary Ephrem launched a new program of devotions called Our Lady of America.89 Defendant Patricia Fuller (“Fuller”), formerly known as Sister Therese, joined Our Lady of America that same year.90 In 1993, Sister Ephrem founded Our Lady of America Center in Indianapolis, directing the Center until her death in 2000, whereupon she willed all of her property, and the Center, to Fuller.91 In 2005, plaintiff Kevin McCarthy (“McCarthy”), a lawyer and Catholic layman, and Albert Langsenkamp, another member of the Catholic Church, met Fuller and committed to help her promote the Center’s work.92 The three worked together agreeably for approximately two years, until 2007 when they had a falling out.93 Langsenkamp and McCarthy established the Langsenkamp Family Apostolate, and both claimed to be the authentic promoters of devotions to Our Lady of America and to be the rightful owners of all the documents and artifacts accumulated by Fuller and Sister Ephrem.94 Shortly thereafter, a retired postal inspector, Paul Hartman, assisted Fuller in “launching a campaign to smear McCarthy’s and Langsenkamp’s reputations.”95 A bitter lawsuit ensued, and McCarthy and Langsenkamp sued Fuller and Hartman for defamation in the Southern District of Indiana.96

89 McCarthy v. Fuller, 810 F.3d 456, 457 (7th Cir. 2015).
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id. at 458. McCarthy also sued for conversion and fraud, and Fuller and Hartman counterclaimed for theft, and copyright and trademark infringement, but those issues are not relevant to this Comment.
Jurors returned a verdict on March 11, 2014, finding both Fuller and Hartman liable for defamation per se, and awarded $100,000 in actual damages and $50,000 in punitive damages to McCarthy, and $50,000 in actual damages and $1 million in punitive damages for Langsenkamp. The following month, McCarthy and Langsenkamp filed a Motion for Injunction Against Further Defamation with the district court.

A. District Court Holding

The District Court granted McCarthy and Langsenkamp’s motion for permanent injunction against further defamation by the Defendants. In a mere footnote, District Judge Lawrence “recognize[d] that there are First Amendment implications in enjoining speech,” but nevertheless summarily granted Plaintiffs’ motion, and amended the judgment to include injunctive relief, because Defendants’ response was filed late and exceeded the page limit set forth in the Court’s Local Rules. The court did not conduct a First Amendment analysis, nor did Judge Lawrence analyze whether a permanent injunction was appropriate under the applicable four-factor test that all Plaintiffs are required to satisfy in order to be granted a permanent injunction.

99 Id. at *7 n.7.
100 Id.
101 See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant injunctive relief: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).
The permanent injunction stated:

It is hereby ordered, adjudged and decreed that Defendants Fuller and Hartman . . . are hereby permanently enjoined from publishing the following statements, as well as any similar statements that contain the same sorts of allegations or inferences, in any manner of forum . . . .\textsuperscript{102}

The judgment further ordered that Defendant Hartman take down the website operated by him at ourladyofamerica.blogspot.com.\textsuperscript{103}

Defendants appealed, among other things, the entry of the permanent injunction.\textsuperscript{104}

\textsuperscript{102} McCarthy, 810 F.3d at 460.

\textsuperscript{103} Id.

\textsuperscript{104} As discussed \textit{supra} in Section II, the Supreme Court has passed down three narrow exceptions to the ban on prior restraints of speech. None of those exceptions apply to the statements at issue in McCarthy. The injunction banned Defendants’ statements that:

McCarthy suggested that Jim Whitta’s name be forged on a quit claim deed; Plaintiffs bribed various members of the Clergy (including Catholic Priests, Bishops, Archbishops, Cardinals and Popes); McCarthy physically threatened Fuller or otherwise committed any wrongful act against Fuller; Plaintiffs are con-men, crooks, forgers, thieves, racketeers, or otherwise stole or converted property from Fuller or engaged in any conspiracy against Fuller with any Catholic clergy, lawyer (canon or civil) or investigator, or any Catholic lay person promoting the devotion; Plaintiffs stole any statue (including the Latrobe statue), crucifix, plaque, medallions, pins, gold coinage, website (including the ourladyofamerica.com and ourladyofamerica.org web-sites) and/or proceeds from Fuller’s Key Bank Stock; Langsenkamp was involved in a car chase in which he chased Fuller around Fostoria; Plaintiffs used the name “Ron Norton” in an inflammatory email exchange that was first published by Hartman at his website, ourladyofamerica.blogspot.com; and McCarthy, without the knowledge or consent of Fuller, caused a will to be drafted for Fuller in which she left the Devotion to McCarthy.

\textit{Id.} at 460.
B. The Appeal to the Seventh Circuit

Focusing almost exclusively on the breadth of the injunction issued by the lower court, the Seventh Circuit vacated the injunction, leaving it to the district judge to decide whether to issue a new injunction consistent with Judge Posner’s criticisms. The Seventh Circuit had four main concerns with the injunction issued by the district judge: (1) the jury did not specifically find which statements, of the nine listed on the jury instruction, were defamatory; (2) the District Judge enjoined statements that the jury never even considered; (3) the indefiniteness of the preamble’s language did not provide guidance for the injunction’s boundaries; and (4) in summarily granting the Plaintiffs’ motion and failing to consider Defendants’—admittedly, waived and late—arguments, the lower court failed to consider the public interest in issuing a broad permanent injunction.

One jury instruction listed each of the nine statements that plaintiffs claimed were made by the defendants and were defamatory. Judge Posner found it fatal to the injunction that the jury was not asked which of these statements had been made by the defendants and, of those statements, which were defamatory. Since the jury did not indicate which statements in the jury instruction it found to be defamatory, the lower court had no basis for enjoining statements that tracked this jury instruction. The district judge also enjoined statements that the jury was never even asked to consider. For example, the judge permanently enjoined Defendants from stating

\[\text{References:}\]

105 Id. at 463.
106 Id. at 460.
107 Id.
108 Id. at 461.
109 Id.
110 Id. at 459–60.
111 Id. at 460.
112 Id.
113 Id.
that Plaintiffs had “committed any wrongful act against Fuller,” and from calling the Plaintiffs “con-men, crooks, forgers, thieves, racketeers, or [saying that they] otherwise stole or converted property from Fuller or engaged in any conspiracy against Fuller with any Catholic clergy, lawyer (canon or civil) or investigator, or any Catholic law person promoting the devotion.”

Perhaps most offensive to the First Amendment, the lower court also ordered Defendant Hartman to take down his website, without making a finding that everything published on the website defamed the Plaintiffs.

Not surprisingly, the Seventh Circuit’s greatest criticism was the language of the injunction’s preamble, enjoining “any similar statements that contain the same sorts of allegations or inferences, in any manner or forum.” Judge Posner concluded that the injunction’s preamble was a patent violation of the First Amendment. The court held that Federal Rule of Civil Procedure 56 requires injunctions to be specific about the acts that they prohibit. Vague language like “similar” and “same sorts” does not provide guidance to the scope of the injunction. The court further conceded that forbidding statements not yet determined to be defamatory, and the order requiring Hartman to take down his website—which would prevent him from posting any non-defamatory messages on his blog—would unconstitutionally enjoin lawful speech. The remainder of Judge Posner’s First Amendment analysis, however, was minimal. He quickly dismissed the argument that defamation can never be enjoined because doing so would constitute a prior restraint on speech by

114 Id.
115 Id. at 461.
116 Id. at 461, 463.
117 Id. at 463.
118 Id. at 461 (citing FED. R. CIV. P. 56).
119 Id.
120 Id. at 462.
121 Id.
concluding that such a rule “would make an impecunious defamer undeterrable.”

Whether the permanent injunction issued by the district court was a violation of Fuller and Hartman’s First Amendment rights was fiercely debated on appeal. The Seventh Circuit implicitly adopted the rule that a narrow and limited injunction is allowed to prohibit a defendant from reiterating the same, specific libelous statements. Constitutional law professors and scholars Erwin Chemerinsky and Lyrissa Barnett Lidsky filed an Amicus Brief in support of the Defendants and in favor of reversal. Chemerinsky and Lidsky concluded without hesitation that the First Amendment does not permit permanent injunctions against defamatory speech. To no prevail, the Amici urged the Court to follow the “long-held rule” that equity will not enjoin libel, and maintained that “[i]njunctions against libelous speech, after a final judicial determination, are prior restraints and cannot withstand the rigorous scrutiny due such orders.”

122 Id.
123 Id. (noting that, “Most courts would agree . . . [with the Sixth Circuit] that defamatory statements can be enjoined . . . provided that the injunction is no ‘broader than necessary to provide relief to plaintiff while minimizing the restriction of expression.’”) (citing Balboa Island Village Inn, Inc. v. Lemen, 156 P.3d 339, 346 (Cal. 2007), as modified (Apr. 26, 2007)).
124 Professor Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke of Professor of First Amendment Law, at the University of California, Irvine School of Law. He has frequently argued matters of constitutional law in front of the nation’s highest courts, including United States Supreme Court decisions involving injunctions in defamation cases. Chemerinsky & Lidsky Brief, supra note 47 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 563–64 (1980).
125 Professor Lyrissa Barnett Lidsky is the Stephen O’Connor Professor of Law and Associate Dean for International Programs at the Levin College of Law at the University of Florida. Professor Lidsky is the author of a casebook entitled First Amendment Law. She has also written extensively on issues of Internet free speech and defamation. Id.
126 Id. at 4.
127 Id.
C. Judge Sykes’ Concurring Opinion

Judge Diane Sykes concurred in judgment insofar as the injunction was vacated for its indefinite and overbroad language. She disagreed, however, with allowing the lower court to re-issue a narrower injunction. In this specific case, she thought the court was ill equipped to fashion a constitutionally acceptable injunction because the jury did not make a statement-specific finding on defamation. The “equivalent of a general verdict that defendants are liable for defamation” does not contain the necessary findings to support the issuance of a permanent injunction. Additionally, outside the bounds of this specific case, Judge Sykes rejected the “emerging modern trend” that allows for the possibility of narrowly tailored permanent injunctive relief as a remedy for defamation as long as the injunction prohibits only the repetition of the specific statements found at trial to be false and defamatory.

V. Criticisms of McCarthy’s Reasoning: Judge Sykes Got It Right

The reasoning in McCarthy shared many of the same flaws as the state and federal trial courts discussed supra in Section III. Like the Ohio Supreme Court in O’Brien and the California Supreme Court in Balboa, the McCarthy majority mistakenly relied on Kingsley Books, Inc. v. Brown to conclude that, while the “Supreme Court . . . has not yet addressed the issue, . . . it has permitted injunctions preventing other types of scurrilous speech.” As Judge Sykes correctly pointed out, temporarily enjoining dissemination of obscene

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128 McCarthy v. Fuller, 810 F.3d 456, 463 (7th Cir. 2015) (Sykes, J., concurring).
129 Id.
130 Id.
131 Id.
132 Id. at 464–66.
133 Id. at 462 (majority opinion).
material is different from permanently enjoining defamatory speech. She stated, “Defamation is materially different from obscenity. There’s a meaningful distinction between [temporarily] enjoining the distribution of a particular pamphlet once it’s been found to be obscene and enjoining a person in perpetuity from uttering particular words and phrases.” Judge Sykes’ reasoning is directly on point with Supreme Court precedent. In *Kingsley*, Justice Frankfurter reconciled his holding with *Near* because the New York law in *Kingsley* was “concerned solely with obscenity,” whereas the Minnesota law in *Near* concerned matters “deemed to be derogatory.” It is evident that the Supreme Court has traditionally treated obscenity and defamation differently, as reflected by the fact that one of the three very narrow exceptions to the ban on prior restraints is focused solely on obscene material.

Judge Sykes also argued that defamation is inherently contextual in that a statement that is defamatory in one circumstance, time, or place, might not be defamatory in another circumstance, time, or place. Permanent injunctions do not take into account these contextual factors that change how speech is characterized. Even a permanent injunction limited to the exact words found to be defamatory in one context might prohibit speech that would not be actionable in another. A defamatory statement today, when spoken tomorrow in a different time and in a particular context, may not be defamatory for a number of reasons, and thus entitled to full constitutional protection. For example, the injunction in *McCarthy* permanently prevented Defendants from stating, “McCarthy physically threatened Fuller or otherwise committed any wrongful act

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134 *Id.* at 465 (Sykes, J., concurring).
135 *Id.*
137 *Supra* section I.
138 *Id.*
139 *Id.*
against Fuller.”141 This statement is incredibly broad, and it does not take a vibrant imagination to think of a context where such statements, if uttered, would not be defamatory—say, if McCarthy showed up at Fuller’s home and physically threatened her with a baseball bat.142 That is the problem with permanent injunctions: they permanently prevent reiterating defamatory statements, even when reiterating the statement would not constitute defamation.

In their Amici Brief, Chemerinsky and Lidsky expanded on Judge Sykes’ point that defamation is inherently contextual. They stated, “The richness of the English language and the myriad ways of expressing any given thought make it impossible for a trial court to craft an injunction against future defamatory speech that is both effective and that does not also bar the publication of constitutionally protected speech.”143 In essence they argue that, for an injunction to be effective, it will be overly broad because its parameters will be impossible to determine, while a specific, narrowly tailored injunction will be ineffective because defendants can just use different words to get around it.144 What is stopping a defendant, permanently enjoined from uttering certain statements, from avoiding the injunction’s terms by making the same point using different words?145 This situation, Chemerinsky and Lidsky argue, results in what is called a “revolving-door injunction.”146 The plaintiff will then return to court to get a new

141 McCarthy, 810 F.3d at 459.
142 Chemerinsky and Lidsky illustrated a similar situation in their Amici Brief: [A] statement that was once false may become true later in time. Suppose a court, after finding that a defendant defamed a plaintiff by saying that the plaintiff blackmailed her, issues a permanent injunction against the defendant’s repeating any similar statements. If the plaintiff subsequently begins blackmailing the defendant, the defendant would remain enjoined from saying so, even though the statement would be true and hence constitutionally protected.

Chemerinsky & Lidsky Brief, supra note 47, at *16
143 Id. at *4–5.
144 Id. at *12.
145 Id. at *14.
146 Id. at *14–15.
injunction prohibiting the more recent statements from being uttered. If the modern trend continues to expand, revolving-door injunctions will become particularly common since the Internet allows for the rapid publication of opinions, and courts will potentially be forced to modify injunctions over and over. Thus, permanent injunctions do not take into account changed circumstances or contextual factors, rendering both broad and narrow injunctions unconstitutional prior restraints, and ineffective remedies for a defamed plaintiff.

VI. POLICY CONSIDERATIONS AGAINST ISSUING INJUNCTIONS

A. Money Damages Are Adequate to Compensate Defamed Plaintiffs

In *McCarthy v. Fuller*, the Seventh Circuit observed that permanently enjoining defamation might be required in some cases. Surprisingly, Judge Posner defended this holding almost exclusively on the assumption that plaintiffs would (potentially) be left remediless against insolvent defendants. Disagreeing with the customary rule that equity will not enjoin a libel, Judge Posner stated, “The problem with such a rule is that it would make an impecunious defamer undeterrable.” “He would continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment.” As applied to the facts of *McCarthy*, Judge Posner held that it was “beyond unlikely” that Fuller and Hartman could pay the judgment against them. “They will be broke, and if defamation can

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147 Id.
148 *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015).
149 Id.
150 Id.
151 Id.
152 Id.
never be enjoined, they will be free to repeat all their defamatory statements with impunity.”

Apparently, the *McCarthy* majority was concerned that McCarthy and Langsenkamp (and other plaintiffs in the future) would have no remedy because all they would obtain is an uncollectible money judgment. This reasoning is curious, however, because *many* defendants—in tort and contract lawsuits, for example—are, or become, judgment proof, and the usual remedy for defamation has always been damages. Indeed, the Supreme Court has repeatedly compensated plaintiffs whose constitutional rights have been violated with monetary damages. Moreover, in lawsuits outside the realm of defamation where plaintiffs often request injunctive relief (e.g., copyright infringement cases), few courts are willing to consider insolvency as a factor in determining whether an injunction should be issued.

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153 Id.
154 Id.
155 Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE. L. REV. 603, 606 (2006) (Noting that when tort claims are large enough to litigate, many Americans are judgment proof, lacking sufficient assets to pay the judgment in full).
156 See Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (“There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation.”); Karhani v. Meijer, 270 F.Supp.2d 926, 930 (E.D. Mich. 2003); Kessler v. General Servs. Admin., 236 F.Supp. 693, 698 (S.D.N.Y. 1964), *aff’d per curiam*, 341 F.2d 275 (2d Cir. 1964) (refusing to enter an injunction against libel because, “As a general rule, a court will not issue an injunction to restrain torts against the person, since the remedy at law is adequate.”).
158 See Weinstein v. Aisenberg, 758 So. 2d 705, 706 (Fla. Dist. Ct. App.) *dismissed*, 767 So. 2d 453 (Fla. 2000) (“Even where the party seeking injunctive relief alleges that the opposing party may dissipate bank assets, a judgment for money damages is adequate and injunctive relief is improper, notwithstanding the possibility that a money judgment will be uncollectible.”).
This is not to say that a reputation has a price tag; to the contrary, sometimes money damages, no matter how high, can never make a plaintiff whole again. But “the law often relies on monetary damages to partially recompense a loss even when those damages cannot perfectly repair the damage done.”¹⁵⁹ Fox Sports Broadcaster Erin Andrews was recently awarded $55 million in damages—an award she likely will never receive in full.¹⁶⁰ Andrews’ stalker, defendant Michael David Barrett, surreptitiously videotaped her through a peephole in the privacy of Andrews’ own hotel room and posted nude videos of her on the Internet for millions of viewers to see.¹⁶¹ $28 of the $55 million judgment was assigned to Barrett individually (the rest was assigned to the hotels that were negligent in protecting Andrews’ privacy).¹⁶² Many journalists have surmised that if Andrews receives any money from Barrett, it will likely be a very small amount.¹⁶³ Similarly, in wrongful death cases, courts frequently place a “price tag” on the plaintiff’s harm, when in reality no amount of money can remedy the wrongful loss of life.¹⁶⁴ Andrews was demeaned, embarrassed, and violated when nude photographs were posted, without her consent, on the Internet. The loved ones of a wrongfully killed individual are undoubtedly permanently wounded. And defamed plaintiffs, like McCarthy and Langsenkamp, may never get their good reputation back. Nevertheless, money damages have

¹⁶¹ Id.
¹⁶² Id.
¹⁶³ Id.
¹⁶⁴ Id. (noting that the average award for the wrongful death of an adult female is $3 million).
always compensated in-compensable harms, and the First Amendment’s protection should not turn on whether a defendant is judgment proof. The McCarthy reasoning wrongly implies that the right to be free from prior restraints on speech stops at cases with insolvent defendants. In light of the dangers of infringing First Amendment rights, the scale should tilt in favor of money damages over an injunction.

### B. The Public Interest is Disserved When Courts Issue a Permanent Injunction in Defamation Cases: The Potential Chilling of Free Speech

Perhaps the most obvious consequence of this modern trend is the potential chilling of free and legitimate speech. Unlike subsequent punishment for defamation or harmful speech activity, the prior restraint of speech before it occurs deprives the public of information that should otherwise be disseminated. Each time a court enters a permanent injunction in a defamation case in favor of one plaintiff, everyone’s constitutional right to free speech is eroded. The Seventh Circuit permitted the district court to issue a narrow, permanent injunction against only the specific statements that have been found to be defamatory. Whether an injunction could permissibly be issued, according to the McCarthy majority, turned on the breadth of the injunction and what exactly it enjoined. However, a permanent injunction, no matter how specific, sweeps free speech within its confines making the breadth of the injunction immaterial under a First Amendment analysis.

In refusing to issue a temporary restraining order against defendant’s distributing offensive pamphlets, the Eastern District of Michigan in its 2003 decision Karhani v. Meijer recognized that the breadth of the injunction played no role in the Supreme Court’s

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165 McCarthy v. Fuller, 810 F.3d 456, 466 (7th Cir. 2015) (Sykes, J., concurring).
166 Id. at 463 (majority opinion).
167 Id.
decision in Organization for a Better Austin v. Keefe. The plaintiff in Karhani attempted to persuade the court that the temporary restraining order was permissible because it was extremely limited in its scope. The district court was unconvinced, observing that the Supreme Court in Keefe “was simply concerned with the impermissible restraint on First Amendment speech caused by the prior restraint imposed by the state courts.” Indeed, like the preamble of the injunction at issue in McCarthy, the broad language of the injunction issued in Keefe proved fatal. In Keefe, the Illinois trial court entered an injunction enjoining petitioners from passing out pamphlets, leaflets or literature “of any kind”. Unlike the Seventh Circuit in McCarthy, though, the Keefe and Karhani courts did not remand to the district court with the possibility to fabricate a narrower injunction. Instead, the Supreme Court firmly concluded that “[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court,” and vacated the injunction.

Similarly, in Kinney v. Barnes, the Texas Supreme Court held that requesting an injunction on future speech was “the essence of prior restraint[.]” The plaintiff in Kinney filed a defamation lawsuit regarding defamatory online posts and requested a permanent injunction on any similar future statements. The Texas Supreme Court refused to prohibit future speech based on adjudication that

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169 Id.
170 Id.
172 Id. at 420; Karhani, 270 F.Supp.2d at 930.
173 Keefe, 402 U.S. at 419 (emphasis added).
175 Id. at 89.
certain statements were defamatory because doing so would impermissibly threaten to chill protected speech.\textsuperscript{176}

Injunctions are an incredibly powerful tool. Injunctions frequently have consequences so sweeping that they shut down operating businesses or otherwise dramatically affect the rights of the parties involved in an irreversible manner. “Put simply, injunction proceedings are high stakes poker.”\textsuperscript{177} The Supreme Court has reiterated that courts must “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”\textsuperscript{178} The public consequences are most severe in the First Amendment context, as this modern trend has the effect of potentially chilling lawful and legitimate speech.

CONCLUSION

On March 29, 2016, Fuller filed a petition for certiorari with the United States Supreme Court.\textsuperscript{179} Her petition was denied on April 25.\textsuperscript{180} Our society relies on the Internet as its main platform for communication. The intense debates surrounding net neutrality in the upcoming presidential elections show how important many people believe it is to preserve every citizen’s right to communicate freely online. But more Internet communication likely means more defamation lawsuits.\textsuperscript{181} Thus, it is imperative that the Supreme Court

\textsuperscript{176} Id. at 101.


\textsuperscript{179} McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015), petition for cert. filed, (U.S. Mar. 29, 2016) (No. 15-212).

\textsuperscript{180} Fuller v. Langsenkamp, 136 S.Ct. 1726 (2016).

\textsuperscript{181} See, e.g., Laura Parker, Jury Awards $11.3M over Defamatory Internet Posts, USA TODAY (Oct. 11, 2006, 10:53 AM), http://usatoday30.usatoday.com/news/nation/2006-10-10-internet-defamation-
determine whether injunctions against defamation violate the First Amendment’s prohibition on prior restraints.

As this Comment highlights, the Supreme Court has repeatedly struck down injunctions against harmful speech.\textsuperscript{182} Prior restraints are the least tolerable infringements on First Amendment rights. Thus, this modern trend does not appear to comport with precedent. Moreover, as Chemerinsky and Lidsky make clear from a practical point of view, injunctions against defamation—no matter how narrow or broad—just do not work. The context-dependence of defamation renders injunctive relief against it both ineffective and blatantly unconstitutional. Lastly, public policy (and tradition) dictates that money damages are adequate to remedy a defamed plaintiff. Judge Posner’s concern about the infamous undeterrable, insolvent defendant cannot justify the entrance of a remedy that infringes First Amendment rights. The American judicial system has long used money damages to compensate incompensable harms including wrongful death and violations of citizens’ constitutional rights. And, most importantly, injunctions against defamation have the effect of chilling free speech. There is a profound national interest in the uninhibited debate of issues. The imperfection of our legal system requires us to protect defamation, not because it is inherently worth protecting, but so we can ensure that legitimate and lawful speech is not mistakenly penalized.\textsuperscript{183} Thus, the modern trend to issue permanent injunctions against defamation must be stopped.


INTRODUCTION

In response to the Netflix original documentary Making a Murderer, a petition on We the People, a section of the whitehouse.gov website dedicated to petitioning the current presidential administration’s policy experts, collected nearly 130,000 petition signatures in an attempt to obtain a pardon for Brendan Dassey and Steven Avery.1 Such a movement, which is not advocated for by the

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1 We the People, https://petitions.whitehouse.gov/response/response-your-petition-teresa-halbach-murder-case (last visited April 24, 2016); Making a Murder is a TV mini-series appearing on Netflix which documents arrest, prosecution and conviction of Stephen Avery and Brendan Dassey, who are both charged for the murder of Teresa Halbach. The show suggests that the Manitowoc County sheriff’s department had a conflict of interest when participating in the murder proceedings. Making a Murderer, IMDB, http://imdb.com (search in search bar for “Making a Murderer”) (last visited April 24, 2016).
show, illustrates the power of mass media and its ability to influence the public. Programs like Making a Murder, Serial\(^2\) and others reflect the public obsession with law enforcement and judicial proceedings.\(^3\) While disclosure of information pertaining to law enforcement and judicial proceedings is generally in society’s best interest, projects like these can also threaten the integrity of these proceedings. The potential for prosecutors and law enforcement officials to over-exaggerate or overstate the details of a case poses a real threat to the integrity of these public institutions. Accordingly, courts and other authority figures should allow media into law enforcement and judicial proceedings cautiously.

This Article uses the Seventh Circuit’s decision in Hart v. Mannina as its vehicle to explore the role of media in the justice system, and determine what, if any, boundaries should be placed on the media’s involvement in the judicial system. Part I will explain the evolution of the public’s attitude toward the criminal justice system. Part II will discuss the impact of mass media on law enforcement and judicial proceedings. Part III will focus on Hart v. Mannina, highlighting the troublesome conduct that occurred in that case and discussing the Seventh Circuit’s resolution of the claims presented. Part IV will suggest limitations and guidelines that courts and law enforcement department should consider placing on the media’s presence in these settings.

DEPICTION OF THE LAW IN POPULAR CULTURE

The attitude toward law enforcement and lawyers in American culture has varied over time. In colonial times, authoritarian figures, like the police, were seen as instruments of the crown and as the embodiment of oppression and injustice.\(^4\) In fact, at one time the

\(^2\) Serial, WBEZ Chicago (Oct. 3, 2014) (downloaded using iTunes).

\(^3\) See e.g. THE STAIRCASE (Maha Productions broadcast October 2004).

colonies of Pennsylvania and Massachusetts banned lawyers.\textsuperscript{5} Colonial Americans maintained a strong anti-authoritarian impulse, which reverberated throughout popular culture.\textsuperscript{6} Initial depictions of police and lawyers were contained in “pulp novels” and detective magazines, and these depictions were not flattering.\textsuperscript{7} Early stories depicted detectives, cowboys and private eyes as protagonists.\textsuperscript{8} These stories romanticized figures that acted outside the formal justice system, and idealized a notion of vigilante justice.\textsuperscript{9}

As time progressed, societal attitude toward law enforcement and lawyers gradually improved. Once radio became the popular form of media, police and lawyers began being depicted in a positive light.\textsuperscript{10} While programs based on private-eye detectives continued to display a distain for the police, a new batch of police-friendly, crime-fighting heroes became popular with the general public. This change reflected society’s improving attitude towards public institutions.\textsuperscript{11} During the advent of television as the predominant form of entertainment, the public perception of law enforcement changed again. Although numerous television programs have utilized the police drama format, this paper focuses exclusively on two television programs that were instrumental in shaping the public perception of police and lawyers: Dragnet and Perry Mason.

\textsuperscript{5} Id.; DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 230 (Little, Brown and Co. 1963) (One common complaint was that lawyers tended to monopolize positions in all branches of the government, especially the judiciary).

\textsuperscript{6} Stark, supra at note 3, at 236.

\textsuperscript{7} Id.

\textsuperscript{8} Id. at 237.

\textsuperscript{9} Id.

\textsuperscript{10} See, e.g., Mr. District Attorney (ZIV Television Programs broadcast 1954); The Crime Club (CBS radio broadcast 1946-1947).

\textsuperscript{11} Stark, supra at note 3, at 242 (“[I]n the 1920’s many police agencies had lost the public’s confidence due to the scandals involving inefficiency, bribery, and collusion with criminals. . . . [B]eginning in the 1930’s, by means of the most popular entertainment medium, the mass of American citizens began hearing of the heroic undertakings of private and public investigative agencies.”)
A. Prime Time Television

From the outset, crime dramas were a perfect match for television. Crime shows come prepackaged with dramatic tension because they nearly always involve serious crimes and serious consequences. That prepackaged tension is extremely important given that most television shows last only thirty or sixty minutes, which significantly hampers the opportunity to develop genuine dramatic complexity. Aside from the natural drama associated with crime, crime shows and westerns offered prime time television guaranteed methods of success with low costs. As television relied more and more on the weekly series as its dominant form of entertainment, television needed proven formulas to attract audiences. Crime shows and westerns were able to supply their audiences with “an abundance of action without requiring much in the way of expensive special effects.”12 Because of that, they were the perfect option for television executives looking to maximize viewership and minimize costs.

Yet even these early crime shows depicted legal professionals and law enforcement in a manner similar to their earlier depictions in radio and print.13 Early portrayals of lawyers and police reinforced the anti-establishment mentality contained in early radio programs and detective magazines.14 The private detectives and amateur sleuths in these television programs, portrayed as protagonists, displayed the same sense of contempt for police officials as in early radio programming. Programs like *Gunsmoke*, which was actually adapted from radio for television, used the same western-style mentality to tell stories about characters who acted outside the letter of the law on occasion.15 In fact, *Gunsmoke*’s main character was designed to be a “Philip Marlowe of the West,” a tribute to the infamous noir character created by Raymond Chandler.16 However, these anti-establishment

12 Id.
13 Id.
14 Id.
15 Id.
16 Id. at 243.
programs, as with many popular trends, began to turn stale. The changing public palate presented an opening for programs that depicted the law and law enforcement in a more positive light. None of these law or police-friendly programs ever experience more than moderate success in the 1940s-50s. Then, with the popularity of Dragnet, the attitude toward law enforcement and lawyers in television shifted drastically.

B. Dragnet

Dragnet changed the perception of law enforcement in popular culture. Joe Friday played the hero, a police officer with a gritty mentality. With few outside relationships, Friday dedicated his life to his job. One of the most important changes about the hero’s depiction in Dragnet was that, unlike the traditional private eye, Friday worked as one cog within a larger police unit.

The show’s success was massive. Friday even appeared on the cover of Time magazine in 1954. The program’s popularity helped to shift the public image of law enforcement. Police-friendly programing became more popular at this time. The rise of police-friendly programming likely resulted from a combination of changing social values, the alignment between these programs’ conservative-friendly message with conservative executive producer’s own ideologies, and the positive effect these programs had on audiences by encouraging positivity rather than propagating distrust of public institutions amongst their viewers. The changing characterization of law enforcement, along with major reforms of police institutions, helped to improve the public image of law enforcement. In much the same way that Dragnet changed the attitude toward law enforcement,

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17 Id.
18 Id. at 244.
19 Jack, Be Nimble!, TIME, Mar. 15, 1954, at 47.
20 See Stark, supra at note 3, at 245.
21 See Id. at 246.
22 See Id. at 247.
the television show *Perry Mason* would elevate the public image of lawyers.

**C. Perry Mason**

*Perry Mason* followed the adventures of a master defense attorney as he solved difficult criminal cases for his accused clients. The series ran from 1957 to 1966, and wound up being an important show that shaped the media’s portrayal of lawyers. The *Perry Mason* program signaled a change from the police as a show’s central hero to a lawyer being depicted as the protagonist.

*Perry Mason* ushered in a new era in entertainment based on the criminal defense lawyer. The show helped to revitalize the public image of lawyers. Shows like *Perry Mason* paved the way for other lawyer-centric shows like *Mr. District Attorney* and *The Defenders*. Not only did these defense lawyers operate with the bounds of the law, but they also displayed other altruistic characteristics. They often acted as father-figures, solving not only their clients’ cases, but also helping their clients with the “existential travails of modern living, including unhappy marriages, ungrateful children, or terrible jobs.” In some respects, these new heroes became “society’s counselor,” presenting a positive view of the legal profession to which audiences could attach themselves. Some scholars even speculate that *Perry Mason* may have impacted the surge in law school enrollment that occurred during the 1960s and 70s. However, because television is often reflective of

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25 *Mr. District Attorney* (ZIV Television Programs broadcast 1954).
27 Stark, *supra* at note 3, at 255.
28 *Id.*
societal trends, this lawyer-hero would also fade from popularity by the late 1960s.

Today, the field of police and legal dramas varies widely, with some heroes displaying a traditional respect for the law, some playing the role of private-eye with a comedic disrespect for the law,30 some displaying a cynical view toward authority,31 and others acting wholly outside the law in a vigilante capacity.32 Aside from fictional legal/police programming, modern perceptions of law enforcement and judicial proceedings are often molded by the media’s coverage of real cases involving some area of great public interest. Divisive issues such as race, abortion, gay marriage and consumer fraud are a few among many areas where public interest can be extremely high.33 For instance, cases or instances involving minorities and altercations with the police have been of great interest to the public.34 These highly controversial and politicized issues are prime targets for television executives to broadcast.

HOW CAN TELEVISION BE HARMFUL?

The influence of television is so pervasive that its depictions of certain subject matters can actually affect how people act. For example, within six weeks of the home video release of the movie Gone in Sixty Seconds auto thefts spiked twenty-three percent in

30 E.g. Psych (USA Network broadcast July 7, 2006).
31 E.g. The Wire (HBO broadcast June 2, 2002).
Philadelphia. One gang, comprised of about twenty youths, responsible for a host of stolen vehicles, even went so far as to label themselves the “Gone in 60 Seconds Gang.”

In all fairness, televising courtroom proceedings has beneficial qualities. The public has an interest in understanding how judicial and law enforcement proceedings operate. Few people ever attend court, and so they must obtain their understanding of its operation from elsewhere. Television fills that education gap. By exposing larger groups of individuals to courtroom and law enforcement proceedings, the public obtains a better understanding and ability to monitor these institutions. In addition, newspaper and broadcast reporter’s accounts of what occurs in these proceedings are far more accurate when a camera is present. One New York study even suggested that cameras ensure greater partiality by judges towards parties. Because televising these events can be beneficial, the courts and other authorities permitting audio-video coverage must be sensitive to both the benefits and potential harms. These authorities must balance the public interest in monitoring and understanding the justice system with the defendant’s right to a fair and uninterrupted trial.

A. Harm to Judges, Lawyers and Police

Apart from an impact on impressionable youths, the media can also influence how professionals perform their jobs. In Estes v. Texas, the Supreme Court commented on the effect the presence of television

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36 Id.
37 See Hollingsworth, 558 U.S. at 207 (Breyer, J., dissenting) (“The competing equities consist of not only respondents’ interest in obtaining the courthouse-to-courthouse transmission they desire, but also the public’s interest in observing trial proceedings to learn about this case and about how courts work”).
38 Katzman, 923 F. Supp. at 586.
39 Id.
40 Id.
has on judges.\footnote{Estes v. Texas, 381 U.S. 532, 548 (1965).} A judge’s job is to make sure the defendant receives a fair trial.\footnote{Id.} However, when cameras become involved the judge is required to make more difficult judgment calls about whether the media is impeding on the ability to ensure a fair trial. In \textit{Estes}, the trial judge had to, on several occasions, enter an order or have a hearing “made necessary \textit{solely} because of the presence of television.”\footnote{Id. (emphasis added).} In addition to physical disruptions, television can become a political weapon as well. Television displays judges to the public, and can reveal their personally held beliefs or how they operate their courtroom. Generally, this is beneficial because it keeps the judges accountable for their actions. But problems can arise when television editing mischaracterizes what a judge says or does. This is particularly worrisome where judges are elected and thus dependent upon their public image in order to continue being elected.\footnote{Id.} These factors combine to divert the attention of the judge from his primary objective: a fair trial of the accused.

But, judges are not the sole victims of television’s effect. Television can also become harmful when it affects the behavior of the individuals trusted with enforcing and upholding the law. One study found that half the methods employed by police officers—lineups, fingerprinting, etc.—were used because the public expected them from television, despite their lack of utility in the case.\footnote{Stark, \textit{supra} at note 3, at 267.} A lawyer may seek to introduce similar types of forensic evidence on the belief that jurors will be more convinced of the defendant’s guilt or innocence, despite the evidence being wholly irrelevant. A lawyer may also make other decisions or tactical choices which are influenced by the media’s presence that results in less effective counsel for their client.\footnote{Estes, 381 U.S. at 549 (“[T]elecasting may also deprive an accused of effective counsel”).} A less innocuous effect, some have suggested that television programs
promoting a “do-whatever-it-takes-mentality” have resulted in more violent encounters with police.47 Many of the law enforcement officers in television programs display a willingness to disregard wrongdoer’s constitutional rights in pursuit of “justice.”48 This pressure placed on police may be similar to what others have deemed the “YouTube Effect,” which describes the effect cellphones have on police interactions.49 This theory suggests that civilians who record police interactions with their cellphones make police feel as if they are under attack.50 In turn, some officers may hesitate in performing their job out of fear that their actions will end up on social media as a calling card for social reform.

B. Harm to Witnesses and Jurors

Perhaps the more harmful effect wrought by mass media on the law enforcement and legal systems is its potential impact on witnesses and jurors. Popular culture is one of the few avenues the general public has to educate themselves about the judicial process.51 Because it acts as an important supplier of information, the media has the ability to shape public perception with regard to the integrity of and how public institutions operate. Public perception is significant in a society, such as ours, where the laws and practices evolve around public perception. Much in the same way other government institutions do, judicial and law enforcement institutions develop their policies and rules based on, or in reaction to, public perception. This correlation becomes a problem when television’s depictions of the

47 See Stark, supra at note 3, at 264-269.
48 Id. at 264-65.
50 Id.
justice system create public expectations of law enforcement, prosecutors and courts that are unrealistic.\textsuperscript{52} Jurors are becoming conditioned by television’s depiction of law and police work to expect forensic evidence or witty cross examinations in nearly every case.\textsuperscript{53} For example, in Dallas, Texas an attorney had produced two eyewitnesses to a robbery, however, a hung jury found the defendant innocent.\textsuperscript{54} Afterwards, the attorney spoke with a juror who said that they weren’t convinced of the defendant’s guilt because on every robbery case they “had ever seen on TV, the thief had left fingerprints.”\textsuperscript{55} This kind of phenomenon has come to be known as the “CSI Effect.”\textsuperscript{56} The CSI effect is a term used to describe when jurors hold unrealistic expectations about the use and availability of forensic evidence and investigative techniques, and become interested in the discipline of forensic evidence.\textsuperscript{57}

On the other hand, there is some dispute as to the actual effect on jurors and witnesses. Lower courts have suggested that cameras in the courtroom do not impede the fair administration of justice.\textsuperscript{58} Because cameras placed inside the courtroom tend to be small and silent, and therefore unobtrusive to the judicial process, these courts have been reluctant to limit the televising of courtroom proceedings. In fact, one court has gone so far as to find a First Amendment right of the press to televise court proceedings\textsuperscript{59}, in spite of the Supreme Court holding in

\begin{itemize}
\item[\textsuperscript{52}] Id. at 813.
\item[\textsuperscript{53}] Id.
\item[\textsuperscript{54}] The Case of the Unhappy DA, TV GUIDE, Apr. 26, 1958, at 6-7.
\item[\textsuperscript{55}] Id.
\item[\textsuperscript{59}] Id. at 589 (“Twelve years after the Westmoreland decision and twenty-two years after the Estes holding, the advances in technology and the above-described experiments have demonstrated that the stated objections can readily be addressed
\end{itemize}
1965 that no such right exists. But there is a difference between an unobtrusive camera which disrupts no part of a proceeding and a potential psychological effect that cameras can have on witnesses and jurors. The Judicial Conference of the United States, a conference of supreme, appellate and district court judges dedicated to framing policy guidelines for the administration of justice in federal courts, stated in a 1994 report that cameras can have an intimidating effect on some witnesses and jurors. By intimidating witnesses or jurors, the quality of deliberation and testimony is lessened which can have serious consequences in a criminal trial.

Aside from actual or psychological effects, phenomenon such as the CSI effect can be viewed as now requiring authority figures to utilize every possible tool in the administration of justice, which is potentially beneficial. The problem with that position is that it is not always as easy as television makes it appear. Forensic evidence such as fingerprints, DNA and gunshot residue are often unavailable in a criminal trial. It is rare indeed that a “smoking gun” will exist that will make the prosecutor’s case impervious to attack. And even if such evidence is available, jurors may not understand when it would be appropriate to present such evidence to the jury. But because they are expecting that evidence to be presented, they may believe that its omission is a sign of innocence, or guilt in some circumstances, when the truth is that the evidence sheds no light on the guilt or innocence of a defendant. Shows that create these unrealistic expectations undermines the administration of justice based on a misunderstanding of how the criminal justice system works.

and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings (\textsuperscript{60}).

\textsuperscript{60} Estes v. Texas, 381 U.S. 532, 539 (1965).

\textsuperscript{61} REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 47 (Sept. 20 1994).

\textsuperscript{62} Tyler, \textit{supra} note 56, at 1053.

\textsuperscript{63} \textit{Id}.

\textsuperscript{64} The “\textit{CSI effect}”, \textsc{The Economist}, April 22, 2010, http://www.economist.com/node/15949089.
Additionally, cases involving famous individuals or divisive issues can be affected in a slightly different way when those proceedings are televised. Studies show that pretrial publicity shapes verdicts from jurors. These studies show that participants are significantly more likely to find a guilty verdict when exposed to negative pretrial publicity rather than positive pretrial publicity. The results indicate that prior exposure to media coverage alters the types of evidence that jurors find persuasive in evaluating a defendant’s guilt or innocence. While few cases may obtain such national attention, those few cases can be affected which can be problematic because those cases often involve important and highly controversial issues. The integrity of the justice system is paramount if the defendant’s rights are to be protected in such highly politicized cases garnering pretrial publicity.

Witness testimony is also compromised by the presence of television. The range of reactions by a witness to being televised spreads from cocky and overconfident to frightened and petrified. The Supreme Court acknowledged this possibility in Estes, stating, “The quality of the testimony in criminal trials will often be impaired.” When this kind of pressure is placed on a witness, the court opens the door for the trial process, and discovery of the truth, being impeded on or frozen when a witness is reluctant to take the stand for fear of publicity. Even expert witnesses can experience this chilling effect.

66 Id.
67 Id.
70 Id.
71 Id. at 547.
There is a fundamental difference between bearing testimony in open court and having that testimony broadcast throughout the country. Witnesses may be less willing to have their testimony, or their thoughts and views, broadcast on television. They may feel that their testimony or viewpoints will subject them to threats or ridicule from others. The Supreme Court recognized as much in \textit{Hollingsworth v. Perry}. Interestingly, that decision was accompanied by a dissenting opinion authored by Justice Breyer and signed onto by three other justices. With the recent Supreme Court vacancy, the attitude toward cameras in the courtroom may change depending on who fills that vacancy. However, acceptance of potentially harmful effects on witnesses and jurors is not universal. Some academics doubt the actual effect on jurors or programs like CSI. They argue that no actual prejudice is present in case proceedings due to an effect like CSI, and instead offer explanations like sympathy for the defendant or a lack of confidence in legal authorities to explain odd criminal verdicts. Yet even if empirical evidence does not support the existence of phenomena like the CSI effect, courts must protect against even hypothetical risks to ensure faith in the justice system. Our system of justice endeavors to prevent “even the probability of unfairness.” “Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” It is the

\begin{footnotesize}
\begin{enumerate}
\item Hollingsworth v. Perry, 558 U.S. 183, 195 (2010).
\item \textit{Id}.
\item \textit{Id} at 199.
\item Tyler, supra note 56, at 1054.
\item Tyler, \textit{supra} note 56, at 1077-1083.
\end{enumerate}
\end{footnotesize}
appearance of justice which the courts must uphold to ensure the integrity of the judicial system. 79

C. Harm to the Defendant

Besides judges, attorneys, law enforcement, witnesses and jurors, there is another individual likely to feel the pressure accompanied by the presence of television: the defendant. 80 A courtroom swarming with press and cameras will inevitably create a sense of prejudice against the accused. 81 “The inevitable close-ups of [the defendant’s] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.” 82 By focusing a camera on a particular witness, the court risks animating the behavior of that witness, disrupting the fact-finding process, and ultimately harming the defendant’s right to a fair trial. Even a courtroom, devoid of media coverage, packed with spectators will affect the defendant as well as the trial process. By adding cameras into the mix, the court risks creating a spectacle out of a judicial or law enforcement proceeding. “A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena.” 83 By involving the media in the justice process, we risk opening a Pandora’s box inside the justice system.

Again, there is merit to allowing the media to film law enforcement and legal proceedings. The more the public is aware of how these institutions operate, the more accountable the institutions will be and the better informed the public is. 84 Nevertheless, there are

79 See Offutt, 348 U.S. at 14.
81 Id.
82 Id.
83 Id.
84 Id. at 539-40.
some practical limits associated with television that limit its potential benefit. In order to make sure these programs receive airtime, they have to appeal to sponsors. This is likely why only notorious cases are the subject of television programs. The run-of-the-mill case is not likely to generate the kinds of viewership ratings that will induce a sponsor to spend the funds necessary to produce a television program. This practical limitation creates a built-in screening mechanism in television programs that gives viewers only a partial understanding of how courts and law enforcement operate. These shows are only going to follow events that can appeal to larger numbers of viewers. The types of cases television programs are attracted to are those with novel features. Yet, those kinds of cases are not indicative of how the justice system operates. “By focusing on the sensational or aberrational, the media implant within the public psyche a potential for undue cynicism and the basis for rejecting judicial authority.” Television teaches its viewers that every case is solved because of some kind of forensic evidence or a crafty attorney during cross examination. Unfortunately, that is not how the system works practically since most cases are settled well before the trial stage.

**EXPLORING THE HARM OF MEDIA IN HART v. MANNINA**

In *Hart v. Mannina*, the Seventh Circuit held that Carlton Hart’s § 1983 lawsuit alleging Fourth and Sixth Amendment violations failed because a reasonable jury could not find that the police lacked probable cause to arrest him when he was identified by four separate

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85 Id. at 549-50.
89 Bond, supra note 86, at 14.
90 Id.
witnesses and no evidence showed these witnesses were coached. The Seventh Circuit considered three claims in the case: a Fourth Amendment claim for making false or misleading statements in support of a probable cause affidavit, a Fourth Amendment claim for false arrest and false imprisonment, and a Sixth Amendment claim for denial of the right to a speedy trial. Only the first two claims involve the media. Understanding these claims requires a description of how events unfolded and what the media’s involvement in the investigation entailed.

A. The Investigation

On November 3, 2008 a deadly home invasion occurred which resulted in the death of one individual: Richard Miller. Duane Miller, Ricky Bluett, Tamela Daniels and Kourtney Glassock were also victims of the attack. The principal detective involved in the case was Detective Christine Mannina of the Indianapolis Metropolitan Police Department (IMPD). The four surviving witnesses told Mannina and other detectives that the invasion was conducted by black men wearing hooded sweatshirts, however, none of the witnesses were able to identify the perpetrators. After little initial success, the investigators were able to identify a suspect after one of the witness’s contacted Detective Mannina claiming to have recognized Carlton Hart as one of the culprits from his MySpace.com webpage. Detective Mannina then singlehandedly conducted private interviews with all the remaining witnesses on November 22, 2008. After each witness identified Hart, Mannina drafted a probable cause

91 Hart v. Mannina, 798 F.3d 578, 583 (7th Cir. 2015).
92 Id. at 584.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
affidavit in which she swore that all the witnesses identified Hart. After consulting with prosecutor Denise Robinson, Mannina arrested Hart on December 3, 2008.

Nearly a year after Hart’s arrest, Bluiett reached out to the prosecutor’s office and expressed concerns about his identification of Hart. Two additional detectives, Jeff Breedlove and Kevin Kelly, re-interviewed Bluiett on December 11, 2009. Bluiett told the detectives that, “I was reluctant. I kind of signed, but I signed because I guess that’s what I was supposed to do, you know?” In response to questions about whether Blueiett had ever expressed these reservations to Mannina, Blueiett told the detectives that he had talked to Mannina about his uncertainty, but this event occurred after Hart was arrested. Bluiett described this encounter with Mannina, telling the detectives: “[W]e talked about something and I told her I wasn’t completely sure that these were the people” and that Detective Mannina “was just trying to convince me.” The conversation between Bluiett and Mannina lasted about two and half hours, during which time Mannina tried to reassure Bluiett telling him, “These are the guys . . . if they don’t go to jail, they’re just gonna have a chip on their shoulder and be out here and think they’re invincible.” After spending nearly two years in jail pending trial, Hart was released after the State moved to dismiss the case due to “an ‘insufficient nexus’ between Hart and the crime.”

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98 Id. at 585.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id. at 586.
106 Id.
107 Id.
Detective Mannina also conducted an interview, along with Officer Lesia Moore, of Adrian Rockett in March 2009. Officer Lesia Moore, of Adrian Rockett in March 2009. Detective Breedlove, originally schedule to participate in person but having been called away by something else, also participated in the interview via a direct feed to his computer. After the interview, Breedlove expressed some objections to the way Mannina conducted the interview. Breedlove stated “that it looked as if Mannina had encouraged Rockett to sign the photo array after [Rockett] initially hesitated.” While Breedlove did not think Mannina had communicated with Rockett whom to pick out of the photo array, he believed that Mannina “crossed a line.”

In support of his Fourth Amendment claims, Hart attempted to show that probable cause did not exist for his arrest by establishing three theories on which to rely: (1) Detective Mannina failed to record the beginning of each interview conducted on November 22, 2008; (2) the IMPD destroyed evidence in violation of a duty to preserve it; and (3) a reasonable trier of fact could have inferred that Mannina coached the witnesses into providing false identifications.

B. The “Shift”

Lucky Shift, Inc. (“Lucky Shift”) created a six-episode reality police drama about homicide detectives that worked between 2:00 and 10:30pm (known as IMPD’s middle-shift). The season finale of the program, titled “The Shift”, focused on the home invasion and

\[108\] Id. at 590.
\[109\] Id.
\[110\] Id.
\[111\] Id.
\[112\] Id.
\[113\] Id.
\[114\] Id. at 587-90.
\[115\] Id. at 586.
culminated in Hart’s arrest. For their participation in the show, Detective Mannina was paid $14,500, Detective Breedlove was paid $2,750, Detective Kelly was paid $3,000, and officer Moore was paid $2,500. The City received a $1,000 contribution for access to detectives and its facilities, window tinting for the homicide detectives’ squad cars paid for by the television company, and new badges for the detectives also paid for by the television company.

C. The November 22, 2008 Interviews

Detective Mannina’s interview with the surviving witnesses, minus Miller, were recorded and included in the television episode titled “Brother’s Keeper.” Before recording the interview, Mannina showed each witness the photo array of suspects and asked if they could identify anyone. Only after each witness confirmed that they recognized one of the suspects did Mannina turn on the tape recorder. While the Seventh Circuit acknowledged that this procedure was flawed, they held that it did not meet Hart’s burden of showing evidence of coercion or manipulation.

Unlike Detective Mannina, Lucky Shift videotaped the entirety of the interviews. However, they destroyed these videos in compliance with company policy nearly one month after the episode aired. The court held that IMPD did not have a duty to preserve this evidence because the record established that the raw video footage would not

116 Id.
117 Id.
118 Id. at 586-87.
119 Id. at 586.
120 Id. at 588.
121 Id.
122 Id.
123 Id. at 589.
124 Id. (Lucky Shift’s president testified that the company typically sent raw footage to an independent shredding company approximately 30 days after the episode aired).
have provided exculpatory evidence.\textsuperscript{125} Similarly, the court found that Lucky Shift did not destroy the evidence in bad faith, despite the fact that the footages was destroyed three days after Hart’s co-defendant’s attorney filed a discovery motion seeking “all contracts and/or agreements between the [IMPD] and/or the City of Indianapolis and Investigation Discovery/Discovery Channel/Discovery Communications, Inc. relating to . . . the television program ‘The Shift.’”\textsuperscript{126} The court found that because there was no evidence that Lucky Shift knew about the request, their destruction of the footage was not done illegally.\textsuperscript{127}

\textbf{D. The Probable Cause Affidavit}

Hart also alleged that Mannina made false or misleading statements with regard to her probable cause affidavit.\textsuperscript{128} Warrant requests violate the Fourth Amendment “if the requesting officer knowingly, intentionally or with reckless disregard for the truth, [make] false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue.”\textsuperscript{129} An officer recklessly disregards the truth when it is shown that “the officer entertained serious doubts as to the truth of statements, had obvious reasons to doubt [the statements’] accuracy, or failed to disclose facts that he or she knew would negate probable cause.”\textsuperscript{130} In her probable cause affidavit, Mannina omitted that Bluiett told her that he was only “pretty sure” that Hart was involved in the home invasion.\textsuperscript{131} The Seventh Circuit held that this omission was not material, despite the fact that the court “believe[d] she should

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 590.
\textsuperscript{129} Knox v. Smith, 342 F.3d 651, 658 (7th Cir. 2003).
\textsuperscript{130} Betker v. Gomez 692 F.3d 854, 860 (7th Cir. 2012).
\textsuperscript{131} Hart, 798 F.3d at 593.
have included this qualification.” Seemingly the court included its belief for the sake of posterity, suggesting that in similar circumstances in the future detectives should include such information in their probable cause affidavits. Ultimately however, all of Hart’s claims were dismissed on summary judgment by the district court, and affirmed by the Seventh Circuit. While the outcome in the case may have ultimately been correct, the troubling conduct that occurred during the course of the investigation demonstrates how the media’s presence in law enforcement and judicial proceedings can potentially have a negative effect.

_Hart v. Mannina_ is a perfect illustration of the media’s effect on law enforcement. Detective Mannina tried to convince Bluiett that he had identified the correct perpetrator. Mannina also engaged in interview techniques that at least one of his colleagues found disconcerting. One explanation for Mannina’s overly aggressive tactics could be that Mannina was acting in this manner in order to secure an arrest and conviction because she knew her case would be the seminal piece for the show’s series finale. Mannina’s conduct arguably reflected the “do-whatever-it-takes” mentality promoted by crime dramas. The Seventh Circuit itself acknowledged that such a circumstance could arise when it said, “It is easy to imagine a detective with a looming television deadline cutting a corner to ensure that a suspect is arrested in time for the final episode.” When the “whatever-it-takes” mentality migrates from television programs into real police work, the system is threatened by police officers willing to violate due process and other constitutional rights in order to achieve the result they seek.

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132 _Id._
133 _Id._ at 585.
134 _Id._ at 590.
135 _Id._ at 583.
The primary purpose of establishing trial procedures is to ensure fairness in the justice system. Criminal trials are mechanisms for determining guilt. In order to facilitate that purpose, the rules of criminal procedure, which dictate how courtroom proceedings unfold, must be designed to provide for the fair and reliable determination of guilt. When the colonists began establishing laws to govern their new nation, they sought to put in place safeguards protecting the right to a fair trial. The enactment of the Sixth Amendment was one such attempt to protect this fundamental right. The Sixth Amendment guarantees a defendant the right to a “public trial.” This guarantee was established because of the fear of secret tribunals. In both federal and state criminal trials, courts are required to “comport with the fundamental conception of a fair trial.”

There is no constitutional right mandating the entry of electronic media into judicial proceedings. Rather, the media’s “right” to access courtroom proceedings and law enforcement efforts acts more like a privilege. Attempts have been made to read such a right from the First Amendment, Sixth Amendment, or some combination of the two; however the Supreme Court has been unequivocal that such a right does not exist. That is not to say that the media may not have a valid

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137 Id.
138 See Stark, supra at note 3, at 236.
139 Estes, 381 U.S. at 559.
140 U.S. CONST. amend. VI.
141 Estes, 381 U.S. at 538 (“History [has] proven that secret tribunals were effective instruments of oppression”).
142 Id. at 560 (quotations omitted).
144 Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (“[T]here is no constitutional right to have [live witness] testimony recorded or broadcast…[n]or does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public”).
reason to access courtroom proceedings. In fact, the Supreme Court opposes a per se rule prohibiting the presence of the media inside the courtroom. The presence of the media in the courtroom provides several beneficial functions. The media is often the best source for awakening the public interest in governmental affairs. By stimulating public interest in the government, the press helps keep the system and officials accountable by exposing corruption and informing the citizenry of important public events. Thus, a certain degree of freedom must be allotted to the media if they are to effectively carry out this important function. By allowing access to criminal proceedings, both prior to and during trial, the media adds another level of accountability to the system. Media accountability affects strengthens the integrity of the justice system. However, as discussed above, there are other countervailing factors that make this strengthening of public confidence less effective than it probably could be.

Because of the significant effect of courts on citizen’s day-to-day lives, and the ability of mass media to reach mass groups of people, access to courtrooms and police proceedings should not be completely cut-off from the media. Instead, courts should focus on establishing clear-cut rules, designed to keep up with the evolution of the media, which will encourage public confidence in the justice process as well as protect defendants’ constitutional guarantees to fair and expedient trials. The next sections lay out guidelines courts should consider when addressing the presence of medial in the courtroom or in law enforcement proceedings. The following suggestions are meant to help courts navigate the potential problems that might arise when the media wants to access judicial or law enforcement proceedings. They are not intended to be rules and remove the discretion of judges and other individuals charged with making these decisions. Ultimately, courts should make decisions about whether to allow the media to access certain events on a case-by-case basis. The guidelines specifically address the following: objections by the accused, protection of certain witnesses, and media coverage taken out of context.

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A. Objections by the Accused

Many states experiment with allowing the media to televise their public institutions.\textsuperscript{146} While states have taken great liberties to ensure that the media will not disrupt the trial process, some defendants are sure to object to the media’s presence. For example, in \textit{Chandler v. Florida}, the defendant made repeated attempts to ban or limit the media’s access to the courtroom proceedings.\textsuperscript{147} Despite the defendant’s efforts, the media was eventually allowed to cover the trial.\textsuperscript{148} The only protection put in place for the defendant was a court instruction to the jury that they should not “watch or read anything about the case in the media.”\textsuperscript{149} It is hard to imagine this instruction provided the defendant with any great relief. In upholding the state conviction, the Court held that the defendant did not show any evidence which would have suggested an adverse impact on the trial process.\textsuperscript{150} Similarly, in \textit{Hart v. Mannina}, the Seventh Circuit upheld the district court’s decision because Hart could not provide sufficient evidence that Detective Mannina pressured an eyewitness into making a false identification or that Lucky Shift destroyed the video footage in bad faith.\textsuperscript{151}

Requiring the defendant to prove that the media’s presence will be disruptive to the trial is a backward proposition considering it is the prosecution burdened with proving most other elements in a criminal trial. It is not that startling that the defendant was required to prove that the media’s presence would be disruptive in \textit{Chandler} because in that case the defendant lost at the trial level, and therefore the defendant had the burden at the appellate level. What is alarming about \textit{Chandler}, is that the Court said the the appropriate safeguard against juror prejudice “is the defendant’s right to demonstrate that the

\textsuperscript{146} Id. at 576.
\textsuperscript{147} Id. at 567.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 581.
\textsuperscript{151} Hart v. Mannina, 798 F.3d 578, 589-90 (7th Cir. 2015).
media’s coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly.”

The burden should be on the opposite party. The media enjoys no special right to televise courtrooms. Estes unequivocally stated that the First Amendment does not extend so far as to provide the press with a right to televise courtroom proceedings. Therefore, if a defendant objects at the trial level or during law enforcement proceedings to the media’s presence, the burden should be on the prosecution, or perhaps the media itself, to show that the media’s presence will not disturb the process or disrupt the defendant’s ability to receive a fair trial. Such a rule has two beneficial side effects. First, it protects the defendant by removing the burden of showing that the media will be an unwanted nuisance to the trial court or law enforcement proceedings. Burdening the defendant to show why the media shouldn’t be allowed in the proceeding distracts the defendant from their primary focus: establishing a solid defense to their accused crime. Our system favors the defendant (e.g. rule of lenity) and so it makes sense that the rules should favor them in this area as well. The other beneficial effect of such a rule is that it requires the media, prosecution or whomever wants access, to take the necessary steps to ensure that media presence will not be disruptive. This will help to develop the necessary policies and technology to ensure that media coverage will not cause the kind of disruptive behavior that implicates due process concerns.

That is not to say the media should have to prove their presence will not be disruptive beyond a reasonable doubt. A more practical solution is to simply require that the media show by a preponderance of the evidence that their presence will not have a negative effect. After all, the court or police department should take into account the positive aspects of media coverage, and balance those benefits with the potential for disruption. Proof by a preponderance of
the evidence would appropriately balance the benefits of media’s presence with its potentially disruptive effects.

B. Protection for Certain Witnesses

Another area that courts and law enforcement should be concerned about is protection for certain types of witnesses, for example children, victims of sex crimes, some informants, and extremely timid witnesses. Given the effect media tends to have on witnesses and their importance to the fact-finding process, it is imperative that they receive protection when the media’s presence threatens to undermine the fact-finding process. An overly aggressive law enforcement officer or prosecutor may be able to intimidate and sway the opinion of a particularly vulnerable witness. A perfect example of this is on display in Mannina. Detective Mannina conducted an interview of Adrian Rockett where it was noted by another office that “Rocket seemed a little wishy-washy in his identification and that it looked as if Mannina had encouraged Rockett to sign the photo array after he initially hesitated.”\textsuperscript{154} An extreme reaction to this kind of conduct would be to require the police to question witnesses only in the presence of an attorney. In fact, Regent University law professor James Duane advises his law students to never talk to the police without the presence of an attorney, even in circumstances where the media is not a factor.\textsuperscript{155} Undoubtedly, this would be an untenable rule. Still, media coverage can create added pressure for witnesses to recall details with 100% accuracy, and if they do not they will be impeached not just in front of the judge and jury, but in front of the camera—potentially damaging their public credibility. Some states have addressed this concern by promulgating special rules to address such circumstances.\textsuperscript{156} While courts and police departments may have policies to address these kinds of situations,

\begin{footnotes}
\footnotetext[154]{Hart, 798 F.3d at 590.}
\footnotetext[155]{Russr, Don’t Talk to Police, YOUTUBE (June 21, 2008), https://www.youtube.com/watch?v=6wXkI4t7nuc}
\footnotetext[156]{Chandler, 449 U.S. at 577.}
\end{footnotes}
these institutions should be especially sensitive to these individuals because they tend to be especially vulnerable to intimidation and influence.

C. Media Coverage Taken Out of Context

The last guiding principle that police departments, courts, and other governmental institutions should consider is how to deal with the media taking their coverage out of context. As already discussed, the media is attracted to particularly bizarre or drama-filled cases. Media presence becomes even more problematic when the coverage consists of only select portions of the proceeding. For instance, in *Estes* the Court noted that the “cameras operated only intermittently.” By only recording various portions of the trial and airing those select pieces, the media was creating a distorted image of how the trial process occurred. That does not mean that the media had a nefarious purpose by only airing select segments. News programs are constrained by practical limits, like their timing schedules and the need to play commercials, which pay the bills at the end of the day. Additionally, these programs are constrained by what the judge permits them to record. The district court in *Estes* only permitted the taping of the opening and closing arguments of the State, the return of the jury’s verdict and its receipt by the judge. These rules and practicalities create a dangerous situation where the public is not seeing the entire picture, and thus are constructing their opinions about the case and the judicial process based on incomplete information.

Courts and law enforcement departments should be wary about letting coverage of these processes be taken out of context. The danger is not necessarily tied to the administration of justice in the trial or police investigation because the individuals who participate in that process, attorneys, judges and law enforcement, will by privy to all the relevant information. The danger arises from the media’s ability to

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157 *Id.* at 580.
158 *Estes*, 381 U.S. at 537.
159 *Id.*
shape the appearance of justice through these programs. As we’ve discussed, the media is a great source of knowledge about public institutions like courtrooms or police departments. These institutions are not always readily accessible to the public, and so the media can play an important function by making the general public aware of how these institutions operate. Coverage of high profile cases can even incite reform and the passage of laws. Matthew Shepard stands as an example of this. Matthew Shepard was a twenty-one-year-old male who was brutally murdered because of his sexual orientation. In the wake of his death, then-President Bill Clinton renewed attempts to extend federal hate crime legislation to include violent acts because of homosexuality. While initial attempts were unfruitful, Congress eventually passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. This Act was signed into law by President Barack Obama in October 2009. The passage of this law was direct result of the national attention paid to Matthew Shepard’s murder. Media coverage was instrumental in creating this reform.

Certain events in *Hart v. Mannina* demonstrate the danger of incomplete coverage of legal or law enforcement proceedings. Portions of the November 22, 2008 interviews were not recorded. Before she turned on the tape recording, Mannina presented the photo array to each witness and asked if the witness recognized anyone. Mannina failed to observe the proper protocol, and therefore captured an incomplete picture of the event in the tape recording. Given that Mannina was the only detective present

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160 *Id.* at 539
162 *Id.*
163 *Id.*
164 *Hart v. Mannina*, 798 F.3d 578, 588 (7th Cir. 2015).
165 *Id.*
during those interviews, it becomes difficult to know what transpired when the cameras were off. Lucky Shift did record the entire interaction, but destroyed the tapes per company policy. Although the Seventh Circuit found the tapes were not destroyed in bad faith, they were destroyed three days after Swavely’s attorney filed a motion to obtain “all contracts and/or agreements between the Indianapolis Metropolitan Police Department and/or the City of Indianapolis . . . relating to the recording and production of . . .’ The Shift.” The timing of the request begs the question, what was actually contained on the videotapes. But even if we accept that the tapes contained no incriminating evidence against Mannina, there is another issue with the way Mannina conducted the interviews. Had a witness been presented with a photo array and asked to identify the suspect, and could not do so, the defendant would be entitled to know about the non-identification. This kind of information has come to be known as *Brady* material. Mannina’s technique failed to account for this possibility. The interviews were also conducted in such a way as to avoid the preferred “double-blind” method of administering identification procedures, where the administering officer does not know who is and is not a suspect. By avoiding the double-blind procedure, the officer introduces a risk of inadvertently cueing the witness before, during or after the viewing as to who they believe the suspect to be. These kinds of mistakes are made possible with the introduction of cameras into judicial and law enforcement proceedings. In order to avoid such oversights, the courts and police should be vigilant of the media’s presence and take steps to ensure that the process is fortified to deal with any potential disruptions.

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167 *Hart*, 798 F.3d at 584.
168 *Id.* at 589.
169 *Id.*
171 *Id.*
172 *Hart*, 798 F.3d at 588 n.1.
173 *Id.*
A PROPOSAL FOR ELIMINATING ADJUDICATIVE LOOPHOLES UNDER STATUTORY LAW OF TRADE SECRETS IN THE SEVENTH CIRCUIT

ANNA A. ONLEY*


INTRODUCTION

In its 2014 decision in Spitz v. Proven Winners,1 the Seventh Circuit Court of Appeals held that, under the Illinois Trade Secrets Act (“ITSA”),2 a plaintiff’s claim of unjust enrichment was displaced by her claim of trade secret misappropriation (“TSM”) in the absence of a finding that the business information at issue amounted to a trade secret.3 Whether intended or not, this was a radical decision on the issue of TSM and displacement of common-law claims. The Spitz holding has likely made the Seventh Circuit, and particularly Illinois, less friendly to businesses seeking trade secret protection for their know-how. Trade secrets include confidential customer lists, chemical

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1 Spitz v. Proven Winners N.A., LLC, 759 F.3d 724 (7th Cir. 2014).

2 765 ILCS 1065/1.

3 Spitz, 759 F.3d at 724.
formulas, and manufacturing processes\(^4\) as well as business methods and software, which are increasingly more difficult to protect under federal patent law.\(^5\)

Today, 70% of business value is derived from intangible assets, which include intellectual property.\(^6\) Trade secrets and patents are complementary forms of intellectual property protection, and inventors who are not ready to publicly disclose business methods in a patent application often opt for trade secret protection. Furthermore, a trade secret is not a binary construct—the question of whether a trade secret exists cannot be answered with a simple “yes” or “no.”

Rather, it is proper to think of proprietary business information as falling in one of three categories: proper trade secrets, “valuable and proprietary” information that does not quite fall under the definition of trade secrets,\(^7\) and information that is widely known to the public and therefore does not constitute a trade secret.\(^8\) The second category of business assets is the least likely to be adequately protected under the current statutory law of trade secrets in the Seventh Circuit, such as the ITSA.

The ITSA, which is the Illinois version of the 1979 Uniform Trade Secrets Act\(^9\) (“UTSA” or “Uniform Act”), became effective in


\(^5\) Alice Corp. Pty. Ltd. v. CLS Bank Int’l, 134 S. Ct. 2347 (2014) (holding that method and software claims were unpatentable).

\(^6\) INTELLECTUAL PROPERTY ASSETS IN MERGERS AND ACQUISITIONS xxvii (Lanning Bryer & Melvin Simensky eds., John Wiley & Sons, Inc., 2002).

\(^7\) Abanco Int’l, Inc. v. Guestlogix Inc., 486 F. Supp. 2d 994, 1007 (N.D. Ill. 2007) (“I cannot equate the complaint's description of the information as ‘valuable and proprietary’ with the definition of trade secrets under the ITSA at defendant's request.”).

\(^8\) Spitz v. Proven Winners N.A., LLC, 969 F. Supp. 2d 994, 1007 (N.D. Ill. 2013), aff’d, 759 F.3d 724 (7th Cir. 2014) (“Information that is generally known within an industry, even if not in the public at large, as well as information that can be readily duplicated without considerable time, effort, or expense, is not a trade secret.”).

\(^9\) NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS,
1988. Its objective was to achieve greater uniformity among the states. The goal of the Illinois Act, as with the Uniform Act, was “to displace conflicting tort, restitutionary law, unfair competition, and other Illinois laws that provide civil remedies for misappropriation of a trade secret.” Since the introduction of the Uniform Act and its adoption by all three states within the Seventh Circuit, the Seventh Circuit Court of Appeals has oscillated between supporting the free flow of information and unrestrained competition and helping businesses safeguard and capitalize on their know-how. Unfortunately, the Seventh Circuit has not provided much guidance to reconcile its holdings as to the rules on displacement of common-law claims by the trade secret misappropriation claims when business information at issue, though “valuable and proprietary,” does not rise to the level of a trade secret.

Legal certainty is important to creating a business-friendly climate and attracting innovation. This article proposes a framework for determining whether and to what extent trade secret misappropriation claims should displace common law claims. This approach includes four proposed rules.

First, if the claim arises in the law of contract or if the plaintiff could recover on a theory of quasi-contract, the claim should not be displaced unless expressly prohibited by statute. Claims that arise in the law of contract include tortious interference with contract, breach of fiduciary duty, and breach of a confidentiality agreement. Quasi-contract claims include unjust enrichment.

Second, in deciding whether the information at issue is a trade secret, courts should supplement the statutory definition with the state’s common-law analysis.
Third, if the information at issue is a trade secret, there may still be an actionable wrong that does not fall under the definition of misappropriation. In such cases, the plaintiff should be able to recover on alternative theories.

Finally, the statutory term “displace” should be construed as “preempt,” meaning “handle or acquire beforehand to the exclusion of others,” or “take precedence over,”¹³ rather than “preclude,” or “make impossible by necessary consequence.”¹⁴¹⁵ Thus, displacement of common-law claims should require: (1) a trade secret; and (2) a finding of no misappropriation of the trade secret. Otherwise, the plaintiff may be left without any remedy by simply pleading TSM.

It follows from the rules proposed here that dismissal or adjudication of common law claims on summary judgment is inappropriate when based solely on statutory language. After all, if there is no trade secret, then nothing can displace the common law claims, which in such instances should be independently adjudicated.

Part I sets up the legal context for the issue, explaining the common law elements of trade secret misappropriation and statutory common law claims. Part II presents the history and current status of the state Uniform Trade Secrets Acts¹⁶ adopted by Illinois, Wisconsin, and Indiana. Part III presents an analysis of post-UTSA Seventh Circuit decisions and the questions they left unanswered. Building on these considerations and against the historical background of trade secret legislation and litigation in the Seventh Circuit, Part IV proposes a procedure for adjudicating common law claims that are brought with the claims of trade secret misappropriation.

¹³ PREEMPT, Garner’s Dictionary of Legal Usage.
¹⁴ PRECLUDE, Webster’s New Collegiate Dictionary.
¹⁵ For clarity, the terms “preclude” and “preempt” discussed here should not be confused with the concept of preemption of state law by federal law.
¹⁶ See NATIONAL CONFERENCE, supra note 9.
PART I: LEGAL CONTEXT

This section presents an overview, within a historical context, of the elements required in claims of trade secret misappropriation.

Trade secret is the most litigated form of intellectual property protection and has been recognized in U.S. jurisprudence since the mid-nineteenth century. It is defined as business information that is sufficiently valuable and secret to afford the holder an actual or potential economic advantage over others. Initially, the primary function of trade secret misappropriation law was to prevent third parties from unfairly benefiting from the know-how of the trade secret holder by providing remedies for breach of confidence and unjust enrichment. Today, trade secret law continues to punish the same categories of behavior: breach of duty and bad acts. To the extent that it seeks to prevent breach of duty, the law of trade secrets aims to promote investment in research and encourage innovation through the practice of trade secret protection and the resulting necessary disclosure to employees, contractors, and licensees. To the extent that the law of trade secrets seeks to punish bad acts, it serves as a vehicle for preventing unjust enrichment by recognizing an interest in commercial privacy, which is generally attenuated only by heightened government interest, as in closely regulated industries.

18 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).
19 Id.
20 Id.
22 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).
23 Id.
24 Chiappetta, supra note 21.
To state a claim for misappropriation of a trade secret, the following elements are required: (1) a trade secret; (2) misappropriation of the trade secret; and (3) a showing that the owner of the trade secret was damaged by the misappropriation.\textsuperscript{26}

\textit{A. What Constitutes a Trade Secret?}

Courts within the Seventh Circuit determine what falls within the definition of a trade secret\textsuperscript{27} by applying the test from section 757 of the Restatement (First) of Torts.\textsuperscript{28} However, these courts recognize that it is not necessary that the information at issue meet all factors.\textsuperscript{29} The factors generally focus on different aspects of secrecy of the information at issue.\textsuperscript{30} First, courts evaluate the extent to which information is known outside the business\textsuperscript{31} because the law of trade secrets is understood to “preclude[] trade secret protection for information generally known or understood within an industry even if not to the public at large.”\textsuperscript{32} The second factor is the extent to which confidential information is known to employees and others within the organization,\textsuperscript{33} such as contractors. Courts also evaluate the extent to which the owner of the alleged trade secret attempted to protect the information\textsuperscript{34} and the ease with which others could acquire the

\textsuperscript{26} Covenant Aviation Security, LLC v. Berry, 15 F.Supp.3d 813 (N.D. Ill. 2014).
\textsuperscript{27} Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 722 (7th Cir. 2003).
\textsuperscript{28} Id.
\textsuperscript{29} Id. (“The language of the Act itself makes no reference to these factors as independent requirements for trade secret status, and Illinois case law imposes no such requirement that each factor weigh in favor of the plaintiff.”); see also ILG Indus., Inc. v. Scott, 273 N.E.2d 393, 396 (1971).
\textsuperscript{30} Learning Curve Toys, Inc., 342 F.3d at 722.
\textsuperscript{32} Learning Curve Toys, Inc., 342 F.3d at 722.
\textsuperscript{33} Computer Associates Int’l, 333 F. Supp. 2d at 695.
\textsuperscript{34} Id.
Finally, courts look at the value of information to competitors and the amount of time, money, and effort expended in developing the information. Thus, a total of six factors inform the analysis.

Additionally, when the plaintiff pleads trade secret misappropriation, courts within the Seventh Circuit generally find it sufficient that the plaintiff identify “specific types of business information” and “specific efforts to protect the business information.” Crucially, the Seventh Circuit noted that the existence of a trade secret is ordinarily a question of fact because the existence of a trade secret is not obvious and requires an ad-hoc evaluation of all the surrounding circumstances. As a result, the question of whether the information amounts to a trade secret should not be disposed of on summary judgment or motions for judgment as a matter of law.

B. What Constitutes Misappropriation of Trade Secrets?

Courts within the Seventh Circuit are generally plaintiff-friendly when construing pleadings of misappropriation. For example, when the plaintiff pleads misappropriation, the fact that the plaintiff’s

35 Id.
36 Id.
37 Id.
38 Covenant Aviation Sec., LLC, 15 F. Supp. 3d at 818.
40 Id. (citing Lear Siegler, Inc. v. Ark–Ell Springs, Inc., 569 F.2d 286, 289 (5th Cir.1978)).
allegations of misappropriation are based on information and belief are not sufficient to dismiss the complaint.\footnote{41}

Furthermore, plaintiffs are not required to show use of a trade secret in every case.\footnote{42} In fact, trade secret misappropriation can be shown one of three ways: (1) by improper acquisition; (2) by unauthorized disclosure; or (3) by unauthorized use.\footnote{43} Further, under the inevitable disclosure doctrine, courts may infer that unauthorized use took place simply “based on a defendant’s prior positions with plaintiff, the information to which they had access and the nature of their work for their new employer.”\footnote{44} Disclosure of trade secrets is considered inevitable unless the new employer takes specific actions to prevent the new hire from using the former employer’s trade secrets.\footnote{45}

In summary, courts within the Seventh Circuit have expressed the view that “[b]ecause direct evidence of misappropriation of trade secrets is typically not available, a plaintiff can rely on circumstantial evidence to prove misappropriation.”\footnote{46} As a result, the question of whether misappropriation took place should not be disposed of on motions to dismiss for failure to state a claim or for judgment as a matter of law.

C. The Common Law: Breach-of-Duty and “Bad Act” Claims

This section delineates the elements of common-law claims that are commonly brought together with statutory trade secret claims and discusses the circumstances where trial and appellate courts allowed common-law claims. These claims include breach of fiduciary duty,
diversion of corporate opportunities, unjust enrichment, unfair competition, and conversion. Courts and commentators alike have noted that the key to determining whether the common law claims should be displaced is “to analyze each claim and its relationship to the facts or conduct of the trade secret claim.”

1. Breach of Fiduciary Duty

Claims of trade secret misappropriation often arise when proprietary information is misused by insiders who have a duty of loyalty to the employer, such as employees, officers, and directors of the company holding a trade secret. The term “duty” generally implies that an individual must conduct himself in a particular manner toward those to whom the duty is owed.

To set out a claim for breach of fiduciary duty, a plaintiff must allege facts establishing: (1) the existence of a fiduciary duty on the defendant’s part; (2) the defendant’s breach of the duty; and (3) damages proximately resulting from the breach. With respect to the first prong, there are two kinds of fiduciary relationships: a fiduciary relationship as a matter of law and a fiduciary relationship as a matter of fact. An agent and a principal are in a fiduciary relationship as a matter of law. However, even in the absence of evidence that the defendant ever agreed to be the plaintiff’s agent, as may be the case in licensing negotiations, a fiduciary relationship may still exist if “one

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48 Lawlor v. N. Am. Corp. of Illinois, 983 N.E.2d 414, 433 (Ill. 2012) (“Employees as well as officers and directors owe a duty of loyalty to their employer. . . . Accordingly, a fiduciary cannot act inconsistently with his agency or trust and cannot solicit his employer's customers for himself.”).
51 Khan v. BDO Seidman, LLP, 948 N.E.2d 132 (2011).
52 Tummelson v. White, 47 N.E.3d 579 (Ill. App. 4th Dist. 2015).
party reposes special trust and confidence in another[,] who accepts that trust and confidence and thereby gains superiority and influence over the subservient party.”

Importantly, the existence of a trade secret is not a prerequisite for claims of breach of duty. For instance, a comment to the Uniform Act states, and the Seventh Circuit agrees, that the Act does not apply “to duties imposed by law that are not dependent upon the existence of competitively significant secret information, like an agent’s duty of loyalty to his or her principal.”

2. Diversion of Corporate Opportunities

Courts within the Seventh Circuit have found that diversion, or usurpation, of corporate opportunities occurs when a fiduciary takes advantage of a business opportunity developed through the use of corporate assets. This activity may give rise to breach-of-duty claims under the second prong of the test for breaching fiduciary duty, discussed supra. Qualifying activities may include solicitation for the actor’s own benefit of business or customers before leaving the company, failure to inform the company, and unauthorized use of the company’s facilities or resources. Diverting business away from a

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53 Id.
54 Hecny Transp., Inc., 430 F.3d at 405 (emphasis added); see also Lucini Italia Co., 231 F. Supp. 2d 764, 770 (N.D. Ill. 2002) (citing Thermodyne Food Serv. Prod., Inc., v. McDonald's Corp., 940 F.Supp. 1300, 1309) (N.D. Ill.1996) (“In a situation where the alleged breach of duty does not rely on the misappropriation of a trade secret, the claim survives.”).
56 Id.
57 Star Forge, Inc. v. F.C. Mason Co., 2014 IL App 2d 130527-U, ¶ 18 (citing Cooper Linse Hallman Capital Management, Inc. v. Hallman, 856 N.E.2d 585 (2006) (“[F]iduciaries have been found to have breached their duty of loyalty where they solicited for their own benefit the business of even one customer before leaving the company, used the company’s facilities or resources to assist them in competing with the company, or failed to inform the company that they were competing with the company or engaging in other fiduciary breaches.”)).
company is considered a breach of fiduciary duty even if the actor’s efforts are not compensated\textsuperscript{58} or if the alleged competitors are not in the same line of business as the plaintiff.\textsuperscript{59}

3. Unjust Enrichment

An unjust enrichment claim must allege that: (1) the defendant has “unjustly retained a benefit to the plaintiff’s detriment” and (2) the defendant’s “retention of the benefit violates the fundamental principles of justice, equity, and good conscience.”\textsuperscript{60} In one case, where a consultant allegedly misappropriated the plaintiff’s marketing plans and usurped a corporate opportunity created by an olive oil seller by breaching an exclusive supplier agreement,\textsuperscript{61} the District Court for the Northern District of Illinois found that the claim of unjust enrichment was not preempted to the extent it relied on the usurpation of corporate opportunity rather than misappropriation of marketing plans.\textsuperscript{62}

4. Unfair Competition

Unfair competition is a broad, fact-specific\textsuperscript{63} category of dishonest\textsuperscript{64} conduct that is injurious to the plaintiff’s business.\textsuperscript{65} In the context of trade secrets, Indiana and Illinois courts have allowed trade secret plaintiffs to proceed on theories of unfair competition. Specifically, Indiana courts recognized two instances when claims of

\textsuperscript{58} Star Forge, Inc., 2014 IL App (2d) 130527-U, ¶ 18.
\textsuperscript{59} Id. ¶ 20 (citing Anest v. Audino, 773 N.E.2d 202 (2002)).
\textsuperscript{60} Lucini Italia Co., 231 F. Supp. 2d at 772.
\textsuperscript{61} Id. at 769.
\textsuperscript{62} Id. at 772 (noting that “to the extent that Lucini relies on Grappolini’s alleged misappropriation of the confidential marketing information to show his benefit, the claim is preempted by the ITSA; however, to the extent that it is based on the usurpation of the Vegetal agreement, it survives.”).
\textsuperscript{64} Id.
unfair competition could survive: the use of confidential information that is damaging to the defendant’s former employer and passing off of the “goods or business of one person as that of another.” 66 Similarly, District Court for the Northern District of Illinois has allowed unfair competition claims, acknowledging that confidential information is a broader category of information than trade secrets and noting that it would be unfair to allow defendants to compete with the plaintiffs in the same market by using misappropriated confidential information. 67 It is not even necessary for a finding of unfair competition for the parties to directly compete in the same market. 68

5. Conversion

The elements of a conversion claim include the following: (1) the plaintiff’s right to the property in question; (2) the plaintiff’s “absolute and unconditional right to the immediate possession of the property”, 69

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66 Panther Brands, LLC v. Indy Racing League, LLC, 1:14-CV-00472-TWP, 2015 WL 1396910, at *7 (S.D. Ind. Mar. 25, 2015) (“First, ‘a claim for unfair competition may be brought when [an] employee uses ‘trade secrets or other confidential information acquired in the course of his employment for his benefit or that of a competitor in a manner which is detrimental to his former employer.’ . . . Second, ‘a cause of action for unfair competition arises when there is ‘any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off goods or business of one person as and for that of another.’”’) (internal citations omitted).

67 FAIP N.A., Inc. v. Sistema s.r.l., 05 C 4002, 2005 WL 3436398, at *6 (N.D. Ill. Dec. 14, 2005) (“Although encompassing trade secrets, we believe confidential information is a broader category of information. We are unwilling to limit the alleged misappropriation of confidential information to merely trade secrets . . . Further, we believe it is reasonable to assume that misappropriated confidential information, not of trade secret nature, could give Defendants an unfair advantage and therefore allow them to unfairly compete in the pressure washer market.”).


(3) a demand for possession made to the defendant; and (4) wrongful assumption of control, dominion, or ownership over the property.\textsuperscript{70}

At least one court in the Seventh Circuit, the District Court for the Central District of Illinois, has acknowledged that plaintiffs could bring claims of conversion with respect to the property that did not fall under the statutory definition of a trade secret.\textsuperscript{71}

Also, Indiana and Illinois courts have found that claims of misappropriation of \textit{tangible media} that embody trade secrets are not displaced if these objects have independent value.\textsuperscript{72}

Finally, the Seventh Circuit itself has held that claims of “outright theft” were not displaced by the law of trade secrets even when the information in question included non-confidential customer identities, which were widely known in the trade and therefore did not amount to a trade secret.\textsuperscript{73}

\textbf{PART II: STATUTORY ENACTMENTS TO DISPLACE COMMON-LAW CLAIMS}

Civil trade secret litigation is governed by state law.\textsuperscript{74} In 1979, the National Conference of Commissioners on Uniform State Laws

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\footnotesize
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.} (“Plaintiff’s conversion claim must be limited to the farm equipment guides, the soil maps, First Financial’s collateral schedules, and other First Financial documents in which it is not claiming a trade secret.”).
\textsuperscript{73} Hecny Transp., Inc., 430 F.3d at 404.
\textsuperscript{74} LOUIS ALTMAN & MARIA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 16:32 (4th ed. 2011), 2 CALLMANN ON UNFAIR COMP., TR. & MONO. § 16:32 (Westlaw) (citing Wesley-Jessen Inc. v. Reynolds, 182 U.S.P.Q. (BNA) 135, 1974 WL 20197 (N.D. Ill. 1974), aff’d, 521 F.2d 1402 (7th Cir. 1975) (state law is applied to issue of misappropriation of trade secrets in diversity cases)).
\end{flushright}
promulgated the Uniform Trade Secrets Act. The goal of the Uniform Act was to establish a uniform and consistent treatment of trade secrets among the states that adopted the act.

The Uniform Act displaced “conflicting tort, restitutionary, and other [state law] providing civil remedies for misappropriation of a trade secret.” Importantly, the Uniform Act did not displace “(1) contractual remedies, whether or not based upon misappropriation of a trade secret or (2) other civil remedies that are not based upon misappropriation of a trade secret; or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.”

While a handful of states chose to forgo uniformity and retained the state common law of trade secrets, an overwhelming majority of states, including the three states within the Seventh Circuit, adopted the Uniform Act with few substantive revisions—Indiana did so in 1982, Wisconsin in 1985, and Illinois in 1988. All three state statutes retain the Uniform Act language maintaining that the states’ laws do not displace contractual remedies and criminal remedies.

As to displacement of civil tort-based claims and equitable remedies, state legislation is very similar to the UTSA but for two provisions. First, while Illinois and Wisconsin are consistent with the Uniform Act in displacing civil remedies that are not based on trade secret misappropriation, Indiana law displaces “all conflicting law of this state pertaining to the misappropriation of trade secrets, except

77 UTSA § 7(a) (emphasis added).
78 § 7(b) (emphasis added).
79 See Boyer, supra note 76 (New York and Massachusetts).
80 IND. CODE ANN. § 24-2-3-1.
81 WIS. STAT. ANN. § 134.90.
82 765 ILCS § 1065/1.
83 § 1065/8; § 134.90 6(b); § 24-2-3-1.
84 § 1065/8; § 134.90 6(b)
contract law and criminal law.”85 Second, the Illinois and Wisconsin statutes differ on the extent to which they expressly address displacement of civil remedies. The Wisconsin statute displaces “conflicting tort law, restitutuory law and any other law of this state providing a civil remedy for misappropriation of a trade secret.”86 The Illinois statute, in addition to the above, expressly displaces restitutuory claims of unfair competition and unjust enrichment.87

The adjudicative procedure proposed in this article accounts for the differences in state law with respect to displacement of these claims. For example, Illinois and Wisconsin likely intended to preempt rather than preclude restitutuory claims, because even though Wisconsin appears to displace restitutuory claims, it does so only with respect to damages.88 Further, all three states adopted UTSA definitions of a trade secret with some modifications. For instance, under Indiana and Wisconsin law:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.89

Illinois adopted a substantially similar statutory definition but broadened the definition of a trade secret to include “technical or non-technical data . . . [including a] drawing, [. . .] financial data, or list of

85 § 24-2-3-1 (emphasis added).
86 § 134.90 6(a).
87 § 1065/8.
88 Wis. Stat. Ann. § 134.90 (“Damages may include both the actual loss caused by the violation and unjust enrichment caused by the violation that is not taken into account in computing actual loss.”).
89 § 24-2-3-2 (West); see also § 134.90 (1)(c) (a substantively identical definition).
actual or potential customers or suppliers.” In addition, Illinois qualified the requirement of secrecy by stating that the information subject to protection must actually be “sufficiently secret.”

Similarly, all three states adopted virtually identical definitions of trade secret misappropriation:

“Misappropriation” means: (1) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) disclosure or use of a trade secret of another without express or implied consent by a person who: (A) used improper means to acquire knowledge of the trade secret; (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Finally, all three statutes require two findings in order to recover damages: that the information at issue was a trade secret and that the trade secret was misappropriated. The remedies available for trade secret misappropriation vary slightly among the states and include injunctive relief, damages, and payment of the plaintiff’s attorney’s

90 § 1065/2.
91 Id.
92 § 24-2-3-2 (West); § 134.90 (2); § 1065/2.
94 § 1065/3; § 134.90(3) (West); § 24-2-3-3 (West).
fees for “willful and malicious misappropriation” or bad-faith motions to terminate an injunction. 96

PART III: POST-UNIFORM ACT SEVENTH CIRCUIT DECISIONS ON COMMON-LAW CLAIM DISPLACEMENT

A. Spitz v. Proven Winners97

In Spitz, the plaintiff, a marketing copywriter in the horticultural industry, developed a marketing concept for the defendant, a marketing agency. 98 Part of the marketing concept included the plaintiff’s idea for marketing certain plants as pet-safe. 99 The plaintiff later expanded the concept to include toxicity testing. 100 She verbally presented the idea to the defendant, repeatedly asked the defendant to keep the plans confidential, and eventually executed a non-disclosure agreement. 101 The defendant subsequently developed and marketed a list of pet-safe plants, which it claimed were gathered from public sources, such as the Humane Society, 102 and used the indicator “pet-safe” on product labels without compensating the plaintiff. 103

The plaintiff brought multiple claims, including trade secret misappropriation under the ITSA, quantum meruit, and unjust enrichment. The district court found on summary judgment that the plaintiff’s idea for pet-safe plants was not a trade secret 104 because the information was generally known within the industry and because the

95 § 1065/4; § 134.90(4) (West) (restitutionary and punitive damages); § 24-2-3-4 (West).
96 § 1065/5; § 24-2-3-5 (West).
97 Spitz, 759 F.3d .
98 Id. at 724-730.
99 Id.
100 Id.
101 Id.
102 Spitz, 969 F. Supp. at 1001.
103 Id. at 1003.
104 Spitz, 759 F.3d at 733; Spitz, 969 F. Supp. 2d at 1007.
plaintiff did not show evidence that she provided to the defendant a list of pet-friendly plants that was more than what the defendant could have gathered from public sources. The court also noted that the non-disclosure agreement did not specifically refer to the idea of pet-safe horticultural practices. Likewise, the district court dismissed the plaintiff’s claims of quantum meruit and unjust enrichment. The Seventh Circuit affirmed and noted that restitutionary claims of unjust enrichment and quantum meruit were displaced by the ITSA.

The Seventh Circuit relied on an Illinois appellate court’s decision, where the court affirmed, on statutory grounds, the dismissal of restitutionary common law claims on summary judgment after it found that the information at issue was not a trade secret. However, the Seventh Circuit failed to take into account an important distinction: the Illinois appellate court, in addition to considering the statutory definition of a trade secret, considered the six common law factors when it determined on the record that the plaintiff’s product concept did not amount to a trade secret. On the other hand, in Spitz, the district court concluded that the plaintiff’s marketing plan was not a

105 Spitz, 969 F. Supp. 2d at 1007.
106 Id. at 1003.
107 Id. at 1008 (“Even if it can be inferred from this fact that plaintiff’s idea had value, evidence does not support that PW relied on work of plaintiff—other than that previously paid for and plaintiff’s publicly available article—in designating pet-friendly or non-harmful plants. Plaintiff has not shown that she provided valuable services that were not compensated.”).
108 Spitz, 759 F.3d at 733.
109 Id. (citing Pope v. Alberto–Culver Co., 694 N.E.2d 615, 619 (1998) (“Illinois courts have read the preemptive language in the ITSA to cover claims that are essentially claims of trade secret misappropriation, even when the alleged “trade secret” does not fall within the Act's definition.”)).
110 Pope, 694 N.E.2d at 618 (“The extent to which the information is known outside of [plaintiff's] business; (2) the extent to which it is known by employees and others involved in [plaintiff's] business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”).
trade secret merely because it was based on information generally known within the industry.\textsuperscript{111}

Even assuming that the ITSA intended for restitutionary common law claims to stand or fall with the claim of trade secret misappropriation, greater legal certainty could have been achieved by remanding the \textit{Spitz} case for re-adjudication of the ITSA claim under the six-factor test and subsequent reconsideration of the common law claims.

\textbf{B. Other Notable Decisions}

Scholarly literature posits that the issue of whether other claims should be displaced when the plaintiff argues trade secret misappropriation has two sub-questions, both of which should be addressed: first, whether it is irrelevant that the information at issue is not a trade secret; and, second, whether common law claims should be precluded rather than preempted.\textsuperscript{112}

An affirmative answer to both questions (such as in the \textit{Spitz} holding), even if these questions are not expressly articulated in judicial opinions, represents an approach least friendly to owners of commercial know-how because plaintiffs may be left without a remedy if they plead but do not adequately prove trade secret misappropriation.\textsuperscript{113} As illustrated by the cases discussed below, the Seventh Circuit has not adopted a consistent analytical framework for deciding these cases.

In 1992, the Seventh Circuit held that a litigant in \textit{Composite Marine Propellers, Inc. v. Van Der Woude}, whose know-how did not amount to a trade secret, could not prevail on common law claims of

\textsuperscript{111} \textit{Spitz}, 969 F. Supp. 2d at 1007.


unfair competition and breach of fiduciary duty.\textsuperscript{114} The court noted that, “unless defendants misappropriated a statutory trade secret, they did no legal wrong.”\textsuperscript{115} Composite Marine Propellers, a product designer and manufacturer, sued former employees of its supplier, which had contractually promised to refrain from competition and use of the manufacturer’s trade secrets.\textsuperscript{116} Van Der Woude and other employees subsequently left the supplier to establish their own company, obtained a patent on a marine propeller, and sued Composite Marine Propellers for patent infringement.\textsuperscript{117} Composite Marine Propellers contended that Van Der Woude used its trade secrets in obtaining a patent. The jury in the district court’s proceedings agreed, awarding compensatory and punitive damages.\textsuperscript{118} The Seventh Circuit, finding that no trade secret misappropriation occurred, set aside the jury verdict, holding that “Illinois . . . abolished all common law theories of misuse of [trade secrets].”\textsuperscript{119} The court stated that “[t]he punitive damages [were] based expressly on the claim of unfair competition”\textsuperscript{120} but “most competition is ‘unfair’ in lay terms.”\textsuperscript{121} Thus, the court disposed of the claim of unfair competition on the grounds that this claim arose under the law of trade secrets. With regard to the claim of breach of fiduciary duty, the court found that fiduciary duty did not extend to employees.\textsuperscript{122}

\textsuperscript{114} Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263 (7th Cir. 1992).
\textsuperscript{115} Id. at 1265.
\textsuperscript{116} Id. at 1264.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 1265 (referencing 765 ILCS 1065/8, which states that “this Act is intended to displace conflicting tort, restitutionary, unfair competition, and other laws of this State providing civil remedies for misappropriation of a trade secret.”).
\textsuperscript{120} Id. at 1268.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 1265 (“A person free to compete against his ex-master may compete against the master’s customers too.”) The supplier’s former employees did not have a non-compete agreement with the supplier.
Interestingly, the court also noted that “[c]laims based on unfair competition and breach of fiduciary duty stand or fall with those based on contract.” While this statement is consistent with the court’s adjudication of the claim of breach of fiduciary duty based on the law of contract, which the Illinois trade secrets statute allows, the court was inconsistent in classifying the claim of unfair competition as one related to a breach of contract between the parties but not adjudicating the claim independently. Had the court adopted the construction of the statutory term “displace” as “preempt,” the claim of unfair competition could have survived even on a finding that there was no trade secret since the court classified the claim as one arising in contract or quasi-contract.

Later, in IDX v. Epic Systems decided in 2002, the court deviated from its initial position on displacement of common law claims. There, an IDX customer disclosed confidential information to Epic Systems in order for the latter to duplicate IDX functionality. The court held that if the allegedly misappropriated information did not amount to a trade secret, IDX, an electronic medical records company, could still recover under the theory of tortious interference with contract. The court concluded that the theory was founded in the law of contract even though there was no contract between the litigants. Additionally, the court found that the claim of tortious interference with contract was brought to enforce a confidentiality agreement, and this situation was not contemplated by the Wisconsin trade secrets statute as a trade secret law issue.

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123 Id.
124 765 ILCS 1065/8.
126 Id. at 584 (“IDX and the Foundation (through its predecessors in interest) agreed to the sort of contractual remedy preserved in § 134.90(6)(b)1.”).
127 Id. at 586 (“Even when read apart from paragraph (b), paragraph (a) deals only with ‘conflicting tort law’ . . . Enforcement of a non-disclosure agreement does not conflict with trade-secret law, and thus preventing third parties from inducing breach of such an agreement does not conflict with trade-secret law.”).
Subsequently, in *Hecny Transportation, Inc v. Chu*, the court went even further when it held, on public policy grounds, that common law claims are not displaced even when the event that gives rise to plaintiff’s common law claims is misappropriation of a proper trade secret. The common law claims at issue in *Hecny* were diversion of corporate opportunities, breach of fiduciary duty, and theft.

Finally, in 2012 the Seventh Circuit considered concurrent trade secret misappropriation and unjust enrichment claims in *Fail-Safe, LLC v. A. O. Smith Corp.* Similar to *Spitz*, the unjust enrichment claim was dismissed because the plaintiff failed to take the steps to preserve the secrecy of the information at issue.

In summary, it is clear that the Seventh Circuit is more likely to allow concurrent common law claims if they are somehow linked to a theory of recovery in contract or quasi-contract. However, the Seventh Circuit has not yet made clear the boundaries for its analysis of whether the information at issue is in fact a trade secret. For example, greater clarity could have been achieved in the cases discussed supra if the court had explained whether meeting certain prongs of the common-law trade secret test and failing others is, first, necessary and, second, relevant to the disposition of the claims of unjust enrichment and unfair competition, which are displaced by the trade secret statute in Illinois (but not in Indiana or Wisconsin).

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128 *Hecny Transp., Inc.*, 430 F.3d 402 (7th Cir. 2005).
129 *Id.*
130 *Id.* at 405.
131 *Fail-Safe, LLC v. A.O. Smith Corp.*, 674 F.3d 889, 891 (7th Cir. 2012).
132 *Id.*
133 P.A. 85-366, § 1, eff. Jan. 1, 1988 (codified in 765 ILCS § 1065/1).
134 IND. CODE ANN. § 24-2-3-1.
135 WIS. STAT. ANN. § 134.90.
C. Questions Remaining After the Seventh Circuit Decisions

Spitz may appear to represent a full-circle return to the principle of anti-monopolization upheld by the court twenty-two years earlier in Composite Marine Propellers, Inc. v. Van Der Woude.\textsuperscript{136} However, in Composite Marine Propellers, did the court really adopt a position on the following: first, whether a finding of trade secret misappropriation is required to issue a ruling on displacement of other claims; and, second, the extent of the preclusive relationship between trade secret misappropriation claims and other common law claims?

One could argue that the court did not do so. For example, in reversing the jury verdict, the court found that the plaintiff’s assets did not amount to trade secrets,\textsuperscript{137} as opposed to commenting on whether a finding of trade secret misappropriation was required to dismiss other claims. Also, the court in Composite Marine Propellers moved past the issue of displacement by adjudicating the common law claims when it found that the plaintiff’s "[c]laims based on unfair competition and breach of fiduciary duty stand or fall with those based on contract."\textsuperscript{138} Arguably, in Composite Marine Propellers, the parties contracted around the statute\textsuperscript{139} which expressly excludes unjust enrichment from separate adjudication if trade secret misappropriation is also alleged,\textsuperscript{140} and the court could did not go all the way in deferring to the parties on this issue when it acknowledged that the claim was based on contract but made the finding of TSM dispositive.\textsuperscript{141}

In contrast to Composite Marine Propellers, which was decided in 1995, with its holdings in Spitz (2014) and Fail-Safe (2012), the court provided even less clarity. The court did not expressly articulate its

\textsuperscript{136} Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263 (7th Cir. 1992).
\textsuperscript{137} See supra note 119.
\textsuperscript{138} Composite Marine Propellers, Inc., 962 F.2d at 1265.
\textsuperscript{139} Id.
\textsuperscript{140} P.A. 85-366, § 1, eff. Jan. 1, 1988 (codified in 765 ILCS § 1065/1).
\textsuperscript{141} Composite Marine Propellers, Inc. 962 F.2d at 1265.
analytical process, essentially leaving the public in the dark as to the extent of commercial privacy currently afforded the plaintiffs by the law of trade secrets. Thus, the court held *ab silentio* that a finding of whether or not TSM occurred was unnecessary and that merely pleading TSM displaced common law claims because the court did not remand for a determination on whether TSM occurred or for adjudication of the common law claims.

The two most recent holdings raise two additional questions. First, was it proper to find an absence of a trade secret merely because one of the factors not in plaintiff’s favor? Second, what is needed for defendant to prevail on summary judgment on the question of misappropriation? The cases discussed above illuminate several important areas where the law should be clarified. These questions are addressed by the adjudicative procedure proposed *infra*.

**Part IV: Proposed Procedure for Adjudication of Common-Law Claims**

Merely displacing all common law claims would be an impermissible, overly broad reading of the trade secret statutes. On the other hand, courts cannot simply ignore the state statutes by allowing any and all common law claims. Therefore, a granular, step-by-step analytical framework is needed.

Central to the step-by-step analysis is the proposed definition of the statutory term “displace.”\(^{142}\) To achieve clarity and consistency, this term should be interpreted as “preempt”\(^{143}\) rather than “preclude.”\(^{144}\) As a consequence of this interpretation, common law claims should be adjudicated after a finding of no trade secret or, with few exceptions discussed below, after a finding that misappropriation took place. Additionally, as a consequence of this interpretation, common law claims should not be dismissed on a motion to dismiss, summary

\(^{142}\) *See, e.g.*, 765 ILCS § 1065/8.

\(^{143}\) *Preempt, supra* note 13.

\(^{144}\) *Preclude, supra* note 14.
judgment, or a motion for judgment as a matter of law solely on the grounds that these claims are displaced by state statutes.

Discussed here is the proposed procedure for determining how the claims accompanying the trade secret misappropriation claim should be handled. The procedure includes the following steps: (1) identify the claims that should not be displaced based on plain meaning of the state statues; (2) determine if there is a trade secret within the meaning of state statutes and state common law; (3) determine if there is misappropriation within the meaning of the UTSA; and (4) adjudicate the remaining claims.

A. Identify the Claims that Should Not Be Displaced

At the outset, the easiest category of claims to identify are claims that should be not be preempted nor precluded—contract and criminal. The UTSA, as well as all three states within the Seventh Circuit, expressly preempt these claims. Furthermore, the Seventh Circuit indicated that the category of claims that are never preempted may include claims that are not based on a contract between the litigants but arise in the law of contracts, such as tortious interference with contract, which was not precluded in IDX, breach of a confidentiality agreement, and breach of fiduciary duty. Additionally, as illustrated infra, courts have found that diversion of corporate opportunities originates in breach of fiduciary duty, which would also mean that this common-law cause of action could arise in the law of contract.

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145 See NATIONAL CONFERENCE, supra note 9.
146 IDX Sys. Corp., 285 F.3d at 581 (7th Cir. 2002).
147 See supra note 126.
B. Is There a Trade Secret?

Once contract and criminal claims have been identified and disposed of, courts should determine whether the information at issue is a trade secret. Here, courts should consider state common law to supplement the statutory definition.

It is important to determine if there is a trade secret before adjudicating common law claims other than those expressly displaced because courts, both within and outside of the Seventh Circuit,\(^\text{149}\) have held that this is a threshold inquiry.\(^\text{150}\) If there is no trade secret, either because it does not have the requisite secrecy, because it does not derive independent value from its secrecy, or because the owner has not taken reasonable steps to preserve secrecy, common law claims should not be displaced.\(^\text{151}\)

For instance, in *Burbank Grease Services, LLC v. Sokolowski*, decided by the Supreme Court of Wisconsin, the plaintiff brought a claim of trade secret misappropriation under the Wisconsin Uniform Trade Secrets Act together with claims of breach of fiduciary duty and computer crimes.\(^\text{152}\) The defendant argued that legislative intent underlying the statute was to encompass all claims based upon confidential business information, even where a claim does not allege or depend on determining that the confidential information met the statutory definition of a trade secret.\(^\text{153}\) The Supreme Court of Wisconsin disagreed. The court started its analysis by looking at the statutory provision, which provides that the statute displaces “any other law of this state providing a civil remedy for misappropriation of


\(^{150}\) *Id.* at 451.

\(^{151}\) *Id.*

\(^{152}\) *Burbank Grease Services, LLC v. Sokolowski*, 717 N.W.2d 781 (Wis. 2006).

\(^{153}\) *Id.* at 789.
a trade secret.”154 Because trade secret is a statutorily-defined term, the court noted that, as has been customary in the jurisdictions that adopted the Uniform Act,155 common law claims for misappropriation of information other than the statutorily-defined trade secret should be allowed.156 The court also considered the dictionary definition of “any,” concluding that the breadth of this term “evinces a broad range of civil remedies.”157 Finally, the court confirmed its plain-meaning statutory interpretation with an analysis of legislative intent.158 The court cited a report prepared in 1984 by the Wisconsin Legislative Council, commissioned to investigate the desirability of incorporating uniform trade secret protections into state law, which stated that “the [Uniform Trade Secrets] Act [was] not intended to be a comprehensive remedy” and did not apply to “duties voluntarily assumed through an express or an implied-in-fact contract” or “duties imposed by law which are not dependent upon the existence of competitively significant secret information, like an agent’s duty of loyalty to his or her principal.”159

Illinois law is less straightforward because Illinois courts take into account both the statutory160 and common law161 elements of trade secret claims. As to the six-factor common-law test, as discussed supra, the Spitz and Fail-Safe decisions raise the question of whether a court may find an absence of a trade secret merely because one of the factors is not in the plaintiff’s favor. Regardless of whether statutory or common law definitions of a trade secret are used under Illinois law, the Seventh Circuit itself has held that “the existence of a trade secret

154 id.
155 id. (citing Minuteman, 147 Wis.2d at 851, 434 N.W.2d 773; Electro–Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 899 (Minn.1983); Convolve, Inc. v. Compaq Computer Corp., No. 00CV5141 (GBD), 2006 WL 839022, at *5–6 (S.D.N.Y. March 31, 2006)).
156 id.
157 id.
158 id.
159 Id. at 791.
160 765 ILCS § 1065/8.
161 Learning Curve Toys, Inc., 342 F.3d at 723.
ordinarily is a question of fact\textsuperscript{162} that is difficult to define,\textsuperscript{163} which requires an ad hoc evaluation of all the surrounding circumstances.\textsuperscript{164} Therefore, the existence of a trade secret is best resolved by a fact finder after full presentation of evidence from each side.\textsuperscript{165} It may be inappropriate to dispose of the claim of trade secret misappropriation without answering the question of whether a trade secret exists at all.

\textbf{C. Was a Trade Secret Misappropriated?}

If the information at issue is a trade secret, there may still be an actionable wrong that does not fall under the definition of misappropriation; therefore, the plaintiff should be able to recover on alternative theories.\textsuperscript{166} As a federal district court located in Illinois noted, “ITSA only preempts actions predicated on misuse of secret information. Common law claims based on different theories are still permissible.”\textsuperscript{167} Courts use different approaches to evaluate the elements of trade secret misappropriation and common law claims.\textsuperscript{168} Not all of these approaches may require a separate evaluation of each element.\textsuperscript{169} However, the Seventh Circuit has not considered the standard for

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Burbank Grease Services, LLC, 717 N.W.2d at 789-90 (“We conclude the sum effect of the statutory terms is that civil claims for relief are not abrogated by Wis. Stat. § 134.90(6)(b) 2, with the exception of those civil tort claims that require the use of a statutorily-defined trade secret. It follows that all other types of civil tort claims that Burbank may assert in regard to the misuse of its confidential information remain available to it under the directive of § 134.90(6)(b)2.”).
\textsuperscript{168} See generally JOHN T. CROSS, supra note 445 (delineating three tests for displacement).
\textsuperscript{169} Id.
evaluating claims of misappropriation on summary judgment and because the finding of misappropriation may not result in a finding of no conversion, the question of misappropriation should be addressed separately before common law claims are adjudicated.

One Illinois case, *Tempco Elec. Heater Corp. v. Temperature Engr. Co.*, addressed what is needed for the plaintiff to prevail on summary judgment as to misappropriation of a trade secret. The standard, previously articulated in *PepsiCo*, had been that the circumstantial evidence of misappropriation had to be considered against the “likely to prevail” test, but the district court articulated a more relaxed standard, suggesting that plaintiffs “need only show that a reasonable jury could possibly allow them to prevail.” In support of its position, the district court noted that, first, the *PepsiCo* court considered a preliminary injunction rather than a motion for summary judgment, and, second, there was a need to bring the standard closer in line with the summary judgment doctrine articulated by the Supreme Court that no summary judgment can issue “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”

Courts generally agree that despite the fact that misappropriation merely requires intent while the Uniform Act imposes an additional requirement of impropriety, a finding of trade secret misappropriation will generally preclude common law claims that include this element, such as conversion, unless the misappropriated object is tangible and has intrinsic, independently derived value. For example, in *Remy, Inc.*, the District Court for the Southern District of Indiana dismissed the plaintiff’s claim of conversion that pertained to software, transferred to the defendant’s computer via zip files and not embodied in a tangible

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172 *Id.*
174 *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).
medium to which independent value could be ascribed.\textsuperscript{175} It is important to note, however, that claims of conversion with respect to the elements that are not trade secrets should be adjudicated separately.\textsuperscript{176}

\textbf{D. Adjudicate Remaining Common-Law Claims}

At this point, statutory trade secret claims have been fully adjudicated and, if there was trade secret misappropriation, any claims of conversion likewise have been fully adjudicated. If it was found that the information at issue is not a trade secret, the remaining common-law claims (breach of duty/diversion of corporate opportunities, unjust enrichment, and unfair competition) should be adjudicated. Here, the strongest argument for adjudicating these claims separately is that the elements of these claims are sufficiently distinct and, further, courts have found that proprietary information merits protection even if it does not rise to the level of a trade secret.

For instance, in \textit{Lucini Italia Co. v. Grappolini}, the Illinois District Court for the Northern District explained that claims of breach of duty that are based on independent facts survive claim displacement.\textsuperscript{177} The court discussed \textit{AutoMed Technologies, Inc. v. Eller},\textsuperscript{178} as an example. In \textit{AutoMed Technologies}, an employer sued a former employee for taking trade secrets when he left the plaintiff’s employment. The plaintiff alleged an ITSA claim along with many other common law claims, but the court only dismissed claims based on the same facts as the ITSA claim and “[sustained] the breach of

\begin{footnotesize}
\textsuperscript{175} \textit{Remy, Inc.}, 1:11-CV-00991-SEB, 2014 WL 2882855, at *11.
\textsuperscript{176} See, e.g., \textit{Heeny Transp.}, 430 F.3d at 404; \textit{First Fin. Bank, N.A.}, 71 F. Supp. 3d at 847.
\textsuperscript{177} \textit{Lucini Italia Co.}, 231 F. Supp. 2d at 770 (citing Thermodyne Food Serv. Prod., Inc., v. McDonald's Corp., 940 F.Supp. 1300, 1309 (N.D. Ill.1996) (“In a situation where the alleged breach of duty does not rely on the misappropriation of a trade secret, the claim survives.”)).
\end{footnotesize}
fiduciary duty claim which alleged that the defendant breached his duty as an officer by usurping a corporate opportunity.  

As to claims of unjust enrichment, the UTSA displaces restitutionary (equitable) remedies arising in the law of trade secrets and all three states within the Seventh Circuit provide for equitable remedies under the state trade secret statutes.  

But even though unjust enrichment plaintiffs essentially seek restitutionary relief and it may be appropriate to limit punitive damages, claims of unjust enrichment should be treated similarly to breach-of-duty claims for the purpose of claim displacement analysis; the dispositive question should be whether the claim would survive independently of the trade secret claim rather than the type of relief sought. With unjust enrichment, the duty in question does not arise out of the fact of secrecy itself; instead, as one commentator noted, “[it] turns on the fairness of letting the defendant keep the benefit.”  

This analysis should be informed by whether the plaintiff took any steps to protect her ideas—as the Seventh Circuit noted in *Fail-Safe, LLC*: “[W]here one company fails to take any protective steps to shield its proprietary information, it cannot then expect the law to protect it when the relationship sours.”

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182 JOHN T. CROSS, supra note 487 (“The duty in a quantum meruit or unjust enrichment case turns on the unfairness of letting the defendant keep the benefit, either because the defendant requested it (as in quantum meruit), or because the plaintiff mistakenly supplied it to the defendant (as in unjust enrichment). Because the duty does not arise out of the fact of secrecy itself, proposed [statutory construction, which is consistent with one articulated in this article] would not displace these claims.”).

183 *Fail-Safe, LLC*, 674 F.3d at 891 (“But where one company fails to take any protective steps to shield its proprietary information, it cannot then expect the law to protect it when the relationship sours.”).
Additionally, in *Hecny*, the Seventh Circuit held that common-law claims are not foreclosed if there is no trade secret misappropriation, and the United States District Court for the Northern District of Illinois relied on this rule when it stated, in *Abanco Intern., Inc. v. Guestlogix Inc.*, that the defendant’s claim of unjust enrichment was not displaced. The district court noted that the plaintiff’s claim of unjust enrichment related to information that the plaintiff claimed was “valuable and proprietary” but the court determined was not a trade secret. Similarly, the plaintiff in *Spitz* clearly attempted to protect her ideas by executing a general non-disclosure agreement, notwithstanding the fact that the district court found the NDA was not specific enough. Therefore, the Seventh Circuit should not have dismissed the unjust enrichment claim, especially in view of the fact that a perfectly specific non-disclosure agreement is nearly impossible to draft as inventors continue to brainstorm and business ideas evolve.

Finally, with respect to claims of unfair competition, this article has demonstrated that Illinois and Indiana courts note, first, that unfair competition claims are fact-specific (and therefore should not be dismissed merely on the face of the trade secret statutes) and, second, unfair competition claims are not preempted when the information at issue does not rise to the level of a trade secret.

**CONCLUSION**

Trade secrets are the most frequently litigated form of intellectual property protection, and this trend is likely to continue in view of the

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184 *Hecny Transp., Inc.*, 430 F.3d at 404-05 (“The dominant view is that claims are foreclosed only when they rest on the conduct that is said to misappropriate trade secrets.”).

185 *Abanco Intern., Inc.*, 486 F. Supp. 2d at 781 “The ITSA does not preempt claims that are not dependent upon the existence of trade secrets.”.

186 *id.* at 782 (“I cannot equate the complaint's description of the information as ‘valuable and proprietary’ with the definition of trade secrets under the ITSA at defendant's request.”).

fact that federal courts are tightening patentability criteria for business methods. Because valuable and proprietary information evolves as inventors refine their ideas, it is not always possible to draft a perfect non-disclosure agreement that would identify all of the plaintiff’s trade secrets with sufficient specificity. As such, plaintiffs may not be able to prove that their misappropriated assets were indeed trade secrets. It would be counter-productive to leave these plaintiffs without the common-law remedies displaced by the Uniform Trade Secrets Act, and courts within the Seventh Circuit have already successfully developed the rules for adjudicating such common-law claims. In response, this article has consolidated these rules and the existing state trade secret statutes into a coherent, step-by-step analytical framework for adjudicating common-law claims without duplicating the available remedies.