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GROUPS AND RIGHTS IN INSTITUTIONAL REFORM LITIGATION

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Lawsuits pursue institutional reform when plaintiffs ask courts to issue broad, systemic remedies to improve the performance of malfunctioning government programs. Once thought in decline, this litigation persists. Plaintiffs continue to seek judicial protection from dysfunctional prisons, immigration enforcement regimes, foster care systems, and other institutions. But an important aspect of the substantive law that institutional reform litigation involves has gone overlooked. This substantive law often vests rights in groups. An institutional reform lawsuit does not always—or even often—bundle large numbers of individual rights violations. Rather, a group of incarcerated people or children in foster care sues to vindicate a group right to a competently-administered institution.

During institutional reform's formative era in the 1970s, important commentators hinted that groups could bear rights. This suggestion sparked controversy and subsequently disappeared from American public law scholarship. Over the intervening decades, developments in procedural and remedial doctrines important to institutional reform litigation have required litigants and courts to specify the contours of the substantive law with increasing precision. These forces have prompted group rights to coalesce, unobserved and largely without controversy, in various public law domains. An account of this development provides a substantive foundation for a new, up-to-date jurisprudence of institutional reform.

This Article makes three contributions. First, I connect rights design to institutional reform's procedural and remedial features to demonstrate the existence of group rights. The procedural, remedial, and substantive pieces of institutional reform's puzzle fit together best if plaintiffs vindicate group rights. Second, I describe what group rights are and how they differ from what American public law scholarship once supposed. Group rights do not require the existence of "natural" groups in American public life. They can evolve for instrumental reasons. When courts have recognized group rights, they have done so because rights designed in these terms best enable litigation to realize the values and policies of the substantive law. Third, I show how

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an accurate understanding of rights design can help courts avoid errors that have unjustly thwarted institutional reform efforts.

INTRODUCTION

Lawsuits pursue institutional reform when plaintiffs sue malfunctioning government institutions and seek broad, systemic remedies to bring these institutions' policies and practices in line with applicable substantive law. Pioneered by the legal campaign against

school segregation,[1] institutional reform (IR) litigation is now a staple of the American judicial diet. In 2017, for example, a federal judge documented a "skyrocketing" suicide rate in Alabama prisons and "horrendously inadequate" mental healthcare there.[2] An extensive, complex set of remedial interventions followed.[3] A consent decree entered in 1997 governs the conditions under which the U.S. government can hold immigrant juveniles in detention facilities.[4] It empowered a district judge in 2017 to remedy immigration authorities' refusal to give detained children soap, toothbrushes, and blankets.[5] Settling a class action in 2020, Ohio agreed to a host of changes to its policies and practices to protect adults with intellectual and developmental disabilities from an unnecessary risk of institutionalization.[6] In 2016, a class of young children with disabilities won sweeping changes to how the District of Columbia meets its legal obligations to educate them properly, showing that the district had failed to provide special education services to a significant number of qualifying preschoolers each month.[7]

Cases like these and many more drew intense scholarly interest during institutional reform's formative era in the 1960s and 1970s.[8] These lawsuits' proliferation sparked a legal and political backlash that purportedly set IR litigation on a path toward oblivion in the 1980s and 1990s.[9] This story of decline has proven inaccurate. The current scholarly consensus recognizes what the examples mentioned above suggest, that IR litigation persists.[10] Indeed, new variants continue to emerge. Over the past decade, innovative litigation brought to reform

1 *E.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1408 (2007); Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 176 (2017).

2 Braggs v. Dunn, 257 F. Supp. 3d 1171, 1186, 1267 (M.D. Ala. 2017).

3 Braggs v. Dunn, No. 14CV601, 2018 WL 985759, at *1 (M.D. Ala. Feb. 20, 2018) (describing the process of fashioning a remedy).

4 Flores v. Barr, 934 F.3d 910, 911 (9th Cir. 2019).

5 *Id.* at 913.

6 *See* Ball v. Kasich, No. 16–CV–282, 2020 WL 1969289, at *2–3 (S.D. Ohio Apr. 24, 2020) (describing the settlement).

7 DL v. District of Columbia, 194 F. Supp. 3d 30, 48 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017); *see also DL*, 860 F.3d at 719 (affirming district court's ruling).

8 *E.g.*, Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 564 (2006); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 279 (1989).

9 Schlanger, *supra* note 8, at 564–66.

10 *Id.* at 554; *see also* Jeffries & Rutherglen, *supra* note 1, at 1411; Kathleen G. Noonan, Jonathan C. Lipson &William H. Simon, *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 IND. L.J. 545, 551–53 (2019); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1021 (2004).

indigent criminal defense systems has taken firm root,[11] and lawsuits filed to address educational inequities that threaten children's literacy have met with success.[12]

Institutional reform, however, has not sparked the deep scholarly engagement it attracted fifty years ago.[13] Only a few commentators have studied this litigation closely this century, and their work mostly dates from its first decade.[14] This relative neglect has left almost entirely unaddressed a key issue that these cases often raise. IR jurisprudence has long emphasized broad, systemic remedies and how courts craft and implement them as core matters for explication, debate, and justification.[15] But unless a defendant agrees to a quick settlement upon a case's filing, these remedies will not issue if IR plaintiffs cannot demonstrate standing, if a court will not certify a class, and, obviously, if a case does not survive a motion to dismiss or for summary judgment. These liability-phase matters depend in important measure on the makeup of the substantive rights the plaintiffs allege.

Assessing the IR landscape in 1980, Theodore Eisenberg and Stephen Yeazell recommended that the literature on institutional reform place less emphasis on remedies and accept "[t]hat the merits do . . . matter."[16] I follow their suggestion, long neglected, and use this

11 Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 94–106 (2018) (describing this litigation through 2017).

12 Jennifer Chambers & Beth LeBlanc, *Settlement for Detroit Literacy Lawsuit Eyes Nearly $100M in Funding*, DET. NEWS (May 14, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/05/14/whitmer-announces-late-night-settlement-detroit-right-literacy-case/5189089002/ [https://perma.cc/9F6M-LD6V]; Sonali Kohli & Iris Lee, *California Students Sued Because They Were Such Poor Readers. They Just Won $53 Million to Help Them*, L.A. TIMES (Feb. 20, 2020), https://www.latimes.com/california/story/2020-02-20/california-literacy-lawsuit-settlement-53-million [https://perma.cc/ZF4S-HWLY].

13 Schlanger, *supra* note 8, at 567 (describing a "sharp drop-off in scholarly interest"). Prof. Schlanger described a "recent resurgence of scholarly interest" in 2006, but she cited only three publications as evidence. *Id.* at 567–68 & n.64–68.

14 Notable works published over the past twenty years include: ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); Jeffries & Rutherglen, *supra* note 1; Noonan et al., *supra* note 10; Parkin, *supra* note 1; Sabel & Simon, *supra* note 10; Schlanger, *supra* note 8; and David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004). Prof. Schlanger has written a series of important articles on prison conditions litigation. *E.g.*, Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013). All but articles by Schlanger, Parkin, and Noonan et al. date from 2006 or earlier.

15 *E.g.*, PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS 331 (1988) ("Much of the discussion of remedial decree cases jumps from the launching of suits to the crafting of remedies.").

16 Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 515–16 (1980).

Article to offer a fundamental observation about the nature of the substantive law that IR litigation often involves. Plaintiffs leverage a variety of public law domains when they sue governments. But their claims share a common characteristic. IR plaintiffs often allege violations of what are best described as *group rights*. Put differently, in a number of doctrinal areas, the substantive law that determines government liability for systemic maladministration often vests rights in groups, not individuals.

An identification of group rights at institutional reform's substantive law core is important for historical, doctrinal, and jurisprudential reasons. First, the evolution of a group rights jurisprudence further challenges the stubborn narrative of institutional reform's decline. The present-day existence of group rights in multiple public law domains has resulted from a long process of common-law elaboration and confirms this litigation's entrenchment. Second, conceptual clarity about rights design helps to resolve confusion that has dogged efforts to adjudicate IR cases. This litigation can often conflate what are really contests over whom the substantive law protects and from what with procedural fights over matters like class certification. Whether a class gets certified or an abstention motion prevails should depend on the contours of the underlying substantive law, but they often involve misguided procedural shadowboxing.

Third, the existence of group rights in a variety of public law domains challenges the longstanding assumption that rights in "U.S. constitutional and legal culture" are "*essentially* individualistic."[17] The term "group rights" surfaces here and there in American public law scholarship. But this literature tends to refer to rights for groups recognized by some thick, socially determined, and often controversial metric—religious ties, for instance, or a shared ethnic or racial identity.[18] The group rights that IR plaintiffs commonly invoke come from a variety of public law domains. They protect groups whose members share nothing more than an interest in a public good, such

17 Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26–27 (1993); *cf.* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1052 n.130 (2009) (referring to "[t]he omission of groups (as distinct from individuals) from dominant legal theory"); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 141 (2017) ("American equality law . . . . does not envision social groups as the basic units of analysis or the bearers of rights.").

18 *E.g.*, Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3119 (2013) (tribes); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 419 (2013) (religious groups); *id.* at 415 n.62 (citing literature on religious groups and group rights).

as the lawful administration of a government program or institution.[19] Once presumed to be "ideologically troublesome,"[20] group rights actually exist without deep controversy—indeed, largely without comment.

This Article proceeds as follows. In Part I, I situate my claim that IR plaintiffs often allege group rights violations in this litigation's jurisprudential history. During institutional reform's formative era following *Brown*, leading voices in judicial and scholarly commentary recognized that litigation brought by groups of inmates or school children had implications for rights design. By the early 1980s, the term "group rights" had begun to surface in important IR literature. But flexibility in the procedural and remedial doctrines that governed this litigation excused a close look at the substantive law's makeup, resulting in only modest jurisprudential engagement with rights design.

Parts II and III are this Article's core and make my case for the existence of group rights. Onetime flexibility in the doctrines IR litigation often involves has given way to rigor. But the administration of these doctrines has not led to predicted results, particularly for IR litigation's procedural governance. In Part II, I show how a group rights account can solve IR litigation's procedural puzzle. If groups litigate group rights, then administration of transsubstantive procedural doctrines makes sense, suggesting the existence of these rights in an array of public law domains. Part III builds on this suggestion of group rights' existence and uses a case study to prove their existence. In numerous jurisdictions, groups have successfully litigated broad Sixth Amendment challenges to obtain significant reforms to malfunctioning indigent criminal defense systems. These remedies suggest something basic about rights design. I use leading public law accounts of the rights-remedies relationship to show how differences in individual and group Sixth Amendment remedies illuminate differences in individual and group Sixth Amendment rights.

Part IV identifies jurisprudential and doctrinal implications of my effort to excavate group rights. I offer a definition of group rights distilled from the administration of procedural, substantive, and remedial doctrines Parts II and III describe. A group right, I argue, is

19 This category corresponds to Joseph Raz's "collective" conception of group rights. JOSEPH RAZ, THE MORALITY OF FREEDOM 207–09 (1986); *see also* Peter Jones, *Group Rights*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), https://plato.stanford.edu/archives/sum2016/entries/rights-group/ [https://perma.cc/2MY9-QF4U]. Groups connected by a thicker, sociological determinant measure of identity correspond better to the "corporate conception." *See* Jones, *supra*. The two types of group rights I discuss, then, have well-established analogues in political theory.

20 Tushnet, *supra* note 17, at 27.

best known by the characteristics of judicial decisionmaking in cases where groups of plaintiffs prove government liability without showings of individualized harm to discrete victims, and where they win relief that necessarily benefits groups and cannot aid individuals severally. These twin characteristics of liability and remedy indivisibility materialize not just when litigation proceeds to advantage or protect groups recognized by some sort of socially determined metric. A group right can also coalesce for instrumental reasons—when, given the context, a group right best realizes the substantive law's policies and values. The law itself thus can constitute groups of people whose connection is no thicker than a shared interest in improved government performance.

Part IV also explains why conceptual clarity in descriptions of rights matters to the day-to-day adjudication of IR cases. I use two doctrinal hurdles these cases commonly encounter to show how procedural wrangling can obscure more fundamental fights over whom the substantive law protects and whether it works at the group or individual level. Explicit engagement with rights design can ensure that IR cases do not unjustly founder on procedural shoals.

This Article sings in a mostly descriptive key. Its task is to piece together various doctrinal clues, first to prove that group rights exist in various public law domains, and then to define what they are and explain why their acknowledgment matters. The big normative questions must remain for future engagement. Should the substantive law vest rights in groups? Under what circumstances and conditions? Are courts institutionally equipped to make rights design choices? I conclude by suggesting some lines of inquiry that an exercise seeking answers to such questions might pursue.

I. THE GROUP RIGHTS LINEAGE

The group rights that present-day IR plaintiffs invoke have antecedents in canonical texts from this litigation's formative era. John Minor Wisdom's magisterial *Jefferson County* opinion, issued in 1966, capped a decade of legal wrangling over desegregation and rights design with a robust articulation of Fourteenth Amendment group rights.[21] The next decade, Owen Fiss provided a landmark account and defense of institutional reform that described this litigation's core features in group terms. He did not place rights design at the center of his jurisprudence, but the doctrine then governing this litigation's procedural and remedial aspects did not require detailed engagement with substance. The doctrinal landscape

21 United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

has changed in ways that now force litigants and courts to articulate the contours of rights with more precision. My account, then, has an antecedent in Wisdom's great achievement, and it updates Fiss's jurisprudence for a new doctrinal era.

A. Antecedents

1. Doctrine

After the Supreme Court decided *Brown v. Board of Education*, it famously left the task of implementation to the lower federal courts.[22] This work included the fashioning of remedies to fix segregated schools, but it also required lower courts to flesh out the Fourteenth Amendment right whose contours the Court had left vague.[23] John Parker, a Fourth Circuit judge, seized an early opportunity to craft post-*Brown* doctrine in *Briggs v. Elliott*.[24] There, he wrote that, after *Brown*, "[t]he Constitution . . . does not require integration. It merely forbids discrimination."[25] Put differently, the Fourteenth Amendment "merely forbids the use of governmental power to enforce segregation" but does not require affirmative efforts to undo it.[26]

Briggs gave southern governments legal cover to drain *Brown* of any real significance.[27] Districts would leave black children in their segregated schools, then ostensibly allow individual black children to transfer if they wanted to do so. To vindicate her equal protection right, a black child would have to apply to transfer, pursue this application through various administrative channels the district provided, and then file an individual lawsuit upon the application's inevitable denial.[28] Plaintiffs, litigating one-by-one, would never realize *Brown*'s promise. The delays were too long, the legal resources too few, and the threats to children who stepped forward too grave.

Wisdom, a legendary Fifth Circuit judge, responded to these circumstances in *United States v. Jefferson County*. The problem with *Briggs*, he insisted, was its "view that Fourteenth Amendment rights are

22 *See e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971).

23 *See id.*

24 Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam); John Minor Wisdom, *A Federal Judge in the Deep South: Random Observations*, 35 S.C. L. REV. 503, 508 (1984). On the importance of Judge Parker's interpretation of *Brown* for segregationists, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1058, 1060, 1097–98 (2014).

25 *Briggs*, 132 F. Supp. At 777.

26 *Id.*

27 *E.g.*, David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 683–85 (2011).

28 *Id.* at 684–85.

exclusively individual rights . . . to be asserted individually."[29] But "[s]egregation is a group phenomenon," one "directed against the group as a unit and against individuals only as their connection with the group involves the antigroup sanction."[30] The litigation of equal protection claims does not place "[t]he peculiar rights of specific individuals . . . in controversy," but "the rights of Negro school children as a class."[31] Properly understood, Wisdom insisted, the right is not to "be considered for admission to a white school" on an individual basis.[32] It is a right held by all black children together to have schools "reorganize[d] . . . into a unitary, nonracial system."[33] A Fourteenth Amendment violation had to be remedied accordingly, with a group remedy.

2. Jurisprudence

If group rights' doctrinal roots extend at least as far back as *Jefferson County*, their scholarly lineage includes Fiss's work in the late 1970s, the most important IR jurisprudence from this formative era.[34] Fiss defended this litigation against the charge that it thrusts the judge into a novel and inappropriate institutional role.[35] "Adjudication," Fiss argued, is and always has been "the social process by which judges give meaning to our public values,"[36] or "an exercise of collective power . . . to assure that social life conforms to the public values embodied in the Constitution and other authoritative legal texts."[37] Because the modern state acts through large-scale organizations to threaten these values wholesale rather than individually, judges have to "restructur[e]" organizations to "remove the threat" and thereby give public values concrete meaning.[38] Institutional reform, then, represents the judici-

29 United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 864 (5th Cir. 1966).

30 *Id.* at 866 (quoting Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 577 (1953) (using "invokes" instead of "involves")).

31 *Id.* at 870.

32 *Id.* at 845 (quoting Braxton v. Bd. of Pub. Instruction, 7 RACE RELS. L. REP. 675, 678 (S.D. Fla. 1962), *aff'd* 326 F.2d 616 (5th Cir. 1964) (putting quotes around "white")).

33 *Id.* at 847.

34 The other landmark attempt at a jurisprudential synthesis from the era is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). *See* Daniel A. Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy Making and the Modern State*, 24 LAW & SOC. INQUIRY 751, 757 (1999) (book review) (referring to Fiss and Chayes as the two "[p]rophets of [the] [n]ew [p]aradigm"). I focus on Fiss because his work encompassed more and extended throughout the decade.

35 Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1164 (1977).

36 Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

37 Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1461 (1983).

38 Fiss, *supra* note 36, at 17.

ary's evolutionary response to the modern scale of government harm, an adjustment to settled judicial practice that "acknowledges the bureaucratic character of the modern state."[39]

Institutional reform does not change what litigation asked courts to do. Rather, Fiss argued, its novelty involves the "implications for the *form* of the lawsuit" that this core judicial task has.[40] He thus focused his IR jurisprudence on procedural and remedial innovations. Both contemplated the existence of groups as jural entities different from their individual members.[41] The "party structure" of an IR lawsuit, often a class action, reflects the fact that the alleged "victim . . . is not an individual, but a group"[42]—an entity that is "not simply an aggregation or collection of identifiable individuals."[43] This party structure has remedial implications. For instance, the "risk of future harm" requirement for an injunction "need not be satisfied" by the threat to a specific individual but to "the victim group."[44] Moreover, because a remedy targets a large-scale organization "to remove the condition that threatens the constitutional values,"[45] "[t]he beneficiary . . . is not an individual, or even a collection of identifiable individuals," but "a social group."[46]

Fiss's IR scholarship includes suggestions that rights, like procedure and remedies, assume a group cast.[47] His nearly contemporaneous work on equal protection more directly engaged with rights design.[48] Writing at a time of significant doctrinal upheaval,[49] Fiss argued that equal protection does not protect against the classification

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39 *Id.* at 2.

40 *Id.* at 17.

41 *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 14–15 (1978).

42 Fiss, *supra* note 36, at 19, 21.

43 *Id.* at 19.

44 *Id.* at 20.

45 *Id.* at 27–28.

46 FISS, *supra* note 41, at 14; *see also* Fiss, *supra* note 36, at 19, 21.

47 *See* FISS, *supra* note 41, at 14–15 (referring to the "group character of the underlying substantive claim").

48 Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107–08 (1976). Although he only gestured at the term, for decades commentators have described Fiss as advocating a "group rights" approach to Equal Protection. *E.g.*, Robert G. Dixon, Jr., Bakke*: A Constitutional Analysis*, 67 CALIF. L. REV. 69, 75, 75 n.19 (1979); David A. Strauss, *"Group Rights" and the Problem of Statistical Discrimination*, ISSUES LEGAL SCHOLARSHIP, May 29, 2003, art. 17, at 7 (2003). *But cf.* Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 942 n.56 (1978) (noting the conceptual ambiguity in Fiss's treatment of equal protection and describing it as based "either on a notion of group rights . . . or on more individualistic premises which remain unstated and obscure").

49 On the evolution of equal protection doctrine in the 1970s, see, e.g., Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 9–23 (2013).

of individuals based on particular traits but against government conduct that disadvantages certain groups.[50] Certain people (for Fiss, chiefly black Americans) suffer subordination as a result of their group identity,[51] creating caste systems. Equal protection, the law's response, responds by insisting on these systems' dismantling.[52] What entitles an individual to benefit from such a remedy is not his particular treatment per se, but whether his treatment contributes to his group's subordination.[53]

Fiss did not elaborate as extensively on the group nature of rights in his IR jurisprudence. His defense of institutional reform worked without this engagement. "Rights and remedies are but two phases of a single social process," Fiss argued, jointly contributing to the meaning of the public value that a lawsuit realizes.[54] Remedies have the same capacity as rights to express values, and, unlike rights, they do so concretely and tangibly. Rights can therefore afford to "operate in the realm of abstraction,"[55] Fiss insisted, without jeopardizing adjudication's capacity to discharge its core task. Fiss agreed that procedure and remedies "should be[] ineluctably tied to the merits and nature of the underlying substantive claim."[56] But remedies do not need to be "tailor[ed]" to the contours of rights.[57] Robust reservoirs of procedural flexibility and remedial discretion allow a remedy to issue without precise delineation of a right's four corners.[58]

B. The Evolving Primacy of Rights Design

Others writing at the end of institutional reform's foundational era identified groups as important to rights design. In 1980, for instance, Eisenberg and Yeazell emphasized "new rights of individuals *and groups*" as IR litigation's chief innovation.[59] Abram Chayes mentioned "the burgeoning of theories about groups (as opposed to individuals) as right bearers" in 1982.[60] But the group rights thread

50 *See* Fiss, *supra* note 48, at 147, 153.
51 *Id.* at 150–52.
52 *See id.* at 150, 154–55.
53 *See id.* at 159–60.
54 Fiss, *supra* note 36, at 51–52.
55 *Id.* at 52.
56 FISS, *supra* note 41, at 94.
57 Fiss, *supra* note 36, at 46–49.
58 *See id.* at 49–50.
59 *See* Eisenberg & Yeazell, *supra* note 16, at 510 (emphasis added).
60 Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982) (identifying these doctrines as central to institutional reform's governance). For an example from critical legal studies, see Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

got dropped, and, as Morton Horwitz commented in 1988, American "legal theory" remained "very resistant to recognizing group rights."[61]

Changes to institutional reform's doctrinal regulation since the 1970s have made a relative neglect of rights design no longer tenable. Normative disagreement over the core of the Fourteenth Amendment's meaning forced clarity in Wisdom's and Fiss's articulation of equal protection rights. Changes to the law regulating standing, class certification, and remedies have had the same effect of forcing attention to substance in a number of public law domains.[62] Increasingly since the 1970s, litigants and courts have had to justify procedural and remedial decisions with claims about the contours of the rights plaintiffs allege.

Fiss celebrated remedial discretion and critiqued what he called the "tailoring principle," or "the insistence that the remedy must fit the violation."[63] During this era, Wendy Parker writes, "the Supreme Court judged the scope of an injunction not just by the right-remedy connection, but also according to the idea of equitable discretion."[64] But the Supreme Court would grow "preoccup[ied]" with the insistence that courts justify public law remedies by reference to the right's four corners.[65] By the end of the 1990s, Parker observes, the Court had embraced "the right-remedy connection as the only recognized measure of the scope of [an] injunction."[66] Today, a district court must match a remedy more formally to the contours of the violated right.[67]

Another doctrinal evolution involves standing. In 1985, Fiss described the administration of standing doctrine in IR litigation as "permissive."[68] Few would characterize the doctrine similarly today.[69] Among other requirements, plaintiffs now must justify their standing in terms of the content of the rights they allege defendants infringed.[70]

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61 Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 400–01 (1988); *see also* Tushnet, *supra* note 17, at 26–27.

62 *See* Chayes, *supra* note 60, at 8.

63 Fiss, *supra* note 36, at 46–49.

64 Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 524 (1999).

65 Chayes, *supra* note 60, at 47.

66 Parker, *supra* note 64, at 528.

67 Lewis v. Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."(citing Missouri v. Jenkins, 515 U.S. 70, 88, 89 (1995))); *see also* Schlanger, *supra* note 8, at 598.

68 Owen M. Fiss, *The New Procedure*, 54 REV. JURIDICA U. P.R. 209, 212 (1985).

69 *See* Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 558–62 (2012).

70 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982); Sabel & Simon, *supra* note 10, at 1086; James Leonard & Joanne C. Brant, *The Half-Open Door: Article*

In *Lewis v. Casey*, for instance, the Court commented extensively on the contours of the constitutional right to access to the courts that a prison system allegedly violated, determined that most of the systemic injunctive relief the inmate plaintiffs sought was of no concern to the right's design, and thus concluded that most plaintiffs lacked the requisite injury to support standing.[71]

Finally, changes the Supreme Court has fashioned to class action procedure over the past decade have forced litigants and courts to justify joinder arguments in terms of substantive rights and their contours. To determine that "there are questions of law or fact common to the class," as Rule 23's commonality requirement demands,[72] the court must conclude after a "rigorous analysis" that the defendant's liability to each class member depends primarily on issues determinable with legal arguments and evidence common to all.[73] This task requires precision in the articulation of the allegedly violated right.

A recent foster care reform class action illustrates how changes to these procedural and remedial doctrines force more precision in the articulation of the contours of rights. In *M.D. v. Perry*, a class of approximately 12,000 children alleged that various systemic deficiencies in Texas's long-term foster care system, including inadequate caseworker resources and poor oversight, threatened them with substantial harm in violation of the Fourteenth Amendment.[74] The district court certified the class in 2011, agreeing that the state's liability to all class members turned vaguely on answers to questions like "whether Defendants' actions in general caused harm or risk of harm to Plaintiffs."[75] Shortly thereafter, the Supreme Court raised the commonality threshold in *Wal-Mart Stores, Inc. v. Dukes*.[76] The district court's analysis may have held up before *Wal-Mart*, the Fifth Circuit acknowledged when it reversed the class certification decision in 2012. But the district court failed to "understand the claims, defenses,

III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction, 54 RUTGERS L. REV. 1, 111 (2001).

71 *Lewis*, 518 U.S. at 349–51.

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

73 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

74 M.D. *ex rel.* Stukenberg v. Perry, No. C–11–84, 2011 WL 2173673, at *1 (S.D. Tex. June 2, 2011), *certifying question to* 799 F. Supp. 2d 712 (S.D. Tex. 2011), *rev'd*, 675 F.3d 832 (5th Cir. 2012).

75 *Perry*, 2011 WL 2173673, at *5.

76 *Wal-Mart Stores*, 564 U.S. at 338.

relevant facts, and applicable substantive law" and justify class certification in their terms.[77]

On remand, the class certification fight boiled down to a dispute over the Fourteenth Amendment right's design. The plaintiffs' proposed common questions of fact all focused on aggregate conduct and risk of harm to children generally.[78] These questions failed "to address any element of [the] Fourteenth Amendment claim," the state agency replied,[79] because its "'individual-plaintiff-blind' approach" did not show how the adjudication of class members' "truly individualized" claims depended upon the agency's general conduct toward all children.[80] But "[l]iability depends on Defendants' uniform course of conduct toward all . . . [c]lass . . . members," class counsel responded, "not the individual circumstances of any particular child."[81] The district court agreed and explained why with an extensive discussion of Fourteenth Amendment doctrine, what it required plaintiffs to prove to prevail, and the common evidence the plaintiffs could use to establish a prima facie case for all class members collectively.[82] "Defendants' argument . . . mistakes the legal harm that is the basis of the" class's claim, the district court reasoned. The "unreasonable risk of harm . . . alone is the legal injury," and "actual harms suffered by some class members [are] not constitutive" of it.[83] When the district court ultimately ruled for the plaintiffs on the merits, it repeatedly referred to "class members' Fourteenth Amendment *right*" in the singular.[84] The Fifth Circuit likewise referenced "plaintiffs' *right* to be free from a substantial risk of serious harm" when it upheld the second class certification order and the merits decision.[85]

The timing of doctrinal evolution makes sense of the relative neglect of rights in Fiss's group-oriented jurisprudence and explains

77 *Perry*, 675 F.3d at 841 (quoting McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 548 (5th Cir. 2003)).

78 Plaintiffs' Memorandum of Law in Support of Motion for Class Certification and Appointment of Class Counsel at 14–24, M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7 (S.D. Tex. 2012) (No. 11–CV–84), 2012 WL 5305324.

79 Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification at 21, *Perry*, 294 F.R.D. 7 (No. 11–CV–84), 2012 WL 13049817.

80 *Id.* at 40.

81 Plaintiffs' Post-Hearing Brief in Support of Motion for Class Certification at 49, *Perry*, 294 F.R.D. 7 (No. 11–CV–84), 2013 WL 1292636.

82 *Perry*, 294 F.R.D. at 31–36 (discussing the substance of Fourteenth Amendment doctrine); *id.* at 38–45 (evaluating the class wide evidence the plaintiffs would adduce to prove the violation).

83 *Id.* at 45.

84 M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 694 (S.D. Tex. 2015) (emphasis added), *aff'd in part, rev'd in part, vacated*, 907 F.3d 237 (5th Cir. 2018); *see also id.* at 697; *id.* at 828.

85 *Abbott*, 907 F.3d at 271 (emphasis added).

why the literature on institutional reform dropped the group rights thread decades ago. The substance-forcing changes to remedies, standing, and class certification doctrine have happened gradually over recent decades.[86] But, as I argue in the next Part, forthright recognition of group rights is now necessary to explain important aspects of IR litigation's doctrinal governance. The next Part goes into greater doctrinal detail to show how a group rights account makes the most sense of this litigation's procedural regulation.

II. PROCEDURAL PUZZLES AND THE GROUP RIGHTS SOLUTION

In March 2012, fourteen class representatives sued the Arizona Department of Corrections (DOC) on behalf of all inmates incarcerated in the state's prisons.[87] They brought a case much like the one the Texas children litigated, challenging systemic deficiencies in prison healthcare. These plaintiffs alleged that the defendants' poor administration of Arizona's ten prisons "subject[ed] all prisoners to a substantial risk of serious harm" in violation of the Eighth Amendment.[88] They sought an injunction to require the state to make numerous improvements to healthcare provision.[89]

The DOC moved to dismiss much of the complaint on standing grounds.[90] In an ordinary lawsuit, a prisoner who suffers from one inadequacy in prison healthcare does not have standing to challenge other inadequacies that did not harm him.[91] The DOC argued that, because none of the named plaintiffs had experienced many of the complained-of inadequacies individually, they did not suffer the required injury-in-fact for standing to challenge the full extent of the alleged institutional failings.

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86 On the timing of developments in class certification doctrine, see David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 417 (2020).

87 Class Action Complaint for Injunctive and Declaratory Relief at 1, Parsons v. Ryan, No. CV–12–601 (D. Ariz. filed Mar. 22, 2012) [hereinafter Class Action Complaint]. This Part expands considerably on analyses of procedural doctrines in prior work. *See* Marcus, *supra* note 86, at 421–25; David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 811–21 (2016).

88 Class Action Complaint, *supra* note 87, at 2.

89 *Id.* at 73–74.

90 Defendants' Motion to Dismiss at 5–7, Parsons v. Ryan, No. CV–12–601, 2014 WL 3887867 (D. Ariz. Aug. 7, 2014).

91 *E.g.*, Caldwell v. Bentley, No. 11cv975, 2015 WL 1198608, at *6 (M.D. Ala. Mar. 16, 2015); Wishneski v. Doña Ana Cnty., No. CV 08-0348, 2009 WL 10708582, at *4 (D.N.M. Feb. 19, 2009).

The defense failed,[92] just as it has fizzled in a number of IR cases over the past decade.[93] This futility is puzzling. Given standing doctrine's increased rigor, especially as it has evolved since the 1970s, how can IR plaintiffs sue to challenge and remedy inadequacies that do not harm them individually? The answer, involving class certification and preclusion doctrine, only begs more questions. If Arizona inmates have different health needs and experience different deprivations at different facilities, how do their Eighth Amendment claims raise common questions of law or fact, as Rule 23's newly strict commonality requirement demands for class certification? Why doesn't a class judgment or settlement in an IR case preclude plaintiffs from litigating valuable individual claims in subsequent cases?

No case can proceed unless the plaintiffs have standing. Most IR cases proceed as class actions and require class certification.[94] Making sense of these doctrines' administration matters is not just important for its own sake but also to ensure that this litigation can proceed when it should. The procedural governance of IR litigation fits together in a coherent whole if plaintiffs in many of these cases sue as groups vindicating rights that protect them as such—as groups, that is, not as discrete individuals.

A. The Standing Puzzle

The standing puzzle has its origins in two basic principles:

1. As a general matter,[95] a plaintiff "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others."[96]
2. "[A] plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'"[97]

This second principle follows as a remedial corollary of the first. The first would lose its force if, after finding that a plaintiff has

92 *See Parsons*, 2014 WL 3887867, at *2–3.

93 *E.g.*, Gayle v. Meade, 106 Fed. R. Serv. 3d (West) 1595 (S.D. Fla. 2020); B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 966–67 (9th Cir. 2019); Braggs v. Dunn, 317 F.R.D. 634, 652–53 (M.D. Ala. 2016), *certifying questions to* 257 F. Supp. 3d 1171 (M.D. Ala. 2017); DL v. District of Columbia, 302 F.R.D. 1, 19 (D.D.C. 2013), *certifying questions to* 194 F. Supp. 3d (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017); Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 290 F.R.D. 409, 415 (S.D.N.Y. 2012), *certifying questions to* 980 F. Supp. 2d 588 (S.D.N.Y. 2013).

94 Marcus, *supra* note 87, at 783–84.

95 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9 (3d ed. 2021), Westlaw FPP [hereinafter WRIGHT & MILLER].

96 Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972). *See also* Warth v. Seldin, 422 U.S. 490, 499 (1975).

97 Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018) (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)) (alteration in original).

standing to challenge certain of the defendant's acts, the court could enjoin other acts that did not injure the plaintiff.[98]

A hypothetical, illustrated in Figure 1, explains how these principles create a puzzle for litigation challenging government policies and practices.[99] A state has five counties with a physician in each who provides abortion services. The state passes a law that requires these physicians to administer sonograms to all women seeking abortions before proceeding. A physician who fails to comply commits a misdemeanor. Dr. A, a physician in County A, sues on her own to enjoin the statute's enforcement. She surely has standing to seek an injunction to bar County Attorney A from prosecuting her for a violation. But the two standing principles mean that she cannot also seek to enjoin County Attorney E from prosecuting Dr. E, the County E physician.[100] Dr. A cannot litigate Dr. E's injury, and an injunction benefiting Drs. A and E would do more than necessary to remedy the harm (the risk of criminal prosecution) to Dr. A.[101]

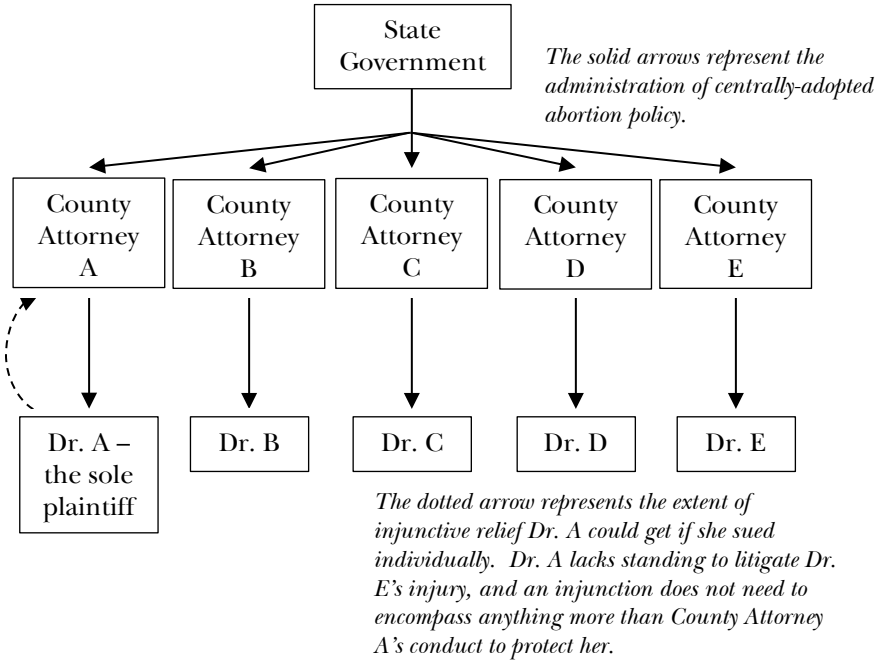
98 *See* Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

99 This hypothetical is based on a Texas law described in *Texas Medical Providers Performing Abortion Services v. Lakey*, 806 F. Supp. 2d 942, 948 (W.D. Tex. 2011), *vacated on other grounds*, 667 F.3d 570 (5th Cir. 2012) (describing H.B. 15, 2011 Tex. Gen. Laws 342 (codified as amended at TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2021))).

100 *See Lakey*, 806 F. Supp. 2d at 950–51; *see also Summers*, 555 U.S. at 494 (holding that a plaintiff who has used one national forest lacks standing to challenge a government policy enforced in another forest).

101 *See* Garnett v. Zeilinger, 301 F. Supp. 3d 199, 205 & n.4 (D.D.C. 2018).

FIGURE 1: *DR. A. V. COUNTY ATTORNEY A*



The story changes if Dr. A brings a class action on behalf of all physicians in the state. If her lawsuit succeeds, it can unquestionably yield a statewide injunction, enjoining the statute's enforcement in all five counties, including County E.[102] Such class actions against stated, uniform policies are legion.[103] But the fact "[t]hat a suit may be a class action . . . adds nothing to the question of standing," the Supreme Court has repeatedly insisted: "[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class . . . ."[104] If nothing alchemical happens just because Dr. A sues as a class representative instead of as an individual plaintiff, how can she win the statewide remedy consistent with the two standing principles?

102 *See Lakey*, 806 F. Supp. 2d at 976–77. The Fifth Circuit reversed the *Lakey* district court, but not on standing or remedial overbreadth grounds. *Lakey*, 667 F.3d at 584.

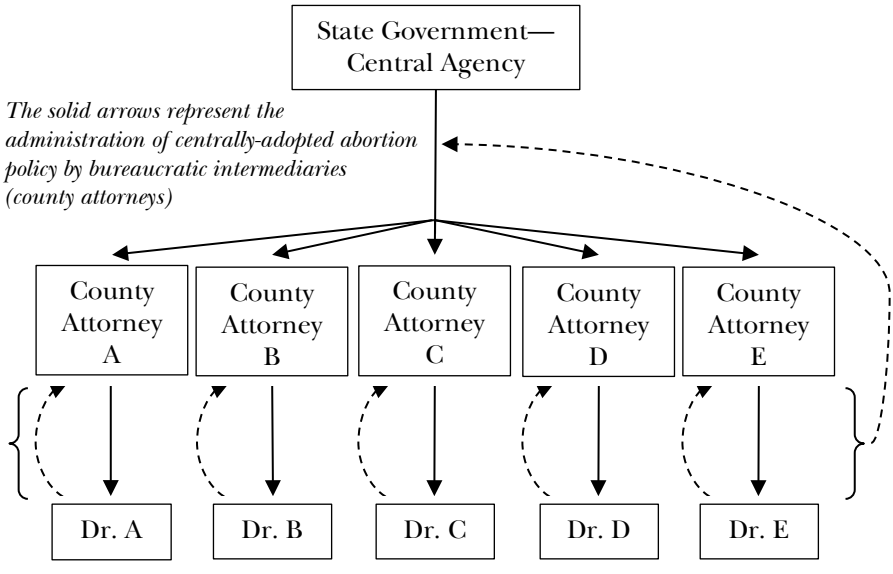
103 *See* Marcus, *supra* note 86, at 412–15 & n.74–89.

104 Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40 n.20 (1976) (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

1. Bundling Claims in Cases of Undifferentiated Conduct

This puzzle has an easy answer for cases challenging undifferentiated conduct, or conduct directed at or experienced by each class member uniformly. Figure 2 models this sort of case, one the abortion hypothetical exemplifies. A "central agency" is responsible for the overall design and administration of a policy regime (here, the law requiring sonograms before abortions). The central agency's conduct determines or at least affects the behavior of "bureaucratic intermediaries" who administer policy regimes on the ground (here, county prosecutors). A case involving undifferentiated conduct is one where the challenged policy forged centrally remains unadjusted or unaltered as the bureaucratic intermediaries administer it. The policy regime's "regulatory targets" or "regulatory beneficiaries" (here, the physicians) experience the government's conduct identically.

FIGURE 2: *DR. A ET AL. V. STATE* (CLASS ACTION)



If each physician is joined as a plaintiff through class certification, each physician would have standing to sue for an injunction directed at the county attorney enforcing the statute against her (the dashed lines). The sum of these individual injunctions equals an injunction against the state policy in its entirety (the dotted line).

If Dr. A and Dr. E sued together as co-plaintiffs in a non-class lawsuit, the court would obviously have jurisdiction to enjoin the statute's enforcement in Counties A and E. The case would bundle together Dr. A's standing to sue for a County A injunction with Dr. E's standing to sue for a County E injunction. The only question would be whether Dr. A could join Dr. E, a matter determined not by standing doctrine but by one of the joinder rules in the Federal Rules of Civil Procedure. Likewise, when a court grants class certification in *Dr. A et al. v. State*, it joins all physicians providing abortion services, working in all five counties, as parties.[105] Each one has standing to challenge the statute's enforcement against him or her. The sum of each class member's individual standing to seek an individually tailored injunction equals sufficient standing to authorize a single statewide injunction to benefit all physicians at once. Nothing of functional significance distinguishes five individual injunctions, each enjoining a single county attorney, from a single injunction enjoining the law's enforcement statewide. The latter thus does not conflict with the two standing principles.

Whether Dr. A can sue on behalf of physicians in all five counties, then, depends on Rule 23, one of the Federal Rules' joinder provisions, and not on standing doctrine. The standing puzzle disappears.[106] Each alleged individual rights violation gives the court power to enjoin a slice of the defendant's action or policy. The class action bundles the slices together to give the court power to target the central agency with a sweeping injunction.

2. The Problem of Differentiated Conduct

This bundling solution to the standing puzzle fails when cases involve differentiated conduct, defined as central agency policies, customs, or actions that bureaucratic intermediaries change or alter when they administer it for bureaucratic targets or beneficiaries. These cases are institutional reform's core. In the Arizona prison healthcare case, for example, the central agency conduct the plaintiffs targeted included statewide failures to provide adequate medication, mental healthcare, and emergency medical training for staff.[107] This maladministration, filtered through wardens and corrections officers

105 *E.g.*, David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511, 1541–42.

106 *E.g.*, Langan v. Johnson & Johnson Consumer Cos., Inc., 897 F.3d 88, 95 (2d Cir. 2018).

107 Parsons v. Ryan, 754 F.3d 657, 664–67 (9th Cir. 2014).

at different prisons (the bureaucratic intermediaries), materialized differently for the different inmates (the regulatory targets).[108]

If each Arizona inmate had sued on his or her own, the two standing principles would have limited the discrete, individual injunctions each one could have obtained, as Table 1 indicates. Prison A officials' liability to Inmate A has no bearing on the liability of officials at Prisons B or C. The individual remedies, addressed to bureaucratic intermediaries, are likewise independent of each other. Inmate C gets no benefit, for instance, when Inmate A wins access to skin cancer medication.

TABLE 1: INDIVIDUAL INMATE LAWSUITS FOR INDIVIDUAL INJUNCTIONS

Inmate Experience	**Liability Determination**	**Remedy**
Inmate A receives no medication to prevent recurrence of skin cancer[109]	Officials at Prison A are deliberately indifferent to Inmate A's health and violate the Eighth Amendment	Injunction requiring officials at Prison A to send Inmate A to an oncologist and a dermatologist, and to provide Inmate A with required medication
Inmate B complains of tooth pain, but corrections officers at Prison B do nothing in response[110]	Officials at Prison B are deliberately indifferent to Inmate B's health and violate the Eighth Amendment	Injunction requiring officials at Prison B to treat Inmate B's toothache
Inmate C, suffering from gender dysphoria, requests but is refused sex reassignment surgery[111]	Officials at Prison C are deliberately indifferent to Inmate C's health and violate the Eighth Amendment	Injunction requiring officials at Prison C to make sex reassignment surgery available to Inmate C

108 *See id.* at 672.

109 This scenario comes from *D'Amico v. Montoya*, No. 15CV127, 2016 WL 4708950 (N.D. Fla. July 28, 2016).

110 This scenario comes from *Chambers v. NH Prison*, 562 F. Supp. 2d 197 (D.N.H. 2007).

111 This scenario comes from *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015).

The Arizona prison healthcare litigation, by contrast, alleged a systemic violation of inmates' Eighth Amendment right to be free from a substantial risk of serious harm.[112] Table 2 offers a stylized description of the litigation. Each inmate suffers the same harm as above, but the case alleges these harms as illustrations of the risk of harm that systemic maladministration state-wide creates for all inmates.

TABLE 2: GROUP PRISON CONDITIONS LAWSUIT FOR A SYSTEMIC INJUNCTION

Inmate Experience	**Liability Determination**	**Remedy**
Inmate A receives no medication to prevent recurrence of skin cancer	The Department of Corrections' customs, policies, and practices for the management of prison healthcare state-wide expose all inmates to a substantial risk of serious harm in violation of the Eighth Amendment.	Injunction requiring DOC to make systemic improvements, by obtaining increased funding, improving medical records, putting an independent monitoring system in place, hiring more and better healthcare providers, and other changes to central agency policy administration.
Inmate B complains of tooth pain, but corrections officers at Prison B do nothing in response		
Inmate C, suffering from gender dysphoria, requests but is refused sex reassignment surgery		

The DOC's liability depended on a determination with regard to the class as a whole and not individual inmates.[113] This liability determination was *indivisible*, meaning that the court could not adjudicate the wrongdoing any one inmate allegedly suffered without doing so for all inmates at once. The class settled for sweeping relief to force the DOC to make systemic improvements.[114] A vast gulf divides the individual injunctions described in Table 1 from the single remedy aimed at the central agency that Table 2 describes. The former are divisible. An injunction can protect a single inmate while leaving the

112 *Parsons*, 754 F.3d at 676.

113 *Id.* at 678.

114 Exhibit B to Stipulation at 7, Parsons v. Ryan, No. CV–12–601 (D. Ariz. filed Oct. 14, 2014) (document number 1185–1 filed the day before notice of settlement).

others' remedial experience unchanged. The latter, like the liability determination, is indivisible. The fundamental changes the systemic injunction orders to central agency policy administration necessarily benefit all inmates together.

I pause briefly to highlight liability and remedy indivisibility. They are key definitional traits of group rights. I discuss them further in Part IV.

3. Class Certification and Preclusion Issues

Arguably, the bundling solution to the standing puzzle can work in cases of differentiated conduct if each inmate is entitled to his own individual slice of the systemic injunction. After all, discrete injuries to individual Arizona inmates ultimately result from systemic institutional flaws that mar the DOC's performance. Inmate A might benefit more directly from an injunction ordering that the prison give him cancer medication. But he might pursue more indirect individualized relief instead—perhaps an order requiring the prison system to maintain better health records for him, to get more funding to purchase the medication he needs, and to put oversight mechanisms in place to ensure that he does not go without skin cancer treatment any further.[115]

115 *Cf.* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 316–17 (2004); *id.* at 352–54 (commenting on equitable discretion and formulating injunctions).

TABLE 3: INDIVIDUAL INMATE LAWSUITS FOR DIVISIBLE INDIRECT INJUNCTIONS

Inmate Experience	**Liability Determination**	**Remedy**
Inmate A receives no medication to prevent recurrence of skin cancer	Officials at Prison A are deliberately indifferent to Inmate A's health and violate the Eighth Amendment.	Direct injunction: injunction requiring officials at Prison A to send Inmate A to an oncologist and a dermatologist, and to provide Inmate A with required medication
		Indirect substitute: injunction requiring officials at Prison A to maintain better medical records for Inmate A, to get more funding to purchase the medication he needs, etc.
Inmate B complains of tooth pain, but corrections officers at Prison B do nothing in response	Officials at Prison B are deliberately indifferent to Inmate B's health and violate the Eighth Amendment	Direct injunction: injunction requiring officials at Prison B to treat Inmate B's toothache
		Indirect substitute: injunction requiring officials at Prison B to maintain better medical records for Inmate B, to get more funding to provide the treatment he needs, etc.
Inmate C, suffering from gender dysphoria, requests but is refused sex reassignment surgery	Officials at Prison C are deliberately indifferent to Inmate C's health and violate the Eighth Amendment	Direct injunction: injunction requiring officials at Prison C to make sex reassignment surgery available to Inmate C
		Indirect substitute: injunction requiring officials at Prison C to maintain better medical records for Inmate C, to get more funding to provide the treatment she needs, etc.

The class action would add together all of the individual claims and generate a bundle of indirect substitutes as each inmate's remedy. An indivisible injunction requiring statewide improvements in medical record-keeping, funding, and oversight would be the functional equivalent of this bundle of divisible remedies and thus could issue without violating the two standing principles.

This substitution of the indirect injunction for the direct solves the standing puzzle, but it creates two class certification problems. The

first involves Rule 23(a)(2)'s commonality requirement. Seeking an injunction requiring better record-keeping, for instance, Inmate A would have to make a showing connecting poor record-keeping at his facility to his particular harm.[116] The claims of Inmates B and C would require similar discrete showings of causation. The defendants' liability to the class would thus depend on individualized determinations of fact and law. Resolution of questions common to the class, such as "does the state have an adequate system for medical records," would not "drive the resolution" of all class members' claims, as commonality requires.[117]

The second class certification problem implicates preclusion doctrine. By pursuing the indirect injunctions instead of the direct ones, the class representative has standing to sue for the indivisible equivalent of this remedies bundle. But a class representative who proposes to eschew valuable remedies potentially available to individual class members to make a class certifiable may fail an adequacy of representation test.[118] As a general matter, class members are parties for the purposes of preclusion, and thus a class judgment has claim preclusive effects for all class members.[119] Under standard preclusion doctrine, a party who asserts one claim for relief arising from a transaction or occurrence must assert all such claims or be precluded from doing so in future litigation.[120] If a class representative brings only claims for indirect remedies on behalf of the class, the preclusive effect of the class judgment or settlement jeopardizes class members' claims for the individualized, direct remedies. The class representative's claim for better overall record-keeping, for instance, might jeopardize another inmate's individual claim for an order requiring the prison to provide him immediate dental care.

Muddled doctrine makes highly uncertain the actual preclusive effects of class judgments or settlements for individualized claims plaintiffs cannot join in a class action.[121] But one tension points toward

116 Lewis v. Casey, 518 U.S. 343, 357 (1996).

117 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

118 *See* McClain v. Lufkin Indus., Inc., 519 F.3d 264, 283 (5th Cir. 2008); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 781 (2013).

119 *See e.g.*, Giannone v. York Tape & Label, Inc., 548 F.3d 191, 193–94 (2d Cir. 2008); RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. f (AM. L. INST. 1982).

120 *E.g.*, Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986).

121 Tobias Barrington Wolff, *Preclusion in Class Action Litigation*,105 COLUM. L. REV. 717, 743–44 (2005). *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 881 (1984), an employment discrimination case, seems to endorse a preclusion exception for class members' claims whose joinder in the class action would prevent certification by introducing too many individual issues. This exception is warranted, the Court explained, in part to preserve the class action's capacity "to provide a mechanism for the expeditious

a principled doctrinal untangling, at least for IR cases. In numerous instances courts have held that settlements in money damages class actions can preclude individualized claims, even "inherently individual" claims that "could not have been brought in the class action," provided class members had notice of the settlement's breadth and a right to opt out.[122] By contrast, a class judgment or settlement in an injunctive relief case most likely cannot preclude individual class members from pursuing individualized injunctive relief in subsequent litigation.[123] What explains the difference?

B. Group Rights and Doctrinal Fit

An understanding that IR plaintiffs sue not as assemblages of individuals but as groups vindicating rights benefiting them as such provides a ready answer. It also solves the standing puzzle in cases of differentiated conduct, and it makes sense of the administration of class certification doctrine. Table 4 summarizes the procedural problems IR litigation poses and shows how a single explanation—*groups litigate group rights*—fits all of these pieces together.

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decision of common questions." *Id.* at 881 (emphasis omitted). As Professor Wolff explains, the *Cooper* court primarily based this exception on Title VII doctrine. It has not generated a single, transsubstantive preclusion exception. Wolff, *supra*, at 730. *But see* 6 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 18:17 (5th ed. 2021), Westlaw CLASSACT (reading *Cooper* more broadly).

122 *See* Thompson v. Edward D. Jones & Co., 992 F.2d 187, 190–91 (8th Cir. 1993); *see also* Thomas v. Blue Cross & Blue Shield Ass'n, 333 F. App'x 414, 419–20 (11th Cir. 2009); Gonzalez v. City of New York, 396 F. Supp. 2d 411, 418 (S.D.N.Y. 2005).

123 *See, e.g.*, Pride v. Correa, 719 F.3d 1130, 1137 (9th Cir. 2013); Akootchook v. United States, 271 F.3d 1160, 1164–65 (9th Cir. 2001); Cameron v. Tomes, 990 F.2d 14, 18 (1st Cir. 1993); Fortner v. Thomas, 983 F.2d 1024, 1031 (11th Cir. 1993); Watson v. Sisto, No. 7–CV–1871, 2011 WL 533716, at *6 (E.D. Cal. Feb. 14, 2011), *adopted*, No. 7–CV–1871, 2011 WL 1219298 (E.D. Cal. Mar. 30, 2011); Burnett v. Dugan, 618 F. Supp. 2d 1232, 1237 (S.D. Cal. 2009). *But see* Harper v. Thomas, 988 F.2d 101, 104 (11th Cir. 1993) (holding that a prior class settlement bars a class member's claim for individualized injunctive relief but not money damages). Before the Ninth Circuit decided *Pride*, district courts within California split on this preclusion exception. For courts that rejected it, see, e.g., Tilei v. Cal. Dep't of Corr. & Rehab., No. C 12-1688, 2012 WL 12953766, at *1 (N.D. Cal. Aug. 31, 2012), *aff'd in part, vacated in part*, 644 F. App'x 758 (9th Cir. 2016); Ortiz v. Reynolds, No. 10–CV–1380, 2012 WL 2521994, at *4 (E.D. Cal. June 28, 2012), *adopted*, 10–CV–1380, 2012 WL 4364143 (E.D. Cal. Sep. 21, 2012); Gonzalez v. Runnels, No. C 7-2303, 2009 WL 10710478, at *5 (N.D. Cal. Sept. 28, 2009).

TABLE 4: THE GROUP RIGHTS SOLUTION TO PROCEDURAL PROBLEMS IN IR LITIGATION

Procedural Issue	**Problem**	**Solution**
Standing	How does an individual class representative who does not personally suffer harmful effects from every aspect of the central agency's misconduct have standing to challenge its full scope?	The class representative does not sue as an individual but as a group member, on behalf of the group. The group as a whole suffers harm from the full scope of the maladministration and has standing to remedy it.
Class Certification	How does a claim raised by one class member for the harm she experiences share common questions of law or fact with another class member who suffers a different harm?	The class members litigate as group members, alleging a violation of the group right they share to be free from a substantial risk of serious harm. The defendant's liability depends on central agency conduct toward all group members, not how the risk materializes for particular members.
Preclusion	Why doesn't the judgment or settlement obtained in an injunctive relief class action preclude class members from litigating individual injunctive relief claims against the government defendant in subsequent individual lawsuits?	The class members sue in their jural capacities as group members, not as individuals. They are not parties in their individual capacities. When they sue in subsequent individual lawsuits, they do so as individuals, and thus as different parties litigating different claims.

1. Preclusion and Standing

A group rights account makes quick work of the preclusion exception in injunctive relief cases that excuse claims for individualized injunctive relief from the preclusive effects of a class judgment. In most instances, "[a] court's judgment binds only the parties to a suit."[124] A derivative action brought to vindicate a corporation's rights does not bind individual shareholders. Individual shareholders are different jural entities from the corporations they own and thus are not parties to the derivative action.[125] The same logic obtains in an IR case. If class members do not litigate in their jural capacities as individuals but instead as members of a group, then individual class members qua individuals are not parties to the class action. The class judgment or settlement cannot preclude class members if they bring individualized injunctive relief claims in subsequent litigation.

Group rights also solve the standing puzzle. In recent years, courts adjudicating IR cases involving a range of public law domains have come to understand the alleged injury as the exposure of a vulnerable population to a risk of serious harm.[126] Specific, concrete harms that individual members of the group suffer can illustrate how the risk manifests. But the systemic risk that all group members endure, not these specific harms, constitutes the alleged rights violation.[127]

When plaintiffs allege a risk of harm as their injury, they litigate a group right. In my diagram's parlance, a risk of harm claim conceives of the violated right as the central agency's failure to administer a policy regime, such as the Arizona DOC's healthcare failures, competently. The defendant's liability thus turns entirely on central agency conduct and can only be determined indivisibly. Whatever bureaucratic intermediaries like wardens do or do not do has no determinative relevance for the defendant's liability. In effect, the conduct of bureaucratic intermediaries loses legal significance except

124 Smith v. Bayer Corp., 564 U.S. 299, 312 (2011) (citing 18A WRIGHT & MILLER, *supra* note 95, § 4449); *see also* Taylor v. Sturgell, 553 U.S. 880, 893–95 (2008) (describing exceptions).

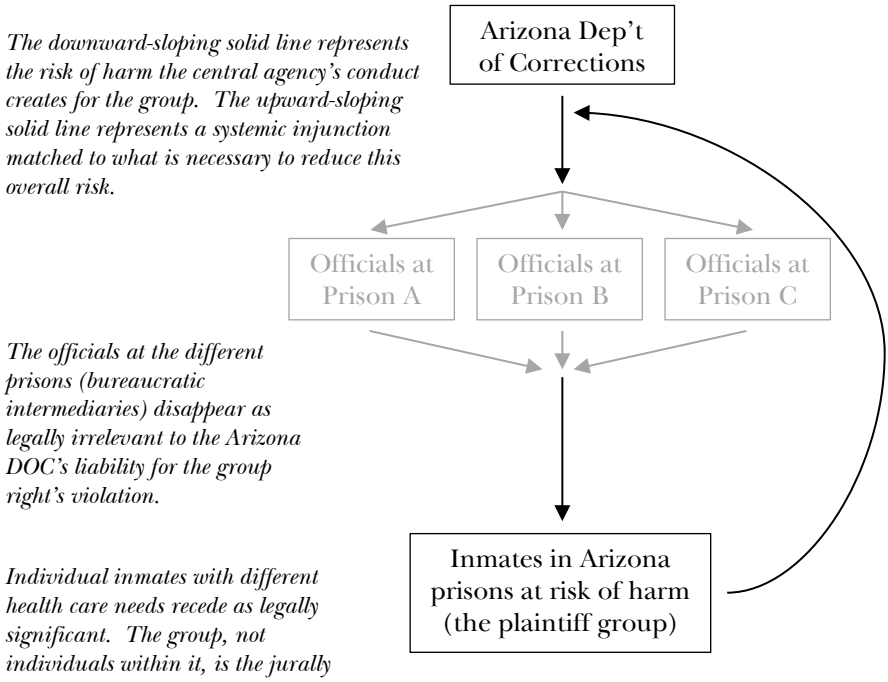
125 7C WRIGHT & MILLER, *supra* note 95, § 1840.

126 *E.g.*, B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 968–69 (9th Cir. 2019); Parsons v. Ryan, 754 F.3d 657, 681 (9th Cir. 2014); Savino v. Souza, 453 F. Supp. 3d 441, 451 (D. Mass. 2020), *certifying questions to* 459 F. Supp. 3d 317 (D. Mass. May 12, 2020); J.P. v. Sessions, No. CV18–6081, 2019 WL 6723686, at *20 (C.D. Cal. Nov. 5, 2019); Blake v. City of Grants Pass, No. 18–CV–1823, 2019 WL 3717800, at *5 (D. Or. Aug. 7, 2019), *certifying questions to* No. 18–CV–1823, 2020 WL 4209227 (D. Or. July 22, 2020); Cain v. City of New Orleans, 327 F.R.D. 111, 125 (E.D. La. 2018); Kenneth R. *ex rel.* Tri-Cnty. Cap, Inc. v. Hassan, 293 F.R.D. 254, 267 (D.N.H. 2013).

127 *E.g.*, Braggs v. Dunn, 317 F.R.D. 634, 657 (M.D. Ala. 2016).

to illustrate how the central agency's policy maladministration creates a risk of harm. Likewise the identities and circumstances of individual regulatory targets or regulatory beneficiaries do not matter to a determination of the defendant's liability. The central agency does not differentiate among members of the group as it administers the policy regime. Whether it creates an intolerable risk of harm thus depends on the impact of central agency conduct on the group as a whole.[128] Thus the court determines the defendant's liability with aggregate, indivisible findings, not individual ones.

FIGURE 3: GROUP RIGHTS AND INJUNCTIVE RELIEF



A "risk of harm" case presents no standing puzzle at all. The two standing principles limit a plaintiff's standing to seek redress for injuries done to her and not others, and they limit the remedy to what is necessary to redress the injury. A group of undifferentiated members alleges the risk of harm claim, arguing that central agency policy maladministration in all its aspects injures the group as a whole by

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

creating a generic risk of harm. The group thus has standing to challenge the entirety of the central agency's conduct. The injunction redresses the group-wide risk of harm that the central agency's maladministration creates and no more. There is no need to bundle individual claims together to justify a class-wide remedy, and there is no concern for the preclusive effects of a judgment on individualized first-best claims. For the group, the structural systemic injunction targeting the central agency's customs, policies, and practices is the most direct remedy.

2. Class Certification

Finally, a group rights account makes sense of the administration of class action doctrine in IR cases. Following *Wal-Mart*, courts administering Rule 23(a)(2)'s commonality requirement require plaintiffs to show, often with evidence, how all class members' claims raise questions of law or fact that can generate common answers apt to drive the resolution of each one's claim.[129] An Arizona inmate suing in his individual capacity and trying to establish DOC's deliberate indifference based on its failure to give him emergency dental treatment would have to marshal evidence about his requests, how corrections officers at his prison responded, and so forth—all individualized matters, the resolution of which would have no bearing on any other inmate's claim. Interpreting Rule 23(b)(2), *Wal-Mart* also requires class members to show how a single "indivisible" remedy can benefit all of them together.[130] If each inmate seeks an individualized injunction for her discrete harm, the proposed class would fail Rule 23(b)(2).

Courts took a casual approach to class certification in IR litigation before *Wal-Mart*. If class members litigate individual rights violations, one would have expected a dramatic decline in the certification of IR classes after the decision. But courts continue to certify these classes at a robust clip.[131] A group rights account explains why. The group has a right to competent central agency policy administration.[132] The substantive law, then, makes the defendants' liability turn exclusively on the lawfulness of central agency conduct, which all class members have in common. The plaintiffs' case for liability poses no

129 Marcus, *supra* note 86, at 419–20.

130 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) (quoting Nagareda, *supra* note 117, at 132).

131 Marcus, *supra* note 86, at 398–99.

132 For a rich development of an idea related to that expressed here, see Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 YALE J. ON REGUL. 165 (2016).

commonality problem. A single, class-wide injunction directly responds to this indivisible conduct, meeting Rule 23(b)(2)'s demand for indivisible relief. The violation of a group right does not just allow but requires group-wide adjudication and a group-wide remedy.

* * *

Other reasons might explain why IR plaintiffs do not routinely lose on standing grounds, why courts routinely grant class certification motions in these cases, and what accounts for the peculiar administration of preclusion doctrine in them. These alternatives may have nothing to do with each other and still be plausible. A group rights account, however, makes all of the procedural pieces fit together in a coherent whole. If groups litigate group rights, then the administration of procedural doctrine in IR litigation, even in an era of increased rigor, makes perfect sense.

III. THE SUBSTANCE OF GROUP RIGHTS: THE SIXTH AMENDMENT EXAMPLE

But do group rights really exist? IR plaintiffs are inmates, children in foster care, people with mobility impairments, indigent criminal defendants, and other individuals with no connection more formal than the fact that they happen to share a similar relationship with a government institution. Each one has his or her own set of individual rights. The claim that they inhabit a different jural identity may smooth over some procedural wrinkles, but it smacks of transcendental nonsense. Liability determinations and remedies may be indivisible, but do these traits really suggest something about rights design?

Proving the existence of group rights may seem an impossible challenge. After all, a "right is a concept, not a thing."[133] It is difficult to describe in objective, empirically verifiable ways. But remedies are concrete and identifiable, and they relate to rights in ways that can illuminate the latter's design. Procedure suggests the existence of group rights. Remedies can lay bare the real, tangible distinction between individual and group rights.

This Part uses a case study to show how remedies illuminate rights design. Most Sixth Amendment adjudication happens when individual criminal defendants seek to vacate convictions or sentences after a guilty plea or trial. But a fledging species of IR litigation has yielded Sixth Amendment adjudication of a different sort. Groups of indigent criminal defendants have brought class actions to win systemic changes

133 Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, *in* TAKING REMEDIES SERIOUSLY 31, 36 (Kent Roach & Robert J. Sharpe eds., 2009).

to poorly funded, badly administered indigent defense systems. As did the Arizona inmates in the litigation described in Part II, these groups argue for the defendant's liability in indivisible terms. Similarly, these groups seek indivisible remedies, such as better funding for indigent defense or caps on lawyer caseloads. Indigent criminal defendants suing as classes assert group Sixth Amendment rights. Differences between individual postconviction remedies and systemic, class-wide remedies can prove this so.

A. The Sixth Amendment in Individual and Group Litigation

1. Individual Sixth Amendment Remedies

The Sixth Amendment guarantees not just the right to appointed counsel for indigent criminal defendants, as *Gideon v. Wainwright* famously extended, but also this counsel's effective assistance.[134] *Strickland v. Washington* and *United States v. Cronic* provide the doctrine that individual criminal defendants follow when they try to vindicate this right.[135] The decisions treat the right to effective assistance as a means to ensure acceptably accurate outcomes.[136] For this reason, criminal defendants do not have a right to lawyer performance that measures up by some metric of competence or professionalism.[137] Rather, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[138]

This emphasis on outcome accuracy has implications for the burden an individual criminal defendant bears to establish a Sixth Amendment violation. Obviously, "the defendant must show that counsel's performance was deficient."[139] But poor lawyer performance alone isn't enough. As the *Strickland* court declared, "the defendant must [also] show that the deficient performance prejudiced the defense."[140] In other words, a "counsel's errors" must be "so serious as to deprive the defendant of a fair trial, a trial whose result is

134 Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Johnson v. Zerbst, 304 U.S. 458, 467 (1938); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.7(a) (4th ed. 2004).

135 Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984).

136 *See Strickland*, 466 U.S. at 691–92; *Cronic*, 466 U.S. at 658.

137 *See* LAFAVE ET AL., *supra* note 134, § 11.7(a).

138 *Strickland*, 466 U.S. at 686.

139 *Id.* at 687.

140 *Id.*

reliable."[141] To establish this showing of prejudice, a defendant must overcome a "'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance."[142] *Cronic* crafted a "narrow exception" to the prejudice requirement,[143] presuming a "constructive denial" of counsel altogether under particularly extreme circumstances.[144]

Strickland's prejudice requirement means that a Sixth Amendment violation only ripens after the prosecution's conclusion.[145] This conception of the right has remedial consequences. Individual criminal defendants can almost never raise Sixth Amendment claims preconviction.[146] They therefore almost invariably pursue their rights in postconviction proceedings, either direct appeals or collateral challenges.[147] For this reason, a court remedies an individual's Sixth Amendment violation by vacating his conviction.[148]

A court adjudicating an individual Sixth Amendment challenge makes a divisible liability determination. *Strickland* and *Cronic* contemplate individual criminal defendants showing one-by-one how their lawyers' missteps prejudiced outcomes.[149] Likewise, the remedy is divisible. When a court vacates one defendant's conviction, the remedy has no formal implications for any other defendant.

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141 *Id.*

142 Bell v. Cone, 535 U.S. 685, 702 (2002) (quoting *Strickland*, 466 U.S. at 689).

143 Wright v. Van Patten, 552 U.S. 120, 124 (2008) (per curiam) (quoting Florida v. Nixon, 543 U.S. 175, 190 (2004)).

144 *Strickland*, 466 U.S. at 692 (citing United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984)).

145 *E.g.*, United States v. Carmichael, 372 F. Supp. 2d 1331, 1333 (M.D. Ala. 2005).

146 Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1216 (2013); 43A C.J.S. *Injunctions* § 304 (2021). *But see* State v. Young, 172 P.3d 138 (N.M. 2007) (addressing a Sixth Amendment challenge to the adequacy of public defender resources before conviction); Dalton v. Barrett, No. 17–CV–4057, 2019 WL 954982, at *6 (W.D. Mo. Feb. 26, 2019) (denying class certification in a systemic challenge to the adequacy of an indigent defense system in part because "[p]laintiffs . . . could bring their claims" challenging the system "individually . . . and obtain an individual injunction," but providing no authority for this assertion).

147 LAFAVE ET AL., *supra* note 134, § 11.7(e); *see also* United States v. Triplett, 104 F.3d 1074, 1083 (8th Cir. 1997); Yarls v. Bunton, 231 F. Supp. 3d 128, 132 (M.D. La. 2017).

148 *E.g.*, United States v. Young, 315 F.3d 911, 915 (8th Cir. 2003).

149 Osagiede v. United States, 543 F.3d 399, 408 (7th Cir. 2008) (citing Williams v. Taylor, 529 U.S. 362, 391 (2000)) (referring to the *Strickland* inquiry as entailing an "individualized fact-based analysis"); United States v. Rashad, 331 F.3d 908, 909 (D.C. Cir. 2003) (referring to the "fact-intensive" *Strickland* inquiry).

2. Systemic Sixth Amendment Remedies

Challenges to individual convictions are woefully out-of-sync with the scale of the American indigent defense crisis.[150] Badly underfunded systems across the country struggle to provide even the barest minimum of representation.[151] Overworked attorneys staggering under the weight of enormous caseloads cannot investigate cases or even review discovery materials. They cannot meet with clients except immediately before hearings and even trial. They have almost nonexistent investigator and training resources, and they cannot provide conflict-free representation.[152] Ineffective assistance is standard operating procedure for the many systems afflicted with these sorts of problems.[153] A vast gulf divides the values and policies in the Sixth Amendment and *Gideon*, on one hand, and lived realities for many criminal defendants, on the other.

In a couple of cases decades ago, individual criminal defendants attempted to leverage these systemic deficiencies in the service of their individual Sixth Amendment claims.[154] In one instance, the Arizona Supreme Court held that a badly overburdened indigent defense system created a rebuttable presumption of ineffective assistance, effectively flipping the *Strickland* burden from the defendant to the state.[155] But this sort of intervention proved ineffective at galvanizing systemic reform, in part because these early efforts still required individuals to litigate their rights in one-by-one postconviction challenges.[156]

Starting in the 1990s, but accelerating quickly over the past fifteen years, impact litigators have launched wholesale challenges to

150 *See* Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 401–05 (2012).

151 *E.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1578–89 (2018); NAT'L RIGHT TO COUNS. COMM., CONST. PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL xi-xii (2009) [hereinafter JUSTICE DENIED].

152 *E.g.*, Kuren v. Luzerne Cnty., 146 A.3d 715, 723–25 (Pa. 2016); Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261, 278 (Fla. 2013).

153 David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQUALITY 371, 372 (2014) (citing JUSTICE DENIED, *supra* note 151, at 2–7).

154 Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. L. REV. L. & SOC. CHANGE 427, 436–39 (2009).

155 State v. Smith, 681 P.2d 1374, 1384 (Ariz. 1984); *see also* State v. Peart, 621 So. 2d 780, 791 (La. 1993).

156 Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1741–42 (2005).

dysfunctional indigent defense systems.[157] Plaintiffs in these class actions typically sue on behalf of "fluid" classes of indigent criminal defendants being or to be prosecuted.[158] They bring what the Pennsylvania Supreme Court labeled a "structural claim," as distinguished from an "individual one."[159] Class representatives typically allege that systemic deficiencies in the indigent defense system at issue create the "considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel."[160] These cases "make no individual claims of ineffective assistance of counsel."[161] Rather, they seek aggregate-level remedies for systemic deficiencies that degrade the quality of representation that all indigent defendants experience.[162]

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157 Lucas, *supra* note 11, at 96–98 & n. 44–55 (listing cases and outcomes current through March 2017); *see also* Drinan, *supra* note 154, at 439–62. I focus on cases challenging indigent defense systems that formally provide counsel, not ones that fail to provide any counsel at all. *Cf.* Lavallee v. Justs. in the Hampden Superior Ct., 812 N.E.2d 895 (Mass. 2004). Most of these lawsuits proceed in state court due to *Younger* abstention and other doctrines. *E.g.*, Luckey v. Miller, 976 F.2d 673, 677–78 (11th Cir. 1992); Yarls v. Bunton, 231 F. Supp. 3d 128, 132 (M.D. La. 2017). *Compare* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 304 (2020) (using a federal case as "representative" to support the claim that "courts generally leave prospective ineffective assistance claimants empty-handed"), *with* Lucas, *supra* note 11, at 106 (noting that most of these cases proceed in state court).

158 Duncan v. State, 774 N.W.2d 89, 125, 141 (Mich. Ct. App. 2009), *aff'd on other grounds*, 866 N.W.2d 407 (Mich. 2010); Lucas, *supra* note 11, at 93; Drinan, *supra* note 154, at 444–45. In several instances over the past decade, public defenders or counties responsible for providing indigent defense resources themselves have served as plaintiffs or the equivalents. These are effectively representative actions. The litigant is not an individual criminal defendant but rather a lawyer or county claiming that he, she, or it cannot adequately provide defense services to all indigent defendants. *See* Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261 (Fla. 2013); Quitman Cnty. v. State, 910 So. 2d 1032 (Miss. 2005).

159 Kuren v. Luzerne Cnty., 146 A.3d 715, 746 (Pa. 2016); *see also id.* at 736 (insisting that the plaintiffs "make no individual claims" and instead "challenge the system itself").

160 Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010); *see also* Order Denying Motions for Summary Judgment, Recommending Permission to Appeal Pursuant to I.A.R. 12(c)(2), & Staying Proceedings at 28, Tucker v. State, No. CV-OC-2015-10240 (Idaho Jud. Dist. Ct. Mar. 19, 2019) (summarizing the plaintiffs' claim that their burden is to show "that Defendants' policies and practices have created a substantial risk that indigent defendants' rights under the Sixth Amendment or Idaho Constitution will be violated"), *modified*, 484 P.3d 851 (Idaho 2021); *see* Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625, 648–50 (2017).

161 *Kuren*, 146 A.3d at 736; *see also Hurrell-Harring*, 930 N.E.2d at 226; *Duncan*, 774 N.W.2d at 125; Law & Motion Minute Order at 4, Phillips v. State, No. 15CECG02201 (Cal. Sup. Ct. Apr. 12, 2016) ("[P]laintiffs in this action are not challenging individual convictions.").

162 *E.g.*, *Kuren*, 146 A.3d at 718 (describing injunctive relief request as for adequate funding for a public defender's office).

Thus far the exact contours of the Sixth Amendment rights and remedies at stake in this litigation have not settled out. Some participants in this litigation have couched the right in terms of *Cronic*: systemic deficiencies so mar indigent defense systems that each indigent defendant is constructively denied his right to counsel.[163] This design is consistent with an individual rights conception of the Sixth Amendment; systemic dysfunction is so bad that it renders a *Strickland* inquiry for each individual defendant unnecessary. But this *Cronic* conception has staggering remedial implications. A successful lawsuit would effectively mean that every indigent defendant within the system should have his conviction vacated, regardless of the strength of evidence of his culpability. Litigants and courts have consistently disavowed these consequences. Participants either reject *Cronic*'s relevance or they intend *Cronic* to have a different meaning in IR litigation than it has in postconviction proceedings.[164]

One aspect of rights design is clear. Citing *Strickland*, defendants in Sixth Amendment class actions argue that a challenge cannot proceed without individualized inquiries into the prejudicial effects that systemic deficiencies have on each class member's prosecution.[165] Courts that allow these cases to proceed reject this argument.[166] As the Pennsylvania Supreme Court explained, "[a]pplying the *Strickland* test to the category of claims" in a systemic case is "illogical." These plaintiffs do not advance "individual claims of ineffective assistance" but rather challenge "widespread and endemic inability." "[G]eneral allegations" about insufficient staffing and overworked personnel "in no way resemble the individual ineffectiveness claims . . . in *Strickland*." The Court concluded: "There is no performance by individual counsel to evaluate . . . ."[167]

163 *E.g.*, *Hurrell-Harring*, 930 N.E.2d at 225–26.

164 *Tucker*, 484 P.3d at 858; Reply in Support of Plaintiffs' Motion for Class Certification at 9, Davis v. State, No. 170C002271B (Nev. Jud. Dist. Ct. filed May 24, 2019) ("Defendants . . . confuse this *Gideon* challenge to the State's system of indigent defense with a post-conviction individual ineffective-assistance-of-counsel challenge like the one in *Cronic*."); *cf.* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1615 (2020) (referring to "structural *Cronic* violations").

165 *See* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); *Kuren*, 146 A.3d 715 at 746–47; *Hurrell-Harring*, 930 N.E.2d 217; *Duncan*, 774 N.W.2d at 138; Law & Motion Minute Order, *supra* note 161, at 4; *cf.* Remick v. Utah, No. 16–CV–789, 2018 WL 1472484, at *14–15 (D. Utah Mar. 23, 2018) (insisting that plaintiffs must allege that deficiencies prejudiced their individual cases to state a Sixth Amendment claim in the context of a systemic challenge); Cox v. Utah, No. 16–CV–53, 2016 WL 6905414, at *5–6 (D. Utah Nov. 7, 2016).

166 *E.g.*, Law & Motion Minute Order, *supra* note 161, at 6.

167 *Kuren*, 146 A.3d at 746.

In short, *Strickland*'s irrelevance makes indivisible liability determinations appropriate. Because a court does not need to evaluate the causal consequences of systemic dysfunction for individual defendants, it can adjudicate the system's constitutionality for all class members together.[168]

Although mostly muddy, the remedial picture has two clear features. Courts will not vacate individual convictions,[169] and relief will be indivisible. One injunction required the defendant cities to monitor the quality of indigent defense services and to take systemic steps to improve them.[170] If settlements are any guide, remedies might include other sorts of terms, such as caseload maximums for indigent defense counsel, adequate training, and better investigator and interpreter resources.[171] None of this relief could possibly benefit discrete individuals without benefiting the group.

An individual criminal defendant suffers a Sixth Amendment violation if his lawyer's ineffectiveness affects the outcome. A rights violation gets adjudicated postconviction. If the defendant meets the *Strickland* test (a divisible liability determination), he gets to have his conviction vacated (a divisible remedy). A class of indigent defendants, by contrast, suffers a Sixth Amendment violation when an indigent defense system is so overburdened that lawyers cannot meet with clients regularly, access sufficient investigator resources, file motions to suppress, and perform other basic defense tasks.[172] The Sixth Amendment claim's adjudication proceeds independent of any person's actual conviction, and thus generates an indivisible liability determination for all defendants in the system together. If class members prevail, they win an indivisible remedy—something like an order lowering public defender caseloads, creating monitoring and training programs, and increasing investigator and translator resources.

B. Understanding the Sixth Amendment Rights-Remedies Relationship

In a couple of instances, courts rejecting *Strickland*'s relevance in IR cases have insisted that the Sixth Amendment right remains unchanged from the form it assumes in postconviction proceedings.

168 *Duncan*, 774 N.W.2d at 139 ("[T]he factual question *that will be of any relevance to all class members* revolves around the establishment of widespread and systemic instances of deficient performance and denial of counsel; the case's viability with regard to all members depends on an aggregation of harm that is pervasive and persistent.").

169 *Supra* note 161.

170 Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1135–37 (W.D. Wash. 2013).

171 Stipulation & Order of Settlement at 7–10, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014).

172 *See e.g.*, *Duncan*, 774 N.W.2d at 126–27.

Strickland determines "[w]hether an accused has been prejudiced by the denial of a right," "relates to relief," and thus does not determine whether "a right exists."[173] This rigid boundary between right and remedy is implausible by the terms of either of the two main accounts of the rights-remedies relationship in public law.[174] Both the "pragmatist" and the "decision rules" accounts confirm that differences between group and individual remedies correspond to differences in the substance of Sixth Amendment doctrine.[175]

1. The Pragmatist Account

Daryl Levinson uses what he calls "rights essentialism" as an explanatory foil for his pragmatist account of the rights-remedies relationship.[176] A rights essentialist insists "that rights are defined by courts through a mystical process of identifying 'pure' constitutional values without regard to the sorts of functional, fact-specific policy concerns that are relegated to the remedial sphere."[177] Only after "rights are defined and ends therefore established" do courts, accounting for various practical and institutional concerns, shape the remedy "instrumentally."[178]

A pragmatist account does not embrace the claim long associated with legal realism that rights simply equal the remedies issued to enforce them.[179] (To a legal realist, this equivalence means that group and individual Sixth Amendment rights indisputably differ.) But, Levinson argues, rights and remedies do share an "intimate relationship" and are "inextricably intertwined."[180] The generative process does not run exclusively from rights to remedies but also "in the opposite direction, from remedies to rights." This process is "remedial equilibration."[181] A variety of practical and institutional concerns about the design and consequences of remedies "infiltrate

173 Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); Law & Motion Minute Order, *supra* note 161, at 5.

174 *E.g.*, Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 414 (2012); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1013 (2010).

175 Leong, *supra* note 174, at 414–16 (citing Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 43–50 (2004); and then citing Laurin, *supra* note 174, at 1007–08).

176 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 926 (1999). For the term "[p]ragmatist," see Berman, *supra* note 175, at 50.

177 Levinson, *supra* note 176, at 857.

178 *Id.* at 884, 869.

179 K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 84 (1960) ("A right is as big, precisely, as what the courts will do."); *see also* Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L., no. 1, art. 3, at 1, 5 (2011); Smith, *supra* note 133, at 39.

180 Levinson, *supra* note 176, at 858.

181 *Id.* at 884.

rights" themselves.[182] These concerns include, for instance, unease with the judicial role in supervising and enforcing remedies,[183] or judicial inability to identify with precision when rights are violated.[184]

As Table 5 summarizes, remedial equilibration of Sixth Amendment rights leads to different designs of rights depending on whether groups or individuals sue to vindicate them. A stylized version of this process for individual rights goes as follows. *Gideon* conceives of the Sixth Amendment right as the right to have the services of a lawyer.[185] The remedy is obvious: jurisdictions that do not appoint counsel for indigent defendants must do so. If "defendants [are] left to the mercies of incompetent counsel," however,[186] this initial remedy proves inadequate. To mean something, the right needs to strengthen, to require not just the assistance of counsel but minimally competent counsel.[187]

Thus strengthened, however, the Sixth Amendment right poses daunting remedial implications. Subpar attorney performance is ubiquitous. The remedy for a Sixth Amendment violation, the vacation of a conviction, could thus erode finality in criminal litigation on a wide scale. This threat to the government's "fundamental interest" motivates the prejudice requirement,[188] a "par[ing] back" of the right that "lower[s]" remedial cost.[189] Equilibrated thusly, the Sixth Amendment right becomes something different altogether—the right to have the assistance of counsel be sufficiently effective so as not to prejudice outcomes.

182 *Id.* at 914.

183 *See id.* at 884.

184 *See id.* at 887.

185 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

186 McMann v. Richardson, 397 U.S. 759, 771 (1970).

187 *See* Michigan v. Harvey, 494 U.S. 344, 348 (1990) (using this language to describe "[t]he essence" of the Sixth Amendment right under *Gideon*).

188 Hill v. Lockhart, 474 U.S. 52, 58 (1985); *see* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

189 *See* Levinson, *supra* note 176, at 889.

TABLE 5: REMEDIAL EQUILIBRATION FOR INDIVIDUAL AND GROUP SIXTH AMENDMENT RIGHTS

	Initial Right	**Initial Remedy**	**Strengthened Right**	**Remedial Costs**	**Equilibrated Right**
Individual Right	Counsel's assistance	Appointment of counsel	Effective assistance of counsel	Widespread vacation of convictions threatens finality of criminal convictions	Representation effective enough not to prejudice outcomes
Group Right	Counsel's assistance	Appointment of counsel	Effective assistance of counsel	N/A	Effective assistance of counsel

The stylized account of the right-remedy relationship in IR litigation differs. The first steps are the same. Indigent criminal defendants receive a right to appointed counsel, then to meaningful assistance. At this point the path of rights evolution diverges. Because a group of criminal defendants does not sue to challenge particular convictions and seek their vacation, the remedy does not trigger finality costs. The right's content thus does not include a prejudice requirement.[190] A remedy designed for institutional reform, such as better funding or improved oversight, imposes different costs, to be sure. But thus far courts receptive to this litigation have dismissed these costs as insufficiently important to equilibrate the right.[191]

The pragmatist understanding of the relationship between rights and remedies does not simply equate the right to the remedy but allows some conceptual distance between the two. A legal realist would describe a Sixth Amendment group right as one to a competently administered, adequately funded indigent defense system. A pragmatist by contrast might accept a more abstractly articulated right ("right to counsel's effective assistance," for instance). But the two accounts draw the same ultimate lesson from the rights-remedies relationship. The need to account for the remedy's influence on the right's construction leads to a design of Sixth Amendment rights that differs depending on whether a group or an individual litigates them.

2. The Decision Rules Account

The "decision rules" account, pragmatism's chief alternative, posits a wider conceptual divide between rights and remedies. As Mitchell Berman explains, when courts develop the substance of constitutional law, they articulate both a "constitutional operative proposition[]" and a "constitutional decision rule[]." The former is "the proper meaning of a constitutional power, right, duty, or other

190 *See* Hurrell-Harring v. State, 930 N.E.2d 217, 226 (N.Y. 2010) (reasoning that the Sixth Amendment determination does not need a prejudice requirement because the way the court conceives of the "claims" in a class action seeking prospective relief "eliminat[es] any possibility that the collateral adjudication of generalized claims of ineffective assistance might be used to obtain relief from individual judgments of conviction"); *Luckey*, 860 F.2d at 1017 (noting that considerations like "finality . . . do not apply when only prospective relief is sought").

191 *Compare* Duncan v. State, 774 N.W.2d 89, 167–68 (Mich. Ct. App. 2009) (Whitbeck, J., dissenting), *aff'd on other grounds*, 866 N.W.2d 407 (Mich. 2010), *with Hurrell-Harring*, 930 N.E.2d at 227 ("It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps . . . some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right . . . ."); *see also* Tucker v. State, 394 P.3d 54, 68–69 (Idaho 2017).

sort of provision,"[192] while the latter gives courts directions for how to adjudicate claims that involve the operative provision.[193] The Equal Protection Clause's operative provision, for instance, amounts to something like the following: "the government may not treat some people worse than others without adequate justification."[194] The familiar tiers of scrutiny are the decision rules that determine when a particular government action violates this operative provision.[195] Together, the operative provision and the decision rule form constitutional doctrine's substance.[196]

Operative provisions include rights. They and their decision rules "lie upstream" from the determination of whether the defendant violates a right in a particular instance. Logically, the content of rights and decision rules must also come before the court fashions a remedy for that particular violation.[197] A good deal of legal space thus divides rights from remedies. Decision rules, occupying this space, buffer rights from the sorts of practical and institutional pressures that, by the pragmatist account, lead to rights adjustment through remedial equilibration.[198] Operative provisions remain articulated as "general propositions" that do not vary from one enforcement context to the next.[199] Adjustments to decision rules, not operative provisions, account for more pragmatic concerns.[200]

As Table 6 indicates, the decision rules account allows the possibility that the Sixth Amendment right understood solely as its operative provision—something like "criminal defendants have a right to counsel's meaningful assistance"—remains constant whether an individual or group vindicates it. Vacation of an individual defendant's conviction raises institutional concerns for finality and judicial economy. But the decision rule, not the operative provision, accounts for these concerns. Hence the two-pronged decision rule from *Strickland* that completes the substantive doctrine for individual postconviction challenges: (1) criminal defendants must overcome a "strong

192 Berman, *supra* note 175, at 9; *see also* Laurin, *supra* note 174, at 1012.

193 Berman, *supra* note 175, at 9, 12; Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 221 (2006).

194 Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1657 (2005).

195 *See id.* at 1677.

196 *See* Berman, *supra* note 193, at 221.

197 *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 41 (2010); *see also* Laurin, *supra* note 174, at 1014 (distinguishing among operative provisions, decision rules, and remedial rules).

198 *See* Roosevelt, *supra* note 194, at 1658–67.

199 *Id.* at 1658; Laurin, *supra* note 174, at 1059.

200 *See* Roosevelt, *supra* note 194, at 1658.

presumption" that their lawyers performed acceptably, and (2) defendants must show that deficient performance was prejudicial to the outcome.[201]

The decision rules account yields a different body of substantive Sixth Amendment doctrine for groups. The concerns that motivate the *Strickland* decision rule disappear. Courts receptive to systemic claims have rejected defendants' arguments that plaintiffs must show prejudice to individual defendants for this reason. The decision rule assumes a different form, something like the defendants' obligation to show that systemic deficiencies create a "considerable risk" of the denial of Sixth Amendment rights "with a fair degree of regularity."[202]

TABLE 6: SIXTH AMENDMENT OPERATIVE PROVISIONS AND DECISION RULES FOR INDIVIDUALS AND GROUPS

	Operative Provision	**Decision Rule(s)**	**Remedy**
Individuals	Right to counsel's meaningful assistance	Strong presumption of competence performance, and defendant's obligation to show that counsel's performance prejudiced the outcome	Vacation of conviction
Groups	Right to counsel's meaningful assistance	A showing that systemic deficiencies create a "considerable risk" that defendants will be denied Sixth Amendment rights with a "fair degree of regularity"	Systemic reform (better funding, etc.)

201 Strickland v. Washington, 466 U.S. 668, 689–92 (1984); *see also* Christopher N. Lasch, *"Crimmigraion" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131, 2141 (2014) (providing a decision rules account of *Strickland*).

202 Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010); Tucker v. State, 484 P.3d 851, 865–66 (Idaho 2021) (requiring plaintiffs to prove that "Idaho's public defense system suffers from widespread, persistent structural deficiencies that likely will result in indigent defendants suffering actual or constructive denials of counsel at critical stages of criminal proceedings"); Hanlon, *supra* note 160, 648–49.

The substance of Sixth Amendment doctrine, which includes both the operative provision and the decision rule, thus depends on whether an individual or a group alleges the violation. Defined narrowly to include just its operative provision, the Sixth Amendment right is not litigant-dependent. But the decision rules account keeps it so only by cleaving off decision rules from operative provisions. Sixth Amendment substance includes both and thus splits into different strains depending on whether an individual or a group presses the claim.

* * *

Liability determinations and remedies are divisible when individuals litigate postconviction challenges. They become indivisible when groups seek systemic reform. This contrast results from differences in Sixth Amendment rights design.

An indigent defense reform lawsuit is just one type of IR litigation. But the Sixth Amendment right is "universally regarded as an individual right."[203] If group Sixth Amendment rights exist, and if a group rights account makes sense of otherwise puzzling features in transsubstantive procedural doctrine, then there is no reason why group rights have not likewise taken root in other public law domains.

IV. JURISPRUDENTIAL AND DOCTRINAL BEGINNINGS

Some courts involved in IR litigation have grasped, if haltingly, that there is something afoot substantively in the cases they adjudicate. The Pennsylvania Supreme Court distinguished "structural" from "individual" Sixth Amendment claims, for instance, when it allowed a systemic challenge to a malfunctioning indigent defense system to proceed.[204] A Ninth Circuit opinion in the Arizona prison healthcare case differentiated between "institutional reform claims" and "individual Eighth Amendment claims."[205] But participants in IR litigation have not fashioned a coherent terminology for this phenomenon. Lawyers and judges in two foster care reform cases, for instance, referred variously to "'harms' exist[ing] on a macro-level,"[206] "class-wide institutional claims,"[207] an "'individual-plaintiff-blind'

203 Guggenheim, *supra* note 150, at 395; *see also* Julian Darwall & Martin Guggenheim, *Funding the People's Right*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 619 (2012).

204 Kuren v. Luzerne Cnty., 146 A.3d 715, 746 (Pa. 2016).

205 Parsons v. Ryan, 784 F.3d 571, 578 (9th Cir. 2015) (Ikuta, J., dissenting) (mem.) (citing Parsons v. Ryan, 754 F.3d 657, 677 (9th Cir. 2014)).

206 Defendants' Motion *in Limine* to Preclude Evidence of Individual Case Histories at 1, Connor B. *ex rel.* Vigurs v. Patrick, No. 10–CV–30073 (D. Mass. filed Dec. 21, 2012).

207 Connor B. *ex rel.* Vigurs v. Patrick, 985 F. Supp. 2d 129, 166 (D. Mass. 2013).

approach,"[208] and "a 'multifaceted request for broad-based injunctive relief.'"[209]

Parts II and III argue that group rights exist. If I am right, they sorely need jurisprudential and doctrinal explication. The last efforts in this regard came during institutional reform's formative era, and much has changed since then. This task requires more than what I can do here. But a couple of initial steps are possible, and I take them in this Part. The first is to define group rights and to identify which groups can enjoy them, so that participants in IR litigation can better understand their cases' substance. I distill from how courts have resolved various procedural, substantive, and remedial matters in IR cases two definitional traits—liability and remedy indivisibility. Liability and remedy indivisibility, in turn, indicate what types of groups can benefit from rights protection.

The second step is to show why the proper understanding of rights design matters to the management and adjudication of IR litigation. I use two doctrinal problems these cases often encounter to highlight the benefits of conceptual clarity.

A. Defining Group Rights and Identifying Groups

The term "group rights" drew political heat in the 1980s. Conservative lawyers and commentators weaponized the term in their fight against a Fissian conception of equal protection, one whose implementation would have required a reckoning with structural racism and subordination and would have supported controversial remedies like affirmative action.[210] In their imagining, "group rights" meant special advantages for people identified by sociologically determined identities. Fiss arguably understood group rights in this fashion as well. He argued, for instance, that equal protection rights exist "primarily, but not exclusively, as a protection for blacks,"[211] a

208 Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification at 40, M.D. *ex rel.* Stukenberg v. Perry, 294 F.R.D. 7 (S.D. Tex. 2013) (No. 11–CV–84), 2012 WL 13049817.

209 Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 158 (D. Mass. 2011) (quoting LaShawn A. *ex rel.* Moore v. Kelly, 990 F.2d 1319, 1323 (D.C. Cir. 1993)).

210 *E.g.*, L.H. Gann & Alvin Rabushka, *Racial Classification: Politics of the Future?*, POL'Y REV., Summer 1981, at 87, 88 (arguing that new concepts of "group rights" would make "ethic affinity" count more than "personal merit"); William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 996 (1984) (insisting that "[t]he essential concern for *individual* opportunity" at equal protection's core was increasingly "submerged . . . beneath a rising tide of *group* entitlements," and describing group rights as a "fundamental distortion of civil rights in a democratic society"). For a recent use of the term "group rights" to this effect, see THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 15 (2021).

211 Fiss, *supra* note 48, at 147.

"natural class[], or social group[], in American society" whose systemic subordination requires remediation.[212] For a species of group rights defined in these terms, groups first exist, and rights then follow to protect them.

But group rights have emerged in some public law domains without intense handwringing over what groups have sufficient "moral standing" to warrant rights protection.[213] The substantive law has constituted groups in a common-law process of elaboration driven by contingency and circumstance, one prompted by the recognition that, in certain contexts, group rights better realize the values and policies of the substantive law than individual rights. Group rights thus develop for an instrumental reason, to benefit people who share little other than a common interest in the government obeying the law. Put differently, rights exist and groups follow.

My account of the present-day makeup of substantive law in IR litigation follows from how courts actually decide claims and issue remedies, not on deeply contested claims about which groups really exist and warrant protection or advantage. As the discussions in Parts II and III demonstrate, courts often adjudicate defendants' liability without requiring the plaintiffs to prove harm or wrongdoing specific to any particular individual, and they issue remedies that benefit groups as a whole and no specific member of them. Such cases, I argue, involve group rights, whether these rights involve socially or instrumentally determined groups. The group rights genus thus includes more species than what 1980s-era debates recognized.

1. Liability and Remedy Indivisibility

Before the lawyers who brought the Texas foster care reform case filed suit in Corpus Christi, they litigated a similar foster care reform class action in Massachusetts. At several key litigation moments, these lawyers and their state agency adversary clashed over the design of the children's substantive due process right. Because the plaintiffs alleged violations of individual rights, the agency insisted, the case required individualized liability determinations unsuitable for a class action.[214] "We are not ever asking this Court for anything approaching individual

212 *Id.* at 148.

213 Peter Jones, *Collective Rights, Public Goods, and Participatory Goods*, *in* HOW GROUPS MATTER: CHALLENGES OF TOLERATION IN PLURALISTIC SOCIETIES 52, 53 (Gideon Calder, Magali Bessone & Federico Zuolo eds., 2014).

214 Defendants' Opposition to Plaintiffs' Motion for Class Certification at 23, *Connor B.*, 771 F. Supp. 2d at 142 (No. 10–CV–30073).

determinations" of rights violations, the children's lawyer responded.[215]

By the time of trial, the parties agreed that the agency's liability hinged on the overall quality of how it administered Massachusetts' foster care system. Their joint pretrial memorandum summarized the plaintiffs' prima facie case and the agency's defense with no mention of any factual or legal dispute over individual children's injuries.[216] Indeed, pivoting 180 degrees, the agency moved before trial to exclude any evidence of individual children's experiences in foster care as "irrelevant, [and] prejudicial."[217] Had the plaintiffs prevailed, they presumably would have asked for an injunction similar to the one the Texas judge later issued, a remedy requiring systemic changes to foster care management and funding but nothing fashioned to fix any particular child's situation.[218]

The rights adjudicated in these episodes of foster care reform litigation share features with the right to a "unitary, nonracial" school system articulated in *Jefferson County*,[219] or with the Arizona inmates' right to an adequately administered prison healthcare system.[220] Elizabeth Burch argues that a violation of the sort of "inherently aggregate" right shared by Arizona inmates or Massachusetts children "arises from an aggregate harm that affects a group equally and

215 Transcript of Motion Hearing at 32, *Connor B.*, 771 F. Supp. 2d at 142 (No. 10–CV–30073).

216 Joint Pretrial Memorandum at 4–11, Connor B. *ex rel.* Vigurs v. Patrick, 985 F. Supp. 2d 129 (D. Mass. 2013) (No. 10–30073). Under a District of Massachusetts local rule, the parties' joint pretrial memorandum must summarize the evidence they plan to submit at trial, identify contested and uncontested issues of facts that remain in the case, and describe all issues of law that require resolution. D. MASS. LOC. R. 16.5(d). Neither of the parties' trial briefs suggested an intention to establish individual children's injuries and their cause. *See* Plaintiffs' Trial Brief at 1, *Connor B.*, 985 F. Supp. 2d 129 (No. 10–30073); Defendants' Trial Brief at 1, *Connor B.*, 985 F. Supp. 2d 129 (No. 10–30073).

217 Joint Pretrial Memorandum, *supra* note 216, at 13; *see also* Defendants' Motion *in Limine* to Preclude Evidence of Individual Case Histories, *supra* note 206, at 1 ("Evidence of *any* particular child's experience is irrelevant, [and] diverts attention from the issues at hand . . . ."). Class counsel argued that individual children's experiences were admissible to "illustrate the harms that Plaintiffs allege" and thereby "bring the 'cold numbers'" in statistical evidence "convincingly to life." Plaintiffs' Opposition to Defendants' Motion *in Limine* to Preclude Evidence of Individual Case Histories at 3, 5, *Connor B. ex rel.* Vigurs v. Patrick, No. 10–CV–30073 (D. Mass. filed Jan. 4, 2013) (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977)).

218 M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 272–87 (5th Cir. 2018) (describing the district court's injunction).

219 *See supra* note 33 and accompanying text.

220 *See supra* notes 87–89.

collectively."[221] This feature is exactly the liability indivisibility described in Part II. An "aggregate harm" that people suffer "equally" by definition excludes harms with particularized effects for discrete individuals. The defendant's liability does not require any determination of the particular consequences of its conduct for individuals. But liability indivisibility includes more than just the evidentiary irrelevance of individual treatment. Because the harm is suffered "collectively," a court can only determine the defendant's liability for all at once and not individually, victim-by-victim.

A group right's second core characteristic is remedy indivisibility.[222] A remedy cannot be parceled out individual-by-individual but must benefit the group as a whole. *Jefferson County* contemplated a wholesale restructuring of a segregated school system, relief that necessarily benefited all black children at once. Likewise, the remedial benefits of reduced caseloads for caseworkers cannot be parceled out child-by-child in Texas. Nor can better training and supervision for public defenders benefit discrete indigent defendants without benefiting all of them.

A group right needs to have both characteristics to qualify. Liability indivisibility is not uncommon. The Telephone Consumer Protection Act (TCPA) prohibits businesses from contacting potential customers by text or phone call using an "automatic telephone dialing system" (ATDS).[223] A dialing system qualifies if it can "store or produce telephone numbers to be called" or texted, and if the system can "dial" or text "such numbers."[224] If 1,000 people receive unsolicited texts from a business, the business's TCPA liability can only be determined for all of them at once. Either the business used or did not use an ATDS. But no one would label a TCPA right a group right. An individual aggrieved by an unsolicited text message could sue and collect the $500 the TCPA awards her without remediating the harm done to any other recipient.[225]

Likewise remedy indivisibility is not enough. Someone incurs liability under California nuisance law if that person "wrongfully cause[s] water to flow upon another's land which would not flow there

221 Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 338, 342 (2016); *see also* Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3051 (2013).

222 *See* Burch, *Calibrating*, *supra* note 221, at 338–50. For a rich discussion of indivisibility in the context of civil rights class actions, see Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59 (2019).

223 Duran v. La Boom Disco, Inc., 955 F.3d 279, 280 (2d Cir. 2020).

224 47 U.S.C. § 227(a)(1)(A)–(B) (2018); *Duran*, 955 F.3d at 289.

225 *See* 47 U.S.C. § 227(b)(3)(B) (2018).

naturally."[226] If a downhill neighbor sues an uphill neighbor for creating this sort of nuisance, a court might order the uphill neighbor to build an interceptor trench or retention pool.[227] This remedy would benefit all downhill neighbors. But the nuisance right isn't a group right. Proof that water flowed wrongly onto one downhill neighbor's land does not prove that it also flowed wrongly on other downhill neighbors' properties. Each one would have to prove that the uphill neighbor caused water to flow wrongfully on their land. Otherwise, the downhill neighbors who do not sue enjoy the remedy without any claim of entitlement to it.

Indivisible liability means that the substantive law only concerns itself with the defendant's conduct toward a group of undifferentiated members. Likewise, an indivisible remedy means the right's vindication cannot benefit discrete individuals but only the group to which they belong. If a right whose adjudication shares these characteristics is an individual right, it is only so in the most trivial sense—as the right of an individual to have the group to which she belongs protected from harm, by a remedy that protects her not due to individual entitlement but by virtue of her membership in the group. Nothing about the individual qua individual matters. Hence, the term "group rights" better describes those whose adjudication meets the two indivisibility characteristics.

2. Socially and Instrumentally Determined Groups

Indivisibility can take different forms. Some group rights involve liability and remedial determinations that are necessarily indivisible. The right to an undiluted vote—the right against a districting plan that unduly weakens a group's voting strength—illustrates.[228] No individualized option exists for the design of this "inherently aggregate" right, which turns not on how the districting scheme treats any particular individual but how the scheme treats the group.[229] The substantive law can either protect against the group's disenfranchisement or not at all.

A right of this sort presupposes a group with some measure of intra-group solidarity. The effect of district boundaries on the political power of certain groups does not matter unless individual voters identify their political preferences with certain types of socially

226 Aspen Grove Condo. Ass'n v. CNL Income Northstar LLC, 179 Cal. Rptr. 3d 429, 437 (Cal. Ct. App. 2014) (quoting Allen v. Stowell, 79 P. 371, 372 (Cal. 1905)).

227 *Id.* at 436.

228 *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883–84 (1995); *see also* Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 367 (2007); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001).

229 *See* Gerken, *supra* note 228, at 1685–86.

determined group identities. This "intra-group solidarity" gives the group the "moral standing"[230] that makes it "the sort of thing to which duties can be owed and which is capable of being wronged."[231] Likewise, there must be some sort of universal recognition that a particular group deserves some sort of protection or advantage before the right attaches.[232] The group, then, exists "in advance of the interests . . . and the rights it bears."[233]

Other group rights, by contrast, only share the indivisibility characteristics in certain contexts. When a class of inmates challenges systemic inadequacies in the overall administration of prison healthcare, the court determines the system's constitutionality under the Eighth Amendment for all inmates together, with an indivisible liability finding.[234] A remedy for an unconstitutional healthcare system might include better funding for prison healthcare, improved staffing levels for healthcare workers, and better record-keeping systems—all indivisible benefits that inmates share.[235] But, as noted in Part II, injured inmates routinely bring Eighth Amendment prison healthcare claims in individual lawsuits that seek individualized remedies. The right to adequate prison healthcare, unlike a right to an undiluted vote, is only contextually indivisible. It can protect against systemic threats to the group, or it can protect individuals from individualized harm.

When a right can plausibly take either an individual or a group cast, the existence of a group with a preexisting, socially determined identity does not dictate when it assumes the latter design. Rather, the choice turns on instrumental considerations. *Jefferson County* and Wisdom's right to a "unitary, nonracial" school system came after a decade during which an individual rights version of *Brown* frustrated the realization of its promise.[236] Embracing a group version of a Sixth Amendment right, a Michigan court of appeals explained that "[w]idespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals."[237] In Fissian terms, the adjudication of individual rights fails

230 Jones, *supra* note 19.

231 Peter Jones, *Group Rights and Group Oppression*, 7 J. POL. PHIL. 353, 362 (1999).

232 *See* Issacharoff, *supra* note 228, at 883–84.

233 Jones, *supra* note 231, at 363.

234 *Cf.* Parsons v. Ryan, 754 F.3d 657, 676–77 (9th Cir. 2014) (describing the contours of an Eighth Amendment claim for systemic harm).

235 *Cf.* Stipulation at 3–4, Parsons v. Ryan, No. CV–12–601 (D. Ariz. filed Oct. 14, 2014); Exhibit B to Stipulation, *supra* note 114, at 2.

236 United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966).

237 Duncan v. State, 774 N.W.2d 89, 126 (Mich. Ct. App. 2009), *aff'd on other grounds*, 866 N.W.2d 407 (Mich. 2010).

to give public meaning to Sixth or Fourteenth Amendment values. This fact justifies the right's rearticulation in group terms, one that yields liability and remedial indivisibility.

When a group right emerges for this instrumental reason, the group that benefits from it does not exist by some thick, extralegal metric. In other words, a right can attach without universal agreement that children in Texas foster care or inmates in Arizona prisons exist as socially determined groups. The group is defined thinly by members' shared interests in a particular good the government has a duty to provide.[238] Courts recognize group rights when confronted with an entrenched gap between values and policies in the substantive law and a systemic failure by the responsible institution to provide the public good these values demand.[239] In other words, groups do not exist apart from the rights they litigate. The substantive law constitutes groups and their rights in a process of elaboration driven by context.

The Eighth Amendment again illustrates. In theory, a wave of individual lawsuits, each one concerned with individual manifestations of the state's mismanagement, and each one seeking an individualized remedy, could have prompted a Department of Corrections to make systemic changes. The Department might prefer to do so than pay one money judgment after the next or comply with numerous discrete injunctions. But structural flaws in the market for legal services for inmates will leave most unrepresented.[240] Those who find lawyers face limits on monetary recovery,[241] as well as a variety of procedural hurdles that often place a merits determination out of reach.[242]

Given these circumstances, a group right requiring a well-administered, adequately funded prison healthcare system better realizes inmates' collective interests and the policies and values the Eighth Amendment contains. Competent policy administration is a public good, one that no inmate on his own can demand, but one the strength of inmates' interests bundled together can warrant.[243] The group right makes more efficient use of limited public interest lawyer

238 *See* Jones, *supra* note 213, at 67; *see also* Joseph Raz, *Rights and Politics*, 71 IND. L.J. 27, 32, 42 (1995).

239 *Cf.* PAUL SHEEHY, THE REALITY OF SOCIAL GROUPS 176 (2006) ("There is also a[n] . . . instrumental basis for group rights. . . . It may turn out that the most effective means of protecting individual liberties . . . is to assign rights to groups.").

240 Among other issues, the Prison Litigation Reform Act (PLRA) caps attorneys' fees at 150% of the prisoner plaintiff's recovery. Eleanor Umphres, Note, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 261–62 (2019).

241 *E.g.*, McAdoo v. Martin, 899 F.3d 521, 525 (8th Cir. 2018) (describing the PLRA's damages limits).

242 *E.g.*, Porter v. Nussle, 534 U.S. 516, 523–525 (2002) (describing the PLRA's exhaustion requirement).

243 *Cf.* RAZ, *supra* note 19, at 208 (using these terms to describe a "collective right").

resources, and its contours allow the group to seek a remedy broad enough to address systemic management failures.

The difference between necessary and contextual indivisibility corresponds with the different species of group rights. One—the right to an undiluted vote, for instance—protects socially determined groups whose identity commands particular advantage or protection. The other includes rights that get fashioned for instrumental reasons, because liability and remedy indivisibility do a better job at realizing the substantive law's values and policies than individual rights do.

The former species, characterized by necessary indivisibility, has proven controversial because, as Peter Schuck argues, its presupposition of group identity requires "judges to determine the relative social status, mobility, and political efficacy of competing groups."[244] But group rights of the latter species, including those that protect children in foster care, inmates, and indigent criminal defendants, have evolved to assume their current design largely without sparking the same political heat. Indeed, their articulation as group rights has happened largely without any comment at all.

B. Understanding Group Rights' Doctrinal Significance

Conceptual clarity in understandings of group rights is a matter of more than just jurisprudential concern. The demystification of group rights should encourage courts to recognize their existence more forthrightly. Doing so would help solve nettlesome doctrinal problems that require an appreciation for the distinction between individuals and groups as litigants. The rest of this Part illustrates.

1. *Younger* Abstention

Abstention, long a problem in IR litigation, is a good example of the kind of problem that open acknowledgment about rights design could resolve.[245] Under *Younger v. Harris* and its progeny, a federal court must abstain from adjudicating a constitutional challenge if doing so would "improper[ly] intru[de] on the right of a state to enforce its laws in its own courts."[246] If there exists an "ongoing state judicial proceeding" that "implicate[s] important state interests," abstention is required if the federal plaintiff has "an adequate

244 Peter H. Schuck, *Groups in a Diverse, Dynamic, Competitive, and Liberal Society: Comments on Owen Fiss's "Groups and the Equal Protection Clause,"* 2 ISSUES IN LEGAL SCHOLARSHIP, no. 1, art. 15, at 6 (2003); *see also* Isaacharoff, *supra* note 228, at 872–73 (discussing this problem with regard to the right to undiluted vote).

245 For the early administration of *Younger* abstention doctrine in an institutional reform case, see *O'Shea v. Littleton*, 414 U.S. 488, 499–502 (1974).

246 17B WRIGHT & MILLER, *supra* note 95, § 4251.

opportunity in the state proceedings to raise constitutional challenges."[247]

Younger looms whenever a plaintiff in federal court litigation has a state court proceeding open to her to vindicate her claims. It has surfaced repeatedly in IR litigation involving failed foster care reform and indigent defense systems. State child welfare agencies invariably move to dismiss foster care reform class actions on *Younger* grounds, for instance, because children in every state's system remain under state judicial supervision during their periods of commitment.[248] Individual children can complain of individual rights violations in these individualized proceedings, so the argument goes.[249]

This defense prompts litigation over what is really a matter of rights design. In the Massachusetts case, for instance, the state argued that, because "*individual* plaintiffs have the opportunity to raise their constitutional claims in" each one's Juvenile Court proceeding and "obtain 'an adequate remedy'" there, "*Younger* abstention is required—even if the state court remedy does not encompass the systemic relief that plaintiffs seek."[250] Class counsel faulted the argument as a "fundamental misreading of Plaintiffs' Complaint."[251] "This case is not about specific social worker lapses in judgment or individual performance failures," it argued.[252] Rather, "it is about a pattern and practice of ongoing harm to children" caused by systemic deficiencies that result from "decisions made, or not made, by high-level officials."[253] The class action does not concern particular juvenile court orders but flows from what is a dysfunctional system, a system in which certain structural elements are missing.[254]

Class counsel's emphasis on "systemic shortcomings" was imprecise as far as *Younger* doctrine goes.[255] Alone, the fact that a state

247 Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982); *see also* Sirva Relocation, LLC v. Richie, 794 F.3d 185, 191–93 (1st Cir. 2015) (discussing *Younger*'s evolution).

248 *E.g.*, 31 Foster Child. v. Bush, 329 F.3d 1255, 1274–82 (11th Cir. 2003); LaShawn A. *ex rel.* Moore v. Kelly, 990 F.2d 1319, 1322–24 (D.C. Cir. 1993); Tinsley v. McKay, 156 F. Supp. 3d 1024, 1025 (D. Ariz. 2015); Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 153–58 (D. Mass. 2011); M.D. *ex rel.* Stukenberg v. Perry, 799 F. Supp. 2d 712, 717 (S.D. Tex. 2011), *vacated on other grounds*, 675 F.3d 832 (5th Cir. 2012); Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 285–89 (N.D. Ga. 2003).

249 *E.g.*, Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint at 61, *Connor B.*, 771 F. Supp. 2d 142 (No. 10–CV–30073).

250 *Id.* at 61 (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987)).

251 Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 3, *Connor B.*, 771 F. Supp. 2d 142 (No. 10–CV–30073).

252 *Id.* at 36.

253 *Id.*

254 *See id.* at 13.

255 *Id.*

court cannot entertain a systemic challenge or order systemic relief does not defeat abstention.[256] The threat to an individual child's rights may result from systemic deficiencies. But a state court can vindicate the claimed rights violation and issue an order tailored to the child's circumstances, even if it has to leave the systemic deficiencies largely unaddressed.[257] If, however, children sue in their capacity as group members, not as individuals, and if they seek to vindicate a group, not individual, right, then the distinction makes sense. A federal court does not abstain under *Younger* if the plaintiff asserts a right that differs from what the state proceeding adjudicates.[258] Nor does *Younger* apply if the federal plaintiff is a different jural entity from the rights-holder in the state proceeding.[259]

Younger motions have left a mess of contradictory decisions for foster care reform litigation.[260] They have thwarted the federal courts' involvement in indigent criminal defense reform, steering most of these cases to state courts.[261] The muddle and *Younger* along with it disappear as problems for IR litigation if the underlying substantive law vests rights in groups and not individuals. When IR litigation in federal court seems to duplicate state proceedings, the parties should first determine what duties the substantive law creates for the government to discharge and whom—individuals alone, or also groups—this law protects. Only upon the conclusion that the case only bundles individual rights should abstention turn on *Younger* concerns for the adequacy of ongoing state proceedings or the importance of state interests. Does the Fourteenth Amendment give children as a group the right to a competently administered foster care system? If not, then abstention in favor of individualized state proceedings makes sense. If so, *Younger* is irrelevant, and the case should proceed.

256 *Cf.* Moore v. Sims, 442 U.S. 415, 427 (1979) ("The breadth of a challenge to a complex statutory scheme has traditionally militated in *favor* of abstention, not *against* it.").

257 *See* Joseph A. *ex rel.* Wolfe v. Ingram, 275 F.3d 1253, 1274 (10th Cir. 2002) ("We assume without deciding that the Children's Court is not authorized to hear class actions and other representative suits. However, we could find no case, and Appellants cite none, that hold that a party is entitled to avoid the effects of the *Younger* abstention doctrine in cases where relief is available to individual litigants in ongoing state proceedings but not to represented parties in a class action." (citing J.B. *ex rel.* Hart v. Valdez, 186 F.3d 1280, 1292 (10th Cir. 1999))).

258 *E.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 101 (2d Cir. 2004); Habich v. City of Dearborn, 331 F.3d 524, 530–32 (6th Cir. 2003).

259 *See* Vasquez v. Rackauckas, 734 F.3d 1025, 1035 (9th Cir. 2013).

260 Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 156 (D. Mass. 2011) (summarizing the "disparate conclusions" various courts have reached in these cases).

261 *See* Drinan, *supra* note 154, at 468; Lucas, *supra* note 11, at 93.

2. Class Certification

Conceptual confusion has also arisen at the class certification stage. In the years since *Wal-Mart*, government defendants have shoehorned what are really claims about rights design into arguments about Rule 23's administration. Confusing, unnecessarily prolonged litigation can ensue, with fundamental questions of what and whom substantive rights protect cloaked in procedural guise.[262]

As discussed in Parts I and II, the Rule 23 inquiry in IR cases focuses on two matters. The first, commonality, asks whether the heart of class members' claims lie with questions of law or fact that common, class-wide arguments and evidence can answer.[263] By definition, claims alleging violations of group rights involve indivisible liability determinations. Class members' individual circumstances are irrelevant, the focus is on the defendant's conduct toward the aggregate, and thus claims only raise common questions of law and fact. Second, Rule 23(b)(2) requires that plaintiffs seek a single indivisible remedy.[264] Group rights are group rights because they generate this type of relief. When plaintiffs allege violations of group rights, then, a court should need nothing more than the pleadings to decide class certification.

In *Wal-Mart*'s wake, class certification practice in public interest litigation has grown complex and protracted.[265] Courts and litigants have vested Rule 23's requirements with meaning they cannot bear, while failing to wrestle forthrightly with underlying substantive matters. Litigation over a recent petition for certiorari the State of Arizona filed with the U.S. Supreme Court illustrates. Arizona children had alleged that the state's terrible administration of its foster care system created a risk of harm that violated their substantive due process rights.[266] The Arizona district judge certified the class, allowing it to seek sweeping injunctive relief.[267] Arizona sought Supreme Court review after a Ninth Circuit appeal failed. It formulated the first question presented as follows: "Whether a putative class may satisfy the commonality requirement . . . by alleging that a state-run system suffers from 'systemwide failures' to which every class member is 'exposed' simply by virtue of being in the system."[268]

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262 *See* Marcus, *supra* note 86, at 426–27.

263 *See infra* notes 72–73 & accompanying text.

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

265 *See* Marcus, *supra* note 86, at 426–27.

266 Complaint for Injunctive and Declaratory Relief and Request for Class Action at 48–50, B.K. *ex rel.* Tinsley v. Flanagan, No. 15–CV–185 (D. Ariz. filed Feb. 3, 2015).

267 *See* B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 964–65 (9th Cir. 2019).

268 Petition for Writ of Certiorari at i, Faust v. B.K. *ex rel.* Tinsley, 140 S. Ct. 2509 (Mar. 23, 2020) (mem.) (No. 19-765).

Posed in these terms, the question makes no sense.[269] If the underlying substantive law gives children as a group the right to be free from exposure to a risk of harm created by "systemwide failures," then the case obviously satisfies the commonality requirement. The right would require an indivisible liability determination, one for which individual questions of fact pertaining to the state's treatment of individual children have no relevance. If the underlying substantive law vests substantive due process rights exclusively in individual children, and if the state's liability requires divisible determinations, then the proposed class fails. Answers to questions about inadequate funding and poor central agency monitoring of caseworkers would not "drive the resolution" of individual claims of individual rights violations, as *Wal-Mart* requires for commonality.[270]

Arizona insisted that "there is no way to answer in a single stroke whether [the] alleged deficiencies amount to deliberate indifference . . . to 'all children who are or will be' in Arizona's child-welfare system" due to the "individualized nature of [substantive due process] claims."[271] It cited no source of substantive authority for this proposition. Instead, Arizona described the district court's determination that liability could be decided for the class as a whole as "not an application of *Wal-Mart* but an abrogation of it."[272] *Wal-Mart* addressed Rule 23's administration in a case involving Title VII of the 1964 Civil Rights Act. It had nothing to do with substantive due process and how it protects children from harm.[273]

Although Arizona's petition for certiorari failed, other government defendants have more successfully leveraged procedural confusion to derail IR litigation.[274] Milwaukee did so in *Jamie S. v. Milwaukee Public Schools*, an early appellate engagement with IR litigation after *Wal-Mart*.[275] The plaintiffs, public school children with disabilities in need of individualized education plans (IEP), convinced

269 *Cf.* Brief for the Respondents in Opposition at 2, *Faust*, 140 S. Ct. 2509 (No. 19-765) ("[T]he State' [sic] real quarrel is with the well-established substantive due process standard . . . .").

270 *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Nagareda, *supra* note 117, at 132).

271 Petition, *supra* note 268, at 19, 20.

272 *Id.* at 20.

273 *Cf.* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028 (2013) (arguing that *Wal-Mart*'s "commonality holding . . . is at base a statement of Title VII policy").

274 For other examples, see: DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013); Dearduff v. Washington, 330 F.R.D. 452 (E.D. Mich. 2019).

275 668 F.3d 481 (7th Cir. 2012). For different but complementary criticism of *Jamie S.* as conceptually confused, see Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 893 (2016).

the district court that a range of practices, customs, and policies had led Milwaukee to fail systematically to meet its obligations under the Individuals with Disabilities Education Act (IDEA).[276]

The Seventh Circuit reversed the class certification order and threw out a sweeping remedy crafted after eleven years of litigation. Whether and how a public school district meets its IDEA obligations, the court insisted, can only be determined child-by-child. No class-wide, indivisible determination of liability is possible absent the claim that all children's injuries result from the same explicit, uniform policy.[277] "There is no such thing," the Seventh Circuit intoned, "as a 'systemic' failure to find and refer individual disabled children for IEP evaluation."[278] This statement amounts to a claim about the design of IDEA liability policy, but the Seventh Circuit did not support it with any reference to IDEA text or precedent. Rather, the court insisted, the district court's indivisible determination of Milwaukee's liability "completely misunderst[ood] Rule 23(a)(2)."[279] Rule 23(a)(2), of course, has nothing to say about IDEA rights and what an alleged violation requires a plaintiff to prove. What Milwaukee must do for children with disabilities is a question of substance, not procedure.

CONCLUSION—NORMATIVE BEGINNINGS

This Article has proceeded in an almost entirely descriptive register. I have attempted to prove the existence of group rights in IR litigation, then to distill identifying features that define these rights and the groups that enjoy them from judicial engagements with institutional reform's procedural, remedial, and substantive governance. Conceptual clarity on its own packs some modest normative punch. By hiding substantive elephants in procedural mouseholes, participants in IR litigation have obscured deeper issues that attend the choice to fashion rights in group terms. Frank acknowledgment that groups draw their capacity to sue indivisibly and seek indivisible remedies from the design of substantive liability regimes should end confusing jousts over issues like *Younger* abstention and class certification.

But the big normative question—when should group rights coalesce to benefit those seeking institutional reform?—remains unanswered. A sustained effort at an answer must remain for another scholarly treatment of institutional reform. I conclude by suggesting some lines of analysis that might guide an effort of this sort.

276 *Jamie S.*, 668 F.3d at 487–88 (citing 20 U.S.C. §§ 1400–82 (2006)).
277 *See id.* at 497–98.
278 *Id.* at 498.
279 *Id.* at 497.

One involves *legitimacy* and asks whether courts have the power to develop group rights doctrine. This is in part a matter of interpretive license. To Fiss, the power of judges to mold the substantive law came from the existence of "public values" with a true and important meaning, coupled with "[t]he function of a judge," to identify these values through interpretation and "give [them] concrete meaning and application."[280] If a group rights design best realizes a particular value like equality or due process in a particular context, then the judge has not just the power but the duty to say so.[281] But Fiss's interpretive methodology has gone out of style, and judges may be "to one degree or another, 'all textualists now.'"[282] What do twenty-first century interpretive practices mean for the power of courts to fashion group rights?

Legitimacy also involves institutional considerations. Group rights enable courts to issue systemic remedies, and systemic remedies in turn contemplate (often federal) judicial intrusion with (often state and local) policy administration. Separation of powers and federalism anxieties have long dogged IR litigation,[283] and rights design may need to grapple with these concerns more explicitly. The choice to vest a group with a right also prompts competence concerns, since it empowers courts to stray from more modest judicial roles and into more managerial ones. But the previously unobserved entrenchment of group rights in various public law domains should give those inclined to such institutional criticism pause, for at least two reasons. The elaborative process of rights design reflects the accumulation of judicial determinations, over decades in some instances, that the substantive law works best if rights benefit groups and not just individuals. A federalism or separation of powers challenge to IR litigation does not just question how judges wield equitable discretion when they craft remedies. It strikes at more fundamental decisions about rights design and should face a steeper burden of persuasion for that reason. Also, the thin, instrumentally justified ties that bind groups in IR litigation should mitigate concern that judges are ill-suited to identify groups for particular protection or advantage.[284]

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280 Fiss, *supra* note 36, at 2, 9.

281 *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 759–60 (1982).

282 Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring in the judgment) (quoting Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 313 (2017)).

283 For a classic treatment of institutional reform and separation of powers problems, see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). For federalism concerns, see, e.g., *Horne v. Flores*, 557 U.S. 433, 448 (2009).

284 *See* Schuck, *supra* note 244, at 6.

A second line of analysis involves *justification*. Assuming that courts have the legitimate power to fashion group rights, what conditions justify decisions to do so for a particular public law regime, and for particular sets of victims? Phrased thusly, the question implicitly presumes a baseline of individual rights, with group rights a departure. This supposed default reflects the individualistic rights culture in the United States. But the spread and entrenchment of group rights that IR plaintiffs leverage gives reason to interrogate this presumed default. Also, a justification calculus that recognizes that group rights can coalesce for instrumental reasons should account for the real-world barriers that weaken the efficacy of individual rights, such as failures in the market for individual legal representation or government intransigence in the face of multiple successful individual lawsuits.

A third line of analysis focuses on *tradeoffs*. These include group-individual tradeoffs: do group rights interfere with, replace, or somehow come at the expense of individual rights? They also include group-society tradeoffs: what societal costs do group rights entail? Group-group tradeoffs are another type: do group rights set the interests of different groups against each other? Again, appreciation for the existence of instrumentally determined group rights should color these inquiries. 1980s-era challenges to group rights stressed group-group tradeoffs. An equal protection right that benefited black Americans as a group, so the argument went, unfairly disadvantaged white Americans and fueled racial tension.[285] This critique implicitly assumed that a socially determined metric defines groups qua rights-holders. The group rights that characterize IR litigation, by contrast, have often evolved instrumentally, and they benefit thinly defined groups joined together by no more than a shared interest in the public good of adequate government performance. An accurate understanding of group rights as IR litigation presently involves them should help analyzes of tradeoffs move past tired debates.

These normative beginnings suggest a rich vein of scholarly inquiry to tap. The coalescence of group rights in various domains of public law is just one development over recent decades that should bring renewed attention to institutional reform. As vital as this litigation's issues are, as vulnerable as its plaintiffs can often be, and as impactful as remedies can be for policy administration, few topics deserve more scrutiny.

285 *See* Reynolds, *supra* note 210, at 1003.